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Revised Article 9, Securitization Transactions and the Bankruptcy Dynamic [1]

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I.Introduction

Article 9 of the Uniform Commercial Code ("U.C.C.") [3] is the law governing the creation, perfection, and enforcement of security interests in personal property. Originally enacted in 1960, [4] Article 9 was substantially revised in 1972 in response to changes in commercial financing markets and practices. [5] Since this last revision, there have been further changes, including technological advances, affecting commercial practice and custom. [6] These changes have led the Permanent Editorial Board for the U.C.C. ("PEB") to recommend to the American Law Institute ("ALI") and the National Conference of Commissioners on Uniform State Laws ("NCCUSL") that Article 9, once again, be significantly revised. [7] The stated reason for the current revisions is to ensure that Article 9 keeps pace with changes in commercial financing practices, thereby offering enhanced certainty to the commercial financing markets. [8] Among the changes made to Article 9 are a collection of substantive revisions to the rules affecting a relatively new financing method, known as securitization. [9]

Securitization, or structured financing, is a process whereby a debtor raises funds through the sale and repackaging of certain assets. [10] A firm can originate a securitization transaction only if it has earnings in the form of cash flow from long− or medium− term obligations owed to it by account debtors. [11] In a securitization transaction, the securitizing firm sells its cash flows to a Special Purpose Corporation, commonly referred to as an SPC. [12] The SPC in turn, transforms these cash flows into securities, and sells the securities, backed by the cash flows (asset−backed securities or ABS), to private or public investors. [13]

Debtors securitize their assets, in lieu of using them as collateral for secured loans, when they perceive that securitization offers them advantages not available through alternative methods of financing. [14] These advantages, from the debtor's perspective, range from improved liquidity, [15] the opportunity to attain diversified funding sources, [16] improve risk management, [17] accounting−related benefits, [18] and lowering its own effective interest expenses. [19]

The opportunity for lower financing costs, relative to secured financing, provides a central motivation for many securitizing firms. The financing is cheaper because of the originator's potential to transfer the securitized assets beyond the reach of the originator's bankruptcy trustee. [20] Accordingly, upon an originator's bankruptcy, under most circumstances the holders of the securitized assets are not required to participate in the originator's bankruptcy proceeding, and such assets cannot be used in the originator's efforts to reorganize. [21] Because the risks associated with the originator's bankruptcy are effectively eliminated for the asset−backed security investor, these investors can offer funding at a lower rate than a comparable lender would charge in a secured financing. [22] Thus, the investors take less risk; the originator gets cheaper credit.

Not everyone benefits from the risk reducing and cost saving formulation [23] While securitization reduces the risk of non−payment for ABS investors, it increases the risk of non−payment for unsecured creditors of the originator. [24] This consequence becomes exacerbated when the originator files for bankruptcy. [25] Once a firm has securitized a portion of its assets, upon a liquidation, fewer unencumbered assets may be included in the debtor's bankruptcy estate for the benefit of the debtor's residual creditors. [26] Moreover, a bankruptcy debtor who has securitized its assets may have a diminished ability to reorganize due to the dearth of cash collateral. [27]

Historically, there has been a strong bankruptcy policy of promoting the reorganization of viable businesses. [28] This policy is premised on the idea that an enterprise worth more "alive than dead," is worth preserving for the benefit of the debtor, and offers a greater benefit to the debtor's creditors, employees, suppliers, and customers, compared to becoming involved in a liquidation proceeding. [29] If a securitizing debtor finds itself without the cash necessary to sustain itself while it is formulating a reorganization plan, then a reorganization may not be tenable − leaving liquidation as the debtor's only alternative. [30]

This Article will examine the Article 9 revisions affecting securitization, particularly in light of the revisions' impact upon the bankruptcy dynamic. Part II of this Article describes securitization's history and its impact on and place in the commercial credit markets. Part III outlines some of the issues and problems that have been faced by securitizing originators and asset−backed security purchasers under Current Article 9. Part IV analyzes the revisions made to Article 9 affecting securitization transactions. Part V explains securitization's distributive effects and explores the impact that a further proliferation of securitization will have on the bankruptcy dynamic. Part VI describes the proposed amendment to the Bankruptcy Code affecting securitization and examines its potential impact. Part VII concludes by speculating about the extent to which Revised Article 9's provisions affecting securitization will meet the goals of the drafters and the expectations of the various participants in the commercial credit markets.

II.Securitization

Since the first public asset−backed security issuance, [31] the volume of ABS issuances has grown from $1 billion in 1985 to $185 billion in 1999. [32] There are over $2.5 trillion asset−backed securities currently outstanding, [33] and it has been estimated that a typical business day sees $700 million in new ABS issuances. [34] The range of types of assets that can be securitized has similarly expanded [35] and recent assets securitized have included health care receivables, airline ticket receivables, film production and distribution receivables, recreational vehicle loans, equipment leases, and automobile leases. [36]

As "one of the most significant financial innovations in the global capital markets during the past 15 years," securitization continues to "evolve and expand." [37] Rating agencies, charged with the responsibility of evaluating asset quality, [38] have noted that securitization's attractiveness to investors has not waned, [39] and it has been said that this attractiveness is attributed to the high quality and stability of the issued assets. [40]

The long−term attractiveness of the ABS vehicle to investors, however, turns upon the extent of the isolation of these assets from the credit risk of the originator. The extent of the securitized assets' isolation from the originator in turn, depends upon the efficacy of the transaction's structure. The strength of any transaction's structure is a product of a targeted and well developed legal system; one that has contemplated that transaction's volume and structure. Seeing that the legal regime governing securitization has been outpaced by the growth of the securitization market, legal protection against the credit risk of the originator, used as a selling point to ABS investors, may in fact, be "oversold." [41]

There is little case law addressing legal issues raised by securitizations. Likely due to the market's relative youth, there have not been many bankruptcies of securitizing originators. Therefore, courts have not had the opportunity to carefully scrutinize these transactions' structures. As stated in Congressional testimony concerning proposed Bankruptcy Code revisions affecting securitization has noted that:

[the issues of] the possible harm to the bankruptcy estate and other creditors that may result from securitized financings. . . are unresolved, because there have been almost no cases addressing the consequences of securitization in bankruptcy. There are a handful of unreported opinions and almost no reported opinions. We are not learning, because we are not litigating. Usually, judicial development of an area gives us a full sense of the issues raised by any new practice. It is the interaction of case law and legislation that is the genius of the American system . . . [42]

The industry is anticipating that in the coming years there will be significant developments in the case law, addressing many of the open questions concerning a securitization's distributive effects, as well as securitization's impact in bankruptcy. The next years will prove the wisdom of urging caution with respect to changes in the law that further encourage and facilitate securitization transactions.

III.Current Article 9 and Securitization

Article 9 of the U.C.C. is the legal system governing secured transactions, which by definition, includes the sale of accounts [43] and chattel paper. [44] When Current Article 9 was originally enacted, the securitization market, as currently constituted, was not within the contemplation of the drafters. While Current Article 9 does include within its scope the governance of the common commercial practice of account−based financing, including factoring, [45] the variety of assets currently securitized coupled with the complexity of the transactions, leaves many securitizations beyond the reach of Article 9. [46] The rapid evolution of the securitization market has done much to reveal many of the gaps and weaknesses of Article 9; in this regard, Article 9 has not been achieving its goal of providing certainty and consistency to commercial financing markets. [47]

The problem is readily illustrated. Where a transaction falls within Article 9's scope, the rights and obligations of the parties upon default are clear and straightforward. If a transferee of assets in an Article 9−governed transaction has complied with Article 9's attachment and perfection rules, the transferee is deemed secured and is therefore entitled to priority over all of the debtor's unsecured creditors, as well as to priority over subsequent judgment creditors, secured parties and lien creditors with competing claims to the assets. [48] Conversely, if a transferee fails to perfect its interest in transferred assets, its interest may be defeated by a subsequent, competing transferee. [49]

When, however, a financing transaction is governed not by Article 9, but by an amalgam of state common law and remnants of non−uniform accounts receivable statutes, the rules are not as clear. Accordingly, the parties may not be certain of their rights and obligations, and the efficiency of the transactions is compromised. [50]

The problem is magnified by the abstruseness of the characterization and classification issue surrounding securitized assets. For example, if an originator seeks to securitize a payment stream from the licensing of intellectual property, the first step is to determine whether the payment stream is an "account," or falls within the residual category of "general intangibles." If the licensing receivable is an "account," then its sale is governed by Article 9. If it is a "general intangible," Article 9 governs its transfer as collateral for a loan, but not its sale in connection with a securitization. If the parties make an erroneous decision as to the receivables' classification, upon default, they may find themselves unperfected, and thus their interest vulnerable to defeat by a party with a superior interest.

The confusion is heightened when an asset's characterization is determined to be incorrect and there is also a faulty characterization of the transfer. For example, an intended sale may be found to be a transfer of collateral rather than an asset sale. [51] The transfer must meet certain objective tests to be considered a sale, notwithstanding the parties' expressed intention. [52]

Assuming the transferee is satisfied that the transfer meets the tests of sale [53] and the asset is characterized as a "general intangible," then non−Article 9 statutory and case law dictates the steps necessary to perfect the transferee's interest. If these steps are taken, then the transferee is protected against the strong arm of the transferor's bankruptcy trustee. [54] If, however, the transfer is ultimately characterized as a transfer of collateral for a loan, and an Article 9 financing statement was not filed, [55] upon the originator's bankruptcy, the assets must be returned to the debtor's bankruptcy estate. [56]

Even if the parties' characterization of both the assets transferred and the nature of the transfer is deemed to be correct, however, the transferor's bankruptcy may still pose a threat to the interests of the transferee. While it is commonly understood that the sale of an asset, if perfected, [57] removes it from the transferor's bankruptcy estate, this understanding is not universal. [58] For example, the United States Court of Appeals for the Tenth Circuit in *Octagon Gas Systems v. Rimmer* (*In re Meridian Reserve, Inc.*), [59] held that property sold by the debtor prior to its bankruptcy was includable in debtor's bankruptcy estate. [60] The Tenth Circuit relied upon the Supreme Court's expansive interpretation of "estate" in *United States v. Whiting Pools, Inc*., [61] in concluding that, because property of the estate includes property subject to a security interest, and because the *sales* of accounts are governed by the law governing transfers of security interests, accounts sold remain property of the debtor's bankruptcy estate. [62]

What assets are included in a securitizing originator's bankruptcy estate is the central concern of parties to securitization transactions. [63] As a practical matter, if securitized assets are deemed part of the originator's bankruptcy

estate, the transferee is a "party in interest" [64] in the originator's bankruptcy, and as such, the transferee is required to participate in the proceedings. Furthermore, as a party in interest, the transferee is subject to collateral substitution, reduction in priority of payment and other alterations of rights. [65] The assets that the transferee has an interest in are accessible to the debtor−in−possession as cash collateral, [66] with only "adequate protection" offered the transferee as compensation for the possibility of a depletion of its interest. [67] In contrast, if transferred assets are not deemed included in the debtor's bankruptcy estate, the transferee is not required to participate in its originator's bankruptcy in any way. In addition, it is not compelled to continue its relationship with its originator. In short, such transferees may simply take their assets and go home. [68]

The view that account transfers can be returned to the originator's estate upon bankruptcy threatened the foundation upon which securitization transaction participants stood. While the *Octagon* analysis is arguably doctrinally unsound, [69] and was widely criticized, [70] it has not been without its supporters. [71] Even those who did not agree with it, realized such a decision could potentially place all securitization transactions in jeopardy. [72] Indeed, the *Octagon* decision, coupled with the uncertainty surrounding both the issue of asset classification and the scope of Article 9, led the PEB Drafting Committee to make a series of substantive changes to Article 9 designed to minimize the risk to originators and investors engaging in securitization transactions. [73]

IV.Article 9 Revisions Affecting Securitization

The PEB recommended the inclusion within Revised Article 9 of the "sale of general intangibles for the payment of money." [74] This was accomplished by expanding the scope of the types of assets that fall within the definition of "account" [75] as well as including within Article 9's scope the sale of accounts, chattel paper, payment intangibles, and promissory notes. [76] This definitional change, coupled with several other revisions to a number of Article 9 provisions impacting securitization transactions, makes it possible for a greater number of securitized asset sales to fall within the scope of Article 9. These changes were enacted in response to the concern of securitization industry participants that the "[legal] uncertainty about the status of asset securitization [has] prevent[ed] deals from going forward . . ." [77] As observed by the PEB, "because Article 9 regulates important relationships among creditors and purchasers of collateral, uncertainty concerning its application adds to transaction costs and also can result in decreased availability of credit." [78] Accordingly, Article 9 has been revised ostensibly to address issues of uncertainty and to further facilitate commercial credit and sales transactions. What follows is a description and analysis of the provisions specifically aimed at facilitating the market for securitization.

A. Debtors Retain No Interest in Sold Assets

The issue that was clouded by the *Octagon* decision −− whether a debtor retains an interest in sold assets −− was squarely addressed in Revised U.C.C. section 9−318(a). [79] Revised section 9−318(a) states that:

A debtor that has sold an account, chattel paper, payment intangible, or promissory note does not retain a legal or equitable interest in the collateral sold. [80]

Comment 2 to Revised section 9−318 observes that this provision,

. . . makes explicit what was implicit, but perfectly obvious, under former Article 9: The fact that a sale of an account or chattel paper gives rise to a "security interest" does not imply that the seller retains an interest in the property that has been sold. To the contrary, a seller of an account or chattel paper retains no interest whatsoever in the property to the extent that it has been sold. [81]

Furthermore, revised section 9−318(b) makes explicit, that "a debtor that has sold an account or chattel paper, while the buyer's security interest is unperfected, ... [has] rights and title to the account or chattel paper identical to those the debtor sold." [82] Comment 3 observes, "if the buyer's security interest is unperfected the seller can transfer, and the creditors of the seller can reach, the account or chattel paper as if it had not been sold." [83] Accordingly, upon the transferor's bankruptcy, the trustee can recover the unperfected transfer under Bankruptcy Code section 544(a), and such transferred assets are included in the bankruptcy estate. [84]

Section 9−318, however, does not address the equitable determination of whether a particular asset transfer is properly characterized as a sale of assets or a transfer of collateral in connection with a loan (the sale versus loan dilemma). [85] Comment 2 makes this clear in noting that, "[n]either this Article nor the definition of 'security interest' in Section 1−201 provides rules for distinguishing sales transactions from those that create a security interest securing an obligation." [86] Thus, this remains a determination to be made by courts on a case by case basis. [87]

What Revised section 9−318 does do, however, is to explicitly overrule *Octagon*, in making clear that once an asset is sold and the transferee's interest is perfected, the debtor retains no residual interest in the asset, either in or out of bankruptcy. Accordingly, under Revised section 9−318, once it is determined that a perfected asset transfer meets the test of a "true sale," the securitized assets are not vulnerable to recapture and return to the debtor or to the debtor's bankruptcy estate. [88]

1"Account" Defined More Broadly

The drafters of Revised Article 9 wanted to bring a greater number of types of commonly securitized assets within the scope of Article 9. They did so by expanding the definition of the term "account" [89] while retaining the rule that sales of accounts and chattel paper are subject to the terms of Article 9. [90] This modification was designed to address one of the most vexing concerns of participants in the securitization markets: issues of ambiguity in asset characterization and in applicable law.

To illustrate this point, assume a retailer−originator wants to securitize its pool of credit card receivables. Credit card receivables are the cash flows owed by credit card customers, for the payment of merchandise, services and various related fees. [91] These cash flows arise pursuant to a contractual agreement between the originator and the credit card holders. [92] Under the laws of most states, including the U.C.C., credit card receivables are characterized as either "accounts," "instruments" [93] or "general intangibles". [94] The sale of accounts is specifically governed by Current Article 9, [95] but the sale of instruments and general intangibles is not. [96] Thus, the originator and the other parties to the transaction must first try to accurately characterize the asset to be securitized, and then determine the law applicable to its sale. If the receivable pool is, even in part, deemed general intangibles, the transaction is not wholly governed by Article 9, but by other law. That law may be common law or remnants of a pre−U.C.C. accounts receivable statute. The parties then must determine what steps, if any, need to be taken under non−uniform, non−Article 9 law to perfect the account transferee's interest. If any necessary steps to perfection are not properly taken, upon originator's bankruptcy, the asset transferees may find themselves unperfected. [97] Such uncertainty has the potential to thwart the expectations of the asset−backed securities investors, and thus result in an expensive and unstable market.

Revised Article 9, in response to this uncertainty, has included within the definition of "account," assets, which under current law are deemed to be either "instruments," "general intangibles," [98] or non−Article 9 governed property. Because Article 9 continues to govern the sale of "accounts," the sale of what were formerly non−account, but commonly securitized assets, are now explicitly governed by Revised section 9−102(a)(2). [99] Revised section 9−102(a)(2) reads:

[An account is defined as] . . . a right to payment of a monetary obligation, whether or not earned by performance, (i) for property that has been or is to be sold, leased, licensed, assigned, or otherwise disposed of, (ii) for services rendered or to be rendered, (iii) for a policy of insurance issued or to be issued, (iv) for a secondary obligation incurred or to be incurred, (v) for energy provided or to be provided, (vi) for the use or hire of a vessel under a charter or other contract, (vii) arising out of the use of a credit or charge card or information contained on or for use with the card, or (viii) as winnings in a lottery or other game of chance operated or sponsored by a State, [or] governmental unit of a State. . . . The term includes health−care−insurance receivables. . . . [100]

The redefinition of "account" will fundamentally affect the market for securitization by eliminating the need for securitization participants, in most instances, to distinguish between accounts, general intangibles and other Article 9 and non−Article assets. The securitization of payment streams that arise from the sale, lease, license, assignment or other disposal of tangible and intangible assets (listed in Revised section 9−102(a)(2)), including credit card receivables, lottery receivables, equipment, aircraft, public utility receivables, hotel receivables, insurance receivables

including health−care−insurance receivables, franchise receivables and intellectual property [101] all will be governed by Revised Article 9. [102] As such, the rights and responsibilities of the securitization transaction parties will be far more certain than they are under current law.

2Article 9's Expanded Scope − Inclusion of Sales of Payment Intangibles" and "Promissory Notes"

Revised Article 9 further includes within its scope the sale of the commonly securitized assets, "payment intangibles" and "promissory notes." [103] "Payment intangibles," defined as a "general intangible[s] under which the account debtor's principal obligation is a monetary obligation," are a newly identified category of collateral. [104] Receivables that are not "chattel paper," "instruments" or "accounts" (because they are not property that has been or is to be sold, leased, licensed, assigned or otherwise disposed of) [105] are "general intangibles" for the payment of money − meaning "payment intangibles." [106] The definition of "promissory note" is similarly new, and according to the Official Comment, was "necessitated by the inclusion of sales of promissory notes within the scope of Article 9." [107]

The definition of "payment intangibles" includes payment streams from the sale of portions of loan pools, known as loan participations. Loan participation transactions are not typical securitizations and are primarily originated by financial institutions. [108] Many of the financial institutions weighing in on the Revision of Article 9 expressed conflicting views: they wanted to get both the benefits of increased certainty and decreased risk and the cost of the sale of loan pools participations provided by Article 9 coverage, but did not want to have to comply with the practical burden of filing. [109] A compromise was ultimately reached: loan participations, as a type of payment intangible, fall within the scope of Revised Article 9, but interests of participation purchasers are automatically perfected. [110] Thus, purchases of loan pool participations are not vulnerable to defeat by the seller's trustee in bankruptcy without the added administration involved in having purchasers file a public notice of their interests in such participations. [111]

With the inclusion of the sales of promissory notes and payment intangibles, virtually every asset with a payment stream − and thus every asset that can be securitized −− is governed by Revised Article 9.

A. Express Validation of After Acquired Receivables to be Securitized

"After acquired property" and "after acquired collateral" are terms used in both Current and Revised Article 9 referring to property of the debtor received after the initial financing transaction. [112] "Future advances" are advances of value by the transferee after the initial advance. [113] If a security agreement is broad enough to cover "after acquired collateral" and "future advances," the asset transferee's interest attaches to the "after acquired collateral" and secures the "future advance." [114]

Revised sections 9−204(a) & (c) expressly validate "after acquired property" and "future advance" clauses when the transaction involves the sale of "accounts," "chattel paper," "payment intangibles" and "promissory notes." [115] The comment observes that these provisions makes explicit what was implicit under Current Article 9. [116] While not changing the law, this revision will increase ABS investors' confidence that their initially perfected interests in asset−backed securities, subsequently backed by after acquired payment streams and sold in connection with future advances, remain perfected.

1The Facilitation of Transfers of Accounts, General Intangibles, Payment Intangibles and Promissory Notes

Revised Article 9, building upon Current section 9−318(4), [117] sets forth a number of provisions designed to render ineffective certain provisions in law and contract restricting the transfer of certain commonly−held securitized assets. [118] Revised section 9−406(d) provides that any contractual provision between a debtor and an account debtor prohibiting the assignment or transfer of an account, chattel paper, general intangible, payment intangible or promissory note is ineffective. [119] Revised section 9−406(f) extends the prohibitions on assignment and transfer of accounts and chattel paper to provisions found in statutes and common law. [120] Revised section 9−408 renders ineffective any contractual provision or legal rule applicable to a general intangible or health−care receivable that prevents the attachment and perfection of a security interest, provided that the rights of the account debtor [121] are not adversely affected. [122] Consent of the account debtor, however, is required to enforce such security interest. [123] Revised section 9−408(d) preserves the substantive rights and obligations of account debtors and those obligated on

promissory notes, even in light of the assignment or transfer of such account or note. [124]

These changes in Revised Article 9 are designed to further facilitate the securitization of assets by removing or reducing restrictions on such assets' transfer while protecting account debtors' interests. [125] Debtors ability to transfer, in connection with a securitization, a broader range of assets is enhanced by Revised Article 9's limits on circumstances in which such transfer would give rise to a default or a breach by the transferee.

A. Broader Definition of "Proceeds"

Another significant change affecting securitization found in Revised Article 9 is its definition of what constitutes "proceeds" of collateral. [126] Revised section 9−102(a)(64) defines "proceeds" as "whatever is acquired upon the sale, lease, license, exchange, or other disposition of collateral," and "rights arising out of collateral." [127] This definition, in eliminating the requirement that to constitute proceeds, the original collateral must be "disposed" of, expands the type of collateral that may be claimed by a perfected holder of securitized assets. The impact of this expanded definition is most fully realized upon the securitization originator's bankruptcy.

Bankruptcy law makes a clear distinction between *proceeds* of collateral, and property that arises *after* the initial secured transaction that *does not* fall within the definition of "proceeds" − namely "after acquired collateral." Assets that are acquired by a bankruptcy debtor following the filing of a petition are either deemed to be "proceeds," or "after acquired property." [128] Section 552 of the Bankruptcy Code severs secured parties' interests in "after acquired collateral," unless the post−petition collateral is *proceeds* of the original collateral. [129] Section 552, in limiting its recognition of post−petition security interests, furthers the bankruptcy policy of preserving the value of the bankruptcy estate for the benefit of the bankruptcy debtor's unsecured creditors. [130]

Because the Bankruptcy Code does not explicitly define "proceeds," the Article 9 proceeds definition becomes very important to the determination of what estate property remains unencumbered. [131] Because the interests of ABS purchasers can reach proceeds, but not after acquired property, [132] the expanded definition of "proceeds" in Revised Article 9 will result in less unencumbered "after acquired property" and a greater number and type of assets deemed to be the "proceeds" of asset−backed security−holder's interests. Accordingly, a debtor's efforts at reorganization will be thwarted in the absence of its ability to access the cash flow from its post−petition assets. [133]

V.Securitization and the Bankruptcy Dynamic

There is a debate among legal scholars concerning whether secured creditors ought to have full priority in bankruptcy. Some posit that it is economically efficient and socially desirable for secured claims in bankruptcy to have full priority of repayment. [134] In contrast, other scholars, citing fairness and efficiency, have challenged the absolute supremacy of secured claims, to the exclusion of unsecured claims. [135] A number of these scholars have raised the question of whether secured financing's continued dominance misallocates resources by forcing unsecured creditors into the role of recipient of limited residual interests, without their affirmative consent. [136]

Notwithstanding this academic debate, the drafters of Revised Article 9 did nothing to change secured creditors' supremacy, nor limit the extent to which personal property can be encumbered by consensual liens. [137] Indeed, many of the Article 9 revisions make it easier for secured creditors to create and perfect security interests in a greater number of types of assets, [138] thereby enhancing the primacy of highly leveraged secured lenders in bankruptcy −− arguably at the expense of the debtor's unsecured creditors. [139] The targeted changes to Article 9, which make it easier to securitize more types of assets with greater certainty, will similarly result in fewer assets of value available for the benefit of the debtor's unsecured creditors. [140]

Highly leveraged secured lending transactions and securitization have much in common. [141] Securitization, however, has the potential to pose a greater risk to an originator's unsecured creditors in bankruptcy than do secured credit transactions. [142] The central reason for unsecured creditors' vulnerability in a securitizing originator's bankruptcy has to do with securitization's impact upon the debtor's bankruptcy estate.

Upon a debtor's bankruptcy, an estate is created which includes "all [of debtor's] legal or equitable interests . . . in property as of the commencement of the case," "wherever located and by whomever held." [143] The bankruptcy estate includes property encumbered by security interests. [144] It does not, however, generally include property the debtor has sold in connection with a securitization. [145] The removal of securitized assets from an originator's bankruptcy estate has the potential to drastically change the bankruptcy dynamic.

Debtors in bankruptcy need the cash flow from their receivables to accomplish their goal of business reorganization under chapter 11. [146] These receivables may be the only cash or cash equivalent available to pay trade creditors, employees, consumer claims and other unsecured creditors while the debtor is in the process of rehabilitation. [147] If an originator's liquid assets are deemed not to be part of the bankruptcy estate available to sustain the debtor while the debtor is negotiating its reorganization, then the reorganization will not be feasible and the business will fail. [148]

In contrast, under the bankruptcy rules, secured creditors' collateral is deemed part of debtor's bankruptcy estate and, if such collateral is necessary for the debtor's reorganization, it may be used by the debtor in furtherance of its reorganization. [149] While bankruptcy law respects non−bankruptcy property interests, including security interests, [150] secured creditors are entitled in bankruptcy to receive only the *value* of their collateral, and not the collateral itself. A secured creditor may merely be offered "adequate protection" [151] in the form of substitute collateral or some other interest that is the "indubitable equivalent." [152]

Debtor's ability to use its liquid assets may make the difference between a successful reorganization and business failure. In many cases, business failure will mean that employees, suppliers, trade creditors and customers of a securitizing debtor will lose their opportunity to continue a profitable and beneficial relationship with a reorganized and reinvigorated business. [153] Perhaps the largest impact a further proliferation of securitization will have on the bankruptcy dynamic will be the end of cash collateral, and thus the end of the reorganization of viable businesses.

Not only will unsecured creditors of a securitizing originator be harmed by an increased chance of business liquidation, but the bankruptcy dividend distributed to unsecured creditors of securitizing originators may be smaller, relative to what they might receive had the originator engaged in a secured financing. [154] Following a securitization and upon bankruptcy, the assets that comprise the estate are those assets that were not securitized. While a secured credit transaction similarly involves the encumbrance of assets which, if unencumbered, would likely be used to pay unsecured creditors in bankruptcy, unsecured creditors of a securitizing originator may find themselves in a more dire position. [155]

To illustrate, when a securitizing originator's asset pool is initially assembled, the underwriter, in consultation with the credit rating agency, [156] will analyze the receivable pool's historic record and discard those receivables perceived to be high risk. [157] Certain receivables will be eliminated from the pool because of a history of late payment, an origination from specific, less desirable industries, depressed geographical regions or from classes of less financially dependable obligors. [158] Specific loss probability parameters will be set by the underwriters, and those receivables not falling within these parameters will not be included in the pool. [159] What will remain in the originator's hands will be the lower quality assets −− those with a higher probability of default. These will be the assets in the event of originator's bankruptcy, that will be available for the benefit of the originator's unsecured creditors. The inevitable result of the securitization is a diminution of the quality profile of the firm's asset pool. [160]

While the revisions to Article 9 impacting securitization have provided the guidance and certainty pressed for by securitization transaction participants, time and experience will reveal the prescience of the academics who have been urging caution with respect to such drastic revisions. Business reorganizations cannot be accomplished in the absence of cash, and if ABS investors monopolize debtor's post−petition cash flow, the interests of the debtor, as well as the interests of the debtor's other creditors, employees and suppliers will be compromised. This is perhaps an effect upon the bankruptcy dynamic not fully contemplated or appreciated by the drafters of Revised Article 9.

VI.Bankruptcy Code Amendment to the Definition of "Estate"

On January 30, 2001, Senator Grassley [161] and Congressman Gekas [162] each introduced a bill entitled, The Bankruptcy Abuse Prevention and Consumer Protection Act of 2001, in their respective Congressional chambers. [163] Both

sponsors have vowed to act quickly to see that the bill becomes law. [164] The vast majority of the proposed changes to the Bankruptcy Code are targeted at consumer debtors and the consumer bankruptcy process. [165] There are, however, a number of proposals designed to affect business bankruptcies [166] and among these proposals is a redefintion of the term "estate." [167] The proposed amendment to section 541 of the Bankruptcy Code excludes from a debtor's "estate" assets transferred in a securitization transaction. [168]

Notwithstanding the fact that it was referred to in the Congressional Record reference as a "clarification," [169] and in Congressional testimony as "in the nature of [a] technical correction[]," [170] this amendment to the Bankruptcy Code, if enacted, will fundamentally alter the essence of business bankruptcy. [171] The redefinition of "estate" will remove from the jurisdiction of the bankruptcy court, "eligible assets" [172] transferred by the debtor to an "eligible entity in connection with an asset−backed securitization." [173] "Eligible assets" are defined to include commonly securitized receivables. [174]

This provision is a dramatic change in the law defining estate property. [175] Historically, the Bankruptcy Code has relied upon non−bankruptcy law to define property interests under the Code. [176] When what is at issue is whether a transfer of Article 9 assets are properly included in the transferee's bankruptcy estate, the question of the nature of the transfer, as well as the steps needed to be taken to establish the transferee's property rights, have always been state−law determined.

As noted above, the question of whether an asset transfer is a sale or a transfer of collateral for a loan is an equitable determination to be made under state common law. [177] Moreover, Article 9 outlines the steps necessary to protect "security interest" transfers against competing creditor claims. These transfers must be "perfected" −− which in the case of an account, means the filing of a proper financing statement covering the transferred account. Under Article 9, this filing is required for the protection of creditors, even if the transfer is in the nature of a true sale. Revised section 9−317(a), [178] read in concert with section 544(a) of the Bankruptcy Code, [179] gives the trustee in bankruptcy the power to defeat the interest of an unperfected transferee of an account, whether the transfer is intended for security or is in the nature of an absolute sale.

Securitized assets ("eligible assets") are carved out of the definition of the "estate" in a manner that changes the basic premise of state law under Article 9. First, the proposed amendment federalizes the issue of whether a transfer of assets is a sale, or a collateral transfer. Notwithstanding an objectively determined characterization of the transfer, [180] if the parties represent in writing that a *sale* was intended, the transfer is deemed a sale under federal law. [181] As observed by Professor Kenneth N. Klee in his testimony before the Judiciary Committee:

[R]ating agencies and private parties [should not be authorized] to make the legal determination of whether an asset is property of a bankruptcy estate. [This provision also impedes on states' rights.] Transactions that are not sales under state law should not be treated as sales by federal bankruptcy law to the detriment of the estate and unsecured creditors. [182]

Moreover, under the proposed amendment, if the assets at issue fall within the definition of "eligible assets" [183] and the "transfer" [184] is made to an "eligible entity" [185] "in connection with an asset−backed securitization," [186] then, notwithstanding the absence of Article 9−required perfection of the transfer (the absence of a properly filed financing statement), the bankruptcy trustee has no power under 544(a) to defeat the transferee's interest. [187] Likewise, the transfer may not be recovered for the benefit of the estate as a preferential transfer, nor as a state−law fraudulent conveyance. [188] The only avoidance power that can be exercised to recapture these "eligible assets" is the trustee's power to avoid fraudulent transfers under section 548(a) of the Bankruptcy Code. [189] Allowing ABS transferees to escape the trustee's power to avoid unperfected transfers, preferential transfers, and transfers fraudulent under state law certainly suggests an impairment of established Bankruptcy Code rules, reorganization policies, [190] as well as of the rights of other creditors who rely upon the state law public notice filing system.

This amendment was lobbied for by the bond market, as well as by law firms concerned about their inability to offer unqualified true sale opinions. [191] Notwithstanding the assurances offered by some of the amendment's proponents, [192] this provision tears at the fabric of established bankruptcy policy, [193] and is neither a clarification of existing law, nor a technical correction. [194] It is a drastic change in bankruptcy law and policy that will thwart the long−standing

principle encouraging the reorganization of viable businesses. If this amendment is included in the version of the bankruptcy bill that eventually becomes law, Congress will have succeeded in carving assets out of a debtor's estate that may be necessary to facilitate the debtor's reorganization and to pay priority claimants and unsecured creditors. These may be assets that the parties merely declare to be securitized − even if no state law property rights were established in the transferee and even if, under state law, the transfer is considered unperfected and thus vulnerable to creditors of the debtor, and in the absence of the special treatment provided these assets by this legislation, the trustee in bankruptcy. [195]

VII.Conclusion

The revisions made to Article 9 of the U.C.C. affecting securitization transactions go a long way toward eliminating the uncertainty and ambiguity securitization transaction participants face under current law. The drafters of Revised Article 9 accurately identified the gaps and ambiguities in the law and made targeted changes addressing the vulnerabilities of securitization transaction participants. What is not reflected in Revised Article 9, however, are the concerns of those who believe that a further proliferation of securitization may have distributive consequences. One such consequence may be an increased risk of non−payment in bankruptcy for unsecured creditors of securitizing originators. Another may be the diminished ability to reorganize, notwithstanding other factors positively suggesting the viability of reorganization, due to the lack of cash collateral.

The issue that the drafters of Revised Article 9 could not resolve −− whether a securitized asset is definitively deemed included in a securitizing originator's bankruptcy estate −− was addressed by Congress in its attempted redefinition of bankruptcy estate. Congress, however, went further, in allowing transferees in securitization transactions to avoid the possibility that their transfer might be avoided, even if preferential, fraudulent under state law, or unperfected.

FOOTNOTES:

[1] © Lois R. Lupica 2001. Back To Text

[2] Associate Professor of Law, University of Maine School of Law. B.S. 1981, Cornell University; J.D. 1987, Boston University School of Law. Many thanks to David Nowlin, Laura O'Hanlon, Jennifer Wriggins, and especially Thomas M. Ward, for helpful comments on earlier drafts of this Article. Thanks also to Kevan Lee Rinehart, University of Maine School of Law, Class of 2001, for excellent research assistance. Back To Text

[3] Article 9 of the Uniform Commercial Code ("U.C.C."), as currently in effect, will be referred to in this Article as "Article 9" or "Current Article 9." The revised version of Article 9, as approved by the National Conference of Commissioners of Uniform State Law ("NCCUSL") and the American Law Institute ("ALI") on July 30, 1998, will be referred to as "Revised Article 9," and the specific Code provisions as e.g., "Revised Section 9−318." Back To Text

[4] See PEB Study Group, Permanent Editorial Board for the Uniform Commercial Code Article 9 (Dec. 1, 1992) [hereinafter "PEB Study"]. Back To Text

[5] Id. at 1−2. See also Aaron Chambers, Lawmakers Modernize Transactions Law, 146 Chi. Daily L. Bull. 1 (2000) (pointing out that before 1998 revisions, "the UCC's Secured Transactions Article . . . was last overhauled in 1972"). Back To Text

[6] See PEB Study, supra note 2, at 2; see also Chambers, supra note 3, at 1 ("The revision is designed to bring Article 9 into the 21st century. According to the NCCUSL, the volume of commerce and credit has increased exponentially, as have electronic transactions, but Article 9 had not been modified to reflect those changes."); Alan M. Christenfeld & Shephard W. Melzer, Get Ready for the New Article 9, N.Y.L.J., Oct. 2, 1997, at 5 ("The UCC was adopted long before modern capital markets developed now−common techniques for securitizing streams of payment arising from assets other than accounts receivable."). Back To Text

[7] As stated in the Official Comment to § 9−101, Short title:

In 1990, the Permanent Editorial Board for the UCC with the support of its sponsors, The American Law Institute and the National Conference of Commissioners on Uniform State Laws, established a committee to study Article 9 of the UCC. The study committee issued its report as of December 1, 1992, recommending the creation of a drafting committee for the revision of Article 9 and also recommending numerous specific changes to Article 9. Organized in 1993, a drafting committee met fifteen times from 1993 to 1998. This Article was approved by its sponsors in 1998.

Rev. U.C.C. § 9−101 cmt. 2. Back To Text

[8] See Steven O. Weise, An Overview of Revised UCC Article 9, in The New Article 9 Uniform Commercial Code (Corinne Cooper ed., 2d ed. 1999). Steven O. Weise was the American Bar Association Advisor to the Article 9 Drafting Committee. See also C. Scott Pryor, Revised Uniform Commercial Code Article 9: Impact in Bankruptcy, 7 Am. Bankr. Inst. L. Rev. 465, 467 (1999) (outlining Revised Article 9's "three broad areas of change"). Back To Text

[9] Rev. U.C.C. § 9−102(a)(2) (redefining "account"); id. § 9−102(a)(61) (defining new term "payment intangible"); id. § 9−102(a)(64) (expanding definition of "proceeds"); id. § 9−102(a)(65) (defining new term "promissory note"); id. § 9−109(a)(3) (providing that Article 9 now governs sale of accounts, chattel paper, payment intangibles, and promissory notes); id. § 9−204(a), (c) (expressly validating after acquired property and future advances in a securitization context); id. § 9−318 (making explicit that seller of an account, chattel paper, payment intangible or promissory note retains no interest in such asset); id. §§ 9−406, 9−408 (eliminating restrictions on transfer of certain assets). Back To Text

[10] See generally James A. Rosenthal & Juan M. Ocampo, Securitization of Credit: Inside the New Technology of Finance 3 (1988) (describing securitization as one method of finance); Securitization of Financial Assets (Jason H.P. Kravitt ed., 2d ed. 1997 & Supp. 2000) (explaining the structure of securitization transactions). Back To Text

[11] See Rosenthal & Ocampo, supra note 8, at 3. Back To Text

[12] See id. Back To Text

[13] See id. This Article will assume the following prototype: the originator is a corporation, its securitized assets are a form of receivables and the SPC is a corporate subsidiary of the originator, formed exclusively for the purpose of purchasing the originator's receivables and issuing asset−backed securities. Back To Text

[14] See Bankruptcy Reform Act of 1999 (Part III): Hearing on H.R. 833 Before the Subcomm. on Commercial & Admin. Law, 106th Cong. 6−7 (1999) [hereinafter Leach Testimony] (testimony of Rep. James A. Leach, Chairman, House Banking and Financial Services Committee) (listing benefits of securitization), available at http://www.house.gov/judiciary/leac317.htm. Back To Text

[15] See Glenn B. McClelland, Jr. & James W. McDonald, Jr., Securitizing Trade and Lease Receivables, in The Asset Securitization Handbook 123, 130 (Phillip L. Zweig ed., 1989) (discussing how securitization enables firm to more efficiently manage its cash requirements and expenses). Back To Text

[16] Securitization has been described as "socially useful in that it may reduce the cost of obtaining cash by making it easier for our [sic] certain borrowers to access public markets." The Business Bankruptcy Reform Act: Hearing on S. 1914 Before the Subcomm. on Admin. Oversight and the Courts, 105th Cong. 67 (1998) [hereinafter Picker Testimony] (testimony of Randal C. Picker) (citing The Bond Market Trade Association, Letter to Senator Grassley, April 3, 1998), available at WL 12760356. Back To Text

[17] See Rosenthal & Ocampo, supra note 8, at 12 (describing how investors in asset−backed securities are insulated from credit risk of originator); see also Lois R. Lupica, Circumvention of the Bankruptcy Process: The Statutory Institutionalization of Securitization, 33 Conn. L. Rev. 199, 200 (2000) [hereinafter Lupica, Circumvention] (explaining that one main reason firms securitize their assets is benefit of improved risk management). Back To Text

[18] Harold H. Goldberg et al., Asset Securitization and Corporate Financial Health, J. Applied Corp. Fin., Fall 1988, at 49. Recent rules on the subject of sale versus loan for accounting purposes, promulgated by the Financial Accounting Standards Board state:

A transfer of financial assets (or all or a portion of a financial asset) in which the transferor surrenders control over those financial assets shall be accounted for as a sale to the extent that consideration other than beneficial interests in the transferred assets is received in exchange. The transferor has surrendered control over transferred assets if and only if all of the following conditions are met:

a. The transferred assets have been isolated from the transferor – put presumably beyond the reach of the transferor and its creditors, even in bankruptcy or other receiverships. . . .

b. Either (1) each transferee obtains the right – free of conditions that constrain it from taking advantage of that right . . . – to pledge or exchange the transferred assets or (2) the transferee is a qualifying special−purpose entity . . . and the holders of beneficial interest in that entity have the right – free of conditions that constrain them from taking advantage of that right . . . – to pledge or exchange those interests.

c. The transferor does not maintain effective control over the transferred assets through (1) an agreement that both entitles and obligates the transferor to repurchase or redeem them before their maturity. . . or (2) an agreement that entitles the transferor to repurchase or redeem transferred assets that are not readily obtainable. . . .

Statement of Fin. Accounting Standards No. 125, Accounting for Transfers and Servicing of Financial Assets and Extinguishments of Liabilities 3−4 (Fin. Accounting Standards Bd. 1996). Back To Text

[19] See Goldberg et al., supra note 16, at 50 (stating that securitization has become so popular because it is less expensive than tradition methods of finance). See generally Rosenthal & Ocampo, supra note 8, at 8−23 (outlining securitization's benefits to originators). Back To Text

[20] See Rosenthal & Ocampo, supra note 8, at 8−23; see also Leach Testimony, supra note 12, at 6−7; Lois R. Lupica, Asset Securitization: The Unsecured Creditor's Perspective, 76 Tex. L. Rev. 595, 613−14 (1998) [hereinafter Lupica, Asset Securitization] (noting that because securitizing originators are in better position to manage "event risks," firms can fund operations at lower effective interest rate); Lisa A. Tibbitts, Learning the Basics, Issuers Prepare for Securitization, Standard & Poor's Structured Finance, at http://www.standardandpoors.com/ratings/structuredfinance/173535f.htm. Back To Text

[21] See infra notes 143−46 and accompanying text (discussing extent to which securitized assets are not deemed part of originator's bankruptcy estate). Back To Text

[22] See Rosenthal & Ocampo, supra note 8, at 8−23; see also Nicole Chu, Note, Bowie Bonds: A Key to Unlocking, the Wealth of Intellectual Property, 21 Hastings Comm. & Ent. L.J. 469, 498 (1999) (stating that "[s]ecuritization has been a boon to . . . borrowers seeking to lower their cost of funds by broadening their access to capital markets; investment bankers generating income by underwriting, making markets in, and trading asset−backed securities"); Lupica, Circumvention, supra note 15, 201 (noting that proposed change in Bankruptcy Code would grant super−priority of payment to exclusive class of asset−backed security investors). Back To Text

[23] See generally Lupica, Asset Securitization, supra note 18 (describing impact securitization can have on securitizing originator's unsecured creditors); Lupica, Circumvention, supra note 15, at 225−30 (outlining consequences of Article 9 revisions and proposed amendment to Bankruptcy Code on securitizing originators and their other creditors). Back To Text

[24] See Lupica, Asset Securitization, supra note 18, at 634 ("Not surprisingly, the securitizing firm's unsecured creditors are assuming a risk of nonpayment, as a result of the securitization, that is arguably greater than the risk unsecured creditors experience when their debtor borrows money on a secured basis."); Lupica, Circumvention, supra note 15, at 232−36 (discussing diminished chance of unsecured creditor repayment). Back To Text

[25] See Lupica, Asset Securitization, supra note 18, at 621−623; see also Bankruptcy Reform Act of 1999 (Part III): Hearing on H.R. 833 Before the Subcomm. on Commercial & Admin. Law, 106th Cong. 89 (1999) [hereinafter Tatelbaum Testimony] (testimony of Charles M. Tatelbaum on behalf of The National Association of Credit Managers) (stating that removal of securitized assets from debtor's bankruptcy estate "will have an adverse impact on other classes of creditors. This will have a chilling effect on Americas trade credit grantors in the day to day extension of credit, by removing any potential for recovery in the event of default."), available at http://www.house.gov/judiciary/106−tate.htm. Back To Text

[26] See Karen Gross, Failure and Forgiveness: Rebalancing the Bankruptcy System 101 (1997) (discussing how viewing bankruptcy process from "strongest and most powerful" creditors' perspective "addresses only a limited number of those affected by a bankruptcy filing. It fails to take into account the myriad parties touched by a bankruptcy case and the economic consequences of their situations."); see also Lupica, Asset Securitization, supra note 18, at 624 (noting that "a further objective of a securitizing originator is to remove its securitized assets from its potential bankruptcy estate"). Back To Text

[27] See In re Dynaco Corp., 162 B.R. 389, 393 (Bankr. D.N.H. 1993) ("Debtors seeking to reorganize under chapter 11 of the Bankruptcy Code frequently need to use their cash and proceeds therefrom in order to continue with their business operations."); In re Rancourt, 123 B.R. 143, 147−51 (Bankr. D.N.H. 1991) (recognizing necessity of debtor's use of cash collateral rents in first months following bankruptcy in order to conduct its business during reorganization effort); In re Greenwood Bldg. Supply, Inc., 23 B.R. 720, 721 (Bankr. W.D. Mo 1982) ("The evidence shows that debtor could not reorganize without the use of cash collateral."); Sun Bank/Suncoast v. Earth Lite, Inc. (In re Earth Lite, Inc.), 9 B.R. 440, 443 (Bankr. M.D. Fla 1981) ("[I]t is evident that if a Debtor who seeks relief under chapter 11 is deprived of the use of cash, its chances to secure rehabilitation are immediately destroyed and very few, if any, entities could survive and effectuate a reorganization without cash."); see also Bankruptcy Reform Act of 1999 (Part II): Hearing on H.R. 833 Before the Subcomm. on Commercial & Admin. Law, 106th Cong. 46−58 (1999) [hereinafter Klee Testimony] (testimony of Kenneth Klee on behalf of The National Bankruptcy Conference), available at http://www.house.gov/judiciary/106−klee.htm; Tatelbaum Testimony, supra note 23, at 89. Back To Text

[28] See Gathering Rest. Inc. v. First Nat'l Bank of Valparaiso, 79 B.R. 992, 998 (In re Gathering Rest., Inc.), 79 B.R. 992, 996 (Bankr. N.D. Ind. 1986) (stating that "[a]t the beginning of the reorganization process, the Court must work with less evidence than might be desirable and should resolve issues in favor of the reorganization, where the evidence is conflicting"); id. at 999 (stating that "[i]n the context of a bankruptcy case . . . the public interest . . . means the promoting of a successful reorganization which should be one of the paramount concerns of a bankruptcy court"). Back To Text

[29] See Gross, supra note 24, at 101. But see In re Gathering Rest. Inc., 79 B.R. at 998 (noting that when deciding to grant preliminary injunction to debtor, one must weigh probability of success of reorganization and therefore, "worth more alive than dead" theory depends on court's belief of successful reorganization) Back To Text

[30] See supra note 25 and accompanying text. Back To Text

[31] Sperry Corporation originated the first non−real estate−related public securitization in 1985. This issuance was followed by General Motors Acceptance Corporation securitization in 1986. Lowell L. Bryan, Structured Securitized Credit: A Superior Technology for Lending, J.Applied Corp. Fin., Fall 1988, at 10−11. Back To Text

[32] The 1999 volume was based upon an annualized projection of the volume from the first nine months of 1999. It has been said that the securitization market is the most rapidly increasing segment of the capital markets. Bernadette Minton et al., Asset Securitization Among Industrial Firms, 3 (November 1997) (investigating why industrial firms use asset−backed securities market), at . Back To Text

[33] See Gary Silverman et al., A $2.5 Trillion Market You Hardly Know, Bus. Wk., Oct. 26, 1998, at 122. Back To Text

[34] Minton et al., supra note 30, at 3. Back To Text

[35] See generally Structured Finance Legal Criteria, Standard & Poor's Structured Finance [hereinafter Structured Finance], at http://www.standardandpoors.com/ratings/structuredfinance/index.htm. Back To Text

[36] See Suzanne Woolley & Stan Crock, You Can Securitize Virtually Everything, Bus. Wk., July 20, 1992, at 78; Standard & Poor's: U.S. Legal Criteria in Structured Finance Transactions, April 2000, at http://www.standardandpoors.com/ratings/structuredfinance/index.htm; see also Lupica, Asset Securitization, supra note 18, at 602−03 (listing examples of the array of asset categories currently being securitized); Kim Clark, On the Frontier of Creative Finance How Wall Street Can Securitize Anything, Fortune, April 27, 1997, at 50 (describing trends in securitization); Michael Gregory, S.G. Cowen Brings First Rights Deal, Asset Sales Report, March 13, 2000 (describing securitization of sports stadium naming rights contract); Adam Reinebach, The Outlook for ABS Is so Rosy That It's Scary; New Asset Categories, New Players, New Regions are Proliferating, Investment Dealers' Dig., June 1, 1998, at 26 [hereinafter Reinebach, Outlook for ABS] (describing securitization of intellectual property futures, utility losses, reinsurance risk); Adam Reinebach, As Franchise Loan Industry Expands, Securitization Deals are Following; Pool of Receivables May Widen to Include Golf Course, Movie Theatres, Investment Dealers' Dig., May 11, 1998, at 13 [hereinafter Reinebach, Franchise Loan] (forecasting franchise asset class will significantly expand in the next years); Matthew Schifrin & Howard Rudnitsky, Rx for Receivables, Forbes, May 6, 1996, at 52 (describing securitization of pharmaceutical receivables); Ron Feldman, Will the Securitization Revolution Spread?, The Region, Sept. 1995 (discussing small business loans), at http://woodrow.mpls.frb.fed.us/pubs/region/reg959b.html (last visited March 30, 2001). Back To Text

[37] Standard & Poor's: U.S. Asset−Backed Securities Market Will Continue Expansion, Feb. 10, 2000, available at http://www.prnewswire.com. Back To Text

[38] Rating agencies research and evaluate the quality of securities issuances and publish what are known as credit ratings. See Paul M. Shupack, On Boundaries and Definitions: A Commentary On Dean Baird, 80 Va. L. Rev. 2273, 2296−97 (1994) [hereinafter Shupack, Boundaries] (commenting how AAA/aaa ratings and top ratings are impacted by cash collateral and automatic stay provisions of Bankruptcy Code); Francis A. Bottini, Jr., Comment, An Examination of the Current Status of Rating Agencies and Proposals for Limited Oversight of Such Agencies, 30 San Diego L. Rev. 579, 611 (1993) (discussing regulation of rating agencies). Back To Text

[39] See Shane Kite, Insider's Predictions Point to Maturing Market, Asset Sales Report, Oct. 18, 1999, available at 1999 WL 25988030; Akil Salim Roper, ABS Market Expected to Grow in 1999, Private Placement Letter, Feb. 8, 1999, available at 1999 WL 17487406; U.S. Asset−Backed Securities Market Will Continue Expansion, supra note 35;. Back To Text

[40] The Investor Perspective: The Benefits of Buying Securitized Bonds, Standard & Poor's Structured Finance, at http://www.standardandpoors.com/ratings/structuredfinance/173543f.htm. Back To Text

[41] "In terms of credit risk, the word 'bankruptcy remote' is sounding thinner and thinner, say insiders, as most feel the legal protection offered to bond investors from an issuing company's credit troubles has been oversold." Kite, supra note 37. See also Suzanne Woolley, What's Next, Bridge Tolls? Almost Any Risk Can Be Securitized − But Quality May Be Iffy, Bus. Wk., Sept. 2, 1996, at 64 (quoting rating agency managing director urging caution to ABS investors). Moreover, there have been other criticisms of securitization leveled by industry observers. See Frederic Dannen, The Failed Promise of Asset−Backed Securities, Institutional Investor, Oct. 1989, at 260 (observing that market prices for ABS have not always been accurate reflection of their credit−enhanced quality); Silverman et al., supra note 31 (observing "illusion of liquidity" in ABS market which is leading to more expensive credit for originators, who in turn are passing higher costs on to consumers); Gary Silverman, Securitization is No Security Blanket, Bus. Wk., Oct. 26, 1998, at 140 (noting that certain financial institutions are securitizing their higher quality loans, and keeping the risky ones, thereby masking their risk of insolvency). Securitization's bankruptcy risk are not confined to the issue of whether the securitized assets were completely removed from the originator's bankruptcy estate. See, e.g., In re Kingston Square Assocs., 214 B.R. 713 (Bankr. S.D.N.Y. 1997) (concerning creditors who filed involuntary bankruptcy petition against SPC, thereby threatening ABS investors' interests). One case where structured finance collapsed in bankruptcy was Towers Financial. In the Towers case, the originator and five SPCs filed for bankruptcy protection, resulting in substantial losses for Tower's ABS investors. See Dinsmore v. Squadron, Ellenoff,

Plesent, Sheinfeld & Sorkin (In re Towers Fin. Corp. Noteholders Litig.), No. 93 Civ 0810, 1998 WL 93337 (S.D.N.Y. Feb. 26, 1998). But see In re Federated Dep't Stores, Inc., No 1−90−00130, 1992 Bankr. LEXIS 392 (Bankr. S.D. Ohio, Jan. 10, 1992) (showing court's respect of bankruptcy remote structure of transaction); In re Carter Hawley Hale Stores, Inc., No. LA 91−64140 JD, 1991 Bankr. LEXIS 2186 (Bankr. C.D. Cal., July 30, 1991) (same). Back To Text

[42] Picker Testimony, supra note 14, at 67−68. Professor Picker was referring in his testimony to a Senate Subcommittee on behalf of the National Bankruptcy Conference, to a proposed modification of the definition of bankruptcy "estate" found in § 541 of the Bankruptcy Code. The proposed language addition to § 541 states that "eligible assets" transferred by the debtor in a securitization are affirmatively deemed to be excluded from the debtor's bankruptcy estate. Professor Picker testified:

This provision is highly objectionable. The current existence of a robust asset securitization business, coupled with the existence of minimal case law in the area, strongly suggest that special Bankruptcy Code treatment is unnecessary. The broad definition of "transferred" is likely to cause certain financing arrangements to be treated as sales to prevent the debtor's assets from being considered property of the estate even through they are only pledged as collateral. The proposed provision makes no effort to distinguish those transactions properly characterized as "true sales" from those legitimately subject to characterization as security interests.

Id. at 92. See infra notes 159–190 and accompanying text for a complete discussion of the proposed changes to the Bankruptcy Code and their impact on securitization. Back To Text

[43] Accounts are currently defined in Article 9 as "any right to payment for goods sold or leased or for services rendered, which is not evidenced by an instrument or chattel paper, whether or not it has been earned by performance." U.C.C. § 9−106 (1995). See also Dan T. Coenen, Priorities in Accounts: The Crazy Quilt of Current Law and a Proposal for Reform, 45 Vand. L. Rev. 1061, 1066−67 (1992) (discussing definition of "account"). Current Article 9 recognizes that the distinction between asset sales and assets transferred as collateral was often blurred in practice, and as such, a distinction between the two was not made in the statute. Current Article 9 governs both the sale of accounts and chattel paper as well as security interests in these assets for purpose of its notice requirement. See U.C.C. § 9−102(1)(b) (1995) (setting forth policy and subject matter of Article 9). Back To Text

[44] Chattel paper is defined as "a writing or writings which evidence both a monetary obligation and a security interest in or a lease of specific goods. . ." U.C.C. § 9−105 (1)(b) (1995). Back To Text

[45] See U.C.C. § 9−102(1)(b) (1995) (stating "[e]xcept as otherwise provided in Section 9−104 on excluded transactions, this Article applies . . . to any sale of accounts or chattel paper". Securitization's roots are found in the ancient financing method known as factoring. Factoring originated in the 14th century English textile industry. Factoring is the discounted sale of accounts to a third party. Commonly, the factor both purchases the accounts, and analyzes the account debtor's credit. See also Susan Crichton & Charles Ferrier, Understanding Factoring and Trade Credit 7−9, 22−26 (1986) (describing roots of securitization). Back To Text

[46] See infra note 48 and accompanying text. Back To Text

[47] See infra notes 46–66 and accompanying text. Back To Text

[48] U.C.C § 9−301(1)(b) (1995) states:

(1) Except as otherwise provided in subsection (2), an unperfected security interest is subordinate to the rights of . . .

(b) a person who becomes a lien creditor before the security interest is perfected;

Id.

The most common competitor is likely to be the debtor's trustee in bankruptcy. The trustee is granted, pursuant to § 544 of the Bankruptcy Code, all of the rights of a hypothetical creditor with a state law lien on the debtor's property. Read together, § 544 and § 9−301(1)(b) of the U.C.C. grant the bankruptcy trustee priority in the unperfected transferred property. See 11 U.S.C. § 544 (1994) (providing "[t]rustee as lien creditor and as successor to certain creditors and purchasers"). If the transferred property is in the hands of a third party, § 550 of the Bankruptcy Code grants the trustee the power to recover such property for the benefit of the debtor's bankruptcy estate. Once the property is returned to the debtor's estate, it then becomes available for the pro rata distribution to debtor's unsecured creditors. See 11 U.S.C. §§ 542, 550 (1994). Back To Text

[49] See U.C.C. § 9−301(1)(b) (1995). Back To Text

[50] If the appropriate governing law is identified, and the proper non−Article 9 steps to perfect, if any, are taken however, the transferee's interest should not be subject to defeat by the transferor's trustee in bankruptcy. Discovery of and compliance with the appropriate governing law, however, may not be a simple matter. See 11 U.S.C. § 544 (1994) (describing scope of trustee in bankruptcy's powers); Kapila v. Atlantic Mortgage & Inv. Corp. (In re Halabi), 184 F.3d 1335, 1337 (11th Cir. 1999) (observing that trustee's powers under § 544 "are necessarily limited to the actual or potential property of the bankruptcy estate"). Back To Text

[51] Whether an asset transfer is a "true sale" or a transfer of collateral in connection with a secured loan is not governed by statute, but is a judicially made determination, based upon the equities of the case. Courts generally base their decision upon the presence (or absence) of a number of factors. These factors have included: (i) residual interests retained by the transferor; (ii) transfer price set at fair market value by independent appraisers; (iii) recourse to the asset transferor; (iv) the acquisition of dominion and control over the assets by the transferee; (v) the transfer of the benefits and burdens of ownership by the transferee; and (vi) the intent of the parties as expressed in their writings. Many securitization transactions, however, include a variety of these factors. See, e.g., Fireman's Fund Ins. Cos. v. Grover (In re Woodson Co.), 813 F.2d 266, 272 (9th Cir. 1987) (concluding that transferor retention of risk, coupled with lending interest rate, suggested loan, rather than sale); Bear v. Coben (In re Golden Plan of California, Inc.), 829 F.2d 705, 707, 710 (9th Cir. 1986); Major's Furniture Mart, Inc. v. Castle Credit Corp., 602 F.2d 538, 542−44 (3d Cir. 1979) (describing factors relevant to determination of existence of true sale); In re Coronet Capital Co., 142 B.R. 78 (Bankr. S.D.N.Y. 1992) (describing instance where transfer was loan due to transferee's payment of interest to purchasers of interests, notwithstanding transferor's default); In re Evergreen Valley Resort, Inc., 23 B.R. 659 (Bankr. D. Me. 1982) (finding transfer was security interest due to debtor's retained interest); First Nat'l Bank of Louisville v. Hurricane Elkhorn Coal Corp. II (In re Hurricane Elkhorn Coal Corp. II), 19 B.R. 609 (Bankr. W.D. Ky. 1982) (describing instance where transfer was security interest because of debtor's retained interest); Federated Dep't Stores, Inc. v. Comm'r, 51 T.C. 500, 511 (1968), aff'd, 426 F.2d 417 (6th Cir. 1970) (concluding that because transferor retained some risk, transfer was deemed to be loan). See generally Robert D. Aicher & William J. Fellerhoff, Characterization of a Transfer of Receivables as a Sale or Secured Loan upon the Bankruptcy of the Transferor, 65 Am. Bankr. L.J. 181, 182−84 (1991) (noting that bankruptcy courts look at context of asset transfer); Thomas E. Plank, The True Sale of Loans and the Role of Recourse, 14 Geo. Mason L. Rev. 287, 290 (1991) (noting absence of universal criteria for determination of sale versus loan issue); Peter L. Mancini, Note, Bankruptcy and the UCC as Applied to Securitization: Characterizing a Mortgage Loan Transfer as a Sale or a Secured Loan, 73 B.U. L. Rev. 873, 877−82 (1993) (noting that U.C.C. provides no rules for resolving sale versus loan issue). Back To Text

[52] While parties may intend one characterization, the facts and circumstances of the transfer may suggest another. E.g., Castle Rock Indus. Bank v. S.O.A.W. Enters., Inc. (In re S.O.A.W. Enters., Inc.), 32 B.R. 279, 283 (Bankr. W.D. Tex. 1983) (notwithstanding parties' characterization as sale, participation agreement was determined to be loan transaction); Boerner v. Colwell Co., 577 P.2d 200, 204−05 (Cal. 1978) (finding transfer of construction contracts to be sale rather than loan). Back To Text

[53] Because the definitive determination of the sale versus loan issue is so uncertain, lawyers have historically been reluctant (or in some instances, unwilling) to unqualifiedly conclude in legal opinions that a specific asset transfer is a true sale. See, e.g., George W. Bermant, The Role of the Opinion of Counsel: A Tentative Reevaluation, 49 Cal. St. B.J. 132 (1974); Scott FitzGibbon & Donald W. Glazer, Legal Opinions in Corporate Transactions: The Opinion on Agreements and Instruments, 12 J. Corp. L. 657 (1987); Robert J. Harter, Jr. & Kenneth N. Klee, The Impact of the

New Bankruptcy Code on the "Bankruptcy Out" in Legal Opinions, 48 Fordham L. Rev. 277 (1979); Committees of the New York County Lawyers Association, the Association of the Bar of the City of New York, and the New York State Bar Association, Legal Opinions to Third Parties: An Easier Path, 34 Bus. Law. 1891 (1979); see also United States Committee on the Judiciary Subcommittee on : Hearing the Bankruptcy Reform Act, 106 Congress (March 18, 1999) (statement of Seth Grosshandler, Partner, Cleary, Gottlieb, Steen & Hamilton), available at http://www.house.gov/judiciary/106−gros.htm; Bankruptcy Reform Act of 1999 (Part III): Hearing on H.R. 833 Before the Subcomm. on Commercial & Admin. Law, 106th Cong. 182 (1999) [hereinafter Grosshandler Testimony] (testimony of Seth Grosshandler, Partner, Cleary, Gottlieb, Steen & Hamilton), available at http://www.house.gov/judiciary/106−gros.htm. Mr. Grosshandler stated:

In order to obtain sales treatment under the relevant accounting standards, participants in mortgage−backed and asset−backed securitization transactions must obtain assurances from counsel that the sale of assets will be final under applicable bankruptcy law. Such legal advice is referred to as a "true sale opinion." Unfortunately, there is a lack of guiding judicial precedent regarding what constitutes such a true sale of assets. The considerations in the analysis are highly subjective and depend on a qualitative assessment of a wide variety of facts and circumstances. For these and other reasons, any true sale opinion will generally be a reasoned one, with various assumptions as to factual matters and conclusions that introduce an unnecessary degree of legal uncertainty in the asset−backed market. As a result, for some types of transactions, true sale opinions can be extremely difficult, costly, and in a few cases, impossible to render.

Id. at 189−90. Back To Text

[54] See U.C.C. § 9−301(1)(b) (1995). Back To Text

[55] See U.C.C. § 9−302 (1995) (describing requirements for filing of financing statements for intangibles, including accounts). Back To Text

[56] See 11 U.S.C. §§ 544, 547, 550 (1994) (describing power of bankruptcy trustee to recover assets held by third parties absent perfected security interest). Revised U.C.C. § 9−318(b) official comment 3 states:

Another aspect of sales of accounts and chattel paper also was implicit, and equally obvious, under former Article 9: If the buyer's security interest is unperfected, then for purposes of determining the rights of certain third parties, the seller (debtor) is deemed to have all rights and title that the seller sold. . . . As a consequence of subsection (b), if the buyer's security interest is unperfected, the seller can transfer, and the creditors of the seller can reach, the account or chattel paper as if it had not been sold.

Id. Back To Text

[57] See Rev. U.C.C. § 9−318 cmt. 3. See generally Barkley Clark, Revised Article 9 of the UCC: Scope, Perfection, Priorities, and Default, 4 N.C. Banking Inst. 129, 131 (2000) (describing application of revised § 9−318). Back To Text

[58] See Octagon Gas Sys., Inc. v. Rimmer (In re Meridian Reserve, Inc.), 995 F.2d 948, 957 n.9 (10th Cir. 1993) (rejecting view that sale of asset, if perfected, removes it from transferor's bankruptcy estate). Back To Text

[59] 995 F.2d 948 (10th Cir. 1993). In Octagon, the transferee did not file a financing statement to perfect its interest, leaving it vulnerable to avoidance by the bankruptcy trustee, pursuant to its section 544(a) lien avoidance powers. It is possible, however, that the transferee was automatically perfected under section 9−302(1)(e). Id. at 957−58 & n.10. See U.C.C. § 9−302(1)(e) (1995) (providing for automatic perfection of certain isolated and small transfers of accounts). Back To Text

[60] Octagon did not present the issue of what is included in a transferor's bankruptcy estate in the context of a prototypical securitization. Instead, the transferor was transferring interests in the proceeds of certain sales of natural gas. In re Meridian Reserve, Inc., 995 F.2d at 951−52. The court initially observed that the transferred interest was an

account, as defined by § 9−106, and sales of accounts are governed by Article 9. Id. at 954. The court continued by observing that, notwithstanding the fact that the "transactions giving rise to [the] account were not intended to secure a debt," asset sales are covered by Article 9, "whether intended for security or not." Id. at 955. The underlying asset, natural gas, once extracted and sold, is a "good," and the payment stream arising from the sale of that good is an "account." Id. at 954−55. Article 9 defines an "account" as "any right to payment for goods sold . . . which is not evidenced by an instrument of chattel paper." Okla. Stat. Ann. tit. 12A § 9−106 (West Supp. 1993). Back To Text

[61] 462 U.S. 198, 203−205 (1994). In Whiting Pools, the Internal Revenue Service had a tax lien on the debtor's assets and prior to bankruptcy, seized and was planning to sell these assets. Just prior to the sale, Whiting Pools, the debtor, filed for bankruptcy protection under chapter 11. The IRS claimed that notwithstanding the fact that the foreclosure sale had not yet taken place at the time bankruptcy was filed, the seized assets were nonetheless not included within the definition of debtor's bankruptcy estate. The Supreme Court disagreed and held that the IRS was required to return the property to Whiting Pools as debtor−in−possession pursuant to § 542(a) of the Bankruptcy Code. Id. at 203, 205. Citing both the legislative history and the language of Bankruptcy Code § 541(a)(1), the Court observed that § 541 is "intended to include in the estate any property made available to the estate by other provisions of the Bankruptcy Code," id. at 204, and that in order to "facilitate the rehabilitation of the debtor's business, all of the debtor's property must be included in the reorganization estate, including property in which a creditor has a security interest." id. at 203. Congress could have specifically excluded property subject to a security interest from the bankruptcy estate, but instead "chose . . . to include such property in the estate and to provide secured creditors with 'adequate protection' for their interests." Id. If such encumbered property is in the possession of a third party, the trustee has the authority pursuant to § 542(a) to demand that the party in possession of estate property turn such property over to the debtor's estate. Id. Back To Text

[62] See In re Meridian Reserve, Inc., 995 F.2d at 955. Back To Text

[63] See Rosenthal & Ocampo, supra note 8, at 6; see also Thomas J. Gordon, Securitization of Executory Future Flows as Bankruptcy−Remote True Sales, 67 U. Chi. L. Rev. 1317, 1318 (2000) (stating once assets securitized they are not included in bankruptcy estate eliminating risk of regular unsecured and secured arrangements); Lynn M. LoPucki, The Death of Liability, 106 Yale L.J. 1, 24 (1996) [hereinafter LoPucki, Liability] (discussing benefits of asset securitization where company keeps valuable assets separate from entities at risk). Back To Text

[64] Section 1109(b) of the Bankruptcy Code defines "party in interest" to include debtor's creditors. 11 U.S.C. § 1109(b) (1994). See W. Auto Supply Co. v. Savage Arms, Inc. (In re Savage Indus., Inc.), 43 F.3d 714, 720 (1st Cir. 1994) (stating that parties of interest, for bankruptcy purposes, includes any entity with pecuniary interests which might be adversely affected, not just those with claims). Back To Text

[65] See 11 U.S.C. § 1129(b) (1994). Back To Text

[66] See 11 U.S.C. § 363 (1994) (outlining circumstances and conditions under which debtor may use its cash collateral); see also In re Kain, 86 B.R. 506, 511 (Bankr. W.D. Mich. 1988) (stating consent or court order is needed for use of cash collateral); Weiss v. People Sav. Bank (In re Three Partners, Inc.), 199 B.R. 230, 236 (Bankr. D. Mass. 1995) (using cash collateral is prohibited under § 363(c)(2) unless all creditors with security interest consent or under court order). Back To Text

[67] Section 361(3) of the Bankruptcy Code authorizes the trustee to propose adequate protection by giving the secured claimant any form of relief that will result in the realization of the "indubitable equivalent" of the claimant's interest in the property. 11 U.S.C. § 361(3). This phrase originated in an opinion written by Judge Learned Hand. See In re Murel Holding Corp., 75 F.2d 941, 942 (2d Cir. 1935) ("We see no reason to suppose that the statute was intended to deprive him of that in the interest of junior holders, unless by a substitute of the most indubitable equivalence"). Back To Text

[68] This is true, assuming that the transferee's rights are not voidable under § 544(a)(1) of the Bankruptcy Code. 11 U.S.C. § 544(a)(1) (1994). Section 544(a)(1) provides:

(a) The trustee shall have, as of the commencement of the case, and without regard to any knowledge of the trustee or of any creditor, any knowledge of the trustee or of any creditor, the rights and powers of, or may avoid any transfer of property of the debtor or any obligation incurred by the debtor that is voidable by—

(1) a creditor that extends credit to the debtor at the time of the commencement of the case, and that obtains, at such time and with respect to such credit, a judicial lien on all property on which a creditor on a simple contract could have obtained such a judicial lien, whether or not such a creditor exists;

Id. Back To Text

[69] Not only do the state law provisions of Article 9 treat the grant of a security interest differently from a sale of accounts, the term "security interest" is not defined in the same way under the Bankruptcy Code as it is in Article 9. The Bankruptcy Code's definition of security interest does not include the interest of a purchaser of accounts, whereas § 1−201(37) of the U.C.C. states that the term "security interest" also includes any interest of a buyer of accounts or chattel paper which is subject to Article 9. U.C.C. § 1−201(37) (1995) reads:

"Security interest" means an interest in personal property or fixtures which secures payment or performance of an obligation. . . . The term also includes any interest of a buyer of accounts or chattel paper which is subject to Article 9.

Id. Thus, for the limited purpose of providing for a notice mechanism to third parties, Article 9's filing system applies to both sales of accounts and borrowings secured by accounts. Article 9 does not control, however, what assets constitute property of the bankruptcy estate. This is determined with reference to Bankruptcy Code provisions. Section 101(51) of the Bankruptcy Code defines "security interest" as a lien created by an agreement. 11 U.S.C. § 101(51). Back To Text

[70] See Barkley Clark, The Law of Secured Transactions Under the Uniform Commercial Code ¶ 4.04[5], at 4−122 to 4−124 (A.S. Pratt & Sons ed., rev. ed. 2000) (perfected sales of accounts are not included in transferor's bankruptcy estate); see also Thomas S. Kiriakos et al., Bankruptcy, in 1 Securitization of Financial Assets, § 5, at 5−1, −32 to −33 (noting that Octagon is "clearly incorrect"); Thomas E. Plank, When a Sale of Accounts Is Not a Sale: A Critique of Octagon Gas, 48 Consumer Fin. L. Q. Rep. 45 (1994) (criticizing reasoning of Octagon); Nikiforos Mathews, Note: Circuit Court Erie Errors and The District Court's Dilemma: From Rotolith and the Mirror Image Rule to Octagon Gas and Asset Securitization, 17 Cardozo L. Rev. 739, 740−41 (1996) (referring to Octagon court's misinterpretation of § 9−102(b)). Back To Text

[71] See David Gray Carlson, The Rotten Foundations of Securitization, 39 Wm. & Mary L. Rev. 1055, 1063−64 (1998) (arguing that, in reliance on Whiting Pools, originator retains interest in assets transferred in connection with securitization). Back To Text

[72] See Steven L. Schwarcz, A Fundamental Inquiry into the Statutory Rulemaking Process of Private Legislatures, 29 Ga. L. Rev. 909, 928 (1995) [hereinafter Schwarcz, Fundamental] (stating Octagon's holding erroneously retains transferred property in bankruptcy estate even in true leases); Steven L. Schwarcz, Octagon Gas Ruling Creates Turmoil for Commercial and Asset−Based Finance, N.Y.L.J., Aug. 4, 1993, at 1, 2 [hereinafter Schwarcz, Turmoil] (sharply criticizing Octagon decision). Back To Text

[73] See PEB Study, supra note 2, at 181−84; see also Robert M. Lloyd, The New Article 9: Its Impact on Tennessee Law, 67 Tenn. L. Rev. 125, 158 (1999) (stating that Revised Article 9 extinguishes all equitable or legal interests in assets sold outright, thereby overruling Octagon). Back To Text

[74] PEB Study, supra note 2, at 181−84. Back To Text

[75] See Rev. U.C.C. § 9−102(a)(2) cmt. 5a ("Many categories of rights to payment that were classified as general intangibles under former Article 9 are accounts under this Article."). Back To Text

[76] See Rev. U.C.C. § 9−109(a)(3). See generally Donald J. Rapson, "Receivables" Financing under Revised Article 9, 73 Am. Bankr. L.J. 133, 137 (1999) (noting that Revised Article 9 removes uncertainty around rules for perfection and priority of sales of receivables). Back To Text

[77] Picker Testimony, supra note 14, at 67. The quote continues by observing that "though you would not know it by the number of securitizations that take place." Id. Back To Text

[78] PEB Study, supra note 2, 181−84. Back To Text

[79] Rev. U.C.C. § 9−318. See Steven L. Harris & Charles W. Mooney, Jr., How Successful Was the Revision Of UCC Article 9?: Reflections of the Reporters, 74 Chi.−Kent L. Rev. 1357, 1398 n.178 (1999) [hereinafter Harris & Mooney, How Successful] ("Revised section 9−318 rejects Octagon Gas insofar as the opinion interpreted Article 9."); G. Ray Warner, Asset Securitization under Revised Art. 9, Am. Bankr. Inst. J., Sept. 2000, at 16 ("Revised § 9−318(a) is designed to overrule Octagon by providing that a debtor who has sold an income−producing asset does not retain a legal or equitable interest in the collateral sold"). Back To Text

[80] Rev. U.C.C. § 9−318(a). Back To Text

[81] Rev. U.C.C. § 9−318 cmt. 2. Back To Text

[82] Rev. U.C.C. § 9−318(b). Back To Text

[83] Rev. U.C.C. § 9−318 cmt. 3. Back To Text

[84] See 11 U.S.C. §§ 541(a)(3), 544 (1994). Back To Text

[85] See infra notes 170 to 176 and accompanying text describing the proposed amendment to the Bankruptcy Code designed to federalize the sale versus loan determination, based upon the parties to the transaction's characterization of the transfer. Back To Text

[86] Rev. U.C.C. § 9−318 cmt. 2. Back To Text

[87] See supra notes 49–51 (discussing issue at greater length). Back To Text

[88] Revised Article 9 thus explicitly rejects the argument that "even sold accounts are subject to bankruptcy jurisdiction, provided some 'legal or equitable' debtor property interest in the thing sold can be located." See Carlson, supra note 69, at 1060. Carlson identifies three property interests held by the debtor after the sale of accounts or chattel paper: (i) the power to convey chattel paper to subsequent purchasers who take possession in the ordinary course of the business, free and clear of the asset−backed security interest holder's rights; (ii) the power to collect from the account debtor; and (iii) a future interest in the bankruptcy trustee, on behalf of the debtor's creditors. Id. at 1060−61. Back To Text

[89] See Rev. U.C.C. § 9−102(a)(2). Current § 9−106 defines "account" as "any right to payment for goods sold or leased or for services rendered which is not evidenced by an instrument or chattel paper, whether or not it has been earned by performance." U.C.C. § 9−106 (1995). Back To Text

[90] Revised § 9−109, states that Article 9 applies to "a sale of accounts, chattel paper, payment intangibles, or promissory notes." Rev. U.C.C. § 9−109(a)(3). Back To Text

[91] See Structured Finance Legal, supra note 33. Back To Text

[92] Id. Back To Text

[93] See, e.g., First Union Nat'l Bank of North Carolina v. Brendle's Stores, Inc. (In re Brendle's Stores, Inc.), 165 B.R. 811, 814 (M.D.N.C. 1993) (stating that confusion concerning classification of credit card receivables is consequence of receivables having some attributes of instruments). Under Current Article 9, instruments can be perfected by possession, whereas general intangibles can be perfected only by the filing of a financing statement. See U.C.C. §§ 9−302, 9−304 (1995). Instruments can now be perfected by filing under Revised Article 9, but such perfection does not prevail against a holder in due course. See Rev. U.C.C. §§ 9−312(a), 9−331(a). Back To Text

[94] Stephen L. Sepinuck, Classifying Credit Card Receivables Under the U.C.C.: Playing with Instruments? 32 Ariz. L. Rev. 789 (1990) (examining characterization issues involved in sale of credit card receivables). Back To Text

[95] See U.C.C. § 9−102(1)(b) (1995). Back To Text

[96] Id. Back To Text

[97] If unperfected upon debtor's bankruptcy trustee, their interest can be defeated by debtor's bankruptcy trustee. See U.C.C. § 9−301 (1995); 11 U.S.C. § 544 (1994). Back To Text

[98] This extension of the concept of "accounts" in Revised Article 9 has the effect of reducing the range of assets which will qualify as general intangibles and payment intangibles. See Rev. U.C.C. § 9−102(42); see also Thomas M. Ward, Intellectual Property in Commerce § 2:11, at 2−32 (2000) (royalties and other income streams from the licensing of intellectual property are captured under the broader definition of "account" in Revised Article 9). Back To Text

[99] Standard & Poor's Structured Finance Legal Criteria report includes the following commonly securitized assets: automobile; recreational vehicle and marine loans; unsecured credit card receivables; unsecured consumer loan receivables; secured credit card receivables; trade receivables; equipment leases; and student loans. Structured Finance, supra note 33. Back To Text

[100] Rev. U.C.C. § 9−102(a)(2). Revised § 9−102(a)(2) further reads:

(2) . . . The term does not include (i) rights to payment evidenced by chattel paper or an instrument, (ii) commercial tort claims, (iii) deposit accounts, (iv) investment property, (v) letter−of−credit rights or letters of credit, or (vi) rights to payment for money or funds advanced or sold, other than rights arising out of the use of a credit or charge card or information contained on or for use with the card.

Id. Back To Text

[101] The securitization of intellectual property royalty streams has become an increasingly popular phenomenon. The first intellectual property futures securitization was a $55 million ABS issuance, backed by the royalties from the future sale of David Bowies first 25 albums. See Kathy Bergen, 100 Shares of Pavarotti? Stars Turn to Securitization, Sun−Sentinel (Ft. Lauderdale), Dec. 6, 1997, at 16C; Peter Newcomb, Dead Men Earning, Forbes, Mar. 22, 1999, at 253; see also Ward, supra note 96, at § 2:11. Back To Text

[102] See Rev. U.C.C. § 9−102(a)(2). Back To Text

[103] See Rev. U.C.C. § 9−109(a)(3) (stating "this article applies to . . . a sale of accounts, chattel paper, payment intangibles, or promissory notes"). The sale of payment intangibles and promissory notes are subject to Article 9's perfection and priority rules. Back To Text

[104] Rev. U.C.C. § 9−102(a)(61). Comment 5(d) notes that "payment intangibles" are a subset of "general intangibles." See Rev. U.C.C. § 9−102 cmt 5d. It further states:

Virtually any intangible right could rise to a right to payment of money once one hypothesizes, for example, that the account debtor is in breach of its obligation. The term "payment intangible," however, includes only those general intangibles "under which the account debtor's principal obligation is a monetary obligation."

Rev. U.C.C. § 9−102 cmt. 5d (emphasis in original). General intangibles are a "residual category of personal property" under Revised Article 9. Id. Under Revised Article 9, "General intangible" encompasses

. . . any personal property, including things in action, other than accounts, chattel paper, commercial tort claims, deposit accounts, documents, goods, instruments, investment property, letter−of−credit rights, letters of credit, money, and oil, gas, or other minerals before extraction" are general intangibles.

Rev. U.C.C. § 9−102(a)(42). Examples cited in the Official Comment include intellectual property and the right to payment of a loan of funds that is not evidenced by chattel paper or an instrument. See Rev. U.C.C. § 9−102 cmt. 5d. Back To Text

[105] See Rev. U.C.C. § 9−102(a)(2) (including within definition of "account," "a right to payment of a monetary obligation . . . for property that has been or is to be sold, leased, licensed, assigned, or otherwise disposed of"). Back To Text

[106] See Rev. U.C.C. § 9−102(a)(42), (61) (defining "general intangible" and "payment intangible" respectively). Back To Text

[107] Rev. U.C.C. § 9−102 cmt. 5c. The definition of "promissory note" reads:

"Promissory note" means an instrument that evidences a promise to pay a monetary obligation, does not evidence an order to pay, and does not contain an acknowledgment by a bank that the bank has received for deposit a sum of money or funds.

Rev. U.C.C. § 9−102(a)(65). Back To Text

[108] See Harris & Mooney, How Successful, supra note 77, at 1370−72 (discussing The Drafting Committee's recognition of loan participation challenge, with respect to general intangibles). Back To Text

[109] Id. at 1371−72. See also Paul M. Shupack, Making Revised Article 9 Safe for Securitizations: A Brief History, 73 Am. Bankr. L.J. 167, 176 (1999) [hereinafter Shupack, Making Revised Article 9] (noting that under Current Article 9, cash flows from sale of loan pools are deemed to be general intangibles and thus, their sale is not governed by Article 9); Securitization of Financial Assets, supra note 8, at 6−18 (explaining that loan pool participations are not governed by Current Article 9). Back To Text

[110] See Rev. U.C.C. § 9−309(3) ("The following security interests are perfected when they attach: . . . (3) a sale of a payment intangible;"). Shupack, Making Revised Article 9, supra note 107, at 176. The danger with such automatic perfection of a transfer of payment intangibles and promissory notes is that searchers of the public records will not discover another party's prior interest in these assets. Back To Text

[111] Transferees of loan pool participations, however, are well advised to file a financing statement to perfect their interests to avoid the challenge that they are unperfected because the transfer was a transfer of collateral and not a true sale. Under Revised Article 9, security interests in promissory notes may be perfected by filing. See Rev. U.C.C. §§ 9−310(a), 9−312(a); see also Randal C. Picker, Perfection Hierarchies and Nontemporal Priority Rules, 74 Chi.−Kent L. Rev. 1157 (1999) (discussing Revised Article 9's process of perfection); Pryor, supra note 6, at 474 (discussing filing under Revised Article 9). Back To Text

[112] See U.C.C. §§ 9−108, 9−204 (1995); Rev. U.C.C. § 9−204. Back To Text

[113] See U.C.C. § 9−204 (1995); Rev. U.C.C. § 9−204. Back To Text

[114] See U.C.C. §§ 9−108, 9−204 (1995); Rev. U.C.C. § 9−204. Back To Text

[115] Revised sections 9−204 (a) & (c) read:

(a) [After−acquired collateral.] . . . a security agreement may create or provide for a security interest in after−acquired collateral.

. . .

(c) [Future advances and other value.] A security agreement may provide that collateral secures, or that accounts, chattel paper, payment intangibles, or promissory notes are sold in connection with, future advances or other value, whether or not the advances or value are given pursuant to commitment.

Id. Back To Text

[116] Rev. U.C.C. § 9−204 cmt. 6 states:

Sales of Receivables. Subsections (a) and (c) expressly validate after−acquired property and future advance clauses not only when the transaction is for security purposes but also when the transaction is the sale of accounts, chattel paper, payment intangibles, or promissory notes. This result was implicit under former Article 9.

Id. But see Carlson, supra note 69, at 1111−12 ("Article 9 does not expressly authorize after−acquired property clauses when accounts are sold. Rather, it authorizes after−acquired property clauses only when a lender advances a loan and takes after−acquired accounts as collateral."). Back To Text

[117] U.C.C. § 9−318(4) (1995) reads:

A term in any contract between an account debtor and an assignor is ineffective if it prohibits assignment of an account or prohibits creation of a security interest in a general intangible for money due or to become due or requires the account debtor's consent to such assignment or security interest.

Id. Back To Text

[118] See Rev. U.C.C. § 9−406, 9−408. Back To Text

[119] Rev. U.C.C. § 406(d) reads:

(d) [Term restricting assignment generally ineffective.] Except as otherwise provided in subsection (e) and Sections 2A−303 and 9−407, and subject to subsection (h), a term in an agreement between an account debtor and an assignor or in a promissory note is ineffective to the extent that it:

1. prohibits, restricts, or requires the consent of the account debtor or person obligated on the promissory note to the assignment or transfer of, or the creation, attachment, perfection, or enforcement of a security interest in, the account, chattel paper, payment intangible, or promissory note; or
2. provides that the creation, attachment, perfection, or enforcement of the security interest may give rise to a default, breach, right of recoupment, claim, defense, termination, right of termination, or remedy under the account, chattel paper, payment intangible, or promissory note.

Id. See generally Carl S. Bjerre, International Project Finance Transactions: Selected Issues under Revised Article 9, 73 Am. Bankr. L.J. 261, 294 (1999) (maintaining that Revised Article 9 made certain anti−assignment clauses ineffective in response to pressure for commercial transactions to go forward). Back To Text

[120] Rev. U.C.C. § 406(f) reads:

. . . a rule of law, statute, or regulation that prohibits, restricts, or requires the consent of a government, governmental body or official, or account debtor to the assignment or transfer of, or creation of a security interest in, an account or chattel paper is ineffective to the extent that the rule of law, statute or regulation:

(1) prohibits, restricts or requires the consent of the government, governmental body or official, or account debtor to the assignment or transfer of, or the creation, attachment, perfection, or enforcement of a security interest in the account or chattel paper; or

(2) provides that the creation, attachment, perfection, or enforcement of the security interest may give rise to a default, breach, right of recoupment, claim, defense, termination, right of termination, or remedy under the account or chattel paper.

Id. See Edwin E. Smith, Overview of Revised Article 9, 73 Am. Bankr. L.J. 1, 38 (1999) (noting that Revised U.C.C. § 9−406(f) renders ineffective any law preventing attachment, perfection, or enforcement of security interests in account or chattel paper). Back To Text

[121] Comment 5 to Revised § 9−408 further makes clear that the term "account debtor," defined in Revised § 9−102(3), refers to the party, other than the debtor, to a general intangible, including a permit, license, franchise, or the like, and the person obligated on a health−care−insurance receivable, which is a type of account. The definition of "account debtor" does not limit the term to persons who are obligated to pay under a general intangible. Rather, the term includes all persons who are obligated on a general intangible, including those who are obligated to render performance in exchange for payment.

Rev. U.C.C. § 9−408 cmt. 5. The licensor of intellectual property is obligated to perform on "general intangibles" and is therefore an "account debtor." See Ward, supra note 96, at § 2:13. Back To Text

[122] Revised § 9−408(a) & (c) declares ineffective any contractual term or law, statute or regulation that:

(1) would impair the creation, attachment or perfection of a security interest; or

(2) provides that the assignment or transfer or the creation, attachment, or perfection of the security interest may give rise to a default, breach, right of recoupment, claim, defense, termination, right of termination, or remedy under the promissory note, health−care−insurance receivable, or general intangible.

Rev. U.C.C. § 9−408 (a), (c). Revised § 9−406(e) renders Revised § 9−406(d) & (f) inapplicable to sales of payment intangibles and promissory notes but Revised § 9−408(a) and (c) step in to fill this void by making invalid attempts to restrict a Revised Article 9 sale of payment intangibles and promissory notes. See Rev. U.C.C. § 9−408(a), (c). Back To Text

[123] See Rev. U.C.C. § 9−408(d) (describing limitations on rights of secured party while preserving rights of account debtor); see also Bjerre, supra note 117, at 301 (discussing fact that Revised Article 9 gives debtor right to enforce security interest, but does not entitle secured party to exercise that right). Back To Text

[124] See Rev. U.C.C. § 9−408(d) (describing limitations on rights of secured party while preserving rights of account debtor); see also Bjerre, supra note 117, at 190 (noting that, to extent assignment is effective, § 9−408(d) frees account debtor from various obligations to secured party). Back To Text

[125] See Rev. U.C.C. § 9−102(a)(3) ("'Account debtor' means a person obligated on an account, chattel paper, or general intangible. . . . [but] does not include persons obligated to pay a negotiable instrument, even if the instrument constitutes part of chattel paper."); see also Steven L. Schwarcz, The Impact on Securitization of U.C.C. Revised Article 9, 74 Chi.−Kent L. Rev. 947, 959 (1999) (maintaining that another rationale for changes might be fact that refusal to enforce anti−assignment clauses does not in any way prejudice obligor, while enforcement of clause would impair free alienability of property rights). Back To Text

[126] Current Article 9 defines "proceeds" as what is "received upon the sale, exchange, collection or other disposition of collateral or proceeds." U.C.C. § 9−306(1) (1995). Back To Text

[127] Rev. U.C.C. § 9−102(a)(64). "Proceeds" now specifically includes "cash or stock dividends distributed on account of securities or other investment property that is original collateral," rejecting the holding of FDIC v. Hastie (In re Hastie), 2 F.3d 1042 (10th Cir. 1993). Rev. U.C.C. § 9−102 cmt. 13a. Back To Text

[128] See 11 U.S.C. § 552 (1994) (describing post−petition effect of security interest in property); see also Samuel M. Stricklin & Alexander P. Okuliar, Characterization of Healthcare Receivables: Are Post−Petition Healthcare Receivables Subject to Pre−Petition Liens as "Proceeds" or "Rents" under the Bankruptcy Code, or Are They Excluded as After−Acquired Property?, 8 Am. Bankr. Inst. L. Rev. 47, 49−50 (2000) (discussing distinction in § 552 between "proceeds" and after−acquired property). Back To Text

[129] 11 U.S.C. § 552(a) (1994) states that:

(a) Except as provided in subsection (b) of this section, property acquired by the estate or by the debtor after the commencement of the case is not subject to any lien resulting from any security agreement entered into by the debtor before the commencement of the case.

Id. 11 U.S.C. § 552(b)(1) (1994) states:

(b)(1) . . . if the debtor and an entity entered into a security agreement before the commencement of the case and if the security interest created by such security agreement extends to property of the debtor acquired before the commencement of the case and to proceeds, product, offspring, or profits of such property, then such security interest extends to such proceeds, product, offspring, or profits acquired by the estate after the commencement of the case to the extent provided by such security agreement and by applicable nonbankruptcy law, except to any extent that the court, after notice and a hearing and based on the equities of the case, orders otherwise.

Id. Back To Text

[130] "The scope of . . . [§ 541(a)(1)] is broad. It includes all kinds of property, including tangible or intangible property, causes of action . . . and all other forms of property currently specified in § 70a of the Bankruptcy Act." H.R. Rep. No. 95−595, at 367 (1977), reprinted in 1978 U.S.C.C.A.N. 5963, 6323; S. Rep. No. 95−989, at 82 (1978), reprinted in 1978 U.S.C.C.A.N. 5787, 5868. See also supra notes 25−27 (discussing cases describing necessity of post−petition cash flow in connection with debtor's reorganization and for payment to unsecured creditors). Back To Text

[131] Courts have not been consistent in their interpretation of what is meant by "proceeds, product, offspring, or profits" in § 552(b). The exception "except to any extent that the court. . . based on the equities of the case, orders otherwise" has only added to the inconsistency of court opinions with respect to this issue. See In re Hastie, 2 F.3d at 1045−46 (relying upon state law definition of proceeds in holding that security interest in stock dividends were not perfected because dividends were not substituted for disposed of stock (collateral), pursuant to § 9−306(4)); Unsecured Creditors Comm. v. Marepcon Fin. Corp. (In re Bumper Sales, Inc.), 907 F.2d 1430, 1437 (4th Cir. 1990) (holding that Article 9's definition of "proceeds" was definition to be applied in determining scope of Bankruptcy Code § 552(b)); J. Catton Farms, Inc. v. First Nat'l Bank of Chicago, 779 F.2d 1242, 1246 (7th Cir. 1985) (holding that party with security interest in receivables and accounts had perfected interest, as proceeds, in payment received post−petition pursuant to pre−petition account). Revised Article 9 brings licensing income within the definition of "proceeds" whether or not any portion of the underlying intellectual property was "disposed of" under the license. See Rev. U.C.C. § 9−102(a)(64)(A); Ward, supra note 96, at § 2:29, 2−86 to 2−91. Back To Text

[132] See Ward, supra note 96, at § 2:29, 2−86 to 2−91; see also Lupica, Circumvention, supra note 15, at 204−05 (noting that by expanding definition of proceeds, drafters of Revised Article 9 greatly enhanced position of leveraged secured lenders). Back To Text

[133] See infra notes 140−150 and accompanying text; see also In re Sullivan Ford Sales, 2 B.R. 350, 355 (Bankr. D. Me. 1980) ("Reorganization under either the Bankruptcy Code or the Bankruptcy Act is a perilous process, seldom more so than at the outset of the proceedings when the debtor is often without sufficient cash flow to fund essential business operations."). Back To Text

[134] See Richard L. Barnes, The Efficiency Justification for Secured Transactions: Foxes with Soxes and Other Fanciful Stuff, 42 Kan. L. Rev. 13 (1993) (questioning judgment of Revised Article 9 drafters); Thomas H. Jackson & Anthony T. Kronman, Secured Financing and Priorities among Creditors, 88 Yale L.J. 1143 (1979) (discussing advantages of secured transactions); Hideki Kanda & Saul Levmore, Explaining Creditor Priorities, 80 Va. L. Rev. 2103 (1994) (discussing theory of Article 9); Homer Kripke, Law and Economics: Measuring the Economic Efficiency of Commercial Law in a Vacuum of Fact, 133 U. Pa. L. Rev. 929 (1985) (discussing economics of Article 9); Alan Schwartz, The Continuing Puzzle of Secured Debt, 37 Vand. L. Rev. 1051 (1984) (discussing economic justifications for Article 9); Robert E. Scott, A Relational Theory of Secured Financing, 86 Colum. L. Rev. 901 (1986) (discussing justifications for regulation of secured financing); Paul M. Shupack, Solving the Puzzle of Secured Transactions, 41 Rutgers L. Rev. 1067, 1118 (1989) [hereinafter Shupack, Puzzle] (questioning creation of voluntary unsecured debt); James J. White, Efficiency Justifications for Personal Property Security, 37 Vand. L. Rev. 473 (1984) [hereinafter White, Justifications] (discussing efficiency justifications for secured property regulation). Back To Text

[135] See Lucian Arye Bebchuck & Jesse M. Fried, The Uneasy Case for the Priority of Secured Claims in Bankruptcy, 105 Yale L.J. 857 (1996) (challenging desirability of law that entitles secured creditors to full amount of their secured claim); Vern Countryman, Code Security Interests in Bankruptcy, 75 Com. L.J. 269 (1970); Grant Gilmore, The Good Faith Purchase Idea and the Uniform Commercial Code: Confessions of a Repentant Draftsman, 15 Ga. L. Rev. 605 (1981) (questioning secured financing preference towards secured creditors); Lynn M. LoPucki, The Unsecured Creditor's Bargain, 80 Va. L. Rev. 1887, 1894−1895 (1994) [hereinafter LoPucki, Bargain] (questioning reasons for existence of unsecured debt). Back To Text

[136] See Bebchuck & Fried, supra note 133, at 865 (arguing that giving full priority to secured claims promotes inefficient rather than efficient markets); LoPucki, supra note 133, at 1894−95 (discussing problems with giving full priority to secured claims); see also Elizabeth Warren, Making Policy with Imperfect Information: The Article 9 Priority Debates, 82 Cornell L. Rev. 1373 (1997) (arguing that Article 9 allows two parties to change collection rights of third party). Back To Text

[137] As noted in the PEB Commentary:

[One could ask]. . . whether Article 9 should limit the types of property that can be subjected to a security interest or the extent to which a debtor's property can be so encumbered. Or one might question whether any perfection step should be necessary to obtain priority over judicial lien creditors or other competing claimants. Or one might question whether security interests ought to be enforceable at all.

Although it is well aware of challenges to the validity of some basic principles that underlie Article 9, the Committee chose not to undertake a thorough reexamination of those principles. Nor did the Committee's deliberations reflect strong support for making major adjustments in the balance that Article 9 now strikes between secured parties and unsecured creditors. But insofar as the Committee's recommendations would make it easier and less costly to take and perfect security interests, they are likely to have the effect of improving the position of secured parties relative to that of unsecured creditors. . . . The Committee believes that any necessary adjustments for the protection of third parties should be made directly, as by changing Article 9's priority rules or by modifying the avoidance powers or other distributional rules of the Bankruptcy Code, and not indirectly, as by increasing the difficulty and expense of creating perfected security interests.

PEB Study, supra note 2, at 8−9. See also James J. White, The Politics of Article 9: Work and Play in Revising Article 9, 80 Va. L. Rev. 2089 (1994) [hereinafter White, Work and Play] (declaring that efficiency of Article 9 is irrelevant to revision process); Steven L. Harris & Charles W. Mooney, Jr., The Article 9 Study Committee Report: Strong Signals and Hard Choices, 29 Idaho L. Rev. 561, 562−63 (1993) [hereinafter Harris & Mooney, Strong Signals] ("Article 9 represents what many believe to be a grand victory for secured parties."). Back To Text

[138] See Rev. U.C.C. § 9−304 (providing for perfection of security interest in deposit accounts); see id. § 9−102(2) (expanded definition of "account"); see id. § 9−102(64) (expanded definition of "proceeds"). Back To Text

[139] Professor Barry Zaretsky referred to the Article 9 revision as a "love feast for secured creditors." Julian B. McDonnell, Uniform Commercial Code Analysis of Revised Article 9, 2 (1999). Back To Text

[140] See Lupica, Asset Securitization, supra note 18, at 618−35; Lupica, Circumvention, supra note 15, at 232−40. Back To Text

[141] In both secured lending and securitization transactions, the financing−seeking firm receives cash in exchange for the relinquishment of a property interest in identified assets. In the case of both transaction types, the impact on the debtor's unsecured creditors turns, in part, on the extent to which the debtor makes more productive use of the cash received as loan proceeds from the secured loan, or the cash proceeds from the sale of the asset. See Lupica, Circumvention, supra note 15, at 237−39. Back To Text

[142] A securitizing originator may have a greater motive and opportunity to use securitization proceeds to distribute dividends to shareholders or otherwise put unsecured creditors' chance of repayment at greater risk relative to a comparable secured financing. For example, the documentation for secured lending arrangements typically contain provisions that are protective of a debtor's unsecured creditors' interests. These security documents may include covenants not to incur additional debt, or further encumber assets, and thus discourage a debtor from making financially imprudent decisions to borrow more than it can realistically pay back. Likewise, if existing unsecured creditor covenants do not limit or control the debtors' use of securitization proceeds, they may be used in ways that result in a dilution of unsecured claims. See R. Stulz & H. Johnson, An Analysis of Secured Debt, 14 J. Fin. Econ. 501−21 (1985) (asserting that secured credit returns value to existing creditors and shareholders only when there is positive change in investment policy). Although many creditors will include covenants restricting the further encumbrance or sale of assets in their loan documents, to the extent that these covenants do not anticipate the possibility of securitization, an originator could take advantage of this oversight to securitize its assets. In such a situation, when the creditor's debt matures and the originator seeks to replace it, the secured creditors may charge a higher interest rate that reflects the new overall higher risk to the debtor, thus again increasing this firm's overall cost of capital. See Minton, et al., supra note 30, at 4 (arguing that both secured debt and securitized debt may help the firm engage in asset substitution and firms with high leverage and in financial distress are more likely to securitize their assets). Moreover, because they have an ongoing interest in the economic health of their borrowers, secured creditors are motivated to monitor the debtor's business activities. This monitoring activity can take the form of receipt of reports about the debtor's business prospects, the provision of financial counseling and management advice and the placing of restrictions on the debtor's further incurrence of debt. A secured lender with a central position in a debtor's business enterprise has the leverage to make sure that the debtor acts on its advice. In a sense, a secured lender, who has provided a debtor with a significant percentage of its operating capital, functions as a joint venturer with the debtor in its business activities. In contrast, no monitoring of the debtor/originator takes place by the securitized asset purchasers. While a comprehensive review of the originator is conducted by ABS investors at the outset of the transaction, there is little if any ongoing monitoring of the debtor's business for efficiency and financial health. Indeed there is no need for this type of continuing review; whether the ABS investors get paid depends upon the quality of the asset pool and the credit enhancement arrangement − not the financial strength of the originator. The presence of a secured creditor performing its monitoring function provides a signal to the firm's other creditors that the debtor and its business activities are being comprehensively policed by an interested party. This signal is particularly valuable to a firm's unsecured creditors, who typically do not have the resources or the access to monitor or receive signals from the debtor itself. See generally Jackson & Kronman, supra note 132 (monitoring of debtor by secured creditors justifies concept of security as efficient); Lupica, Asset Securitization, supra note 18, at 618−35 (discussing impact of securitization on debtor's unsecured creditors); Lupica, Circumvention, supra note 15, at 232−40 (discussing how Revised Article 9's changes, impact securitization and their potential impact upon debtor's unsecured creditors). Back To Text

[143] 11 U.S.C. § 541(a) (1994). See also Charles Jordan Tabb, The Law of Bankruptcy 274 (1997). Back To Text

[144] See Tabb, supra. Back To Text

[145] One of the hallmarks of securitization, and indeed the principal feature that makes this transaction attractive to investors, is originator's potential ability to remove the securitized assets from the reach of its bankruptcy trustee. But

see supra notes 57−71 and accompanying text (discussing Octagon Gas Systems v. Rimmer). Assets transferred in what is determined to be a preferential transfer or a fraudulent conveyance are also vulnerable to return to the debtor's bankruptcy estate. See 11 U.S.C. § 547 (1994) (outlining circumstances under which assets transferred within 90 days of bankruptcy are deemed to be voidable preferences); see id. § 548 (describing when transfer is fraudulent conveyance). Back To Text

[146] See supra note 25 (listing bankruptcy cases describing reorganizing debtor's need for cash flow); 11 U.S.C. § 363(c)(1) (1994). Back To Text

[147] See 11 U.S.C. § 363(c)(1) (1994) (noting times when trustee does not need court permission to sell or lease property). Back To Text

[148] See supra notes 25−26 (listing cases describing central role of cash collateral in business debtor's reorganization). Back To Text

[149] If a secured creditor's collateral is "necessary to an effective reorganization," the court may deny a secured creditor's motion to lift the automatic stay and grant the secured creditor "adequate protection." See 11 U.S.C. §§ 361, 364(d), 541 (1994); see also Worcester County Nat'l Bank v. Xinde Int'l, Inc. (In re Xinde Int'l, Inc.), 13 B.R. 212, 215 (Bankr. D. Mass. 1981) ("The court in a reorganization case must balance the needs of the creditor's protection against the debtor's likelihood of a successful rehabilitation. If the court acts too swiftly and too rigidly in requiring adequate protection, this debtor's chance of reorganization may be so severely damaged as to be nonexistent."). Back To Text

[150] The Supreme Court has recognized that secured creditors' property interest in their collateral continues, notwithstanding debtor's bankruptcy. See United States v. Security Indus. Bank, 459 U.S. 70 (1982); see also H.R. Rep. No. 95−595 (1977), reprinted in 1978 U.S.C.C.A.N. 5963. Back To Text

[151] 11 U.S.C. § 361 (1994) (stating ways in which adequate protection may be provided). See, e.g., Ford Motor Credit Co. v. JKJ Chevrolet, Inc. (In re JKJ Chevrolet, Inc.), No. 96−1836, 1997 U.S. App. LEXIS 18180, at *5 (4th Cir. July 21, 1997) (noting adequate protection means creditor may not lose his interest in secured property). Back To Text

[152] 11 U.S.C. §§ 361(3), 1129(b)(2)(B) (1994). See also supra notes 63−65 and accompanying text. Back To Text

[153] See Gross, supra note 24, at 101. Back To Text

[154] See Lupica, Asset Securitization, supra note 18, at 618−35 (examining whether having secured claim necessarily results in satisfaction of that claim); Lupica, Circumvention, supra note 15, at 232−40 (discussing securitization with regard to third parties). Back To Text

[155] See Lupica, Circumvention, supra note 15, at 232−40 (noting unsecured creditors are in difficult position because of type of assets included in estate). Back To Text

[156] See supra note 36 and accompanying text (discussing credit rating agencies). Back To Text

[157] Jonathan E. Keighley, Risks in Securitization Transactions, in The Global Asset Backed Securities Market 100 (Charles Stone et al. eds. 1993). Back To Text

[158] Id. at 100−01. Back To Text

[159] Id. Back To Text

[160] Moreover, it is often the case that an originator securitizes its assets with the greatest potential to increase in value. If the securitized assets do appreciate, it is the asset−backed security purchasers that get the benefit of the increased value, not the debtor and its creditors, as would be the case in a secured financing. Further, if a firm uses an asset to secure a borrowing, the borrower retains the use and possession of the collateral, as well as the proceeds of the loan.

The retention, use and possession of collateral has value −− and this value is lost if a third party carries the collateral away. This additional value is typically reflected in the difference between the amount of the secured loan (which is the measure of the secured creditor's property interest in the collateral) and the (presumably greater) value of the collateral. The value retained may have the effect of reducing the risk of default to other creditors. Moreover, debtor's other creditors may require that the debtor retain its valuable assets on its balance sheet, or they may merely be psychologically comforted by the debtor's continuing retention of title in the asset, notwithstanding the fact that they likely have no access to it. However, secured creditors do lose their priority, because the expiration of perfection or faulty perfection, and in such cases, the collateral returns to the general asset pool, available for distribution to the general unsecured creditors in the event of debtor's bankruptcy. The relationship that develops between a secured lender and a debtor may be very important to the continued existence of the debtor in yet another way. If for example, a debtor's account debtors are unable to meet its contractual repayment terms, debtor has the option of offering these account debtor customers some flexibility in payment, by in turn negotiating a concession with its secured lender. Such flexibility may be necessary to sustain the customer relationship and work through troubled accounts. Flexibility may be in the form of an increased credit line, lower interest rate, longer term, or waiver of some requirement of the credit. In the absence of this flexibility, the relationship the firm has with its account debtor customers may be compromised. This may adversely impact the company's business in general, thus hurting the company's other creditors. See Lupica, Asset Securitization, supra note 18, at 616−31. Back To Text

[161] Senator Chuck Grassley is a Republican Senator from Iowa. Information on Senator Grassley is available at http://www.senate.gov.grassley. Back To Text

[162] Congressman George W. Gekas is a Republican Congressman for the 17th District of Pennsylvania. Information on Congressman Gekas is available at http://www.house.gov/gekas. Back To Text

[163] These bills are identical to the final conference report approved at the end of the 106th Congress (passed by both houses of Congress, but pocket−vetoed by President Clinton in the last days of his presidency) and substantially similar to the Bankruptcy Reform Act of 1999, which also failed to become law. See Grassley Continues Effort to Overhaul Bankruptcy System, Congressional Press Releases, Jan. 31, 2001, available at http://www.senate.gov/~grassley/releases/2001/p0111−31.htm; 147 Cong. Rec. H133 (daily ed. Jan. 31, 2001) [hereinafter Gekas] (statement of Congressman Gekas concerning Congressional Record, Bankruptcy Abuse Prevention and Consumer Protection Act of 2001), available at http://www.abiworld.org/hr333.html. Back To Text

[164] Gekas supra note 161, at H133 ("[T]he purpose of the special order to which I am attached today is to announce the introduction of the new bankruptcy reform act that we hope will be enacted into law during this current session and swiftly to arrive at the President's desk for signature."). Back To Text

[165] As announced by Congressman Gekas:

So we never lose sight of, nor will we ever lost sight of, the real purpose of bankruptcy reform or any bankruptcy legislation to allow an American citizen the right to gain a fresh start after finding himself incapable of meeting his obligations. But the other tandem theme that is also part of what we have been doing for the last 3 years, and which will be an important feature of the new bill, will be that certain provisions will be put into place which will make certain that those people who have an ability to repay some of their debts will be compelled to do so, so that instead of a chapter 7 filing which will give that automatic almost−fresh start, we will be able to shepherd some of the debtors into chapter 13 and propose a plan and adopt a plan by which they could over a period of time repay some of the debt out of their then−current earnings.

Id. See also Dissenting Views, available at http://www.house.gov/judiciary_democrats/bankruptcydissent views.htm (citing Professor Elizabeth Warren's March 11, 1999 Written Statement, the bill "has more than 120 pages of amendments affecting consumer cases, and they all head in the same direction: They give a fewer creditor interests more opportunities to try to recover from their debtors while they reduce the protection for other creditors and debtors."). Back To Text

[166] The bankruptcy bill proposes a number of significant changes to the rules affecting business bankruptcies. These changes include: (i) an extension of the time for debtor's assumption or rejection of nonresidential leases; (ii) a modification of the test to determine whether a transfer in the ordinary course of business qualifies as an exception to the rule against preferential transfers; (iii) a change in the venue rule for commencing preference actions; (iv) an extension of the period for filing a plan under chapter 11; (v) a modification of the "disinterestedness" standard for bankruptcy professionals; (vi) a modification of the rules for small business bankruptcies; and (vii) changes to certain bankruptcy tax provisions, and changes to the rules affecting single−asset real estate cases. See generally Dan Morgan & Kathleen Day, Early Wins Embolden Lobbyist for Business; Groups to Push Much Broader Agenda, Washington Post, Mar. 11, 2001, at A01 (stating that pro−business are dusting off dozens of long−stalled legislative proposals). Back To Text

[167] 11 U.S.C. § 541 (1994) reads in part:

(a) The commencement of a case under section 301, 302 or 303 of this title creates an estate. Such estate is comprised of all the following property, wherever located and by whomever held:

(1) Except as provided in subsections (b) and (c)(2) of this section, all legal or equitable interests of the debtor in property as of the commencement of the case.

Id. Back To Text

[168] Section 912 of The Bankruptcy Abuse Prevention and Consumer Protection Act of 2001 (Introduced in the House on Jan. 30, 2001) reads:

SEC. 912. ASSET−BACKED SECURITIZATIONS.

Section 541 of title 11, United States Code, is amended−−

1. in subsection (b), by inserting after paragraph (7), as added by this Act, the following:

(8) any eligible asset (or proceeds thereof), to the extent that such eligible asset was transferred by the debtor, before the date of commencement of the case, to an eligible entity in connection with an asset−backed securitization, except to the extent such asset (or proceeds or value thereof) may be recovered by the trustee under section 550 by virtue of avoidance under section 548(a); and

(2) by adding at the end the following new subsection:

(f) For purposes of this section−−

1. The term 'asset−backed securitization' means a transaction in which eligible assets transferred to an eligible entity are used as the source of payment on securities, including, without limitation, all securities issued by governmental units, at least one class or tranche of which was rated investment grade by one or more nationally recognized securities rating organizations, when the securities were initially issued by an issuer;
2. The term 'eligible asset' means−−

A. financial assets (including interests therein and proceeds thereof), either fixed or revolving, whether or not the same are in existence as of the date of the transfer, including residential and commercial mortgage loans, consumer receivables, trade receivables, assets of governmental units, including payment obligations relating to taxes, receipts, fines, tickets, and other sources of revenue, and lease receivables, that, by their terms, convert into cash within a finite time period, plus any residual interest in property subject to receivables included in such financing assets plus any rights or other assets designed to assure the servicing or timely distribution of proceeds to security holders;
B. cash; and

C. securities, including, without limitation, all securities issued by governmental units;

1. The term 'eligible entity' means−−

A. an issuer; or
B. a trust, corporation, partnership, governmental unit, limited liability company (including a single member limited liability company), or other entity engaged exclusively in the business of acquiring and transferring eligible assets directly or indirectly to an issuer and taking actions ancillary thereto;

1. The term 'issuer' means a trust, corporation, partnership, or other entity engaged exclusively in the business of acquiring and holding eligible assets, issuing securities backed by eligible assets, and taking actions ancillary thereto; and
2. The term 'transferred' means, the debtor, under a written agreement, represented and warranted that eligible assets were sold, contributed, or otherwise conveyed with the intention of removing them from the estate of the debtor pursuant to subsection (b)(8) (whether or not reference is made to this title or any section hereof), irrespective and without limitation of −−

A. whether the debtor directly or indirectly obtained or held an interest in the issuer or in any securities issued by the issuer;
B. whether the debtor had an obligation to repurchase or to service or supervise the servicing of all or any portion of such eligible assets; or
C. the characterization of such sale, contribution, or other conveyance for tax, accounting, regulatory reporting, or other purposes.

H.R. 333, 107th Cong. (2001) [hereinafter Asset−Backed Securitization], available at http://thomas.loc.gov/. Back To Text

[169] Gekas, supra note 161, at H134 ("It also clarifies the treatment of certain financial contracts under the banking laws as well as under the Bankruptcy Code."). See generally Christian A. Johnson, Derivatives and Rehypothecation Failure: It's 3:00 p.m., Do You Know Where Your Collateral Is?, 39 Ariz. L. Rev. 949, 953 (1997) (defining financial contract as value depending on one or more underlying assets or indexes of asset values). Back To Text

[170] Grosshandler Statement, supra note 51, at 185 ("These proposed changes should not raise sweeping new policy issues – they are entirely consistent with many statutory provision that have already been enacted, and are in the nature of technical corrections."). Back To Text

[171] "This section would allow many transactions to be structured so that in the event of bankruptcy no cash collateral would be available for funding a reorganization or repaying unsecured creditors. This is because of the overly broad definition which treats many secured loans as asset transfers, which in turn would remove those assets from property of the bankrupt's estate. Removal of such assets from the estate will virtually ensure a shortage of cash, and thereby create a crisis for many troubled businesses whose receivables represent the only sources of liquidity. Because this provision represents a departure from the federal policy of favoring reorganizations over the liquidation of viable business enterprises, the League opposes this provision." Bankruptcy Reform Act of 1999 (Part III): Hearing on H.R. 833 Before the Subcomm. on Commercial & Admin. Law, 106th Cong. 95 (1999) [hereinafter Miller Testimony] (testimony of Judith Greenstone Miller on behalf of The Commercial Law League of America), available at http://www.house.gov/judiciary/106−gree.htm. Back To Text

[172] See Asset−Backed Securitization, supra note 166. Back To Text

[173] Id. Back To Text

[174] Receivables, including credit card receivables, intellectual property licenses, cash and securities are all deemed to be "eligible" for purposes of this provision. See id. Furthermore, the definition of "asset securitization" in the amendment does not exclude all securitized assets form the originator's bankruptcy estate – simply those assets that

are transferred and result in the issuance of securities rated investment grade or better by a nationally−recognized statistical rating organization. This limits the "carve out" from the definition of "estate" to public offerings and rated private issuances. Excepted from this exception are unrated assets securitized in private issuances. As described by one observer, "This [provision] is wonderfully tailored to favor Wall Street over other sources of debt capital. . . . [T]here is no rational basis for distinguishing amongst sources of debt capital based upon whether it results in the issuance of a [rated] 'security.'" Comments of Kenneth Kettering, Partner, Reed, Smith, Shaw & McCay (June 21, 1999) (on file with Author). See also Testimony of Ann Stern, CEO, Financial Guarantee Insurance Corporation, Federal Document Clearing House Congressional Testimony, (May 19, 1998) [hereinafter, Stern Testimony](stating application of proposed amendment is limited to "investment grade securities substantially reduc[ing] the possibility that a lender or its operating company could transfer some or all of its loan assets or other receivables to a bankruptcy remote entity in an effort to defraud creditors of the company"). Back To Text

[175] The property that constitutes a debtor's bankruptcy estate is at the center of the bankruptcy process. Property of the estate is used to satisfy creditor claims, it may be used, sold, leased, or borrowed against, and may be required to be returned to the estate if in the hands of third parties. 11 U.S.C. § 704(1) (1994) (trustee has the power to "collect and reduce to money the property of the estate"); id. § 726 (1994) (outlining the scheme for the distribution of property of the estate); id. 1129 (1994) (describing how property of the estate used in connection with plan of reorganization); id. § 363(b)(1), (c)(1) (1994) (property of the estate must be used, sold or leased); id. § 364(c)(2)–(3), (d)(1) (1994) (debtor's borrowing secured by property of the estate); id. § 542(a) (1994) (authorizing the trustee to demand return of "property that the trustee may use, sell or lease under § 363"); id. §§ 362(a)(2)–(4), 364(d) (1994). Of course, a secured party whose collateral is being used by a reorganizing debtor must be offered "adequate protection" of its interest. In addition, the Code's automatic stay precludes actions taken with respect to property of the estate. For a debtor rehabilitating its business under chapter 11, property of the estate necessary to the reorganization may be used by the debtor, notwithstanding a secured parties' state law created interest. The corollary to this rule designed to encourage the reorganization of viable businesses is that debtor may not use non−estate property to reorganize. Back To Text

[176] The debtor's estate, as defined under § 541(a) is comprised of "interests of the debtor in property." 11 U.S.C. § 541(a) (1994). Back To Text

[177] See supra notes 49–51 and accompanying text (distinguishing between asset transfer as sale or transfer). Back To Text

[178] Rev. U.C.C. § 9−317(a) (stating that unperfected secured creditor's interest is vulnerable to defeat by lien creditor). Back To Text

[179] 11 U.S.C. § 544(a) (1994) (granting trustee status of hypothetical judicial lien creditor and bona fide purchaser of real property with rights in property superior to those of creditors with unperfected security interests). Back To Text

[180] Id. See Lupica, Circumvention, supra note 15, at 213 (observing that characterization of asset transfer as either "true sale" or secured loan is determined by court after considering variety of factors, and that transferee deemed to be secured lender is considered "party in interest" to debtor's bankruptcy, and therefore, subject to diminution of rights and priority). Back To Text

[181] See Asset−Backed Securitization, supra note 166 (defining term "transferred"). Back To Text

[182] Klee Testimony, supra note 25, at 105. Back To Text

[183] See Asset−Backed Securization, supra note 166 (defining term "eligible assets" to include broad range of financial assets, cash and securities). Back To Text

[184] Id. (defining term "transferred"). Back To Text

[185] Id. (defining term "eligible entity" to include issuers, and certain trusts, corporations, partnerships and limited liability companies). Back To Text

[186] Id. (defining "asset−backed securitization"). Back To Text

[187] In response to an observation by my colleague Professor Tom Ward,

[I]t appears that the "bill go[es] much further than what is avowed in the legislative debates. By adding a new subsection to the list of exclusions in current section 541(b) the new language carves securitized income streams ("eligible assets") out of the definition of property of the estate. . . . the language of this federal exclusion also creates a single exception that allows the trustee to recover these otherwise excluded "eligible assets" under section 550 "by virtue of avoidance under section 548(a)" . . . The negative inference in the language seems to that these excluded "eligible assets" are beyond the reach of the trustee's other avoidance powers – including 544(a)(1) [if the transfer is not perfected] and 547 [if the transfer is preferential.] In other words, this narrow exception for limited avoidance built into the 541(b) exclusion of these eligible assets seems to trump the language in 541(a)(3) that brings all assets recovered by the trustee under any of the avoidance powers within the definition of "property of the estate."

Professor Charles Tabb responded: "I share in your perplexity and astonishment. I think it is inarguable that the bill purports to do exactly what you describe. One of many bad, bad parts of a very bad bill." (Comments on file with Author). Back To Text

[188] See supra id.; 11 U.S.C. § 547(b) (1994) (allowing for avoidance of certain transfers made upon eve of bankruptcy); id. § 544(b) (1994) (allowing trustee to use potentially longer look−back period of state fraudulent transfer law, provided there is actual creditor who could have avoided transfer). Back To Text

[189] See Asset−Backed Securization, supra note 166.

(8) any eligible asset (or proceeds thereof), to the extend that such eligible asset was transferred by the debtor, before the date of commencement of the case, to an eligible entity in connection with an asset−backed securitization, except to the extent such assets (or proceeds or value thereof) may be recovered by the trustee under section 550 by reason of avoidance under section 548(a);

Id. (emphasis added). Back To Text

[190] See Stern Testimony, supra note 172.

[The Association of Financial Guaranty Insurors] believes that the suggested revisions… relating to asset−backed securities reduces uncertainty under the Bankruptcy Code as it applies to the almost $200 billion per year of asset−backed securities issued in the United States. By reducing uncertainty, the proposed amendment will increase stability in the capital markets and thereby facilitate asset−backed financings and eliminate certain risks which otherwise indirectly increase interest rates for millions of consumers, small business and others seeking financing from the capital markets. The proposed revision is constructed to achieve these benefits without impairing any of the reorganization and fairness policies underlying the Bankruptcy Code.

Id. Back To Text

[191] Commenting to Professor Thomas Ward, Professor Kenneth Klee stated:

The language was lobbied in by FSA, the NY bond rating agency that rates securitized paper and by the NY law firms who have written true sale opinions. They are worried about liability for their questionable ratings. The intent of section 912 is to exclude assets from the estate notwithstanding that they may be a financing transaction (rather than a true sale) under state law. This is one of the worst provisions of the bill and will apply retroactively"

Comments of Professor Kenneth Klee to Professor Thomas Ward, Feb. 8, 2001 (on file with the Author). See also Testimony of David Warren, Managing Director of the Bond Market Association, March 25, 1999.

In order to obtain sales treatment under the relevant accounting standards, participants in the mortgage−backed and asset−backed securitization transactions must obtain assurances from counsel that the sale of assets will be final under bankruptcy law. Such legal advice is referred to as a "true sale opinion." Unfortunately, there is a lack of guiding judicial precedent regarding what constitutes such a true sale of assets. The considerations in the analysis are highly subjective and depend on a qualitative assessment of a wide variety of facts and circumstances. For these and other reasons, any true sale will generally be a reasoned one, with various assumptions as to factual matters and conclusions that introduce an unnecessary degree of legal uncertainty in the asset−backed market. As a result, for some types of transactions, true sale opinions can be extremely difficult, costly, and in a few cases, impossible to render."

Id. Back To Text

[192] See supra note 188. Back To Text

[193] See supra note 188. Back To Text

[194] See supra notes 167–168. Back To Text

[195] See 11 U.S.C. § 544 (1994). Back To Text