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THE INTERFACE BETWEEN THE SECURITIZATION ACT OF 2004 AND THE FINANCIAL REHABILITATION AND INSOLVENCY ACT OF 2010

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Abstract: The interface between securitization law and insolvency law is the central legal concern in designing securitization transactions. The complex structure of these transactions under the Securitization Act of 2004 should be understood within a specific legal context: the possible bankruptcy, insolvency, or liquidation of the "originator" (i.e. the entity requiring securitization financing), which may jeopardize the claims of asset-backed security investors. It is a solution to the risk that security holders with claim to specific assets may end up being subordinated to the interest of preferred creditors and ranked pari passu with, or even lower than, unsecured creditors in a rehabilitation or liquidation proceeding. Under present law, this risk may arise through the "substantive consolidation" and "clawback" provisions of the Financial Rehabilitation and Insolvency Act (FRIA) of 2010. This risk is mitigated through the creation of a bankruptcy remote vehicle and true sale of receivables, and it is the lawyer's principal role in the securitization process to isolate or ring-fence assets beyond the reach of creditors, and making them an exclusive claim of investors. How this works in theory and practice is the subject of this paper.
Keywords: securitization law, insolvency law, investors, bankruptcy.

1. Securitization

Securitization is the process of assigning receivables from an entity (called the "originator") to a bankruptcy remote vehicle (called the "Special Purpose Entity"), which in turn issues securities to investors, who have a specific claim to the receivables. To understand this process, let us begin by describing it as a combination of three familiar commercial transactions: (i) factoring, (ii) securities issuance, and (iii) pooled investments.

Through factoring, a creditor who seeks to increase his liquidity sells his receivables to another for cash. The purchaser of the receivables pays at a discount. The discount is the consideration for assuming the credit risk. The sale is usually "without recourse"—i.e., if the debtor defaults on the receivables, the purchaser cannot sue the creditor for the amount of the receivables, without prejudice to the usual warranties of a seller. A securitization transaction involves a process analogous to factoring. The originator is the creditor who owns the receivables. It is called the originator because it is an original party to the contract out of which the receivables arose. For example, a bank "originates" a loan when it grants a line of credit to a borrower. This designation is a useful way to identify the party who is privy to the original transaction that created the receivables, as opposed to other entities involved in the securitization process who are mere claimants or holders of said receivables.

Through a securities issuance, an enterprise obtains funding from investors through the issuance of debt or equity instruments, which are negotiable to third parties. A debt instrument obligates the issuer to repay the principal to the holder, with interest. An equity instrument provides a right to variable returns, which depend on the performance of the enterprise. A securitization transaction involves the issuance of securities by the Special Purpose Entity. The returns of these securities are funded by the receivables assigned from the originator. The investors have a claim to the receivables in the same manner that security holders have a claim to corporate assets.

Through pooled investments, a trust entity obtains funding from the public, and invests these funds in financial assets. The investors receive a unit of participation in the pool of assets. It is indispensable that the trust entity is exclusively doing business as a mere holder of investments. This is to prevent other creditors from having a claim over the asset pool. In securitization, the Special Purpose Entity has a similar function as the trust entity in a pooled investment. The holders of asset-backed securities receive units of participation in the cash flow associated with the receivables. The SPE, like the trust entity, must operate exclusively as a mere holder of the receivables.

The receivables are expected to be "bankruptcy-proof"—i.e., they must be beyond the reach of creditors of the originator. The legal safeguards in the securitization process revolve around managing and pre-empting possible competing claims between the creditors of the originator and the holders of the asset-backed securities. The claims of creditors of the originator are asserted through insolvency proceedings, which under present law are governed by the Financial Rehabilitation and Insolvency Act (FRIA) of 2010. The objective of this paper is to explain how the structure of securitization transactions protect against this legal risk.

2. The structure of securitization transactions

2.1. Origination

The securitization process begins with the origination of the contractual debt by the originator, such as a bank or non-bank financial institution. The originator enters into various contracts in the ordinary course of business. Common examples of these contracts are mortgage-backed loans, credit card debt obligations, auto-loans, and other arrangements that give rise to accounts receivable in the books of the originator. These receivables have an associated cashflow (i.e. the repayment of principal and the payment of interest income, periodic or otherwise), and are treated as assets even if not yet actually received. The originator bears the risk of default and other credit risks associated with the receivables.

2.2. The financing decision and plan of securitization

The originator may have different financing needs. It may want to raise funds to expand its business or to finance its operations, in which case the conventional financing decision is whether to borrow or to raise capital. Borrowing can take the form of a loan or the issuance of debt securities, such as corporate bonds. Raising capital requires the issuance of additional shares of stock. Other drastic measures include mergers or consolidations, with the originator as the absorbed entity.

In other instances, the originator's financing need does not even require borrowing or raising of capital, but simply achieving liquidity. This is particularly true in the case of banks and other non-bank financial institutions. Since they earn from the spread between interest income on loan receivables and interest expense on deposits and other deposit substitutes, one major liquidity issue is the realizability of the cashflow associated with loan receivables. In addition to the risk of default and other credit risks, one constraint banks face is fractional reserve banking, which limits the amount of loans they can issue up to a certain regulatory quota, depending on the amount of their regulatory capital. One solution to achieving liquidity is to sell loan receivables, usually through factoring or discounting. This allows the banks and non-bank financial institutions to increase their regulatory capital, and correspondingly to increase their regulatory quota for the issuance of new loans.

Different forms of financing have their own costs and benefits. Issuance of shares of stock (including mergers and consolidations) dilute corporate control, loans from banks and issuance of corporate bonds can be expensive due to increase in interest rates, and factoring or discounting only allows the seller to receive a portion of the cashflow associated with the receivables, since they must sell these at a discount, in consideration for transferring credit risk and gaining liquidity.

Securitization, on the other hand, combines the benefits of securities issuance and factoring—i.e., it allows the originator to achieve liquidity through public funding, and to transfer all the incidences of ownership over these receivables to the investors. Hence, the second step in the securitization process is a financing decision on the part of the originator to solve its liquidity problem through securitization, rather than other forms of financing. This financing decision is then formalized into writing as the Plan of Securitization.

2.3. Creation of a special purpose entity

After the financing decision and drafting of the Plan of Securitization, the originator creates a Special Purpose Entity. The SPE acts as the buyer and holder of the receivables, and the issuer of securities backed by said receivables. The SPE may be in the form of a Special Purpose Corporation or a Special Purpose Trust. A Special Purpose Corporation is a juridical person created under the Corporation Code, while a Special Purpose Trust is a trust administered by an institution engaged and licensed to do the business of trust under the General Banking Law.

The powers of the SPE are as follows: (i) accept the sale or transfer of assets; (ii) issue and offer the asset-backed securities for sale to investors; (iii) undertake on its own or through contracts with any person, such activities as contained in the approved securitization plan, (iv) create any indebtedness or encumbrances to defray administrative or other necessary expenses as specified in the securitization plan; and (v) pay out or invest its funds in accordance with the securitization plan or as approved by the SEC.

The SPE must be created for the sole purpose of securitization. This narrow corporate purpose is critical in bankruptcy-proofing the assets held by the SPE, as explained in the succeeding sections.

2.4. Approval of the plan of securitization

After the formation of the SPE, the originator submits the Plan of Securitization to the SEC. If the originator is a bank or non-bank financial institution, it must also obtain approval from BSP. After approval, the SEC issues to the SPE an order and permit to sell asset-backed securities.

2.5. True sale of receivables

After the approval of the Plan of Securitization, the originator sells, transfers, or assigns its receivables to the SPE. For purposes that will be explained in the latter sections, the sale, transfer, or assignment must be a "true sale"—i.e., there must be an absolute relinquishment of ownership over the receivables from the originator to the SPE.

2.6. Issuance of Asset-Backed Securities

After the sale of receivables, the receivables form part of the asset pool held by the SPE. The SPE then issues securities to the investing public. These securities are in the form of certificates, the repayment of which are derived from the cash flow of the asset pool. This is the reason why these are called "asset-backed securities".

The issue price of the asset-backed securities, which serves as the consideration to the SPE, is then used by the SPE to fund the purchase of receivables from the originator. The originator has obtained the cash funding and the investing public now holds the securities with specific claim to the receivables.

3. Relationship between securitization transactions and insolvency proceedings

3.1. Doctrine of substantive consolidation

The FRIA does not depart from the general rule that each corporation maintains a separate juridical personality. Section 7 states that the "assets and liabilities of a debtor may not be commingled or aggregated with those of another." The exception is the doctrine of substantive consolidation, which allows the insolvency court to pool the assets and liabilities of a debtor and a "related enterprise owned or controlled directly or indirectly by the same interests." The same provision lays down four criteria for substantive consolidation, as follows:

(a) there was commingling in fact of assets and liabilities of the debtor and the related enterprise prior to the commencement of the proceedings;

(b) the debtor and the related enterprise have common creditors and it will be more convenient to treat them together rather than separately;

(c) the related enterprise voluntarily accedes to join the debtor as party petitioner and to commingle its assets and liabilities with the debtor's; and

(d) the consolidation of assets and liabilities of the debtor and the related enterprise is beneficial to all concerned and promotes the objectives of rehabilitation.

This is the first time that the doctrine of substantive consolidation has been codified in Philippine statute books. It first originated as a judge-made rule in common law, pursuant to the general equitable power of courts. In international bankruptcy laws, it is defined as a process of "pooling the assets of, and claims against, the two entities; satisfying liabilities from the resultant common fund; eliminating inter-company claims; and combining the creditors of the two companies for purposes of voting on reorganization plans."

Since 2010, there is still no Philippine case law that applies Section 7 of the FRIA. We may therefore look at decisions of bankruptcy courts in the U.S. as persuasive authority in applying and interpreting the substantive consolidation provision. The case of In re Owens Corning illustrates the power of the bankruptcy court to decide whether to consolidate related entities of a debtor under bankruptcy proceedings, summarized as follows:

In Re Owens Corning
419 F.3d 195 (3rd Cir. 2005)

I. Facts

In 1997, Owens Corning corporation obtained a loan from several banks to purchase a new subsidiary corporation. The loan contained credit enhancements that provide guarantee provisions in favor of the banks. The guarantors are the "present and future" subsidiaries of Owens Corning. The credit enhancements also provide numerous stipulations obligating Owens Corning to protect the separate identities of its subsidiaries, and prohibiting a merger of entities within the Owens Corning group of companies. This is to ensure that the debtor will not create losses that would impair the guarantee to the prejudice of the banks.

In 2000, Owens Corning and its subsidiaries filed for reorganization under Chapter 11 of the Bankruptcy Code (which is analogous to a Petition for Voluntary Rehabilitation Proceedings under FRIA). The Owens Corning group of companies and a subset of its creditors proposed a reorganization plan that includes a provision for substantive consolidation. The effect of the reorganization plan is to eliminate the individual guarantee obligations of the subsidiaries, and that claims against individual subsidiaries shall be commingled as claims against the entire consolidated estate of Owens Corning.

The banks objected to the proposed substantive consolidation, but the bankruptcy court approved the reorganization plan, including the provision for substantive consolidation.

II. Issue

The core issue is whether Owens Corning and its subsidiaries should be treated as a consolidated estate for the purpose of settlement of claims.

III. Ruling

Substantive consolidation is an equitable relief that treats distinct juridical persons as though they have been consolidated into one entity. The creditors' claims against individual entities are transformed into claims against the "cumulative assets and liabilities" of the consolidated entity. Inter-entity liabilities are eliminated. The consolidation "restructures" and "revalues" creditors' claims, and may result in less recoverable value.

The doctrine of substantive consolidation emanates from the principle that "corporate disregard as a fault may lead to corporate disregard as a remedy." It is a

remedy distinct from the doctrine of piercing the veil of corporate fiction because it is applied only in bankruptcy proceedings, and only for the limited purpose of cumulating assets and liabilities, and restructuring and revaluing creditors' rights.
The doctrine had its origin in Sampsell v. Imperial Paper & Color Corp., 313 U.S. 215, 61 S.Ct. 904, 85 L.Ed. 1293 (1941), where a bankrupt debtor, before the filing of a petition for bankruptcy, transferred its assets to a controlled entity. The Supreme Court, instead of treating the case as a simple case of fraudulent transfer of assets, issued an order to marshal the corporation-debtor's assets for the benefit of the debtor's estate. The Court termed the order as an order to "consolidate the estates" of the debtor.
While the doctrine of piercing the corporate veil renders shareholders personally liable, the doctrine of substantive consolidation is not limited to establishing shareholder liability. It contemplates the merger of all the assets and liabilities of the debtor and its related entities, affecting the claims of creditors in the whole consolidated group of entities. "The bad news for certain creditors is that, instead of looking to assets of the subsidiary with whom they dealt, they now must share those assets with all creditors of all consolidated entities, raising the specter for some of a significant distribution diminution."
There are two critical factors in considering substantive consolidation: (i) the reliance of creditors in dealing with the group of entities as a "single economic unit", and (ii) whether treating the group of entities as a single consolidated unit will benefit all creditors.
Applying these factors, substantive consolidation is not proper because the banks did not rely on the group of entities as a single economic unit, and there is no "hopeless commingling" of assets and liabilities after the petition for reorganization. The Court concludes that there is "[n]o principled, or even plausible, reason exists to undo [Owens Corning]'s and the Banks' arms-length negotiation and lending arrangement, especially when to do so punishes the very parties that conferred the prepetition benefit—a $2 billion loan unsecured by [Owens Corning] and guaranteed by others only in part. To overturn this bargain, set in place by [Owens Corning]'s own pre-loan choices of organizational form, would cause chaos in the marketplace, as it would make this case the Banquo's ghost of bankruptcy."

3.2. Clawback Doctrine

Clawback is the judicial process of annulling asset transfers that constitute fraud against creditors or undue preference of creditors. The FRIA has two clawback provisions. Section 52 allows the clawback of asset transfers made after the commencement date of the insolvency proceeding. Section 58 allows the clawback of asset transfers made before the commencement date. It is also otherwise known as "Avoidance Powers" of the receiver or trustee in insolvency. This is because it is the receiver or trustee in insolvency who institutes clawback suits for the benefit of the debtor's estate in the insolvency proceeding.

The post-commencement clawback provision under Section 52 states:

> The court may rescind or declare as null and void any sale, payment, transfer or conveyance of the debtor's unencumbered property or any encumbering thereof by the debtor or its agents or representatives after the commencement date which are not in the ordinary course of the business of the debtor: Provided, however, That the unencumbered property may be sold, encumbered or otherwise disposed of upon order of the court after notice and hearing:
>
> (a) if such are in the interest of administering the debtor and facilitating the preparation and implementation of a Rehabilitation Plan;
> (b) in order to provide a substitute lien, mortgage or pledge of property under this Act;
> (c) for payments made to meet administrative expenses as they arise;
> (d) for payments to victims of quasi delicts upon a showing that the claim is valid and the debtor has insurance to reimburse the debtor for the payments made;
> (e) for payments made to repurchase property of the debtor that is auctioned off in a judicial or extrajudicial sale under. This Act; or
> (f) for payments made to reclaim property of the debtor held pursuant to a possessory lien.

The pre-commencement clawback provision under Section 58 states:

> Any transaction occurring prior to commencement date entered into by the debtor or involving its funds or assets may be rescinded or declared null and void on the ground that the same was executed with intent to defraud a creditor or creditors or which constitute undue preference of creditors. Without limiting the generality of the foregoing, a disputable presumption of such design shall arise if the transaction:
>
> (a) provides unreasonably inadequate consideration to the debtor and is executed within ninety (90) days prior to the commencement date;
> (b) involves an accelerated payment of a claim to a creditor within ninety (90) days prior to the commencement date;
> (c) provides security or additional security executed within ninety (90) days prior to the commencement date;
> (d) involves creditors, where a creditor obtained, or received the benefit of, more than its pro rata share in the sassets of the debtor, executed at a time when the debtor was insolvent; or

(e) is intended to defeat, delay or hinder the ability of the creditors to collect claims where the effect of the transaction is to put assets of the debtor beyond the reach of creditors or to otherwise prejudice the interests of creditors.

Provided, however, That nothing in this section shall prevent the court from rescinding or declaring as null and void a transaction on other grounds provided by relevant legislation and jurisprudence: Provided, further, That the provisions of the Civil Code on rescission shall in any case apply to these transactions.

The clawback provisions of the FRIA are similar to the strong-arm clauses and avoidance powers clauses of the U.S. Bankruptcy Code. In the absence of Philippine case law applying Sections 52 and 58 of the FRIA, we shall illustrate the clawback suit through the case involving the Madoff Ponzi scheme, summarized as follows:

In re Bernard L. Madoff Inv. Securities LLC
773 F. 3d 411 (2d Cir.2014)

I. Facts

Bernard L. Madoff Investment Securities LLC (BLMIS) offered securities to customers under the representation that it would implement a "split strike conversion strategy", which involves trading a basket of stocks in the S&P 100 Index and executing hedging transactions through related options contracts. However, BLMIS executed no such transactions in reality. Funds from customers were kept in a checking account, and fabricated reports on investment performance were sent out to show the fictitious result of purported trading activities. Withdrawals were funded from the same checking account that pooled the money of customers.

In the course of this Ponzi scheme, some customers were able to withdraw funds in excess of their contributions. When BLMIS was placed under a bankruptcy proceeding, the trustee in bankruptcy instituted clawback actions against said customers to recover the excess of their withdrawals.

The clawback defendants opposed the trustee's claim by interposing an exception to the clawback provision in the Bankruptcy Code. According to them, securities-related payments or payments made in connection with a securities contract are beyond the avoidance powers of the trustee and bankruptcy court.

II. Issue

The core issue is whether the withdrawals in excess of contributions constitute securities-related payments and settlement payments, and whether such payments are exempt from the bankruptcy avoidance powers.

III. Ruling

The Court agreed with the clawback defendants that the withdrawals constituted securities-related payments and settlement payments, which are beyond the avoidance powers under the Bankruptcy Code. Since BLMIS is a stockbroker, the transfers constituted settlement payments under § 546(e), which provides that a trustee “may not avoid a transfer that is a [...] settlement payment [...] made by [a] ... stockbroker.” Accordingly, the trustee cannot recover from the customers who were able to withdraw funds in excess of their initial contributions.

3.3. Effects of substantive consolidation and clawbacks on securitization transactions

A simple illustration of the effect of an insolvency proceeding on a securitization transaction is the case of In re Doctors Hospital of Hyde Park, Inc., 463 BR 93 (Bankr. N.D. Ill. 2011), summarized as follows:

In re Doctors Hospital of Hyde Park, Inc.
463 BR 93 (Bankr. N.D. Ill. 2011)

I. Facts

The Doctors Hospital of Hyde Park, like any other hospital, provides medical services before it is able to collect payment. This resulted to a considerable amount of accounts receivables from patients and their insurers. The Hospital resorted to borrowing money in order to finance its operations.

The loan transaction was not a simple contract between lender and borrower. The Hospital created the MMA Funding, LLC, a separate entity, to receive the loan. Daiwa Healthco extended a revolving USD 25 million line of credit to MMA Funding, and the latter turned over the cash to the Hospital. In exchange, the Hospital assigned its accounts receivables to MMA Funding. Daiwa retained a security interest in the accounts receivable.

The rationale for the creation of MMA Funding, LLC, is to function as a “bankruptcy-remote vehicle”. Through MMA Funding, Daiwa is assured of repayment even if the Hospital becomes bankrupt.

The termination of the Daiwa loan led to the deterioration of the finances of the Hospital. The Hospital entered bankruptcy, with Gus Paloian as trustee.

Meanwhile, MMA Funding made rental payments to LaSalle Bank. These payments were questioned by Trustee Paloian, arguing that they were paid from the assets of the Hospital. The theory of Trustee Paloian is that MMA Funding is not an actual business entity, but a “part, department, or function” of the Hospital.

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II. Issue

The core issues are whether MMA Funding is a separate business entity or a legitimate bankruptcy remote vehicle, and if it is, whether there was a true sale of accounts receivable from the Hospital to MMA Funding.

III. Ruling

It is not sufficient that MMA Funding is a distinct legal entity. MMA Funding should also have a "distinct set of operations." There is not enough evidence indicating that MMA Funding retained "operational separateness" from the Hospital. Second, some of the transfers of receivables met the elements of a true sale, while the others did not. Some transfers did not contain a purchase price, and it is not clear whether the grant of equity interest, loan satisfaction, and cash to the Hospital constitutes adequate consideration.

In this case, the Doctors Hospital of Hyde Park is the originator, the MMA Funding is the purported SPE, Daiwa is the holder of the asset-backed security, and LaSalle Bank is the creditor of the originator. This situation presents a classic case of competing claims between the creditor of the originator and the holder of the asset-backed security. When the originator enters into an insolvency proceeding, the insolvency court has the power to set aside the character of SPE as a legitimate bankruptcy remote vehicle, to set aside the character of the asset-backed security as an exclusive claim of the investor, and to rank the interest of the security holder as pari passu with (or even subordinate to) that of the creditor of the originator.

Hence, during the insolvency proceeding, the structure of the securitization transaction must convince the insolvency court of two things: (i) that the SPE is a legitimate bankruptcy remote vehicle, and (ii) that there was a true sale of receivables from the originator to the SPE. This is how the securitization structure protects against substantive consolidation and clawback, as expounded further in the next section.

4. How the securitization structure protects against substantive consolidation and clawback

The securitization structure protects against substantive consolidation and clawback under the FRIA by (i) establishing a legitimate bankruptcy-remote vehicle and (ii) executing a true sale of receivables from the originator to the bankruptcy-remote vehicle.

4.1. Establishing a Legitimate Bankruptcy-Remote Vehicle

First, the SPE must be a new corporation. This ensures that it has no business history, and therefore no pre-existing creditors that hold prior and preferred claims over its assets. This is the reason why SPEs must be incorporated at the onset of the securitization process.

Second, the Articles of Incorporation of the SPE must expressly restrict its corporate purposes and business activities to (i) the mere holding of receivables from the originator and (ii) the issuance of securities funded by said receivables. The Articles must also provide a strong legal barrier against amendments to expand its corporate purposes and business activities. This ensures that the SPE incurs no significant debt unrelated to the financial intermediation process.

Third, the SPE should be prohibited by its Articles of Incorporation from incurring debt at an amount exceeding its cash flow from receivables. The liabilities of the SPE must not exceed the claims of the asset-backed security investors.

Fourth, the SPE must have a Board of Directors independent from the decision-making authorities of the originator, and the SPE must retain separate operations from the originator, including its own separate accounting books, financial statements, properties, offices, and employees. This is to pre-empt the possible characterization of the SPE as a mere alter ego or instrumentality of the originator.

Fifth, the formalities for the formation of the SPE must comply with the Securitization Act of 2004.

4.2. Executing a True Sale of Receivables

The assignment of receivables must be "without recourse", such that the risk of credit default is completely borne by the SPE. In short, there must be absolute transfer of ownership of receivables from the originator to the SPE. The legal instrument of assignment must expressly and clearly exclude both direct and indirect forms of recourse. The following are common examples of recourse that belie the nature of the assignment as a true sale, as cited in Structured Financing Techniques [1]:

- Warranties as to collectibility
- Holdbacks from the purchase price
- Adjustments to the purchase price
- Guarantees by the transferor
- Keep-well arrangements by the transferor (e.g., obligation to add additional receivables or other assets)
- Collateral security from the transferor
- Obligations to repurchase, or substitute for, underperforming receivables

- Retention by transferor of subordinated interests in the receivables or receipt by transferor of a portion of the purchase price in the form of an obligation the payment of which is economically conditioned on the special purposes vehicle's receipt of collections on receivables
- External credit enhancement with a right of reimbursement by the credit enhancer against the transferor in excess of the reasonably anticipated credit losses
- Advances by the transferor to the special purpose vehicle that result in the transferor taking a credit risk
- Collection of receivables in which the transferor retains an interest by the special purpose vehicle (or its agent) if there is a right of the special purpose vehicle to retain, or set off against, collections on the non-sold receivables.

Section 12 of the Securitization Act of 2004 provides the following criteria for a "true sale", as follows: (i) the transferred assets are legally isolated and put beyond the reach of the originator or seller and its creditors; (ii) the transferee SPE has the right to pledge, mortgage or exchange those transferred assets; (iii) the transferor relinquishes effective control over the transferred assets; (iv) the transfer shall be effected by either a sale, assignment or exchange, in any event on a without recourse basis to the originator or seller; (v) the transferee shall have the right to profits and disposition with respect to the assets; (vi) the transferor shall have the right to recover the assets and the transferee shall not have the right to reimbursement of the price or other consideration paid for the assets; and (vii) the transferee shall undertake the risks associated with the assets.

5. Conclusions

Lawyers help structure securitization transactions as transaction counsels. They do this by issuing two types of legal opinions: (i) a non-consolidation opinion and (ii) a true sale opinion. A non-consolidation opinion is a legal analysis of whether the SPE is a legitimate bankruptcy remote vehicle. A true sale opinion is a legal analysis of whether the assignment of receivables is "without recourse" and is an absolute transfer of ownership to the SPE.

It is ultimately the insolvency court during rehabilitation or liquidation proceedings, and not the regulatory agencies that approve or review the transaction, that has the power to decide the legal standing of the SPE and asset-backed securities. For this reason, the transactional counsel must also equip himself with adequate knowledge in insolvency law and put himself in the shoes of the insolvency court in applying the substantive consolidation and clawback provisions of the FRIA to the securitization structure.

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Notes

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