This Petition for Appeal to Remove is directed to the
One Court of Justice by:
Jeffery Cowan Lind, son of the almighty God; and
Dee Thomas Murphy, son of the almighty God
Address in care of: 248 Wilson Drive [93455]
Santa Maria, California Republic

RECEIVED
MAR 26 2012
CLERK SUPREME COURT

california supreme court

"The One Court of Justice"

RE: REMOVAL OF CASE NO: 1354711
CASE NAME: The People vs. Lind and Murphy
COURT: THE SUPERIOR COURT OF CALIFORNIA (a private corporation)[1]
COUNTY: COUNTY OF SANTA BARBARA (a private corporation)[2]
DIVISION: Anacapa
ADDRESS: 1100 Anacapa Street, P.O. Box 21107, Santa Barbara, California 93121

State of California

San Luis Obispo County, <u>TO WIT</u>:

COME NOW the Defendants in this instance, Jeffery Cowan, family of Lind, herein after "Lind," and Dee Thomas, family of Murphy, herein after "Murphy," Two Witnesses, men of peace created in the image of the Almighty God, Gen. 1:27, people of California and two of the united states and here in their court of record present evidence to the King's Bench of the One Court of Justice in accordance with Lind and Murphy's constitutionally secured Rights, their protections pursuant to the Law of God as written in The Scriptures, Declaration of Independence of 1776, the Bill of Rights of the United States Constitution and the United States Statutes at Large and hereby petition this one court of justice, pursuant to the provisions of 28 U.S.C. § 1446, to remove the above referenced CASE NO. 1354711, THE PEOPLE OF THE STATE OF CALIFORNIA VS. LIND AND MURPHY, SUPERIOR COURT FOR THE COUNTY OF SANTA BARBARA and defined in the 1ST AMENDED FELONY COMPLAINT attached as EVIDENCE EXHIBIT B, to be **<u>discharged, *ab initio* for want of jurisdiction</u>** pursuant to the FINAL ORDER; ADJUDICATION AND DECREE of the superior court of record and attached under NOTICE OF UNLAWFUL PROCEEDING as EVIDENCE EXHIBIT C.

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[1] See Evidence Exhibit A; Also refer to: 16 United States Statutes at Large 419, FORTY FIRST CONGRESS SESSION III, CHAPTER 62, 1871, CHAP. LXII. - An act to provide a Government for the District of Columbia [Will of the legislature]
[2] See Evidence Exhibit A

Declaration[3] for Removal to the One Court of Justice
By: Jeffery-Cowan, family of Lind

State of California)
) ss.
San Luis Obispo County)

To Wit:

Jeffery Cowan, family of Lind ("Lind"), one of the people of California, do herein address this court of record as *in capita* sovereign body authority on behalf and in the interest of the American people, respectively the United States, *de jure* [without the UNITED STATES, *de facto*]. Lind is a male, a man[4] created in the image of God, Gen 1:27, and speaking pursuant to Matthew 10:20, having allegiance to same. Pursuant to Matthew 5:33-37, and James 5:12, "let your yea be yea, and your nay be nay, as confirmed by Federal Public Law 97-280, 96 Stat. 1211. Witnesses have personal knowledge of the matters stated herein, and hereby asseverate understanding the liabilities presented in *Briscoe v LaHue* 460 US 325.

COME NOW the hereunder signed Lind, who hereby declare that he is of legal age and competent to state on belief and personal knowledge that the facts set forth herein as duly noted below are true, correct, complete and presented in good faith of his own free will, act and deed.

As one of the People of California I have been endowed with unalienable, God-given rights among which are life, liberty and pursuit of happiness. I helped create the government to aid and assist me in conducting my business.

I accept the Oath of Office of each and every one of my public servants to protect me from enemies both foreign and domestic by enforcing both the state and federal constitutions as the supreme law of the land.

I am deeply saddened that in this case my enemies are not only domestic but the very purported public servants who swore an oath to protect me. These public servants have incarcerated me without lawful cause, stripped me of my due process rights, refused to prove jurisdiction when jurisdiction was challenged,

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[3] "Indeed, no more than affidavits is necessary to make the prima facie case." United States v. Kis, 658 F.2d 526, 536 (7th Cir. 1981); Cert. Denied, 50 U.S. L. W. 2169; S. Ct. March 22, 1982
Morris v National Cash Register, 44 S.W. 2d 433, clearly states at point #4 that "uncontested allegations in affidavit must be accepted as true.", and the Federal case of Group v Finletter, 108 F. Supp. 327 states, "Allegations in affidavit in support of motion must be considered as true in absence of counter-affidavit."
[4] The masculine gender includes the feminine and neuter

proceeded unlawfully against me with a complete conflict of interest and are trampling under foot my God-given rights guaranteed me by the state and federal constitutions.

These public servants are continuing to conspire, plot and work as a RICO organization to maliciously and falsely prosecute me and it is my testimony to the world that the reason they are conspiring against me is to protect the trillions of dollars of unjust enrichments derived from the United States Waste Water Industry.

I declare that the unlawful acts completely absent jurisdiction committed by the Superior Court of Santa Barbara County are acts of retaliation against my efforts to enforce the public health code, public law 92-500 aka The Clean Water Act of 1972.

This congressional mandate considered of the "highest importance" was and is to protect the health, welfare and safety of the public, our drinking water supplies and our oceans.

I declare that the Santa Barbara Superior Court, an administrative court NOT of record and all of its officers including the Santa Barbara District Attorney have absolute lack of jurisdiction to come against me as one of the People without an injured party.

I declare they have unlawfully kidnapped me, holding me against my will while depriving me of my life, liberty and pursuit of happiness. They have extorted monies from me required to defend myself against their lawless violence and have committed a crime by securitizing my case to obtain unjust enrichments.

I declare it my right as one of the People of California that said case no. 1354711 be moved to the supreme court, the one court of justice and original jurisdiction, and for said one court of justice to discharge these malicious proceedings for absolute lack of jurisdiction and absolute lack of judicial probable cause.

My actions are such, given the knowledge I possess that I am bound and have a lawful duty to report these treasonous acts to which I am a witness.

Pursuant to my authority[5] and in the interest of justice, public health and welfare for all humanity and clean water, I call upon my one court of justice, a lawful court of record to move said case no. 1354711 to original

[5] **Authority: Public Law 97-280; Executive Order 11735; (John 1:9; Gen 12:1-3; Rom 13:1-7; Matt 10:20), Private "Prosecutor" *United States v. Sandford*, Fed. Case No.16, 221 (C.Ct.D.C. 1806); Rights Retained pursuant to the 9th Amendment; Enjoys executive authority and sovereign immunity pursuant to the Bill of Rights, Articles I - XIII; Constitutional Counsel; U.S. Constitution.**

jurisdiction and discharge both charges brought against me ab initio.

The one court of justice shall take special judicial notice and judicial congnizance of the following:

Enforcement Actions: (See at: www.nsea.us/enforcement-actions/)

Click on links to open PDFs:

- PLEAS OF THE CROWN – CRIMINAL COMPLAINT 3-18-2012
- COMMERCIAL CLAIM PACKET – COMPLETE_12-0318-JCL
- COMMERCIAL CLAIM PACKET – COMPLETE_12-0318-DTM
- GRAND JURY – PRESENTMENT OF EVIDENCE
- Criminal_Indictment_(Cc18_33)_Public Official_Two Witnesses__2012_Plea of the Crown-THIRD_CITIZEN ARREST(1)
- Criminal_Indictment_Cc18_33_Public-Official_Two-Witnesses__2012_Plea-of-the-Crown-SECOND_ORDER-complete.pdf
- Criminal_Complaint_(Cc18_33)_Public Official_WarrantofAuthority_Briggs_2012_Plea of the Crown 2-16-12

DECLARATION AND DECREE
Jeffery Cowan, family of Lind; and
Dee Thomas, family of Murphy

State of California)
) ss.
County of San Luis Obispo)

To Wit:

Jeffery Cowan, family of Lind ("Lind"), and Dee Thomas, family of Murphy ("Murphy"), each also people of California (hereinafter also "Witnesses"), do herein address this court of record as *in capita* sovereign body authority on behalf and in the interest of the American people, respectively the United States, *de jure* [without the UNITED STATES, *de facto*]. Both Witnesses are men[6] of God created in the image of Him, Genesis 1:27, and speak with authority as provided them by Matthew 10:20, having allegiance to same. Pursuant to Matthew 5:33-37, and James 5:12, "let your yea be yea, and your nay be nay, as confirmed by Federal Public Law 97-280, 96 Stat. 1211. Witnesses have personal knowledge of the matters stated herein, and hereby asseverate understanding the liabilities presented in *Briscoe v LaHue* 460 US 325.

[6] **The masculine gender includes the feminine and neuter**

COME NOW the hereunder signed Lind and Murphy, who hereby declare that they are of legal age and competent to state on belief and personal knowledge that the facts set forth herein as duly noted below are true, correct, complete and presented in good faith of their own free will, act and deed.

To Wit:

In every state of these Oppressions We have Petitioned for Redress in the most humble terms: Our repeated Petitions have been answered only by repeated injury. A Prince whose character is thus marked by every act which may define a Tyrant is unfit to be the ruler of a free people.

Nor have we been wanting in attentions to our British Brethren. We have warned them from time to time of attempts by their legislature to extend an unwarrantable jurisdiction over us. We have reminded them of the circumstances of our emigration and settlement here. We have appealed to their native justice and magnanimity, and we have conjured them by the ties of our common kindred to disavow these usurpations, which, would inevitable interrupt our connections and correspondence. They too have been deaf to the voice of justice and of consanguinity. We must, therefore, acquiesce in the necessity, which denounces our Separation, and hold them, as we hold the rest of mankind, Enemies in War, in Peace Friends.

We, therefore, the Representatives of the united States of America, in General Congress, Assembled, appealing to the Supreme Judge of the world for the rectitude of our intentions, do, in the Name, and by Authority of the good people of these Colonies, solemnly publish and declare, That these United Colonies are, and of Right ought to be Free and Independent States; that they are Absolved from all Allegiance to the British Crown, and that all political connection between them and the State of Great Britain, is and ought to be to dissolved; and that as Free and Independent States, they have full Power to levy War, conclude Peace, contact Alliances, establish Commerce, and to do all other Acts and Things which Independent States may of right do. And for the support of this Declaration, with a firm reliance on the protection of divine Providence, we mutually pledge to each other our Lives, our Fortunes and our sacred Honor.

Excerpt: The Declaration of Independence – July 4, 1776

Lind has been a Marketing Executive and General Manager for a Central Coast marketing firm located in San Luis Obispo, some 40 miles from Santa Maria, California, from the County Clerk's office of Santa Barbara where the NOTICE OF INTENT TO PERSERVE INTEREST, herein after "NOTICE," was required to be filed. Lind asked his friend Murphy, who was living in Santa Maria, to deliver his NOTICE to the Santa Barbara County for filing on his behalf. Murphy is a 40 year Expert in the UNITED STATES WASTEWATER INDUSTRY and a World re-nound Expert in the Clean Water Act of 1972, Title 33, Chapter 26, Water Pollution Prevention and Control and inventor of technology mandated by Congress for application pursuant to said Clean Water Act. The device known as the RECLAMATOR, invented by Murphy and the subject of 9 US Patents and over 40 international patents, purifies 100% of the water used in any onshore facility, home, commercial, or industrial, to a pure potable "healthy," anti-carcinogenic, water quality at each onshore facility, i.e. home, commercial or industrial, as is required by Congressional Mandate pursuant to the National Standards of the Clean Water Act, 33 U.S.C. § 1311(a). The RECLAMATOR further generates electricity through a hydro-electric turbine technology invented by Murphy. This is what the perpetrators are fighting to prevent the application of, clean water and free energy at each onshore facility, absent the grid. See RECLAMATOR Engineering Report at:
http://reclamator.com/assets/files/Reclamator_ENG-Manual-Resize.pdf

Lind and Murphy, through the National Standards Enforcement Agency, an in capita sovereign body authority of, for and by the people, a non-profit and un-incorporated association of people committed to administering environmental justice in compliance with the requirements of the National Clean Water Standards, have available up to $190 billion in debt-forgiven humanitarian funds from one source of

beneficiaries to implement Clean Water Projects nationally, $2 billion of which has been proposed to "eliminate" the unlawful discharges within the coastal zone of San Luis Obispo and Santa Barbara County.

Murphy agreed to assist Lind that day and delivered the Notice to the County as Murphy had business at Staples just a couple of blocks from the Santa Maria's Office of the Santa Barbara County Clerk. Murphy delivered the original and a copy to the Clerk and requested that the Clerk endorse and return the original. The Clerk refused to file Lind's "Notice" retaining both original and copy.

When Lind showed up to the court for a scheduled hearing on June 30, 2012, he was arrested and incarcerated. When Murphy went to the Santa Barbara County Jail to pick up Lind at around 2:00 am on July 1, 2012, Murphy was shown a FAX containing one sentence, claiming to be a warrant for Murphy's arrest by two Sheriffs, who proceeded, on an unlawful warrant, to arrested and incarcerate Murphy.

Lind and Murphy had been charged with committing three (3) violations. The term "violation" means the following:

> **VIOLATION. An act done unlawfully <u>and with force</u>**. In the English stat. of 25 E. III., st. 5, c. 2, it is declared to be high treason in any person who shall violate the king's companion; and it is equally high treason in her to suffer willingly such violation. This word has been construed under this statute to mean carnal knowledge. 3 Inst. 9; Bac. Ab, Treason,

"And with force." The legal analysis of the meaning of "force" is:

Use-of-Force Legal Analysis

> 1. **8th Amendment - Prohibits "Cruel and Unusual Punishment"-** "wanton and unnecessarily inflicted pain." The Eighth Amendment applies " ... only after the State has complied with the constitutional guarantees traditionally associated with criminal prosecutions." Ingraham v. Wright, 430 U.S. 651, 671, 97 S.Ct. 1401, 51 L.Ed.2d 711 (1977).

"Cruel and Unusual Punishment." Bail was set at $100,000.00 (one hundred thousand dollars) each on Lind and Murphy, companions of the king. This is an example of "force" committed against Lind and Murphy pursuant to these malicious prosecutions waged against them by their perpetrators herein defined.

a. **8th Amendment Standard:**
   1) The standard: " ... whether force was applied in a good faith effort to maintain or restore discipline or maliciously and sadistically for the very purpose of causing harm." <u>Whitley v. Albers</u>, 475 U.S. 312, 320, 106 S.Ct. 1078, 89 L.Ed.2d 251 (1986)

b. **Cruel and Unusual Punishment Standard:**
   1) **Non-Riot** - the "**cruel and unusual punishment standard**" is higher than the "deliberate indifference" standard. Cruel and unusual punishment will be present only when an "unnecessary and wanton infliction of pain," "obduracy and wantonness," and "actions taken in bad faith and for no legitimate purpose". <u>Whitley v. Albers</u>, 475 U.S. 312, 106 S.Ct. 1078, 89 L.Ed.2d 251 (1986).

Aside from the blatant treasonous acts committed by these sinful kidnappers against Lind and Murphy with malice intent to inflict harm, hardship, deprivation of liberty, life, property, happiness, right to benefit from commerce, etc., Lind and Murphy identifies the actual "legal" issues of this case so as to fully disclose the satanic natures of these "public terrorists" as it falls within such a narrow scope having only four questions to

be addressed in regard to the document named NOTICE OF INTENT TO PRESERVE INTEREST, herein after "NOTICE," and hereto attached as EVICENCE EXHIBIT D. Those questions are:

1. Is there evidence of Lind or Murphy exerting any "force" in the legal meaning?

Lind and Murphy did NOT exert any "force" which is required as a prerequisite to a "violation." Consequently, the perpetrators have NO jurisdiction to proceed. Absent evidence of "force" being committed by Lind and or Murphy in this instance, the other three questions are insignificant.

2. Is there evidence to prove the NOTICE was authored as a part of a conspiracy to injure a person as opposed to an act pursuant to Lind and Murphy's constitutionally guaranteed authority by Right?
3. Is there evidence to prove the said NOTICE is in fact **FALSE**?
4. Is there evidence to prove the said NOTICE is in fact **FORGED**?

The legal definitions from Bouvier's Law Dictionary, 1856 Edition, for "False" and "Forged" is:

> **FALSE** ***Not true; as, false pretences; unjust, unlawful***, as, false imprisonment.

A witness has already testified that if the Notice had been filed, it would have accomplished clouding the title of the said property to prevent its transfer until the claim was settled.

> **FORGERY**, crim. law. Forgery at common law has been held to be "***the fraudulent making and alteration of a writing to the prejudice of another man's right***." 4 Bl. Com. 247. By a more modern writer, it is defined, as "a false making; a making malo animo, of any written instrument, for the purpose of fraud and deceit." 2 East, P. C. 852.

The Notice is not "false" and is a true and correct copy of a lawful genuine instrument authored and executed by Lind within his due process rights guaranteed him pursuant to Article I, Amendment 1 of the Bill of Rights of the U.S. Constitution, the right to petition his government for redress of grievances is the right to make a complaint to, or seek the assistance of, one's government, without fear of punishment or reprisals.

The Notice was confirmed a genuine instrument by the neighboring County of San Luis Obispo's Clerk that is "ought to be given full faith and credit." Lind and Murphy, as independent States in the meaning of the Declaration of Independence of 1776,, exercised their unalienable rights of due process by Lind authoring the subject NOTICE, a lawful "full faith and credit" given document having a State Official Witness, a Notary Public Ministerial Officer, and further Authenticated by the Clerk of the San Luis Obispo County Circuit Court, under SEAL, confirming the document as a legal document and that it ought to be recognized as having full faith and credit pursuant to the following acknowledgment given it as follows:

> STATE OF CALIFORNIA)
>) ss.
> COUNTY OF SAN LUIS OBISPO)
>
> **I, JULIE L. RODEWALD**, County Clerk-Recorder of the County of San Luis Obispo, State of California, do hereby certify that whose name is subscribed to the attached certificate of acknowledgment, proof or affidavit, was at the time of taking said acknowledgment, proof or affidavit, **Nicholas Lee Judson, a NOTARY PUBLIC**, duly appointed, commissioned, qualified and residing in said County, and authorized by the laws of the State of California to take and certify the same, as well as to take and certify the proof and acknowledgement of deeds, and other instruments, in writing, and that full faith and credit are and aught to be given to his/her official acts; and, I further certify that I have compared the signature to the original certificate on file in this office and believe that the signature on the attached certificate is his/her genuine signature. [This form, embossed through both its form and the document, is attached to Notice of Intent to Preserve

Interest]

IN TESTIMONY THEREOF, I have hereunto set my hand and affixed the Seal of this Office at San Luis Obispo, in said County, and State of California.

On Monday, December 12, 2011

JULIE L. RODEWALD, County Clerk-Recorder

By: _____/s/_____
Deputy Clerk-Recorder

And, of which said genuine instrument [NOTICE] is Public Record filed with the National Republic Registry and can be view as Public Record at: http://www.nationalrepublicregistry.com/public/2012/CA/03.05.000001.pdf

Lind wished, pursuant to his constitutionally secured Rights, for the Notice to be filed with the County of Santa Barbara County Recorder on June 23, 2011, in accordance with Lind's Article I, Amendment 1 of the Bill of Rights to the United States Constitution, to petition Lind's government authorities for redress of grievances for acting in violation of their laws and trespassing upon the constitutional secured rights of Lind.

Lind wished to notice the record of the County of Santa Barbara of a pending civil action so as to prevent the subject, Kay S. Kuns, from any attempt at transferring her assets to avoid exposure to liability of loss, to prevent Lind from acquiring said property upon Kuns eventual default to answer to the charges of Lind, such which has now occurred. Kuns and her cronies have committed a minimum of 102 Criminal Violations against Lind and Murphy and 18 Constitutional Violations. No fact or affidavits have been disputed.

To the best of his knowledge, with good faith and lawful intent, Lind acted as legally provided for pursuant to Title 5, commencing with Section 880.020, of Part 2 of Division 2 of the Civil Code (Marketable Record Title) as quoted hereunder:

> (a)The Legislature declares as ***public policy*** that:
>
> (1)Real property is a basic resource of the people of the state and ***should be made freely alienable and marketable to the extent practicable*** in order to enable and encourage full use and development of the real property, including both surface and subsurface interests.
>
> (4)Real property title transactions should be possible with economy and expediency. ***The status and security of recorded real property titles should be determinable to the extent practicable from an examination of recent records only.***
>
> (b)It is the purpose of the Legislature in enacting this title to simplify and facilitate real property title transactions in furtherance of ***public policy by enabling persons to rely on record title to the extent provided in this title***, with respect to the property interests specified in this title, subject only to the limitations expressly provided in this title and ***notwithstanding any provision or implication to the contrary in any other statute or in the common law***. This title shall be liberally construed to effect the legislative purpose.

And, Lind and Murphy are Two Witnesses that the aforesaid genuine instrument is not a false instrument but in fact an originally created document by its author, Lind; and,

On June 22, 2011, Lind, in good faith and lawfully authored the genuine instrument, a copy of which is now a matter of public record as full-proof evidence, EVIDENCE EXHIBIT D, of a full faith and credit document

termed as a "notice" as affirmed in Lind's "undisputed" Affidavit[7] hereto attached as EVIDENCE EXHIBIT E; and,

Lind personally signed the genuine instrument in the presence of an authorized State Official with full intent to file said Notice into the County records to prevent Kay Kuns from transferring here properties as there was a lawsuit pending and Lind wished to preserve said asset of Kuns so as to gain remedy for being kidnapped for 71/2 months, deprived of his liberty, life, property, family, enjoyment and happiness. Lind acted to gain justice and remedy for damages and injuries inflected upon him by this tyrant individual; and,

Lind does hereto attest his autograph evidenced on said true and correct copy of the genuine instrument is not forged as accused, but is in fact of Lind's original autograph affixed to said genuine instrument on June 22, 2011, and Murphy is a witness to the lawful rightful and just act; and,

The undersigned notary public, an Official Officer of the State, who knows Lind as a regular customer and certified Lind was in fact Lind, witnessed Lind, author of said Notice, autographing the genuine instrument and made official recordation of Lind's autographing of said genuine instrument as evidenced in the notary's record book; and,

Lind, Murphy, or said genuine instrument, is not part of any conspiracy with intent to hurt anyone, which is didn't, and said instrument was executed pursuant to God's instruction and Lind's lawful authority as declared in the Bible, Matthew 5:25 and Matthew 18:15-18, and to further Lind's interest and constitutionally guaranteed lawful right to remedy in a lawful proceeding of redress of grievances guaranteed Lind and all people of these United States, *de jure*, pursuant to Article I, Amendment 1 of our Bill of Rights to the United States Constitution. Note the following:

> *"The claim and exercise of a Constitutional right cannot be converted into a crime."*
> Miller v. U.S., 230 F.2d. 486, 489.

> *"No citizen can be punished for exercising a right*."
> Shuttlesworth v. Birmingham, Al. 373 U.S. 626

; and,

Accordingly, Lind and Murphy have relied upon the law and are not to be held liable for any presumed "willful" or "evil" intent by these evil perpetrators with intent to harm, as confirmed by the Supreme Court:

> *"Any person who relies upon a prior decision of the Court cannot be willful nor have evil intent*."
> United States v. Bishop 412 U.S. 346

> *"A citizen is entitled to rely on an official interpretation of the law even if mistaken."*
> U.S. v. Barker 546 F. 2d 940

; and,

Neither Lind nor Murphy have ever knowingly and willfully entered into or contracted with any government agency, with a disclosure in such contract with "knowing and willing" intent to submit their sovereignty and final jurisdictional authority to the governing agencies created to serve them, said governing authorities who are deriving its power from them, the people [U.S. Code Title 8, Sec. 1481]; and,

Neither Lind nor Murphy have ever knowingly and willfully expatriated themselves as defined in U.S. Code Title 8, Sec. 1481 to become a foreign state governing authority, aka "public servant," to hold any government office by taking an Oath of Office to hold any governmental position of public service. Lind and

[7] **An undisputed affidavit stands as truth.**

Murphy have always been men of the private sector of government. Accordingly, the Supreme Court has concluded the people of said private sector are not subject to governments' codes:

> *All codes, rules and regulations are applicable to the government authorities only.*
> Rodrigues vs. Ray Donovan 769 F2d 1344, 1348 (1985)

; and further,

The PENAL CODE "violations" charged against Lind and Murphy are codes written with intent to apply to illegal aliens such as an illegal Mexican illegally creating a GREEN-CARD DOCUMENT, however a necessary rule, it does NOT apply to the people, Lind and Murphy; and,

Lind and Murphy stand on the unalienable rights of their Sovereignty as independent people of California and each, one of the United States, *de jure*, within the meaning of the organic U.S. Constitution, the Bill of Rights and the Declaration of Independence of 1776.

Lind and Murphy, as American people and appointed *in capita* sovereign body authorities having a purpose to decree law and not be subject to said law or the agencies created by the free white body politic of this Christian Nation, such agencies created to serve the people, specifically in this instance Lind and Murphy pursuant to the following:

> *"**A Sovereign is exempt from suit**, not because of any formal conception or obsolete theory, but on the logical and practical ground that there can be no legal Right as against the authority that makes the law on which the Right depends."*
> Kawananakoa v. Polyblank, 205 U. S. 349, 353, 27 S. Ct. 526, 527, 51 L. Ed. 834 (1907).

> *"The people of this State **do not** yield their sovereignty to the agencies which serve them."*
> *California Government Code(s), Section(S) 54950 and 11120*

; and,

The STATE OF CALIFORNIA, aka "THE PEOPLE OF THE STATE OF CALIFORNIA," which is an oxymoron because "people" cannot be a "fiction" and a "fiction" cannot be one of the "people," or any of its agencies acting in concert with it, such as Lind and Murphy's perpetrators, CANNOT diminish the Rights of Lind and Murphy pursuant to the following:

> *"Further, when the State of California did attempt to diminish one's rights, it was determined that the state cannot diminish rights of the people."*
> Hertado v. California, 100 US 516

; and,

The Supreme Court FURTHER concludes that Lind and Murphy are entitled to carry on private business in their own way WITHOUT interference by government agencies as confirmed by the following:

> *"The individual may stand upon his constitutional Rights as a citizen. He is entitled to carry on his private business in his own way. His power to contract is unlimited. He owes no such duty [to submit his books and papers for an examination] to the STATE, since he receives nothing therefrom, beyond the protection of his life and property. His Rights are such as existed by the law of the land [Common Law] long antecedent to the organization of the STATE, and can only be taken from him by due process of law, and in accordance with the Constitution. Among his Rights are a refusal to incriminate himself, and the [Eleventh Amendment] immunity of himself and his property from arrest or seizure except under a warrant of the law. He owes nothing to the public so long as he does not trespass upon their Rights."*

Hale v. Henkel, 201 U. S. 43 at 47 (1905).

; and,

Lind and Murphy here do fully invoke their rights *pursuant to the original and* ***ratified 13th Amendment***. Their perpetrators in this matter, having retained titles of nobility and honor, are INCAPABLE of holding ANY office of trust and ARE NOT EVEN a citizen of the United States, but alien having allegiance to a foreign power, and accordingly, besides having dirty hands, lack absolute status and standing accordingly pursuant to the original 13th Amendment to the United States Constitution, ratified as follows:

Maryland, Dec. 25, 1810	Tennessee, Nov. 21, 1811
Kentucky, Jan 31, 1811	Georgia, Dec. 13, 1811
Ohio, Jan 31, 1811	North Carolina, Dec.23, 1811
Delaware, Feb 2, 1811	Massachusetts, Feb. 27, 1812
Pennsylvania, Feb. 6, 1811	New Hampshire, Dec. 10, 1812
New Jersey, Feb. 13, 1811	Virginia, March 10, 1819
Vermont, Oct 24, 1811	

The original ratified 13th Amendment, unlawfully removed from the current versions of the United States and State Constitutions, fraudulently presented to the people to be "original," states **To Wit:**

> ***"No Title of Nobility shall be granted by the United States: And no Person holding any Office of Profit or Trust under them, shall, without the Consent of the Congress, accept of any present, Emolument, Office, or Title, of any kind whatever, from any King, Prince or foreign State."***
>
> Federal Constitution, Article 13, Amendment 13; Article I, Section 9, Clause 8

All of Lind and Murphy's perpetrators contain a title of nobility referred to as "Esquire," aka Officer of the Court. Lind and Murphy's perpetrators are imposters, traitors and domestic terrorists, enemies, warring against two of the United States in the meaning of the United States Constitution, Article III, Sec. 3 that states in part:

> ***"Treason against the United States shall consist only in levying War against them, or in adhering to their Enemies, giving them Aid and Comfort. No Person shall be convicted of Treason unless on the Testimony of two Witnesses to the same overt Act, ……"***
>
> Federal Constitution, Article III, Sec. 3.

And in the meaning of the:

> IX – ***An Act for the Punishment of certain Crimes against the United States.***
>
> United States Statutes at Large/Volume 1/1st Congress/2nd Session/Chapter 9

All of Lind and Murphy's perpetrators are "Title of Nobility" holders, members of the BAR (British Accreditation Registry), subject to the Crown/Great Britain/London and more specifically, members of the Santa Barbara's District Attorney's Office who waged an attack, and act of Warring against Lind and Murphy and a quite obvious act of retaliation against Lind and Murphy exercising their lawful constitutional right to commence in a regress of grievance against a purported public official of Lind's, who acting as a "judge," deprived Lind and Murphy of their Life, Liberty, Property and Pursuit of Happiness for over 7 ½ months now, with NO cause. The arrests of Lind and Murphy were caused by a fraudulent document entitled DECLARATION IN SUPPORT OF ARREST

WARRANT, brought in the name of "THE PEOPLE," which in itself is deficient on its fact, and is hereto attached as EVIDENCE EXHIBIT F. This so called DECLARATION is fraudulent on its face for the following reasons:

1. Officers of the court are "creatures of the law" and cannot bring charges against the people pursuant to the following authorities:

   > "It is a clearly established principle of law that ***an attorney must represent a corporation***, it ***being incorporeal and a creature of the law***. An attorney representing and artificial entity must appear with the corporate charter and law in his hand. A person acting as an attorney for a foreign principal must be registered to act on the principal's behalf."
   > See, Foreign Agents Registration Act (22 USC § 612 et seq.); Victor Rabinowitz et. at. V. Robert F. Kennedy, 376 US 605.

2. Statements, or in this case entitled "DECLARATION," by attorneys is "not sufficient" pursuant to:

   "Statements of counsel in brief or in argument are not sufficient…"
   Trinsey v. Pagliaro, D.C. Pa. 1964, 229 F. Supp. 647

3. The "DECLARATION" was created by Jennifer Glimp, a Deputy District Attorney and a "prosecutor" for the County of Santa Barbara. There is NO affidavit of a corpus delicti, a real party in interest. Accordingly, the document called "DECLARATION" is NOT sufficient to bring any charge against Lind and Murphy pursuant to the following:

   "The prosecutor is not a witness; should not be permitted to add to the record either by subtle or gross improprieties."
   Donnelly v. Dechristoforo, 1974. SCT. 41709 56:416 U.S. 637 (1974) Mr. Justice Douglas, dissenting.

4. The so-called "DECLARATION" was created by Jennifer Glimp absent a SEAL that caused unlawful imprisonment of Lind and Murphy. Glimp's DECLARATION is NOT a lawful affidavit taken under penalty of perjury executed under Oath. Only the people can execute a Declaration. The prosecution has failed to state a claim upon which relief may be granted pursuant to Rule 12(b). Accordingly, there is NO evidence under SEAL. There is NO original writ under the great seal from the court of chancery. There is NO lawful accuser in this matter, NO *corpus delicti*, NO real party in interest. The DECLARATION is evidence of MISPRISON OF TREASON committed against Lind and Murphy by Jennifer Glimp.

5. The "DECLARATION" does not identify a corpus delicti, a "real party in interest" as is required by California Code of Civil Procedure § 367 that states:

   "Every action must be prosecuted in the name of the real party in interest…"
   California Code of Civil Procedure § 367

Lind and Murphy as Two Witness to the same overt acts are in fear for their life, safety, liberty and that of their families. The Santa Barbara County DA's office stopped by Lind's work place on February 23, 2012, at approximately 4:30 pm and is harassing one of Lind's co-workers by serving him a subpoena to appear in court in Santa Barbara, a 2 hour drive each way, in order to create a problem for me at work, acting to terrorize me and other if effort to prevent me from standing up for The Clean Water Act, the Law, and reporting those public officials who violate it and are trespassing on Lind and Murphy's unalienable guaranteed Rights.

Lind and Murphy as Two Witnesses to the same overt acts herein defined are victims of a Constitutional Crisis and are suffering malicious and tyrannical attacks from the very purported public officers who

supposedly swore Oaths of Office to uphold the U.S. Constitution and the state constitutions and to protect the people's God-given unalienable Rights. A Guadalupe Police Officer and a Santa Barbara County Sheriff's Deputy, who bore false witness against Jeffery Cowan, kidnapped him and threw through him into jail depriving his of my right to life, liberty and pursuit of happiness without being taken before a magistrate and absent probable cause or lawful warrant, as admitted seven and one half months later. Lind has been kidnapped and terrorized now for approximately 14 months; Murphy has been terrorized by his kidnappers to date for 9 months.

Lind and Murphy as Two Witnesses to these same overt acts, have been further held for over 14 months, approximately 9 months for Murphy, while our demands to prove jurisdiction, to show lawful judicial probable cause and produce an injured party / real party in interest have been completely ignored, regardless of multiple declarations, requests and affidavits consisting of thousands of documents and filings into the inferior court of no record, aka SANTA BARBARA SUPERIOR COURT, an administrative agency having no Article III judicial authority due to its status and standing as a private corporation as confirmed in EVIDENCE EXHIBIT A. Private corporations, fictions, do not have standing to come against the people absent a corpus delicti / injured party / real party in interest. These tyrannical acts being committed against Lind and Murphy are knowing, wanton and malicious with intent to harm because Lind and Murphy are Two Witnesses to the crimes being committed against humanity, public health, welfare and our nations waters.

Lind and Murphy as Two Witnesses to these same overt acts demanded for their accusers to prove jurisdiction, order of Habeas Corpus, order to show cause, order to produce an injured party, order to face our accuser(s), right to effective assistance of counsel, right to contract and recognition by the Court of Lind and Murphy's status as people of California having superior status and standing as such. All demands have been denied and ignored by these perpetrators who have absolute no jurisdiction over Lind and Murphy.

Our privacy has been unlawfully invaded by the Santa Barbara's District Attorney's office that has intercepted and confiscated our private emails and tapped our phones. We are victims of tyranny in the forms of fraud, mail fraud, intimidation, kidnapping and have been deprived of our rights to speak and defend ourselves in court. Our lawful orders to stop unlawful proceeding, ORDER to dismiss and order to remove from the calendar have all been ignored violating our unalienable rights to due process. Our due process rights have further been violated and the record falsified by my purported public servants who refuse to allow us to file evidence and documentation into the record of this sham proceeding in effort to unjustly persecute us because of our stand, knowledge, and support for clean water for the State of California and for those others of the United States.

We are victims of above defined Counts of violations taken against us in the name of the "people" of California; the government authorities cannot come against the "People" in the name of the People. Such an action is deficient on its face.

We, the Petitioners herein, are Two Witnesses to the same overt acts of felonies in the form of treason and misprision of treason that has been or is being committed against Lind and Murphy and the people, first by Kay Kuns who has admitted to the accusations made against her by Jeffery Cowan Lind as evidenced in EVIDENCE EXHIBIT G, then further by her cronies who have waged a retaliatory attack against Lind and Murphy, aiding and abetting Kay Kuns and complicit with her corruption, is, at a minimum, Jed Bebee, Jean M. Dandona, Joyce Dudley, Brian Cota, Angelina Borrello, Edward H. Bullard, Gary M. Blair, Jennifer Glimp, Kevin Ready, Jeff Chambliss, current acting Santa Barbara County Counsel, among others such as the County Board of Supervisors, namely Salud Carbajal, Janet Wolf**,** Doreen Farr, Joni Gray, Steve Lavagnino and the Santa Barbara County Sheriff, Bill Brown, all guilty of misprision of treason as all have received complaints and refuse to act pursuant to their fiduciary duty of their office and their Oaths, and they are retaliating against Lind and Murphy through causing malicious prosecutions against Lind and Murphy because Lind and Murphy stand for their constitutional RIGHTS and Clean WATER. Based upon and pursuant to our personal knowledge and belief, the above defined retaliatory actions against Lind and Murphy, as Two Witnesses to the same overt treasonous acts, are being led by the Governor of the State of

California, Edmund Gerry Brown, Jr. Accordingly, Lind and Murphy hereby do demand the KING'S BENCH take special judicial notice and consideration of the following cases. Said cases clearly justify Lind and Murphy's claim that these acts being committed against them are with intent and are retaliatory in nature due to exposing their almost 40 years of clean water corruption, refusing to comply with the requirements mandated by Congress to administer, adopt and enforce best available Clean Water standards and limitations:

- SUPERIOR COURT OF THE STATE OF CALIFORNIA FOR THE COUNTY OF SAN LUIS OBISPO, CASE NO. CV080510. Status: "dismissed." See Case at: http://www.reclamator.com/assets/files/FIRST%20AMENDED%20COMPLAINT%204-27-09.pdf
- UNITED STATES DISTRICT COURT, EASTERN DISTRICT OF CALIFORNIA, CASE NO. 209-CV-2587
  Status: "dismissed." See Case at: http://www.reclamator.com/assets/files/Murphy-vs-Schwarzenegger-USDistrictCourt-9-16-09.pdf
- UNITED STATES DISTRICT COURT, EASTERN DISTRICT OF CALIFORNIA, CASE NO. 084876
  Status: "dismissed." See Case at: http://www.reclamator.com/assets/files/US%20DISTRICT%20COURT%20COMPLAINT_FRAUD_10-24-08.pdf
- UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF CALIFORNIA, FIRST AMENDED COMPLAINT, CASE NO. CIV S-09-2587. Status: "dismissed." See Case at: http://www.reclamator.com/assets/files/RICO%20ACTION%202-19-10.pdf

These perpetrators have yet again trespassed upon the property of Lind and Murphy, committing, at minimum, robbery, piracy, peonage, breach of fiduciary duty, extortion, kidnapping, and with intent to harm and create unjust enrichments for their criminal enterprise through acts of unlawful securitization against Lind and Murphy as evidenced in EVIDENCE EXHIBIT H, even prior to the Lind and Murphy "Show Cause Hearing" scheduled for March 20, 2012. Securitization is unlawful as is confirmed in the points and authorities evidenced in EVIDENCE EXHIBIT I. Available Enforcement Authorities List is EXHIBIT J.

The following are eighteen (18) Constitutional Violations committed against Lind and Murphy:

Article I, Amendment 1

- Kidnappers are committing acts of retaliation against Petitioners for petitioning their government authorities for redress of grievances for acting in violation of their laws. Const. BoR. Art. I.

Article IV, Amendment 4

- Kidnappers are intercepted Petitioners' private emails. Const. BoR. Art. IV.

Article V, Amendment 5

- Kidnappers kidnapped Petitioners without a grand jury indictment. Const. BoR. Art. V.
- Kidnappers put Petitioners in jeopardy maliciously filing charges against Petitioners of the same code under color of law. Const. BoR. Art. V.
- Without due process of law, Kidnappers have deprived Petitioners of life, liberty and property. Const. BoR. Art. V.

Article VI, Amendment 6

- Kidnappers deprived Petitioners an impartial jury of their peers. Const. BoR. Art. VI.

- Kidnappers refuse to inform Petitioners of the nature and cause of the accusations made against them. Const. BoR. Art. VI.
- Kidnappers deprived Petitioners their guaranteed right to assistance of counsel for their defense. Const. BoR. Art. VI.

Article VII, Amendment 7

- Kidnappers have deprived Petitioners their right to trial by jury. Const. BoR. Art. VII.

Article VIII, Amendment 8

- Kidnappers have imposed excessive bail on Petitioners. Const. BoR. Art. VIII.
- Kidnappers inflicted unusual punishments upon Petitioners. Const. BoR. Art. VIII.

Article IX, Amendment 9

- Kidnappers deny and disparage the rights retained by the Petitioners. Const. BoR. Art. IX.

Article X, Amendment 10

- Kidnappers refuse to recognize and stand down to the superior status and standing, pursuant to the retained powers reserved to the Petitioners. Const. BoR. Art. X.

Article XI, Amendment 11

- Kidnappers, impersonating legitimate public officers, have commenced prosecution, acting as agencies of government and have extended their inferior judicial power to a suit in law or equity against Petitioners as Subjects of Foreign States, and each having a Title of Nobility of said Foreign States. Const. BoR. Art. XI.

Article, XIII, Amendment 13

- Kidnappers have accepted titles of nobility and honour from a foreign power and are incapable of holding any office of the United States. Const. BoR. Art. XIII.

Article IV, Section 4.

- Kidnappers, as enemies of the united states, refuse to recognize Petitioners' Republican Form of Government and commit acts of domestic Violence in the form of Treason as defined in Article III, Section 3 of the U.S. Constitution. Const. Art. IV, s. 4.

Article I, Section 10.

- Kidnappers are acting against Petitioners in violation of their Obligation of Contract, their Oaths of Office to uphold the Constitution committing gross acts against Petitioners as defined in Article III, Section 3 of the U.S. Constitution. Const. Art. I, s. 10.

Article III, Section 3.

- Kidnappers, as enemies of the untied states, respectively the people of the Petitioners, are committing overt treasonous acts against the Petitioners Const. Art. III, s. 3.

Under the laws of perjury Lind and Murphy, to the best of their knowledge, declare the forgoing is true and correct.

FURTHER DECLARANTS SAYETH NAUGHT.

Accordingly, Lind and Murphy THEREFOR does hereby Petition the supreme court, the one court of justice, to as expediently as practicable and in the interest of justice REMOVE said Case No. 1354711 and DISCHARGE all CHARGES brought against Lind and Murphy.

IT IS SO ORDERED

THE COURT

WITNESS: Petitioners' hand and SEAL this 26th **day of** March **, 2012**

COURT SEAL OF THE COURT OF RECORD

Christian name: SURNAME:
:Dee-Thomas:[petitioner] Murphy

COURT SEAL OF THE COURT OF RECORD

Christian name: SURNAME:
:Jeffery-Cowan:[petitioner] Lind

Please keep Authentication Documentation below this line ---------- so as to not cover the signatures of the petitioner(s)

ACKNOWLEDGEMENT

State of California, County of San Luis Obispo,

On March 26, 2012 before me, Nicholas Lee Judson, Notary Public,

appeared Dee Thomas Murphy and Jeffery Cowan Lind who proved to me on the basis of satisfactory evidence to be the man/men/woman/women whose signature is subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her/their authorized capacity, and that by his/her/their signature on the instrument, the above man/men/woman/women in his/her/their capacity as the people of California executed the instrument.

I certify under PENALTY OF PERJURY under the laws of the State that the foregoing paragraph is true and correct.

Witness my hand and official seal:

NICHOLAS LEE JUDSON
Commission # 1926326
Notary Public - California
San Luis Obispo County
My Comm. Expires FEB. 20, 2015

Signature: (seal)

Under the laws of perjury Lind and Murphy, to the best of their knowledge, declare the forgoing is true and correct.

FURTHER DECLARANTS SAYETH NAUGHT.

Accordingly, Lind and Murphy THEREFOR does hereby Petition the supreme court, the one court of justice, to as expediently as practicable and in the interest of justice REMOVE said Case No. 1354711 and DISCHARGE all CHARGES brought against Lind and Murphy.

IT IS SO ORDERED

THE COURT

WITNESS: Petitioners' hand and SEAL this 26th **day of** March **, 2012**

COURT SEAL OF THE COURT OF RECORD

Back Page Endorsement

Christian name: SURNAME:
:Dee-Thomas:[petitioner] Murphy

COURT SEAL OF THE COURT OF RECORD

Christian name: SURNAME:

STATE OF CALIFORNIA)
) ss.
COUNTY OF SAN LUIS OBISPO)

I, **JULIE L. RODEWALD**, County Clerk-Recorder of the County of San Luis Obispo, State of California, do hereby certify that whose name is subscribed to the attached certificate of acknowledgment, proof or affidavit, was at the time of taking said acknowledgment, proof or affidavit, **Nicholas Lee Judson**, a **NOTARY PUBLIC**, duly appointed, commissioned, qualified and residing in said County, and authorized by the laws of the State of California to take and certify the same, as well as to take and certify the proof and acknowledgment of deeds and other instruments, in writing, and that full faith and credit are and ought to be given to his/her official acts; and, I further certify that I have compared the signature to the original certificate on file in this office and believe that the signature on the attached certificate is his/her genuine signature.

This form, embossed through both its form and the document, is attached to **Petition to Remove and Discharge ab initio**

Signed by: Jeffrey Cowan Lind & Dee Thomas Murphy

On: March 26, 2012

IN TESTIMONY THEREOF, I have hereunto set my hand and affixed the Seal of this Office at San Luis Obispo, in said County, and State of California.

On Monday, March 26, 2012

JULIE L. RODEWALD, County Clerk-Recorder

By: _____
Deputy Clerk-Recorder (SEAL)

COURT AND COUNTY ARE PRIVATE CORPORATIONS – EVIDENCE EXHIBIT A

4,002 U.S. companies matching "COUNTY OF SANTA BARBARA"

Sort by: Relevance

Refine Your Results

Filter companies by:

Newly Formed Businesses

- Date Started: 13 weeks ago

Enhanced Profiles

- Has been claimed by a co. representative
- Has Twitter
- Has Facebook

Company Revenue

- Less than $500,000
- $500K → $1M
- $1M → $2.5M
- $2.5M → $5M
- $5M → $10M
- $10M → $20M
- $20M → $50M
- $50M → $100M
- $100M → $500M
- $500M → $1B
- More than $1Billion

Number of Employees

- 1 → 4
- 5 → 9
- 10 → 19
- 20 → 49
- 50 → 99
- 100 → 249
- 250 → 499
- 500 → 999
- 1,000 → 4,999
- 5,000 → 9,999
- More than 10,000

Ownership

- Public Companies
- Private Companies

Location Type

- Headquarters (HQ)
- Branch
- Single Location

21. **County Of Santa Barbara (Parks Department)** BRANCH
    1114 State Street # 249, Santa Barbara CA
    Land, Mineral, Wildlife, and Forest Conservation

22. **County Of Santa Barbara (District Attorney)** BRANCH
    234 Camino Del Remedio, Santa Barbara CA
    Legal Counsel and Prosecution

23. **County Of Santa Barbara (District Attorney)** BRANCH
    1100 W Laurel Avenue, Lompoc CA
    Legal Counsel and Prosecution

24. **County Of Santa Barbara (Fire Department)** BRANCH
    8901 Frey Way, Goleta CA
    Fire Protection

25. **County Of Santa Barbara (Social Services Department)** BRANCH
    1100 W Laurel Avenue, Lompoc CA
    Individual and Family Social Services

26. **County Of Santa Barbara (Fire Department)** BRANCH
    99 Centennial Street, Los Alamos CA
    Fire Protection

27. **County Of Santa Barbara (District Attorney)** BRANCH
    2125 Centerpointe Parkway # 1, Santa Maria CA
    Legal Counsel and Prosecution

28. **County Of Santa Barbara (Fire Department)** BRANCH
    314 W Cook Street Room 8, Santa Maria CA
    Fire Protection

29. **County Of Santa Barbara (Public Works Department)** BRANCH
    123 E Anapamu Street # 1, Santa Barbara CA
    Regulation and Administration of Transportation Programs

30. **County Of Santa Barbara (General Services)** BRANCH
    114 E Haley Street # A, Santa Barbara CA
    Regulation, Licensing, and Inspection of Miscellaneous Commercial Sectors

31. **County Of Santa Barbara (Fire Department)**

Recently Updated

These companies have updated their profiles. Add your company now.

Santa Barbara Cardiovascular Medical Group
Solvang, CA
Updated 10/8/2010

Thomas D Watson MD
Santa Barbara, CA
Updated 10/5/2010

See all claimed profiles

BRANCH

Ucsb Mesa Road Building 547, Santa Barbara CA
Fire Protection

32. **County Of Santa Barbara** (Executive Offices) BRANCH
615 W Cota Street, Santa Barbara CA
Executive Offices

33. **County Of Santa Barbara** (Fire Department) BRANCH
1600 Tiffany Park Court, Santa Maria CA
Fire Protection

34. **County Of Santa Barbara** (Fire Department) BRANCH
5003 Depot Street, Santa Maria CA
Fire Protection

35. **County Of Santa Barbara** (Fire Department) BRANCH
4570 Hollister Avenue, Santa Barbara CA
Fire Protection

36. **County Of Santa Barbara** (General Services) BRANCH
105 E Anapamu Street Room 406, Santa Barbara CA
General Government, NEC

37. **County Of Santa Barbara** (Public Health) BRANCH
315 Camino Del Remedio, Goleta CA
Medical Laboratories

38. **County Of Santa Barbara** (Fire Department) BRANCH
195 W Highway 246 # 102, Buellton CA
Fire Protection

39. **County Of Santa Barbara** (Public Health) BRANCH
344 N San Antonio Road Floor 2 Santa Barbara CA
Accounting, Auditing, and Bookkeeping Services

40. **County Of Santa Barbara** (General Services) BRANCH
1100 Anacapa Street Stop 1, Santa Barbara CA
General Government, NEC

41. **County Of Santa Barbara** (Fire Department) BRANCH
Santa Barbara CA
Fire Protection

42. **County Of Santa Barbara** (Public Works Department) BRANCH
Santa Maria CA
Regulation and Administration of Transportation Programs

43. **County Of Santa Barbara** (Fire Department) BRANCH
Buellton CA
Fire Protection

44. **County Of Santa Barbara** (Fire Department) BRANCH
Goleta CA
Fire Protection

45. **Housing Authority Of The County Of Santa Barbara** BRANCH
Santa Maria CA
Administration of Housing Programs

46. **County Of Santa Barbara Alcohol, Drug, Mental Health** (Admhs)
Santa Barbara CA
Specialty Outpatient Facilities, NEC

47. **The Judicial Council Of California** (Santa Barbara County Court) BRANCH
Santa Barbara CA
Courts

48. **The Judicial Council Of California** (Santa Barbara County) BRANCH
Lompoc CA
Courts

49. **The Judicial Council Of California** (Santa Barbara Superior Court) BRANCH
Santa Barbara CA
Courts

50. **Santa Barbara County Of** (Santa Barbara Coroners Office) BRANCH
Santa Barbara CA
Offices and Clinics of Health Practitioners, NEC

51. **California Children Service** (Santa Barbara Cnty Health)
1111 Chapala Street # 200, Santa Barbara CA

FIRST AMENDED FELONY COMPLAINT – EVIDENCE EXHIBIT B

NOTICE OF UNLAWFUL PROCEEDING / FINAL ORDER; ADJUDICATION AND DECREE – EVIDENCE EXHIBIT C

NOTICE AND INTENT TO PRESERVE INTEREST – EVIDENCE EXHIBIT D

Jeff Lind's "UNDISPUTED" AFFIDAVIT OF TRUTH – EVIDENCE EXHIBIT E

"DECLARATION" OF JENNIFER GLIMP – EVIDENCE EXHIBIT F

KUNS DAMAGE CLAIM FOR DAMAGES / NOTICE AND DEMAND – EVIDENCE EXHIBIT G

UNLAWFUL SECURITIZATION ON LIND AND MURPHY – EVIDENCE EXHIBIT H

SECURITIZATION IS ILLIGAL / POINTS AND AUTHORITIES – EVIDENCE EXHIBIT I

Title: SECURITIZATION IS ILLEGAL.

AUTHOR: MICHAEL NWOGUGU, Certified Public Accountant (Maryland, USA); B.Arch. (City College Of New York). MBA (Columbia University). Attended Suffolk Law School (Boston, USA). Address: P. O. Box 170002, Brooklyn, NY 11217, USA. Phone/Fax: 1-718-638-6270. Email: **datagh@peoplepc.com**; mcn111@juno.com.

Abstract

Under US laws, securitization is illegal, primarily because its fraudulent and causes specific violations of RICO, usury, and antitrust laws. Securitization of many types of assets (loans, credit cards, auto receivables, intellectual property, etc.) has become more prevalent, particularly for financially distressed companies and companies with low or mid-tier credit ratings. This article focuses on securitization as it pertains to asset-backed securities and mortgage-backed securities, and analyzes critical legal and corporate governance issues.

Keywords:

Securitization; antitrust; RICO; constitutional law; capital markets; complexity; fraud.

Introduction

Under US laws, securitization is illegal. Indeed many authors have illustrated the deficiencies in securitization.[1] This article focuses on securitization as it pertains to asset-backed securities and mortgage-backed securities[2],[3]. The existing literature on legal

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[1] **See:** Yamazaki Kenji, What makes Asset Securitization Inefficient ? (2005); Berkeley Electronic Press, Working paper #603.
See: Steven Schwarcz, Enron And The Use And Abuse Of Special Purpose Entities In Corporate Structures, 70 U. Cin. L. Rev. 1309 (2002).
See: Carlson D. (1998). The Rotten Foundations of Securitization. William & Mary Law Review, 39:_____.
See: Lupica L (2000). Circumvention Of The Bankruptcy Process: The Statutory Institutionalization Of Securitization. Connecticut Law Review, 33: 199-210.
See: Thomas Plank, 2004, The Security of Securitization And The Future Of Security, 25 Cardozo L. Rev. 1655 (2004).

[2] On securitization, **see:** *Eastgroup Properties v. Southern Motel Association, Ltd.*, 935 F.2d 245 (11th Cir. 1991); *Union Savings Bank v. Augie/Restivo Baking Co.* (In Re Augie/Restivo Baking Co.), 860 F.2d 515 (2d Cir. 1988); In Re Bonham, 229 F.3d 750 (9th Cir. 2000); *In Re Central*

European Industrial Development Company LLC, 288 B.R. 572 (Bankr. N.D. Cal. 2003); Special Report by the TriBar Opinion Committee, Opinions in the Bankruptcy Context: Rating Agency, Structured Financing, and Chapter 11 Transactions, 46 Business Lawyer 717 (1991);
See: Sargent, Bankruptcy Remote Finance Subsidiaries: The Substantive Consolidation Issue, 44 Business Lawyer 1223 (1989).
See: *In re Kingston Square Associates*, 214 B.R. 713 (Bankr. S.D.N.Y. 1997).

On "True-sale" and "assignment" distinctions, **see**: *Major's Furniture Mart, Inc. v. Castle Credit Corporation, Inc*., 602 F.2d 538 (3rd Cir. 1979); *In re Major Funding Corporation*, 82 B.R. 443 (Bankr. S.D. Tex. 1987); *Fox v. Peck Iron and Metal Company, Inc*., 25 B.R. 674 (Bankr. S.D. Cal. 1982); *Carter v. Four Seasons Funding Corporation*, 97 S.W.3d. 387 (Ark. 2003); *A.B. Lewis Co. v. Nat'l Investment Co. of Houston*, 421 S.W.2d 723 (Tex. Civ. App. - 14th Dist. 1967); *Resolution Trust Corp. v. Aetna Casualty and Surety Co. of Illinois*, 25 F.3d 570, 578 (7th Cir. 1994); *In re Royal Crown Bottlers of North Alabama, Inc*., 23 B.R. 28 (Bankr. N.D. Ala. 1982) (addressing 'reasonably equivalent value' in transfer by parent to subsidiary); *Butner v. United States*, 440 U.S. 48 (U.S. 1979); *In re Schick*, 246 B.R. 41, 44 (Bankr. S.D.N.Y. 2000); (state law determines the extent of the debtor's interest; bankruptcy law determines whether that interest is "property of the estate").
See: Homburger & Andre, Real Estate Sale and Leaseback Transactions and the Risk of Recharacterization in Bankruptcy, 24 Real Property, Probate and Trust Journal 95, (1989).
See: *In re Integrated Health Services, Inc.,* 260 B.R. 71 (Bankr. Del. 2001).
See: *HSBC Bank v. United Air Lines*, Inc., 317 B.R. 335 (N.D. Ill. 2004).
See: Jonathan C. Lipson, Enron, Asset Securitization and Bankruptcy Reform: Dead or Dormant?, 11 J. Bankr. L. & Prac. 1 (2002).
See: Peter J. Lahny IV, Asset Securitization: A Discussion of the Traditional Bankrupt Attacks and an Analysis of the Next Potential Attack, Substantive Consolidation, 9 Am. Bankr. Inst. L. Rev. 815 (2001).
See: Lois R. Lupica, Revised Article 9, Securitization Transactions and the Bankruptcy Dynamic, 9 Am. Bankr. Inst. L. Rev. 287 (2001).
See: Lois R. Lupica, Circumvention of the Bankruptcy Process: The Statutory Institutionalization of Securitization, 33 Conn. L. Rev. 199 (2000).
See: Lois R. Lupica, Asset Securitization: The Unsecured Creditors Perspective, 76 Tex. L. Rev. 595 (1998)
See: Stephen I. Glover, Structured Finance Goes Chapter 11: Asset Securitization by the Reorganizing Companies, 47 Bus. Law 611, 627 (1992).
See: Thomas J. Gordon, Securitization of Executory Future Flows as Bankruptcy-Remote True Sales, 67 U. Chi. L. Rev. 1317, 1322-23 (2000).
See: In Re Kingston Square Assocs., 214 B.R. 713 (Bankr. S.D.N.Y. 1997)(creditors brought an involuntary petition against an SPV).

[3] On Corporate governance issues pertaining to SPVs and securitization see the following materials:
See: *In Re Buckhead America Corp*., #s 91-978 through 91-986 (Bankr. D. Del, Aug. 13, 1992); *In Re Minor Emergency Center Of Tamarac Inc*., 45 BR 310 (Bankr. SD.FL., 1985); *Revlon Inc. v. Mac Andrews & Forbes Holdings*, 506 A2d 173 (Del. 1986); *In Re Kingston Square Associates*, 214 BR 713 (Bnakr. SDNY 197).
See: Sheryl Gussset, A Not-So-Independent Director In A Bankruptcy Remote Structure, 17 Am. Bankr. Inst. J. 24 (1998). .

and corporate governance issues pertaining to securitization is extensive, but has several gaps that have not been addressed at all or sufficiently:

- Whether securitization is legal.
- Whether securitization causes usury.
- The standards for usurious loans/forbearance.
- The specific components of cost-of-capital, for purposes of assessing usury violations.
- Antitrust liability in securitization transactions.
- Federal/state RICO liability in securitization transactions.
- The constitutionality of securitization transactions.
- The validity of contracts used in effecting securitization transactions.
- Whether securitization usurps the purposes of the US bankruptcy code.

See: Roberg Dean Ellis, Securitization, Fiduciary Duties And Bondholders Rights, 24 J. Corp. L. 295 (1999).
See: Richard Graf, Use Of LLCs As Bankruptcy Proof Entities Widens, National L. J. , April 10, 1995 at B16.
See: Schwarcz Steven, Enron And The Use And Abuse Of Special Purpose Entities In Corporate Structures, 70 U. Cin. L. Rev. 1309 (2002).
See: Schwarcz, Steven, Securitization Post-Enron, 25 Cardozo L. Rev. 1539 (2004).
See: Thomas Plank, 2004 Symposium: The Security Of Securitization And The Future Of Security, 25 Cardozo L. Rev. 1655 (2004).
See: Thomas H, Effects Of Asset Securitization On Seller Claimants, Journal Of financial Intermediation, 10: 306-330.
See: Nolan, Anthony, Synthetic Securitizations And Derivatives Transactions BY Banks: Selected Regulatory Issues, Journal of Structured Finance, Fall 2006, pp. 40-46.
See: American Securitization Forum, ASF Securitization Institute: The Securitization Legal And Regulatory Framework, 2006.
See: Yamazaki, Kenji, What makes Asset Securitization “Inefficient” ? Working Paper # 603, Berkeley Electronic Press.

This article seeks to fill these significant gaps in the literature. Although the following analysis is supported with US case law, the principles derived are applicable to securitization transactions in common-law countries and civil-law countries.

In analyzing the legality of securitization, the following criteria are relevant:

- Origins and history of securitization – legislative history, evolution of securitization processes, and current practices. Carlson (1998), Janger (2002) and Lupica (2000) [4] traces the history of securitization to direct and specific efforts/collaborations to avoid the impact of US bankruptcy laws. Klee & Butler (_____) and other authors have traced the history of securitization to attempts to handle the problem of non-performing debt.
- Types of contracts used in securitization. The key criteria for enforceability.

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[4] **See**: Schwarcz S. (1999). Rethinking Freedom Of Contract: A Bankruptcy Paradigm. *Texas Law Review*, 77: 515-599.
See: Klee K & Butler B (_____). Asset-Backed Securitization, Special Purpose Vehicles And Other Securitization Issues. *Uniform Commercial Code Law Journal*, 35(2):.
***See*:** Carlson D (1998). The Rotten Foundations Of Securitization. *William & Mary Law Review*, 39:
See: Janger, Edward J, Muddy Rules For Securitizations, Fordham Journal of Corporate & Financial Law, 2002.
See: Lois R. Lupica, Circumvention of the Bankruptcy Process: The Statutory Institutionalization of Securitization, 33 CONN. L. REV. 199 (2000).
See: Steven L. Schwarcz, The Inherent Irrationality of Judgment Proofing, 52 STAN. L. REV. 1 (1999).
See: S. 420, 107th Cong. 912 (2001); H.R. 333, 107th Cong. 912 (2001)
See: Steven L. Schwarcz, The Impact on Securitization of Revised UCC Article 9, 74 Cm. - KENT L. REV. 947 (1999) ("Revised Article 9 attempts to broaden its coverage to virtually all securitized assets.").
See: Claire A. Hill, Securitization: A Low-Cost Sweetener for Lemons, 74 WASH. U. L.Q. 1061 (1996).
See: Yamazaki Kenji, What makes Asset Securitization Inefficient ? (2005); Berkeley Electronic Press, Working paper #603.
See: Saayman, Andrea, Securitization And Bank Liquidity In South Africa, Working Paper, Potchefstroom University, South Africa.
See: Sargent Patrick, Structural and Legal Issues in Commercial Mortgage Securitization Transactions, November 1, 2004.

- Purposes, wording and scope of applicable laws – state contract laws, state trusts laws, US bankruptcy code, and state/federal securities laws. The legislative intent of the US Congress in drafting and revising the US Bankruptcy Code.
- How the applicable laws are applied in securitization processes – by market participants, regulators and lawyers that represent investors.
- The people, markets, and entities/organizations affected by securitization.
- The usefulness of existing (if any), possible and proposed (if any) deterrence measures designed to reduce fraud/crime/misconduct.
- Transaction costs.
- The results and consequences of application of relevant laws.

A. Securitization Violates State Usury Laws.

Securitization violates usury laws, because the resulting effective interest rate typically exceeds legally allowable rates (set by state usury laws).[5] There is substantial disagreement (conflicts in case-law holdings) among various US court jurisdictions, and also within some judicial jurisdictions, about some issues and these conflicts have not been resolved by the US Supreme Court [6]. On these issues, even the cases for which the

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[5] See: Schwarcz S (2004). Is Securitization Legitimate ? *International Financial Law Review*, 2004 Guide To Structured Finance, pp.115.
See: Schwarcz S (2002).. The Universal Language Of International Securitization. *Duke Journal Of Comparative And International Law*, 12:285-300.
See: Frankel T (____). Cross-Border Securitization: Without Law But Not Lawless. *Duke Journal Of Comparative And International law*, 8: 255-265.
See: Kanda H (_____). Securitization In Japan. *Duke Journal Of Comparative And International law*, 8: 359-370.
See: Klee K & Butler B (_____). Asset-Backed Scuritization, Special Purpose Vehicles And Other Securitization Issues. *Uniform Commercial Code Law Review*, 35(3):23-33.
See: Higgin E & Mason J(2004). What Is The Value Of Recourse To ABS ? A Study Of The Credit Card Bank ABS Rescue. *Journal Of Banking & Finance*, 28(4):857-874.

US Supreme Court denied certiorari, vary substantially in their holdings. The issues are as follows:

1. What constitutes usury.

2. What costs should be included when calculating the effective cost-of-funds.

See: Carlson D (1998). The Rotten Foundations Of Securitization. *William & Mary Law Review*, 39:
See: Elmer P (_____). Conduits: Their Structure And Risk. *FDIC Banking Review*, pp. 27-40.
See: Dawson P (_____). Ratings Games With Contingent Transfer: A Structured Finance Illusion. Duke Journal OF Comparative & International Law, 8: 381-391.

[6] See: *Fogie v. Thorn*, 95 F3d 645 (CA8, 1996)(*cert. den.*) 520 US 1166; *Pollice v. Nationa;l Tax Funding LP*, 225 F3d 379 (CA3, 2000); *Najarro v. SASI Intern. Ltd*, 904 F2d 1002 (CA5, 1990)(*cert. den.*) 498 US 1048; *Video Trax v. Nationsbank NA*, 33 Fsupp2d 1041 (S.D.Fla., 1998)(*affirmed*) 205 F3d 1358(*cert. den.*) 531 US 822; *In Re Tammy Jewels*, 116 BR 290 (M.D.Fla., 1990); *ECE technologies v. Cherrington Corp.*, 168 F3d 201 (CA5, 1999); *Colony Creek Ltd. v. RTC*, 941 F2d 1323 (CA5, 1991)(*rehearing denied*); *Sterling Property Management v. Texas Commerce Bank*, 32 F3d 964 (CA5, 1994); *Pearcy Marinev. Acadian Offshore Services*, 832 Fsupp 192 (S.D.TX, 1993); *In Re Venture Mortgage Fund LP*, 245 BR 460 (SDNY, 2000); *In Re Donnay*, 184 BR 767 (D.Minn, 1995); *Johnson v. Telecash Inc.*, 82 FSupp2d 264 (D.Del., 1999)(*reversed in part*) 225 F2d 366 (*cert. denied*) 531 US 1145; *Shelton v. Mutual Savings & Loan Asssociation*, 738 FSupp 50 (E.D.Mich., 1990); *S.E.C. v. Elmas Trading Corporation*, 638 FSupp 743 (D.Nevada, 1987)(*affirmed*) 865 F2d 265; *contrast*: *J2 Smoke Shop Inc. v. American Commercial Capital Corp.*, 709 FSupp 422 (SDNY 1989)(cost of funds); *In Re Powderburst Corp.*, 154 BR 307 (E.D.Cal. 1993)(original issue discount); *In Re Wright*, 256 BR 626 (D.Mont., 2000)(difference between face amount and amount actually recovered or owed by debtor); *In Re MCCorhill Pub. Inc.*, 86 BR 283 (SDNY 1988); *In Re Marill Alarm Systems*, 81 BR 119 (S.D.Fla., 1987)(*affirmed*) 861 F2d 725; *In Re Dent*, 130 BR 623 (S.D.GA, 1991); *In Re Evans*, 130 BR 357 (S.D.GA, 1991); *contrast*: *In Re Cadillac Wildwood Development*, 138 BR 854 (W.D.Mich., 1992)(closing costs are interest costs); *In Re Brummer*, 147 BR 552 (D.Mont., 1992); *In Re Sunde*, 149 BR 552 (D.Minn., 1992); *Matter Of Worldwide Trucks*, 948 F2d 976 (CA5,1991)(agreement about applicable interest rate maybe established by course of conduct); *Lovick v. Ritemoney Ltd*, 378 F3d 433 (CA5, 2004); *In Re Shulman Transport*, 744 F2d 293 (CA2, 1984); *Torelli v. Esposito*, 461 NYS2d 299 (1983)(r*eversed*) 483 NYS2d 204; *Reschke v. Eadi*, 447 NYS2d 59 (NYAD4, 1981); *Elghanian v. Elghanian,* 717 NYS2d 54(NYAD1, 2000)(*leave to appeal denied*) 729 NYS2d 410 (there was no consideration in exchange for loan, and transaction violated usury laws); *Karas v. Shur*, 592 NYS2d 779 (NYAD2, 1993); *Simsbury Fund v. New St. Louis Associates*, 611 NYS2d 557 (NYAD1, 1994); *Rhee v. Dahan*, 454 NYS2d 371 (NY.Sup., 1982); *Hamilton v. HLT Check Exchange, LLP*, 987 F. Supp. 953 (E.D. Ky. 1997); *Turner v. E-Z Check Cashing of Cookeville, TN, Inc.*, 35 F.Supp.2d 1042 (M.D. Tenn. 1999); *Hurt v. Crystal Ice & Cold Storage Co.*, 286 S.W. 1055, 1056-57 (Ky. 1926); *Phanco v. Dollar Financial Group.*, Case No. CV99-1281 DDP (C.D. Cal., filed Feb. 8, 1999).
See: Van Voris, B. (May 17, 1999) "'Payday' Loans Under Scrutiny," *The National Law Journal*, page B1.

3. What types of forebearance qualify for applicability of usury laws.

4. Conditions for pre-emption of state usury laws.

Where the securitization is deemed an assignment of collateral, the effective cost-of-funds for the securitization transaction is not the advertised interest cost (investor's coupon rate) of the ABS securities but the sum of the following:

- The greater of the sponsor's/originator's annual cost-of-equity (in percentages) or the percentage annual cash yield from the collateral (in a situation where the SPV's corporate documents expressly state that the Excess Spread should be paid to the sponsor, the Excess Spread should be subtracted from the resulting percentage). The Excess Spread is defined as the Gross Cash Yield From The Collateral, minus the interest paid to investors, minus the Servicing Expense (paid to the servicer), minus Charge-offs (impaired collateral).
- **The Amortized Value Difference**. The difference between the Market Value of the collateral, and the amount raised from the ABS offering (before bankers' fees), which is then amortized over the average life of the ABS bonds (at a discount rate equal to the US Treasury Bond ate of same maturity) and then expressed as percentage of the market value of the collateral. This difference can range from 10-30% of the Market Value of the collateral, and is highest where there is a senior/junior structure, and the junior/first-loss piece serves only as credit enhancement.
- **Amortized Total Periodic Transaction Cost**. The *Pre-offering Transaction Costs* are amortized over the average life of the ABS, a rate equal to the interest

rate on an equivalent-term US treasury bond. The *Periodic Transaction Costs* are then added to the Amortized Pre-Offering Transaction Costs to obtain *Total Periodic Transaction Cost* which is expressed as a percentage of the value of the pledged collateral. The *Pre-offering Transaction Costs* include external costs (underwriters' commissions/fees, filing fees, administrative costs (escrow, transfer agent, etc.), marketing costs, accountant's fees, legal fees, etc.) and internal costs incurred solely because of the securitization transaction (costs incurred internally by the sponsor/originator - direct administrative costs, printing, etc.). The *Periodic Transaction Costs* include administrative costs, servicing fees, charge-off expenses and escrow costs.

- **Foregone Capital Appreciation.** The foregone average annual appreciation/depreciation of the value of the collateral minus the interest rate on demand deposits, with the difference expressed as a percentage of the Market Value of the collateral.

The sum of these four elements is typically greater than state-law usury benchmark rates.

Where the securitization is deemed a 'true-sale', there is an implicit financing cost which is typically usurious, because it is equal to the sum of the following:

- **Base Cost of Capital.** The greater of the sponsor's/originator's annual weighted-average-cost-of-capital, or the annual percentage yield from the collateral.

- **The Amortized Total Periodic Transaction Cost**. The *Pre-Securitization Transaction Costs* paid by the sponsor/originator and directly attributable to the offering is amortized over the life of the ABS, at a rate equal to the interest rate on an equivalent term US treasury bond, and the result (the *Amortized Pre-Securitization Costs*) is added to the *Periodic Transaction Costs* for only one period to obtain the *Total Periodic Transaction Cost*, which is then expressed as a percentage of the market value of the collateral is the *Amortized Total Periodic Transaction Cost*. The *Pre-Securitization Transaction Costs* include external costs (underwriters' commissions/fees, filing fees, administrative costs (escrow, transfer agent, etc.), marketing costs, accountant's fees, legal fees, etc.) and internal costs incurred solely because of the securitization transaction (costs incurred internally by the sponsor/originator - direct administrative costs, printing, etc.). The *Periodic Transaction Costs* include servicing fees, administrative fees, and charge-off expenses.
- **The Value Difference**. The difference between the Market Value of the collateral, and the amount raised from the ABS offering (before bankers' fees), is amortized over the average life of the ABS bonds and the result is then expressed as percentage of the Market Value of the collateral. This difference can range from 10-30%, and is highest where the senior/junior structure is used and the junior piece serves only as credit enhancement.
- **Amortized Unrealized Losses.** Any unrealized loss in the carrying amount of the collateral, is amortized over the estimated average life of the ABS, and the result for one period is expressed as a percentage of the book value of the

collateral. Most ABS collateral are recorded in financial statements at the lower-of-cost-or-market.

- **Foregone Capital Appreciation**. The foregone appreciation/depreciation of the value of the collateral minus the interest rate on demand deposits, with the difference expressed as a percentage of the market value of the collateral.

The sum of these five elements is typically greater that the state-law usury benchmark interest rates.

B. All "True-Sale", "Disguised Loan" And "Assignment" Securitizations Are Essentially Tax-Evasion Schemes.

In the US, the applicable tax evasion staute is the US Internal Revenue Code Section 7201 [7] which reads as follows: "…….*Any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, shall be fined not more than $100,000 ($500,000 in the case of a corporation), or imprisoned not more than 5 years, or both, together with the costs of prosecution*……". Under this statute and related case law, prosecutors must prove three elements beyond a reasonable doubt:

1) the "actus reus" (the guilty conduct) — which consists of an affirmative act (and not merely an omission or failure to act) that constitutes evasion or an attempt to evade either: a) the assessment of a tax or b) the payment of a tax.

2) the "mens rea' or "mental" element of willfulness — the specific intent to violate an actually known legal duty.

[7] See: 26 U.S.C. § 7201. 26 USC Subtitle F, Chapter 75. See: Cheek v. United States, 498 U.S. 192 (1991).

3) the "attendant circumstance" of the existence of a tax deficiency — an unpaid tax liability.

In the case of 'true sale' transactions, the tax evasion [8] occurs because: **a**) the sponsor determines the price at which the collateral is transferred to the SPV, and hence, can arbitrarily lower/increase the price to avoid capital gains taxes – its assumed that the sponsor is a profit-maximizing entity and will always act to minimize its tax liability and to avoid any tax assessment; **b)** the sponsor typically retains a 'residual' interest in the SPV in the form of IOs, POs and "junior piece", which are typically taxed differently and at different tax-basis compared to the original collateral - hence the sponsor can lower the price of the collateral upon transfer to the SPV, and convert what would have been capital gains, into non-taxable basis (for tax purposes) in the SPV "residual"; **c)** there is typically the requisite "intent" by the sponsor – evidenced by the arrangement of the transaction and the transfer of assets to the SPV; **d**) before securitization, collateral is typically reported in the sponsors' financial statements at book value (lower-of-cost-or-market - under both US and international accounting standards, loans and accounts receivables are typically not re-valued to market-value unless there has been some major impairment in value) which does not reflect true Market Values. and results in effective tax evasion upon transfer of the collateral to the SPV because any unrealized gain is not taxed; **e**) the Actus Reus is manifested by the execution of the securitization transaction and transfer of assets to the SPV; **f**) the Mens Rea or specific intent is manifested by the elaborate arrangements implicit in securitization transactions, the method of determination of the price of the collateral to be transferred to the SPV, the objectives of securitization, and the sponsor's transfer of assets to the SPV; **g**) the unpaid tax liability consists of foregone tax on the capital gains from the collateral (transaction is structured to avoid recognition of capital gains), and tax on any income from the collateral which is 'converted' into basis or other non-taxable forms; **h**) income (from the collateral) that would have been taxable in the sponsor's financial statements, is converted

[8] *SEC v. Towers Financial Corp. et al., 93 Civ. 744 (WK) (S.D.N.Y.)*

into non-taxable basis in the form of the SPV's interest-only (IO) and principal-only (PO) securities - part of the Interest-Spread (the difference between the SPV's income and what it pays as interest and operating costs) is paid out to PO-holders and this transforms interest into return-of-capital or just capital repayment, with no tax consequences.

In the case of 'disguised loan' or 'assignment' securitization transactions, the tax evasion occurs because: **a)** the sponsor determines the price at which the collateral is transferred to the SPV, and hence can lower/increase the price of the collateral to avoid capital gains taxes; **b**) the sponsor typically retains a 'residual' interest in the SPV which is typically taxed differently and at different tax-basis compared to the original collateral - hence the sponsor can lower the price upon transfer to the SPV, and covert what would have been capital gains, into non-taxable basis for tax purposes; **c)** the transfer of collateral to the SPV and the creation of interest-only and principal-only securities essentially converts what would have been taxable capital gains into non-taxable basis; **d)** any gain in the value of the collateral is not recognized for tax purposes, because there has not been any 'sale'; **e)** where the ABS is partly amortizing, any capital gains are converted into interest payments; **f**) the Actus Reus is manifested by the execution of the securitization transaction and transfer of assets to the SPV; **g**) the Mens Rea or specific intent is manifested by the elaborate arrangements implicit in securitization transactions, the objectives of securitization and the sponsor's transfer of assets to the SPV; **h**) the unpaid tax liability consists of tax on the capital gains from the transfer of the collateral (the transaction is structured to avoid recognition of a sale, whereas the transfer to the SPV is effectively a sale), and tax on any income from the collateral which is 'converted' into basis or other non-taxable forms (IOs and POs) , by securitization.

C. In All "True-Sale", "Disguised Loan" And "Assignment" Securitizations, The Conflict Of Interest Inherent In The Sponsor Also Serving As The Servicer, Constitutes Fraud And Conversion.

In most securitization transactions, the sponsor eventually serves as the servicer of the SPV asset pool. As servicer, the sponsor: a) determines when there has been impairment of collateral, and b) selects collateral for replacement; c) monitors collateral performance.

To prove fraud, prosecutors must prove several elements beyond a reasonable doubt:

1) **The "actus reus" (the guilty conduct)** — which consists of an affirmative act (and not merely an omission or failure to act) of misrepresentation of materials facts. In securitizations, the sponsor typically makes material mispresentations: a) the sponsor/servicer selects the assets to be transferred to the SPV, and the terms of the Offering Prospectus typically misrepresents the level of objectivity and fairness of the servicer/sponsor; b) the sponsor/servicer selects collateral for substitution where there are problems – the past and present disclosure statements and ABS offering documents materially misrepresent the sponsor/servicers objectivity/fairness.

2) **The "mens rea' or "mental" element of willfulness** — the specific intent to misrepresent the sponsor/servicer's acts, truthfulness and objectivity/fairness is manifsted by the dual role of sponsor/servicer which constitutes a conflict-of-interest. Mens Rea is also clearly inferable from the facts and circumstances - the sponsor/servicer clearly has significant economic, psychological and legal incentives to maximize its profits by: **a)** delaying substitution of collateral for as long as possible, **b)** delaying recognition of collateral impairment, and **c)** substituting impaired collateral with sub-standard collateral; all of which make the sponsor very un-suitable for the role of servicer.

3) **The reliance element**. ABS investors rely heavily on the structure/arrangements, contracts and disclosure statements in securitizations, which are relatively complex. These form the primary source of knowledge and valuation terms for the investor.

4) **The victim(s) suffers loss as a result of the misrepresentations** (direct or proximate causation). Investors suffer losses because of the sponsor's/servicer's misrepresentations of its obligations, fairness, objectivity and fiduciary duties – **a)** investors' estimates of the values of ABS are inaccurate and too high due to the servicer's/sponsor's misrepresentations, **b)** investors incur unnecessary trading costs to re-balance their portfolios as the ABS becomes riskier, **c)** investors and the sponsor/servicer incurs additional monitoring costs whenerver there is any report of impairment of collateral or substitution. Furthermore, in the ABS sales process, the underwriter makes certain representations concerning the effectiveness and predictability of the collection process. Under certain conditions, investors relying on such representations may have a securities fraud claim if the servicer fails to perform, such as in bankruptcy.

C. In All "True-Sale", "Disguised Loan" And "Assignment" Securitizations Where The SPV Is A Trust, The Declaration of Trust Is Void Because Its For An Illegal Purpose.

The declaration of trust relating to the SPV is void because the intent and purpose of the SPV is illegal and unconstitutional as described in this article and in Nwogugu (2006).

D. Off-Balance-Sheet Treatment Of ABS (Both True-Sale And Assignment Transactions) Constitutes Fraud.

Under present accounting rules in the US and most countries, if certain criteria were met, the debt raised by the SPV in securitization can be treated as off-balance sheet debt — but this requires compliance with three criteria:

(i) The SPV should be truly independent from the sponsor and of the directors, fiduciary administrative duties notwithstanding.

(ii) The sponsor's transfer of the assets to the SPV should be a "true sale" and the sponsor should not have any ongoing economic interest in the assets.

(iii) The form and substance should transparently be identical, and the structure should not appear to be illusory or deceptive.

However, this off-balance-sheet treatment criteria has been recently reformed by changes in accounting standards. The UK-based International Accounting Standards Board and the US FASB are moving towards stricter reporting standards:

- FIN 46 (FASB): Effective in 2003, FIN 46 applies only to companies subject to regulation by FASB. Its goal is to substantially tighten the criteria necessary to obtain off-balance-sheet treatment for SPVs, and its main thrust is capital adequacy. FIN 46 also imposes an obligation on originators to consolidate the accounts of an SPV (denying off-balance-sheet treatment) unless the total equity at risk is regarded as sufficient to enable the SPV to finance its own activities.
- IAS 32, IAS 39, and IFRS 7: International Accounting Standards (IAS) 32 covers the disclosure and presentation of financial instruments, but from 2007 onwards the disclosure aspects will be replaced by the introduction of International Financial Reporting Standard (IFRS) 7. IAS 39 deals with the recognition and measurement of financial instruments, and has been challenged in two aspects: introducing the concept of "fair value" accounting for financial instruments and whether SPVs should be consolidated back into the balance sheet of the originator. Like Fin 46, IAS 32 is likely to result in consolidation of most SPVs on-balance-sheet of the sponsors.
- Basel II: The proposals are aimed at the global banking industry and call for a more scientific measurement of risk and of capital requirements for banks in order to support that risk. Since the general expectation has been that, in overall terms, the proposals could require the banking industry to maintain a higher rather than lower capital base, the proposals have met resistance by many banks. The Basel Committee's rules/codes are not binding because the committee is not a regulator.

The off-balance sheet treatment of ABS debt in securitizations, constitutes fraud because:

1) **The “mens rea’ or "mental" element of willfulness** — the specific intent to misrepresent the true “Trust” nature of the SPV debt is manifsted by the elaborate arrangements and structure of the securitization transaction.

2) **The “actus reus” (the guilty conduct).** This consists of the affirmative act of misrepresentation of materials facts by not consolidating the SPV on the sponsor’s Balance Sheet. In Securitization, consolidation of the SPV in the Sponsor’s financial statements is warranted because the sponsor: **a)** typically retains a residual economic interest in the SPV; **b)** functions as servicer of the SPV asset pool – which grants the sponsor signifcant control over the assets and the SPV’s operations, **c)** determines recognition of impairment of collateral, and selects and provides assets for ‘substitution’ of collateral, **d)** typically misrepresents the level of objectivity and fairness of the servicer/sponsor in disclosure statements. Taken together, these factors and the afforementioned new/propsoed accounting standards constitute sufficient Actus Reus.

3) **The reliance element**. The sponsor’s current and prospective shareholders and other investors rely heavily on the structure/arrangements of securitizations, associated disclosure statements and assurances of off-balance sheet treatment of SPV debt in securitizations, which are relatively complex. These form the primary source of knowledge and valuation terms for the investor.

4) **The victim suffers loss as a result of the misrepresentation** (direct or proximate causation). Investors suffer loss because of the sponsor/servicer’ misrepresentations of its obligations – a) investors’ estimates of the values of the sponsor’s equity are inaccurate and too high due to the servicer’s/sponsor’s misrepresentations of the SPV debt, b) investors incur unnecessary trading costs to re-balance their portfolios as the sponsor is deemed more risky, c) the investor and the sponsor/servicer incurs additional monitoring costs whenerver there is any report of impairment of collateral or substitution.

E. All "True-Sale", "Disguised Loan" And "Assignment" Securitizations Involve Fraudulent Conveyances.

Any transfer/conveyance of a debtor's assets that is deemed to be made for the purposes of hindering, delaying or defrauding actual or potential creditors may be determined to be a fraudulent conveyance. [9] In the US, three sets of laws cover potential fraudulent conveyances:

a) Section 548 of the US Bankruptcy Code (the Code); or

b) Most states have adopted the Uniform Fraudulent Transfer Act (UFTA)[10] or the older Uniform Fraudulent Conveyance Act (UFCA); or

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[9] **See**: Schwarcz Steven, Enron And The Use And Abuse Of Special Purpose Entities In Corporate Structures, 70 U. Cin. L. Rev. 1309 (2002).
See: Schwarcz, Steven, Securitization Post-Enron, 25 Cardozo L. Rev. 1539 (2004).
See: Thomas Plank, 2004 Symposium: The Security Of Securitization And The Future Of Security, 25 Cardozo L. Rev. 1655 (2004).
See: Thomas H, Effects Of Asset Securitization On Seller Claimants, Journal Of financial Intermediation, 10: 306-330.
See: Yamazaki, Kenji, What Makes Asset Securitization "Inefficient" ? Working Paper # 603, Berkeley Electronic Press.

[10] The Uniform Fraudulent Transfer Act reads as follows:
SECTION 4. TRANSFERS FRAUDULENT AS TO PRESENT AND FUTURE CREDITORS:
(a) A transfer made or obligation incurred by a debtor is fraudulent as to a creditor, whether the creditor's claim arose before or after the transfer was made or the obligation was incurred, if the
(1) with actual intent to hinder, delay, or defraud any creditor of the debtor; or
(2) without receiving a reasonably equivalent value in exchange for the transfer or obligation, and the debtor: (i) was engaged or was about to engage in a business or a transaction for which the remaining assets of the debtor were unreasonably small in relation to the business or transaction; Or (ii) intended to incur, or believed or reasonably should have believed that he [or she] would incur, debts beyond his [or her] ability to pay as they became due.

(b) In determining actual intent under subsection (a)(1), consideration may be given, among other factors, to whether:
(1) the transfer or obligation was to an insider;
(2) the debtor retained possession or control of the property transferred after the transfer;
(3) the transfer or obligation was disclosed or concealed;
(4) before the transfer was made or obligation was incurred, the debtor had been sued or threatened with suit;
(5) the transfer was of substantially all the debtor's assets;
(6) the debtor absconded;
(7) the debtor removed or concealed assets;

c) Fraudulent Transfers claims can also be made under a theory of constructive fraud, in which circumstantial evidence may warrant a finding that fraudulent transfers were made with the primary purpose of shielding assets from current or future creditors. Although each state has its own laws regarding the appropriate elements of proof of constructive fraud, Section 548(a)(2) of the US Bankruptcy Code permits an inference of constructive fraud if the following factors exist: 1) the debtor received less than reasonably equivalent value for the property transferred; and 2) the debtor either: was insolvent or became insolvent as a result of the transfer, retained unreasonably small capital after the transfer, or made the transfer with the intent or belief that it would incur debts beyond its ability to pay.

The following are various theories of fraudulent conveyance within the context of securitization.

E1. Sponsor/Originator Receives Insufficient Value For Assets Transferred.

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(8) the value of the consideration received by the debtor was reasonably equivalent to the value of the asset transferred or the amount of the obligation incurred;

(9) the debtor was insolvent or became insolvent shortly after the transfer was made or the obligation was incurred;

(10) the transfer occurred shortly before or shortly after a substantial debt was incurred; and

(11) the debtor transferred the essential assets of the business to a lienor who transferred the assets to an insider of the debtor.

Under both the US Bankruptcy Code and UFTA (Section 544 of the US Bankruptcy Code also allows unsecured creditors to sue in Federal Bankruptcy Court using applicable state), judges must determine whether there has been fraudulent conveyance. Courts have developed a series of factors as criteria for proving the requisite intent. The factors to be considered ("badges of fraud") in determining where there has been fraudulent conveyance include:

- Whether the transfer represented substantially all of the debtor's assets.
- Whether the transfer was made around the time a substantial debt was incurred.
- Whether the debtor received reasonable consideration equivalent to the value of the assets conveyed or the obligation incurred.
- Whether the debtor became insolvent soon after the transfer.
- Whether the transfer was made to insiders or family members.
- Whether the transfer or the assets were concealed

All 'true sale" and 'assignment' securitizations involve fraudulent conveyances (as defined in the US Bankruptcy Code and the Uniform Fraudulent Transfer Act) because the originator typically receives insufficient value for assets that it transfers to the SPV[11],[12]**:**

i) horizon mismatch – in the case of receivables and fixed income assets, since the originator/sponsor sells these assets before their maturities, their effective yields and values are much lower than their stated yields, and hence, the originator receives less-than-normal value for assets transferred.

ii) the Originator always incurs substantial cash and non-cash transaction costs in such transfers, which reduces the net-value it receives from the transfer to the SPV – these costs include legal fees, accounting fees, underwriting fees, monitoring costs, administrative costs, regulatory compliance costs, capital-budgeting costs (the decision to

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[11] **See:** Roman Dan, Sarlito M & Mukhtiar A (Winter 2007). Risks to Consider When Purchasing Technology-based IP for Securitization. Working Paper.
See: Nolan Anthony, Synthetic Securitizations and Derivatives Transactions by Banks: Selected Regulatory Issues. The Journal of Structured Finance, Fall 2006.
See: Lucas Douglas, Goodman Laurie & Fabozzi Frank, Hybrid Assets in an ABS CDO: Structural Advantages and Cash Flow Mechanics, Journal Of Structured Finance (Fall 2006).
See: Prince, Jeffrey, A General Review of CDO Valuation Methods. Journal Of Structured And Project Finance (Summer 2006).

[12] **See:** Peter V. Pantaleo et al., Rethinking the Role of Recourse in the Sale of Financial Assets, 52 Bus. Law. 159, 159-63 (1996)(discussing types of permissible and impermissible recourse for sale treatment).
See: Thomas E. Plank, The True Sale of Loans and the Role of Recourse, 14 GEO. MASON L. Rev. 287 (1991).
See: Gordon T (2000). Securitization Of Executory Future Flows As bankruptcy-Remote True Sales. *University Of Chicago Law Review*, 67:1317-1322.
See: Higgin E & Mason J (2004). What Is The value of Recourse To Asset-Backed Securities ? A Study Of Credit Card Bank ABS Rescues. *Journal Of Banking & Finance*, 28(4); 857-874.

securitize has inherent negotiation costs, conflict costs and resource allocation costs), etc.;

iii) in these asset transfers, the Originator looses all the future appreciation of the transferred assets – the transfers are done at book values or stated adjusted costs – the asset valuation for the transfers don't consider future increases in asset value, and hence are an implicit undervaluation.

iv) where the assets transferred have residual values (as in computer leases and equipment leases), the originator often cannot accurately calculate such residual values accurately and does not incorporate them in asset valuation, and looses such residual value, and hence, receives less than normal value for the assets transferred; **v**) in some securitizations, the Originator's transfer of assets to the SPV is backed by recourse (to the originator's assets) and such recourse has economic value that reduces the net-value that the Originator receives from the transfer – Higgin & Mason (2004), Pantaleo et al (1996) and Plank (1991) [13] describe the basis for the value of such recourse.

vi) Where the Originator/sponsor is financially distressed, securitization is often the chosen form of financing, and under fraudulent conveyance laws, securitizations are illegal because, 1) securitizations increase the bankruptcy risk of the Originator/sponsor,

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[13] **See:** Peter V. Pantaleo et al., Rethinking the Role of Recourse in the Sale of Financial Assets, 52 Bus. Law. 159, 159-63 (1996)(discussing types of permissible and impermissible recourse for sale treatment);
See: Thomas E. Plank, The True Sale of Loans and the Role of Recourse, 14 GEO. MASON L. Rev. 287 (1991).
See: Higgin E & Mason J (2004). What Is The value of Recourse To Asset-Backed Securities ? A Study Of Credit Card Bank ABS Rescues. *Journal Of Banking & Finance*, 28(4); 857-874.
See: Lois R. Lupica, Revised Article 9, Securitization Transactions and the Bankruptcy Dynamic, 9 AM. BANKR. INST. L. REV. 287, 291-92 (2001).
See: Carol M. Rose, Crystals and Mud in Property Law, 40 STAN. L. REV. 577, 600 (1988).
See: Louis Kaplow, Rules Versus Standards: An Economic Analysis, 42 DuKE L.J. 557 (1992).

2) the distressed company's assets are typically valued at higher interest rates (which yield lower asset values) and hence, the originator looses value in the transfers.

vii) the originator's/sponsor's net-cash proceeds from the securitization transaction is often significantly less than either the pre-transaction carrying value of the collateral, or the net realizable value of the collateral (liquidation value in a supervised open auction) – primarily because of transaction costs, over-collateralization, etc..

E2. "Intent To Hinder, Delay Or Defraud Creditors"– Implicit Pre-Petition Waiver Of Right To File For Bankruptcy.

All 'true-sale", "Disguised Loan" and "Assignment" securitizations involve fraudulent conveyances (as defined in the US Bankruptcy Code and the Uniform Fraudulent Transfer Act) because as described in this article, such securitizations are the equivalent of illegal pre-petition waivers of the right to file bankruptcy, and the waiver of the bankruptcy stay – all of which are sufficient evidence of "intent to hinder, delay, or defraud any creditor of the debtor", which is the major element of fraudulent conveyance under the UFTA and the US Bankruptcy Code.

E3. "Intent To Hinder, Delay Or Defraud Creditors" – Originator's Transfer Of Assets To SPV.

All 'true-sale", "Disguised Loan" and "Assignment" securitizations are fraudulent conveyances (as defined in the US Bankruptcy Code and the Uniform Fraudulent Transfer Act) because the originator's/sponsor's mere act of transferring assets to an SPV reduces the values of any of its un-secured creditor's claims – ie. trade creditors, holders of unsecured loans, holders of certain preferred stock, etc.. [14] Without such

[14] **See:** Yamazaki, Kenichi, What makes Asset Securitization "Inefficient" ?,2005. Working Paper #603, Berkeley Electronic Press.

transfers, un-secured creditors would have had access to such assets. This is sufficient evidence of "intent to hinder, delay or defraud" existing creditors.

E4. "Intent To Hinder, Delay Or Defraud" Creditors – Originator's Transfer Of Assets To SPV Is Not Done In Arms-Length Transactions.

The originator's transfer of assets to the SPV via a "true sale" or "assignment" is typically not done in arms-length transactions. Most originators have substantial influence/control over the valuation of collateral, the selection of the appraiser/valuers, the choice of appraised collateral, the corporate form and life of the SPV, and the selection of the officers/trustees of the SPV. Hence, the originator can manipulate the values of collateral for accounting and economic purposes. The originator typically creates, funds and staffs the SPV – hires the SPV's officers and directors and determines the SPV's corporate governance policies. The combination of such excessive control, and the originator's transfer of assets to the SPV is prima facie evidence of 'intent to hinder, delay or defraud' the originator's existing and future creditors.

E5. Securitization Increases The Originator's Bankruptcy Risk

Securitization can increase the bankruptcy risk of an originator [15], where: **a)** the cash proceeds from the securitization transaction are significantly less than either the carrying value of the collateral, or the net realizable value of the collateral (liquidation value in a supervised auction); or **b)** management reinvests the cash proceeds of securitization in projects that yield returns that are less than what the collateral would have yielded or less than the company's cost of debt.

[15] **See:** Yamazaki (2005), supra.

Securitization via assignments or 'disguised loans' increases the risk of the originator/sponsor, and also increases its post-transaction cost of capital primarily because: **a**) the amount raised is less than the assets pledged, **b**) the pledge of assets to the SPV reduces the originator's borrowing capacity and financial flexibility, **c**) the pledge of assets to the SPV reduces the originator's ability to repay other debt. Hence, the originator/sponsor looses value in the transfer of assets to the SPV.

F. Securitization Usurps US Bankruptcy Laws And Hence, Is Illegal.

Securitization undermines US federal bankruptcy policy, because its used (in lieu of secured financing) as a means of avoiding certain bankruptcy-law restrictions [16] - the origins of

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[16] **See**: Schwarcz (2002), supra.
See: Schwarcz (2004), supra.
See: Klee & Butler, supra.
See: Lipson J C (2002). Enron, Asset Securitization And Bankruptcy Reform: Dead or Dormant ? *Journal Of Bankruptcy Law & Practice*, 11: 1-15.
See: Lupica L (2001). Revised Articles Nine, Securitization Transactions And The Bankruptcy Dynamic. *American Bankruptcy Institute Law Review*, 9:287-299.
See: Garmaise M (2001). Rational Beliefs And Security Design. *Review Of Financial Studies*, 14(4):1183-1213.
See: David A (1997). Controlling Information Premia By Repackaging Asset Backed Securities. *Journal Of Risk & Insurance*, 64(4):619-648.
See: DeMarzo P (2005).. The Pooling And Tranching Of Securities: A Model Of Informed Intermediation. *Review Of Financial Studies*, 18(1):1-35.
See: Report By The Committee On Bankruptcy And Corporate Reorganization Of The Association Of The Bar Of The City Of New York (2000). New Developments In Structured Finance. *The Business Lawyer*, 56: 95-105.
See: Lupica L (2000). Circumvention Of The Bankruptcy Process: The Statutory Institutionalization Of Securitization. *Connecticut Law Review*, 33:199-209.
See: Glover S (1992). Structured Finance Goes Chapter Eleven: Asset Securitization By The Reorganizing Companies. *The Business Lawyer*, 47:611-621.
See: Gordon T (2000). Securitization Of Executory Future Flows As bankruptcy-Remote True Sales. *University Of Chicago Law Review*, 67:1317-1322.
See: Elmer P (____). Conduits: Their Stricture And Risk. *FDIC Banking Review*, pp.27-40. Available at http://www.lebow.drexel.edu/mason/fin650.elmer.pdf.
See: Lois R. Lupica, Revised Article 9, Securitization Transactions and the Bankruptcy Dynamic, 9 AM. BANKR. INST. L. REV. 287, 291-92 (2001).
See: Steven L. Schwarcz, The Inherent Irrationality of Judgment Proofing, 52 STAN. L. REV. 1 (1999).

securitization in the US can be traced directly to efforts by banks and financial institutions to avoid bankruptcy law restrictions.

An analysis of the legislative intent of the US Congress with regard to the US Bankruptcy Code confirms that securitization contravenes most policies of the US Bankruptcy Code [17]. These policies include: **a**) recognition of financial distress, **b**) stay of bankruptcy proceedings, **c**) determination of claims and priorities of security interests; **d**) fair division of value; **e**) the continuance or liquidation decision, **f**) efficient reorganization.

In most cases, Insolvency often occurs before management decides to file for bankruptcy. Many firms that are either financially distressed and or technically insolvent continue to operate as if they are normal companies, and enter into securitization transactions – often securitization enables them to reduce the effect of actual and or perceived low credit ratings.

See: Lynn M. LoPucki, The Irrefutable Logic of Judgment Proofing: A Reply to Professor Schwarcz, 52 STAN. L. REV. 55 (1999).
See: Steven L. Schwarcz, The Impact on Securitization of Revised UCC Article 9, 74 Cm. - KENT L. REV. 947 (1999) ("Revised Article 9 attempts to broaden its coverage to virtually all securitized assets.").
See: Christopher W. Frost, Asset Securitization and Corporate Risk Allocation, 72 TuL. L. REV. 101 (1997);
See: Claire A. Hill, Securitization: A Low-Cost Sweetener for Lemons, 74 WASH. U. L.Q. 1061 (1996).
See: Steven L. Schwarcz, Judgment Proofing: A Rejoinder, 52 STAN. L. REV. 77 (1999).

[17] **See**: Reams B & Manz W (eds.), FEDERAL BANKRUPTCY LAW: A LEGISLATIVE HISTORY OF THE BANKRUPTCY REFORM ACT OF 1994.
See: The Legislative History of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005; (FRB Leg. Hist); (S. 256 -LoC); Pub. L. 109-8, April 20, 2005, 119 Stat, 23. http://www.llsdc.org/sourcebook/leg-hist.htm
See: Bankruptcy *Reform Act of 1978: A Legislative History*, Hein.
See: *Federal Bankruptcy Law: A Legislative History of The Bankruptcy Act of 1994*; Pub. L. No. 103-394, 108 Stat. 4106, including the National Bankruptcy Commission Act and Bankruptcy Amendments (1987-1993).
See: Ahern, Lawrence (Spring 2001). "Workouts" Under Revised Article Nine: A Review Of Changes And Proposal For Study. *American Bankruptcy Institute Law Review*, 9:115-125.
See: Ribstein, Larry & Kobayashi, Bruce (1996). An Economic Analysis Of Uniform State Laws. *Journal Of Legal Studies*, 25(1):131-199.

Securitization is often a major strategic choice for financially distressed companies. [18] Under the US Internal Revenue Tax Code, securitization qualifies as a reorganization. The underlying issues are as follows.

F1. Implicit Waiver Of Right To File For Bankruptcy And Or Stay.

Securitization involves an implicit (and often express) waiver of the debtor's/Originator's/sponsor's right to file for voluntary bankruptcy. This is achieved by using a bankruptcy-remote SPV and segregating the assets that otherwise would have been part of the bankruptcy estate. [19],[20] Securitization involves an implicit (and sometime express) waiver of the

[18] **See:** Ashta A & Tolle L (200). Criteria For Selecting Restructuring Strategies For Distressed Or Declining Enterprises. *Cahners Du Ceren*, 6:1-20.

See: Carlson D (1998). The Rotten Foundations Of Securitization. *William & Mary Law Review*, 39: .
See: Higgin E & Mason J (2004). What Is The value of Recourse To Asset-Backed Securities ? A Study Of Credit Card Bank ABS Rescues. *Journal Of Banking & Finance*, 28(4); 857-874.
See: *Albany Insurance v. Esses*, 831 F2d 41 (CA2, 1987)(making false statements about value of asset was a "predicate act"); *Howell Hydrocarbons v. Adams*, 897 F2d 183 (CA5 1990)(under federal RICO statutes, making a company look solvent when its not, constitutes a 'predicate act'); *Matter of Lewisville Properties*, 849 F2d 946 (CA5, 1988)(under federal RICO, false pretenses constitutes 'predicate acts").
See: Bens D & Monahan S (Feb. 2005). *Altering Investment Decisions To Management Financial Reporting Outcomes: Asset Backed Commercial Paper Conduits And FIN 46*. Working Paper.

[19] In the following cases, courts held that pre-petition waivers of the right to file for voluntary/involuntary bankruptcy, were unenforceable. *See*: *In Re Huang*, 275 F3d 1177 (CA9, 2002)(its is against public policy for a debtor to waive the pre-petition protection of the Bankruptcy Code); *In Re South East Financial Associates*, 21 BR 1003 (M.D.Fla, 1997); *In Re Tru Block Concrete Products Ins*, 27 BR 486 (E.D.Pa., 1995)(advance agreement to waive the benefits of bankruptcy law is void as against public policy); *In Re Madison*, 184 BR 686, 690 (E.D.Pa, 1995)(even bargained-for and knowing waivers of the right to seek bankruptcy protection must be deemed void); *In Re Club Tower LP*, 138 BR 307 at 312 (N.D.Ga, 1991); In Re Graves, 212 BR 692 (BAP, CA1, 1997); In Re pease, 195 BR 431 (D.Neb., 1996); *In Re Jenkins Court Associates Ltd. Partnership*, 181 BR 33 (E.D.Pa., 1995); *In Re Sky Group International Inc.*, 108 BR 86 (W.D.Pa., 1989); *Association of St.Croix Condominium Owners v. St. Croix Hotel Corp*., 692 F2d 446 (CA3, 1982). But c*ontrast*: *In Re University Commons LP*, 200 BR 255 (M.D.Fla.)(debtors agreement that in the event debtor enters bankruptcy proceedings, the secured lender shall be entitled to court order dismissing the case as 'bad faith' filing an determining that: (i) no rehabilitation or reorganization is possible, and ii) dismissing all

creditor/ABS-investor's right to file for involuntary bankruptcy[21], [22] – US courts have repeatedly

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proceedings is in the best interests of parties and all other creditors, is binding*); In Re Little Creek Development*, 779 F2d 1068 (CA5, 1986).

See: 124 Congr. Record H 32, 401 (1978).

[20] There are several cases that hold that pre-petition waivers of the right to file for voluntary/involuntary bankruptcy, are enforceable: *In Re Shady Grove tech Center Associates Limited Partnership*, 216 BR 386 (D.Md., 1998)(waiver of the right to file for bankruptcy is unenforceable)(*opinion supplemented*) 227 BR 422 (D.Md., 1998); *In Re Atrium High Point Ltd. partnership*, 189 BR 599 (MDNC 1995); *In Re Darrell Creek Associates*, 187 BR 908 (DSc, 1995); *In Re Cheeks*, 167 BR 817 (D.Sc, 1997); *In Re McBride Estates*, 154 BR 339 (N.D.Fla., 1993); *In Re citadel Properties*, 86 BR 275, MD.Fla., 1988); *In Re Gulf Beach Development Corp*., 48 BR 40 (M.D.Fla., 1985). However, these cases are very distinguishable from standard securitization transactions because the following characteristics/conditions existed in these cases: a) they involve only single-asset entities, b) these entities had no employees, c) the timing of filing of bankruptcy petition indicates an intent to delay or frustrate creditors' proper efforts to enforce their rights after a workout had failed, d) there were no or few unsecured non-insider creditors (those existing had small claims); e) there was no realistic chance of rehabilitation or reorganization; f) the assets did not produce any cash flow.

[21] See cases cited in Notes 5, 6, 19 and 20.

[22] On pre-petition waivers of right to file for bankruptcy and waivers of bankruptcy stays, s**ee:** *In re Huang*, 275 F.3d 1173, 1177 (9th Cir. 2002) ("It is against public policy for a debtor to waive the pre-petition protection of the Bankruptcy Code."); *In re Shady Grove Tech Center Assocs. Limited Partnership*, 216 B.R. 386, 389 (Bankr. D. Md. 1998) ("The courts have uniformly held that a waiver of the right to file a bankruptcy case is unenforceable."); *In re Tru Block Concrete Prods., Ins*., 27 B.R. 486, 492 (Bankr. E.D. Pa. 1995) (advance agreement to waive the benefits conferred by bankruptcy law is void as against public policy); *In re Madison*, 184 B.R 686, 690 (Bankr. E.D. Pa. 1995)(even bargained-for and knowing waivers of the right to seek bankruptcy protection must be deemed void); *In re Club Tower L.P*., 138 B.R. 307, 312 (Bankr. N.D. Ga. 1991); *In re Orange Park S. Partnership*, 79 B.R. 79, 82 (Bankr. M.D. Fla. 1987); *In re Aurora Invs*., 134 B.R. 982, 985 (Bankr. M.D. Fla. 1991)(debtor's agreement that petition, if filed, would be in "bad faith" if its primary purpose is to delay foreclosure sale, is binding); *In re University Commons, L.P.,* 200 B.R. 255, 259 (Bankr. M.D. Fla. 1996) (debtor's agreement that in the event debtor becomes subject of bankruptcy case secured lender shall be entitled to order dismissing case as "bad faith" filing and determining that (i) no rehabilitation orreorganization is possible, and (ii) dismissing all proceedings is in the best interest of parties and all other creditors, is binding); *In Re Little Creek Dev. Co*., 779 F.2d 1068, 1073 (5th Cir. 1986). 47212 B.R. 1003, 1005 (Bankr. M.D. Fla. 1997).
See: 124 Cong. Rec. H 32, 401 (1978) ("The explicit reference in Title-11 forbidding the waiver of certain rights is not intended to imply that other rights, such as the right to file a voluntary bankruptcy case under section 301, maybe waived.").

See: Klee, Kenneth & Butler, Brendt (_____), *Asset-backed Securitization, Special Purpose Vehicles And Other Securitization*. Working Paper. Cases that enforced pre-petition waivers of the automatic stay focus upon: (i) the financial sophistication of the borrower; (ii) the creditor's demonstration that significant consideration was given for the pre-petition waiver; (iii) the effect

of the enforcement of the pre-petition waiver upon other parties having legitimate interests in the outcome; (**iv**) circumstances of the parties at the time enforcement of the pre-petition waiver is sought; (**v**) the enforcement of the pre-petition waiver being consistent with public policy of encouraging out of court restructurings and settlements with creditors; and (**vi**) other indicia which support granting relief from stay, such as "bad faith" criteria (i.e. single-asset case, two-party dispute, long history of pre-petition workouts, newly formed entity, filing on eve of foreclosure, no ongoing business to reorganize, few employees, no unencumbered funds, etc.). Cases that held that pre-petition stay waivers were enforceable include: *In Re Shady Grove Tech Ctr. Assocs., L.P.*, 216 B.R.386, 390 (Bankr. D. Md. 1998); *In Re Atrium High Point L.P.*, 189 B.R. 599, 607 (Bankr. M.D.N.C. 1995); *In Re Darrell Creek Assocs.*, L.P., 187 B.R. 908, 910 (Bankr. D.S.C. 1995); *In Re Cheeks*, 167 B.R. 817, 818 (Bankr. D.S.C. 1994); *In Re Powers*, 170 B.R. 480, 483 (Bankr. D. Mass. 1994); *In Re McBride Estates, Ltd.,* 154 B.R. 339, 343 (Bankr. N.D. Fla. 1993); *In Re Citadel Properties, Inc.*, 86 B.R. 275, 276 (Bankr. M.D. Fla. 1988); *In Re Gulf Beach Development Corp.*, 48 B.R. 40, 43 (Bankr. M.D. Fla. 1985). Several courts, however, have refused to enforce pre-petition waivers for any of the following reasons: (i) the pre-petition waiver is the equivalent to an ipso facto clause; (ii) such clause is void as against public policy by depriving the debtor of the use and benefit of property upon the filing of a bankruptcy case; (iii) the borrower lacks the capacity to act on behalf of the debtor in possession; (iv) the debtor has a business with a reasonable chance at reorganization and enforcement of the waiver would otherwise prejudice third-party creditors; (v) the automatic stay is designed to protect all creditors and may not be waived by the debtor unilaterally to the detriment of creditors; and (vi) the waiver was obtained by coercion, fraud or mutual mistake of facts. Courts that have refused to enforce pre-petition waivers of the automatic stay have reasoned that the automatic stay protects not only debtors but also other creditors. US Courts disagree sharply about the utility, benefits and desirability of the enforcement of pre-petition waivers, and relevant criteria. Some courts have held that a pre-petition automatic stay waiver may be considered as a factor in determining whether cause exists for relief from the stay. See: *In Re Darrell Creek Assocs.*, L.P., 187 B.R. 908, 913 (Bankr. D.S.C. 1995) ("out of court workouts are to be encouraged and are often effective"); *In Re Cheeks*, 167 B.R. 817, 819 (Bankr. D.S.C. 1994) ("the most compelling reason for enforcement of the forbearance agreement is to further the public policy in favor of encouraging out of court restructuring and settlements"); *In Re Club Tower L.P.*, 138 B.R. 307, 312 (Bankr. N.D. Ga. 1991) ("enforcing pre-petition settlement agreements furthers the legitimate public policy of encouraging out of court restructurings and settlements"). Cases holding pre-petition automatic stay waivers unenforceable include: *In Re Southeast Financial Assocs., Inc.*, 212 B.R. 1003, 1005 (Bankr. M.D. Fla. 1997); *In Re Graves*, 212 B.R. 692, 694 (B.A.P. 1st Cir. 1997); *In Re Pease*, 195 B.R. 431, 433 (Bankr. D. Neb. 1996); *In Re Jenkins Court Assocs. L.P.*, 181 B.R. 33, 37 (Bankr. E.D. Pa. 1995);*Farm Credit of Cent. Fla., ACA v. Polk,* 160 B.R. 870, 873-74 (M.D. Fla. 1993); *Farm Credit of Cent. Fla., ACA v. Polk*, 160 B.R. 870, 873-74 (M.D. Fla. 1993)("The policy behind the automatic stay is to protect the debtor's estate from being depleted by creditor's lawsuits and seizures of property before the debtor has had a chance to marshal the estate's assets and distribute them equitably among creditors."); *In Re Sky Group Int'l, Inc.*, 108 B.R. 86, 89 (Bankr. W.D. Pa. 1989) ("To grant a creditor relief from stay simply because the debtor elected to waive the protection afforded the debtor by the automatic stay ignores the fact that it also is designed to protect all creditors and to treat them equally") (citing *Assoc. of St. Croix Condominium Owners v. St. Croix Hotel Corp.*, 682 F.2d 446 (3d Cir. 1982)). **Also see**: *In re Shady Grove Tech Ctr. Assocs., L.P.*, 216 B.R. 386, 393-94 (Bankr. D. Md. 1998); *In re S.E. Fin. Assocs., Inc.*, 212 B.R. 1003, 1005 (Bankr. M.D. Fla. 1997); *In re Darrell Creek Assocs., L.P.*, 187 B.R. 908, 910 (Bankr. D.S.C. 1995); In re Powers, 170 B.R.

held that such waivers are void as against public policy. In the absence of securitization, this same investors/creditors would have been a creditor/lender to the sponsor/originator. This implicit waiver is achieved by using an SPV and segregating the assets that otherwise would have been part of the bankruptcy estate; and by various forms of credit enhancement. Without the automatic stay of the bankruptcy code, the debtor/sponsor would not need to transfer assets to an SPV – Carlson (1998) traces the history of securitization to direct and specific efforts/collaborations to avoid the impact of US bankruptcy laws.[23]

Furthermore, there is a distinct difference of opinions among US courts about the enforceability of pre-petition waivers (of rights to file for voluntary or involuntary bankruptcy) which has not been resolved by the US Supreme Court [24] – however, the standard securitization processes differ substantially from the conditions in cases where the courts held that pre-petition waivers (or rights to file for bankruptcy) were un-enforceable.

480, 483 (Bankr. D. Mass. 1994); *In re Cheeks*, 167 B.R. 817, 819 (Bankr. D.S.C. 1994); *In Re Shady Grove Tech Ctr. Assocs., L.P.*, 216 B.R. 386, 393-94 (Bankr. D. Md. 1998) (granting stay relief for cause based upon finding which included debtor's pre-petition agreement not to contest request for stay relief given as part of pre-petition restructuring in which debtor was afforded substantial consideration).

See: Steven L. Schwarcz, Rethinking Freedom of Contract: A Bankruptcy Paradigm, 77 Tex. L. Rev. 515 (1999).
See: *In Re Club Tower L.P.*, 138 B.R. 307, 311-12 (Bankr. N.D. Ga. 1991).

[23] See: Schwarcz S. (1999). Rethinking Freedom Of Contract: A Bankruptcy Paradigm. *Texas Law Review*, 77: 515-599.

See: Klee K & Butler B (_____). Asset-Backed Securitization, Special Purpose Vehicles And Other Securitization Issues. *Uniform Commercial Code Law Journal*, 35(2):.

See: Carlson D (1998). The Rotten Foundations Of Securitization. *William & Mary Law Review*, 39:

[24] See notes 5, 6, 19 and 20, *supra*.

F2. The US Bankruptcy Code Expressly Invalidates Certain Pre-filing Transfers

Sections of the US bankruptcy code that expressly invalidate certain types of pre-filing transfers, payments and transactions (that occur within a specific time period before the filing of bankruptcy). Most securitizations fall under the classes of voidable pre-flinging transfers. Hence under these foregoing circumstances/conditions, bankruptcy laws and associated principles are implicated and apply where the firm has not filed for bankruptcy. Therefore, any pre-bankruptcy-filing transactions that invalidate or contravene the principles of bankruptcy codes are illegal. The bankruptcy-remoteness characteristic of securitizations prevents the efficient functioning of bankruptcy law.

G. New Theories Of The Effects Of Securitization On Bankruptcy Efficiency

The following are new theories that explain how securitization contravenes the principles of US bankruptcy laws.

G1. The *Illegal Wealth-Transfer Theory*

Securitization can result in fraudulent conveyance and illegal wealth transfer where the transaction effectively renders the originator/issuer company technically insolvent; or fraudulently transfers value to the SPV (in the form of low collateral values) and then to the ABS/MBS bond holders (in the form of low bond prices, and or high interest rates). [25] Courts have held that stripping a company of the ability to pay judgment claims is a 'predicate act' that is actionable under federal RICO statutes[26]. Securitization can also result in illegal wealth

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[25] *See*: Shakespeare C (20030. *Do Managers Use Securitization Volume And Fair Value Estimates To Hit Earning Targets* ? Working Paper, University Of Michigan (School Of Business)
See: Shakespeare C (2001). *Accounting For Asset Securitizations: Complex Fair Values And Earnings Management.* Working Paper, University Of Michigan.

[26] *Wooten v. Loshbough*, 649 Fsupp 531 (N.D.Ind. 1986)(*on reconsideration*) 738 Fsupp 314 (*affirmed*) 951 F2d 768 (under federal RICO statutes, stripping of company's ability to pay judgment claim was 'predicate act').

transfers to the intermediary bank where it retains a residual interest in the Trust/SPV (residual securities) or is over-compensated (excessive cash fees, trustee positions, underwriter is granted a percentage of securities offered, etc.).

G2. *The Priority-Changing Theory* –

To the extent that bankruptcy laws are designed to facilitate rehabilitation of troubled companies, and increase efficient allocation of debtor assets to creditors, securitization enables the debtor to defeat the Absolute-Priority principle; and to effectively re-arrange priorities of claims, particularly where the debtor/originator does not have any secured claims (but has only un-secured claims). This is achieved by securitizing un-encumbered assets and using credit enhancement to provide higher-quality securities (the equivalent of higher priority) to other creditors.

G3. The Facilitation Of Inefficient-Continuance Theory:

Securitization enables the debtor/originator to change the progression of financial distress, by supplying cash that typically lasts for short periods of time, and often at a high effective cost of funds. This implicates the principles of 'inefficient continuance' (where an otherwise non-viable company that should be liquidated, sold/merged or substantially reorganized, continues to operate solely as a result of short-term solutions and or bankruptcy court orders), and hence, the sections of the Sarbanes-Oxley Act ("SOX") - which require certification of solvency of the company and adequacy of internal controls, and also carry criminal penalties for non-compliance. [27] The question of whether 'inefficient continuance' has occurred is a matter of law that should be decided by judges. Thus, all else remaining constant, where the necessary elements occur, (a securitization and 'inefficient continuance' and management's certification of solvency and adequate internal controls), management and the company become criminally liable.

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[27] *See*: Kulzick R (2004). Sarbanes-Oxley: Effects on Financial Transparency. *S.A.M. Advanced Management Journal*, 69(1): 43-49.

G4. *The Information-Content Effect Theory* –

Securitization changes and distorts the perceived financial position of the originator/sponsor, because various forms of credit enhancement (senior/junior pieces, loan insurance, etc.) are used to achieve a high credit rating for the SPV – which may be mis-construed by stock-market investors as evidence of good prospects for the originator-company. To the extent that all securities offerings have relevant information content and associated signaling, then securitization by financially distressed companies effectively conveys the wrong signals to capital markets and hence, changes the expectations of creditors and shareholders (and in the case of bankruptcy, makes it more difficult to efficiently form consensus on a plan of reorganization once the bankruptcy petition is filed). In this realm, investor and creditor expectations are critical and have utility value and typically form the basis for investment/disinvestment and for negotiations about restructuring or plan of reorganization. Courts have held that persons that create false impressions about the financial condition of a company are potentially liable under federal RICO statutes. [28]

G5. *Avoidance Theory* –

To the extent that securitzation defers or eliminates a potential creditor's rights to file for involuntary bankruptcy, then securitization can be deemed to be fraudulent, and gives rise to criminal causes of action such as deceit, conversion, etc. The creditor's right to file for a debtor's involuntary bankruptcy is a valid property right that arises from state property law, state contract law, state constitutional laws, and federal bankruptcy laws. [29] Deprivation of, or interference with this property right is a violation of the US constitution. Securitization can defer or eliminate this

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[28] *See*: *Albany Insurance v. Esses*, 831 F2d 41 (CA2, 1987)(under federal RICO statutes, making false statements about the value of asset was a 'predicate act"); *Howell Hydrocarbons v. Adams*, 897 F2d 183 (CA5 1990)(under federal RICO statutes, making a company look solvent when its not, constitutes a 'predicate act').

[29] *See*: *Lockheed Martin v. Boeing*, 357 Fsupp2d 1350 (M.D.Fla., 2005)(bidder violated competitor's property rights to proprietary information by using that information to produce wining bids).

property right, and hence violate the US constitution where the transaction: **a**) effectively re-arranges priority of claims; or **b**) reduces the debtor-company's borrowing capacity (value of un-encumbered/un-pledged collateral) to the detriment of secured and or un-secured creditors; or **c**) uses the proceeds of the transaction to pay-off some (but not all) members of a potential class of creditors that can file an involuntary bankruptcy petition.

H. *Securitization Constitutes A Violation Of Federal RICO Statutes*

In 'true-sale', 'disguised loan' or 'assignment' securitizations, there are fraudulent transactions which serve as 'predicate acts' under federal RICO statutes[30]. The specific RICO sections implicated are:

- Section 1341 (mail fraud)
- Section 1343 (wire fraud)
- Section 1344 (financial institution fraud)
- Section 1957 (engaging in monetary transactions in property derived from specified unlawful activity).
- Section 1952 (racketeering).

The prices of the collateral are determined in negotiations between the sponsor/issuer and the intermediary bank and on occasion, the SPV's trustees. This presents opportunities for "predicate acts" (ie. fraud, conversion, etc.) because:

1. The collateral could be under-valued or over-valued. There are no state or federal laws that require independent valuation of collateral or appointment of

[30] *See*: Colloff M (2005). The Role of the Trustee in Mitigating Fraud in Structured Financings. *Journal of Structured Finance*, 10(4):73-85.

independent/certified trustees in securitization transactions. The parties involved are often business acquaintances. The originator/sponsor controls the entire process.

2. The trustees can be, and are influenced by the sponsor/originator and or intermediary investment-bank.

3. The required disclosure of collateral is sometimes insufficient – a) does not include historical performance of collateral pools, b) does not include criteria for selection of collateral and for substitution of collateral, c) criteria for replacement of impaired collateral is sometimes not reasonable.

4. Mail and wire are used extensively in communications with investors and participants in the transaction.

5. There is compulsion – because the intermediary/investment bank has very substantial incentives to under-price the securities, and to inflate/deflate the value of the collateral in order to consummate the transaction and earn fees.

The entire securitization process constitutes violations of federal RICO [31] statutes because:

See: Shakespeare C (20030. *Do Managers Use Securitization Volume And Fair Value Estimates To Hit Earning Targets* ? Working Paper, University Of Michigan (School Of Business)
See: Shakespeare C (2001). *Accounting For Asset Securitizations: Complex Fair Values And Earnings Management.* Working Paper, University Of Michigan.
See: Katyal K (2003). Conspiracy theory. *The Yale Law Journal*, 112(6):1307-1398.
See: Geary W (2002). The legislative recreation of RICO: Reinforcing The "myth" of organized Crime. *Crime, Law & Social Change*, 38(4):311-315.
See: Kulzick R (2004). Sarbanes-Oxley: Effects On Financial Transparency. *S.A.M. Advanced Management Journal*, 69(1): 43-49.
See: Painter R (2004). Convergence And Competition In Rules Governing Lawyers and Auditors. *Journal of Corporation Law*, 29(2):397-426.
See: Jordans R (2003). The legal approach to investment advisers in different jurisdictions. *Journal of Financial Regulation and Compliance*, 11(2):169-171.
See: Blanque P (2003). Crisis and fraud. *Journal of Financial Regulation & Compliance*, 11(1):60-70.

1. There is the requisite criminal or civil "enterprise" – consisting of the sponsor/issuer, the trustees and the intermediary bank. These three parties work closely together to effect the securitization transaction.

2. There are "predicate acts"[32] of:

a) Mail fraud - using the mails for sending out materials among themselves and to investors.

b) Wire fraud – using wires to engage in fraud by communicating with investors.

c) Conversion – where there isn't proper title to collateral.

d) Deceit- mis-representation of issues and facts pertaining to the securitization transaction.

See: Pickhjolz M & Pickholz J (2001). Manipulation. *Journal of Financial Crime*, 9(2):117-133.
See: Zey M(1999). The subsidiarization of the securities industry and the organization of securities fraud networks to return profits in the 1980s. *Work and Occupations*, 26(1):50-76.
See: Aicher R, Cotton D & Khan T (2004). Credit Enhancement: Letters of Credit, Guaranties, Insurance and Swaps. *The Business Lawyer*, 59(3):897-973.
See: Brief T & MsSweeney T (2003). Corporate Criminal Liability. *The American Criminal Review*, 40(2): 337-366.
See: Landrum D (2003). Governance of limited liability companies - Contrasting California and Delaware models. *The Real Estate Finance Journal*, 19(1):

[31] See: 18 USC 1961-1968.
[32] See: *Alexander v. Thornbough*, 713 FSupp 1271 (D.Minn. 1989)(*appeal dismissed*) 881 F2d 1081; *Mira v. Nuclear Measurements Corp.*, 107 F3d 466 (CA7, 1997); *US v. Manzella*, 782 F2d 533 (CA5, 1986)(*cert. Denied.*) 476 US 1123; *Cadle Co v. Flanagan*, 271 Fsupp2d 379 (D.Conn., 2003); *Seale v. Miller*, 698 Fsupp 883 (N.D.G.A., 1988); *Georgia Gulf Corp. v. Ward*, 701 Fsupp 1556 (NDGA 1988); *Wooten v. Loshbough*, 649 FSupp. 531 (N.D.Ind. 1986)(*on reconsideration*) 738 Fsupp 314 (*affirmed*) 951 F2d 768 (stripping of company's ability to pay judgment claim was 'predicate act' under RICO statutes); *Formax v. Hostert*, 841 F2d 388 (CAFed, 1988); *Abell v. Potomac Insurance*, 858 F2d 1104 (CA5, 1988) (*appeal after remand*) 946 F2d 1160 (*cert. denied*) 492 US 918; *Aetna Ca. Ins. Co. v. P & B Autobody*, 43 F3d 1546 (CA1, 1994); *Albany Insurance v. Esses*, 831 F2d 41 (CA2, 1987)(making false statements about value of asset was a "predicate act"); *Alfadda v. Fenn*, 935 F2d 475 (CA2, 1991)(*certiorari denied*) 502 US 1005; *Laird v. Integrated Resources*, 897 F2d 826 (CA5, 1990); *Shearin v. E F Hutton*, 885 F2d 1162 (CA3, 1989); *Bank One Of Cleveland v. Abbe*, 916 F2d 1067 (CA6, 1990); *BancOklahoma Mortgage Corp. v. Capital Title Co.*, 194 F3d 1089 (CA10, 1999); *Howell Hydrocarbons v. Adams*, 897 F2d 183 (CA5 1990)(under federal RICO statutes, making a company look solvent when its not, constitutes a 'predicate act'); *Matter of Lewisville Properties*, 849 F2d 946 (CA5, 1988)(false pretenses constitutes 'predicate acts").

e) Securities fraud – disclosure issues.

f) Loss of profit opportunity.

g) Making false statements and or misleading representations about the value of the collateral.

h) Stripping the originator/issuer of the ability to pay debt claims or judgment claims in bankruptcy court – this may apply where the sponsor is financially distressed and the cash proceeds of the transaction are significantly less than the value of the collateral.

3. There is typically the requisite 'intent' by members of the enterprise – evident in knowledge (actual and inferable), acts, omissions, purpose (actual and inferable) and results. Intent can be reasonably inferred from: a) existence of a sponsor that seeks to raise capital – and obviously cannot raise such capital on better terms using other means, b) existence of an investment bank that has very strong incentives to consummate the transaction on any agreeable (but not necessarily reasonable) terms,

I. Securitization Constitutes Violations Of US Antitrust Laws

The various processes in securitization constitute violations of the US Antitrust statutes. [33], [34], [35]. These violations are described as follows.

Also See: *Securities Investor Protection Corp. v. Vigman*, 908 F2d 1461 (CA9, 1990); *International Data Bank v. Zepkin*, 812 F2d 149 (CA4, 1987); *Warner v. Alexander Grant & Co*., 828 F2d 14528 (CA11, 1987); *Mauriber v. Shearson/American Express*, 546 FSupp 391 (SDNY, 1982); *Farmers Bank F Delaware v. Bell Mortgage Corp*., 452 FSupp 1278 (D.Del, 1978); *Moss v. Morgan Stanley Inc*., 719 F2d 5 (CA2, 1983); *USACO Coal v. Carbomin Energy Inc*., 689 F2d 94 (CA6, 1982); *Binkley v. Shaeffer*, 609 FSupp 601 (E.D.Pa., 1985); *Sedima v. Imrex Co*., 473 US 479 (1985); .

I1. Market Concentration: The US ABS and MBS markets are dominated by relatively few large entities such as FNMA, Freddie Mac, the top-five investment banks (all of which have conduit programs), the top-five credit card issuers (MBNA, AMEX, Citigroup, etc.), etc.. Hence the top-five ABS/MBS issuers control more than 50% of the US ABS/MBS market. This constitutes illegal market concentration under US Antitrust laws.

I2. Market Integration: The ABS and MBS markets are essentially national and international (geographically-diverse entities/individuals participate in each transaction). Each ABS transaction/offering typically involves a 'roadshow' which consist of presentations to investors in various cities – the cost of the roadshow is often paid by the underwriter(s) before its fees are paid by the sponsor. In addition, there are printing, mailing, traveling and administrative costs that increase with the greater geographical

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See: Glanz M (1983). RICO And Securities Fraud: A Workable Limitation. *Columbia Law Review*, 6:1513-1543.

See: Masella J (1991). Standing TO Sue In A Civil RICO Suit Predicated On Violation OF SEC Rule 10b-5: The Purchase Or Sale Requirement. *Columbia Law Review*, 91(7):1793-1812.

See: Coffey P (1990). The Selection, Analysis And Approval OF Federal RICO Prosecutions. *Notre Dame Law Review*, 65: 1035-1055.

See: Matthews A (1990). Shifting The Burden Of Loses In The Securities Markets: The Role OF Civil RICO In Securities Litigation. *Notre Dame Law Review*, 65: 896-906.

[33] See: *Bradford National Clearing Corp. v. SEC*, 590 F2d 1085 (DCCir, 1978); *In Re Stock Exchanges Options Trading Antitrust Litigation*, 317 F3d 134 (CA2, 2003); *Gordon v. NYSE*, 422 US 659 (1975); *National Gerimedical Hospital v. Blue Cross Of Kansas City*, 452 US 378 (1981); *Silver v. NYSE*, 373 US 341 (1963)(no antitrust immunity); *Strobl v. NY Mercantile Exchange*, 768 F2d 22 (CA2, 1985).

dispersion of investors. This has two main effects: a) it reduces competitive pressure on dominant investment banks and groups of investment banks (to the detriment of smaller investment banks); and b) it raises market-entry barriers by making it more expensive to conduct 'road-shows' for new offerings. Hence, the market integration created by the industry practices of securities underwriters is anti-competitive and violates the Sherman Act, and the FTC Antitrust statutes.

I3. Syndicate Collusion: the syndicates (of investment banks) used in distributing ABS/MBS essentially collude to determine: a) the price at which each ABS tranche is sold, b) which investors can purchase different tranches.

Collusion occurs because:

a) In the typical ABS offering, the price determination process is not transparent or democratic because the lead underwriters typically negotiate the offering price with the originator/sponsor and the prospective investors (but some underwriters use auctions). The lead underwriters purchase most of the new-issue ABS, and the balance is typically sold to 'junior' syndicate members (who presumably can arrange to buy more ABS from the lead underwriters than allocated to them). In essence, the true price-demand characteristics and negotiability of junior underwriting-syndicate members are very much hidden simply because of the structure of the underwriting/bidding process. Hence, the existing syndicate-based ABS distribution system for new issue ABS distorts the true demand for ABS, reduces competition, and facilitates and results in collusion, and constitutes violations of the Sherman Act and the FTC Antitrust statutes.

b) Similarly, the ABS allocation process is not transparent. The lead underwriter and junior underwriters allocate new-issue ABS to investors based on subjectively determined "suitability" and "in-house criteria". There are no established or generally accepted major guidelines for such 'in-house' criteria and associated allocation. The lead and junior underwriters can typically collude to determine that only certain investors deemed appropriate are allocated ABS. Hence, the antitrust violation (collusion) occurs solely by the underwriters' discretionary choice of investors to whom ABS are allocated – this is more evident where the investor pool consists of mostly institutional investors, and thus, final offering prices are more sensitive to choice of investors, and prices can change significantly simply by changes in allocation to investors. In such circumstances, the collusion is reasonably inferable, so long as there are no statutory or generally accepted allocation criteria that have been approved by the NASD or other trade associations.

I4. Price Formation: The price of ABS securities is often linked to the price/yields of US treasury bonds – the credit risk of ABS/MBS is priced relative to risk of US Treasury bonds. This system distorts the true demand/supply balance for ABS/MBS, and errornously incorporates the demand/supply relationships of the US Treasury Bond market, into the ABS/MBS markets. The key question then, is whether there are conditions under which the US Treasury Bond market is completely de-coupled from the ABS market, or phrased differently, whether there is sufficient justification for actual or perceived de-coupling of the US Treasury Bond market and the US ABS market. These conditions are as follows:

1. The credit fundamentals of the US treasury market differ substantially from those of the ABS market. The treasury market is much more sensitive to US Federal Reserve actions, currency fluctuations, consumer spending, federal/state fiscal policies, etc.). The ABS market tends to be more sensitive to industry-specific and sometimes company-specific risks/factors.

2. The use of various credit enhancement techniques/products further exercebates the differences in the credit trends/quality in the US treasury and ABS markets. In ABS transactions, most forms of credit enhancement creates a floor, but does not limit or affect other industry-exposure or company-exposure. In the US treasury market, investors are subject to more variety of risks.

3. The investor objectives in the US treasury bond markets differ from those of investors in ABS markets. Hence, investors are very likely to view these two markets and the underlying risks differently, and should value the securities differently.

I5. Vertical Foreclosure: In the ABS/MBS markets some investment banks and commercial banks are active in almost all phases of the securitization process – origination (through their in-house conduits), due diligence, disclosure and pricing, new-issue securities offerings, and secondary-market trading. Similarly, non-bank entities can use their own asset portfolios (origination of credit card receivables or mortgage receivables), shelf-registration procedures and or Regulation-D/Rule 144A procedures (pricing and new-issue offerings) and in-house trading desks (secondary-market trading) to participate in almost all aspects of securitization processes. Hence, these companies have almost no incentive to, and are not required to make their infrastructure and

relationships available to competitors. Such vertical foreclosure constitutes violation of antitrust laws.

I6. Tying[36]: **a)** the sponsor is sometimes formally or informally required to

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§ 1 Sherman Act, 15 U.S.C. § 1

Trusts, etc., in restraint of trade illegal; penalty

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $10,000,000 if a corporation, or, if any other person, $350,000, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

§ 2 Sherman Act, 15 U.S.C. § 2

Monopolizing trade a felony; penalty

Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $10,000,000 if a corporation, or, if any other person, $350,000, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

§ 3 Sherman Act, 15 U.S.C. § 3

Trusts in Territories or District of Columbia illegal; combination a felony

Every contract, combination in form of trust or otherwise, or conspiracy, in restraint of trade or commerce in any Territory of the United States or of the District of Columbia, or in restraint of trade or commerce between any such Territory and another, or between any such Territory or Territories and any State or States or the District of Columbia, or with foreign nations, or between the District of Columbia and any State or States or foreign nations, is declared illegal. Every person who shall make any such contract or engage in any such combination or conspiracy, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $10,000,000 if a corporation, or, if any other person, $350,000, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

3. CLAYTON ACT, 15 U.S.C. §§ 12-27, 29 U.S.C. §§ 52-53

§ 1 Clayton Act, 15 U.S.C. § 12

Definitions; short title

(a) "Antitrust laws," as used herein, includes the Act entitled "An Act to protect trade and commerce against unlawful restraints and monopolies," approved July second, eighteen hundred and ninety; sections seventy-three to seventy-seven, inclusive, of an Act entitled "An Act to reduce taxation, to provide revenue for the Government, and for other purposes," of August

twenty- seventh, eighteen hundred and ninety-four; an Act entitled "An Act to amend sections seventy-three and seventy-six of the Act of August twenty-seventh, eighteen hundred and ninety-four, entitled 'An Act to reduce taxation, to provide revenue for the Government, and for other purposes,' " approved February twelfth, nineteen hundred and thirteen; and also this Act.
"Commerce," as used herein, means trade or commerce among the several States and with foreign nations, or between the District of Columbia or any Territory of the United States and any State, Territory, or foreign nation, or between any insular possessions or other places under the jurisdiction of the United States, or between any such possession or place and any State or Territory of the United States or the District of Columbia or any foreign nation, or within the District of Columbia or any Territory or any insular possession or other place under the jurisdiction of the United States: Provided, That nothing in this Act contained shall apply to the Philippine Islands.
The word "person" or "persons" wherever used in this Act shall be deemed to include corporations and associations existing under or authorized by the laws of either the United States, the laws of any of the Territories, the laws of any State, or the laws of any foreign country.
(b) This Act may be cited as the "Clayton Act".

§ 2 Clayton Act, 15 U.S.C. §§ 13[(2)]

Discrimination in price, services, or facilities

(a) Price; selection of customers

It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce, where such commodities are sold for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them: Provided, That nothing herein contained shall prevent differentials which make only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered: Provided, however, That the Federal Trade Commission may, after due investigation and hearing to all interested parties, fix and establish quantity limits, and revise the same as it finds necessary, as to particular commodities or classes of commodities, where it finds that available purchasers in greater quantities are so few as to render differentials on account thereof unjustly discriminatory or promotive of monopoly in any line of commerce; and the foregoing shall then not be construed to permit differentials based on differences in quantities greater than those so fixed and established: And provided further, That nothing herein contained shall prevent persons engaged in selling goods, wares, or merchandise in commerce from selecting their own customers in bona fide transactions and not in restraint of trade: And provided further, That nothing herein contained shall prevent price changes from time to time where in response to changing conditions affecting the market for or the marketability of the goods concerned, such as but not limited to actual or imminent deterioration of perishable goods, obsolescence of seasonal goods, distress sales under court process, or sales in good faith in discontinuance of business in the goods concerned.

(b) Burden of rebutting prima-facie case of discrimination

Upon proof being made, at any hearing on a complaint under this section, that there has been discrimination in price or services or facilities furnished, the burden of rebutting the prima-facie case thus made by showing justification shall be upon the person charged with a violation of this section, and unless justification shall be affirmatively shown, the Commission is authorized to issue an order terminating the discrimination: Provided, however, That nothing herein contained

shall prevent a seller rebutting the prima-facie case thus made by showing that his lower price or the furnishing of services or facilities to any purchaser or purchasers was made in good faith to meet an equally low price of a competitor, or the services or facilities furnished by a competitor.
(c) Payment or acceptance of commission, brokerage, or other compensation
It shall be unlawful for any person engaged in commerce, in the course of such commerce, to pay or grant, or to receive or accept, anything of value as a commission, brokerage, or other compensation, or any allowance or discount in lieu thereof, except for services rendered in connection with the sale or purchase of goods, wares, or merchandise, either to the other party to such transaction or to an agent, representative, or other intermediary therein where such intermediary is acting in fact for or in behalf, or is subject to the direct or indirect control, of any party to such transaction other than the person by whom such compensation is so granted or paid.
(d) Payment for services or facilities for processing or sale
It shall be unlawful for any person engaged in commerce to pay or contract for the payment of anything of value to or for the benefit of a customer of such person in the course of such commerce as compensation or in consideration for any services or facilities furnished by or through such customer in connection with the processing, handling, sale, or offering for sale of any products or commodities manufactured, sold, or offered for sale by such person, unless such payment or consideration is available on proportionally equal terms to all other customers competing in the distribution of such products or commodities.
(e) Furnishing services or facilities for processing, handling, etc.
It shall be unlawful for any person to discriminate in favor of one purchaser against another purchaser or purchasers of a commodity bought for resale, with or without processing, by contracting to furnish or furnishing, or by contributing to the furnishing of, any services or facilities connected with the processing, handling, sale, or offering for sale of such commodity so purchased upon terms not accorded to all purchasers on proportionally equal terms.
(f) Knowingly inducing or receiving discriminatory price
It shall be unlawful for any person engaged in commerce, in the course of such commerce, knowingly to induce or receive a discrimination in price which is prohibited by this section.
Discrimination in rebates, discounts, or advertising service charges; underselling in particular localities; penalties, 15 U.S.C. § 13a
It shall be unlawful for any person engaged in commerce, in the course of such commerce, to be a party to, or assist in, any transaction of sale, or contract to sell, which discriminates to his knowledge against competitors of the purchaser, in that, any discount, rebate, allowance, or advertising service charge is granted to the purchaser over and above any discount, rebate, allowance, or advertising service charge available at the time of such transaction to said competitors in respect of a sale of goods of like grade, quality, and quantity; to sell, or contract to sell, goods in any part of the United States at prices lower than those exacted by said person elsewhere in the United States for the purpose of destroying competition, or eliminating a competitor in such part of the United States; or, to sell, or contract to sell, goods at unreasonably low prices for the purpose of destroying competition or eliminating a competitor.
Any person violating any of the provisions of this section shall, upon conviction thereof, be fined not more than $5,000 or imprisoned not more than one year, or both.
Cooperative association; return of net earnings or surplus, 15 U.S.C. § 13b
Nothing in sections 13 to 13b and 21a of this title shall prevent a cooperative association from returning to its members, producers, or consumers the whole, or any part of, the net earnings or surplus resulting from its trading operations, in proportion to their purchases or sales from, to, or through the association.

§ 3 Clayton Act, 15 U.S.C. § 14

purchase other financial services (loans, letters of credit, custody services, etc.) from the investment bank, in order to effect the securitization transaction, **b)** the investors are sometimes required to simultaneously purchase two or more tranches of an ABS offering, or to promise to buy the same or similar ABS/MBS securities in order to be allocated ABS in new offerings; **c)** the sponsor and or investment may formally or informally require investors to purchase minimum dollar volume of ABS in specific offerings in order to get 'allocations' in future offerings. These acts constitute tying which is anti-competitive.

Sale, etc., on agreement not to use goods of competitor

It shall be unlawful for any person engaged in commerce, in the course of such commerce, to lease or make a sale or contract for sale of goods, wares, merchandise, machinery, supplies, or other commodities, whether patented or unpatented, for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, or fix a price charged therefor, or discount from, or rebate upon, such price, on the condition, agreement, or understanding that the lessee or purchaser thereof shall not use or deal in the goods, wares, merchandise, machinery, supplies, or other commodities of a competitor or competitors of the lessor or seller, where the effect of such lease, sale, or contract for sale or such condition, agreement, or understanding may be to substantially lessen competition or tend to create a monopoly in any line of commerce.

FTC Regulations

Section 5 of the Federal Trade Commission Act outlaws "unfair methods of competition" but does not define unfair. The Supreme Court has ruled that violations of the Sherman Act also are violations of Section 5, but Section 5 covers some practices that are beyond the scope of the Sherman Act. It is the FTC's job to enforce Section 5.

[36] See: *Eastman Kodak Co v. Image technical Services*, 504 US 451 (1992); *Jefferson parish Hospital v. Hyde*, 466 US 2 (1984); *Zenith Radio Corp. v. Hazeltine Research*, 395 US 100 (1969).

I7. Price-Fixing[37] – The *Locus-shifting Theory* is introduced here. Locus-shifting occurs when a potential and obvious party to a price-fixing scheme is effectively replaced (in pricing negotiations) by a third party that has the resources and willingness to dramatically alter the pricing of goods/services in either the transaction, or a series of transactions or in the sector/industry as a whole. Normally, price-fixing would occur between two sponsors or two intermediary banks. Since the intermediary-investment bank is central to ABS offerings, and associated pricing and negotiations, the price fixing should be deemed to occur between the sponsor/originator and the investment bank (or between two sponsors). Since each active investment bank typically underwrites many offerings simultaneously, and essentially controls the pricing of each new-issue ABS, the investment banks are the locus of said price fixing and are potentially liable for the associated antitrust violations. Further evidence of price fixing maybe obtained by analyzing: **a)** the yield differentials of various ABS offerings in various asset classes (ie. autos, home equity, mortgages, etc.) by different sponsors within a specific block of time, **b)** the price differentials of various ABS offerings in various asset classes (autos, home equity, credit cards, mortgages, etc.) with the same rating, within a specific block of time.

I8. Exclusive Contracts [38]

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[37] See: *Business Electronics Corp. v. Sharp Electronics Corp*, 485 US 717 (1988); *Copperweld Corp. v. Independence Tube*, 467 US 752 (1984); *Monsanto Co. v. Spray-Rite Service Corp*., 465 US 752 (1984); *US v. Arnold, Schwin et al*, 388 US 365 (1967); *USPS v. Flamingo Industries*, #02-1290 (2004); *Brown v. Pro Football,* 518 US 213 (1996); *FTC v. Ticor Title Insurance Company*, 504 US 621 (1992); *Allied Tube & Conduit Corp. v. Indian head Inc*., 486 US 492 (1988).

[38] See: *Standard Oil Co v. US*, 337 US 293 (1949);
See: *US v. Griffith*, 334 US 100 (1948).
See: *Brooke Group Ltd. V. Brown & Williamson Tobacco*, 509 US 209 (1993).

Exclusive contracts facilitate and enhance anti-competitive behavior by contractually restricting conduct by and trade among participants in the market. In the US ABS/MBS markets, existing illegal exclusive contracts include: **a)** contracts that prevent the intermediary investment bank from providing financial services to other prospective securitization sponsor-companies in the same industry/sector, **b)** contracts (by the sponsor, underwriter(s) or third parties) that prevent or limit the formation of a syndicate of securities dealers; **c)** contracts that prevent the sponsor from selling securities through other underwriters, other than an appointed intermediary investment bank. These types of contracts constitute direct violations of US antitrust statutes.

I9. Price Discrimination[39]

There are several classes of ABS:

1) Securities that involve pure "pass-through" of cash flows, and hence rights to payment of cash from the SPV pool, but no ownership interest in the pool to: a) IO – interest only securities; b) PO – principal only securities; and c) traditional ABS that pay both interest and principal.

2) Securities that confer ownership interests in the underlying pool to: a) IO – interest only securities; b) PO – principal only securities; and c) traditional ABS that pay both interest and principal.

[39] See: *Texaco v. Hasbrouck*, 496 US 543 (1990); *J Truet Payne Co v. Chrysler Motors*, 451 US 557 (1981); *Great Atlantic & Pacific Tea Co. v. Federal Trade Commission*, 440 US 69 (1979); *US v. United States Gypsum*, 438 US 422 (1978); *FTC v. Sun Oil Co*., 371 US 505 (1963).

3) Debt-type securities that involve a security interest in the underlying collateral - **a**) IO – interest only securities; **b**) PO – principal only securities; and **c**) traditional ABS that pay both interest and principal.

In many instances, the SPV offers many tranches in each of the above-mentioned classes of ABS. The tranches within each class typically vary by term, interest rate, duration, and bond-rating/risk-rating. Hence, in any situation where the tranches don't have any priority as to security interests or rights-to-payment of cash flows from the pool, such stratified offerings within each class (IO, or PO or ordinary; or pass-through, collateral-type or equity-interest) constitutes price discrimination because the underlying asset and risk is essentially the same, although different securities are being offered in the same transaction (or series of transactions), at different prices to investors, based on the same underlying pool of assets. The distinguishing and critical element is that there is no contractually agreed-upon priority of claims as to security interests or right-to-payment of cash from the poll of assets.

I10. Predatory Pricing[40]

This occurs when investment banks under-price ABS offerings in order to obtain more investors, and to build name recognition for a particular issuer (that does or intends to come to the ABS market regularly). Evidence of predatory pricing may be inferred or established by:

[40] See: *Brooke Group Ltd. V. Brown & Williamson Tobacco*, 509 US 209 (1993); *Matsushita Electric v. Zenith Radio*, 475 US 574 (1986); *Utah Pie Co. v. Continental Baking Co. et al*, 386 US 685 (1967).

a) Comparing the offering prices of various new-issue ABS bonds sold by one sponsor/originator, in the same asset class (auto loans, home equity, credit cards, etc.), but at different times of the year, to offering prices of similar ABS bonds sold by other regular ABS sponsors/originators in the same time periods.

b) Running regressions to identify any statistically significant relationship between: 1) the difference in the yield of company XYZ's ABS bond and the yields of other similar ABS bonds, and 2) various independent variables such as yield, price, asset type, bond rating, duration, industry, amount of offering, frequency of ABS offerings, types of investors, etc..

c) Comparing the offering prices of various new-issue ABS bonds underwritten by one investment bank (in the same asset class, but at different times of the year) to offering prices of similar ABS bonds underwritten by other investment banks in the same time periods.

I11. Rigging Of Allocations

Most ABS offerings are done via allocations of securities by investment banks to their brokerage customers.

1. Most sponsors issue ABS/MBS through bids by investment banks. Most bids for ABS securities are won by a few investment banking firms. This may suggest that customers have been "allocated" among investment banks. This is also an indication of collusion.

2. On occassion, the primary underwriters subcontract work (re-sell securities) to secondary underwriters.

J. *Securitization Involves Void Contracts*

The process of securitization involves several contracts that are either signed simultaneously or are all signed within a short time frame. Many of these contracts are void and illegal for the following reasons:

a) Lack Of Consideration [41] – there is no consideration in many of the contracts used in effecting securitizations. Many of these contracts are unilateral executory promises and contain illusory promises. There are three main issues:

i) Unilateral Executory Promise [42]– A unilateral executory promise is not consideration. The following are some unilateral executory contracts in securitizations:

- The promise made by the SPV to payout periodic interest, whether contingent or non-contingent on whether the collateral pays cash interest.
- Collateral-substitution Agreement contains a promise in which the sponsor agrees to substitute impaired collateral.
- Assignment Agreement - Assignment of future collateral (not yet existing) may be deemed a unilateral executory promise by the assignor.

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[41] See: *Parmenter v. FDIC*, 925 F2d 1088 (CA8,1991); *Ace-Federal Reporters v. Barram*, 226 F3d 1329 (Ca.Fed., 2000)(*on remand*) 2002 WL 1292032; *Workman v. UPS*, 234 F3d 998 (CA7, 2000); *Dibrell Brothers v. Banca Nazionale Del Lavorro*, 383 F3d 1571 (CA11, 1999); *Gibson v. Neighborhood Health Clinics*, 121 F3d 1126 (CA7, 1997); *Floss v. Ryans Family Steakhouses*, 211 F3d 306 (CA6, 2000)(*cert. denied*) 531 US 1072; *Heinig Furs*, 811 Fsupp 1546 (M.D.Ala., 1993); *Flanders Medeiros v. Bogosian*, 88 Fsupp 412 (DRI, 1994)(*affirmed in part*) 65 F3d 198*; Johnson Enterprises v. FPl Group*, 162 F3d 1290 (CA2, 1998); *Hoffman v. Bankers Trust*, 925 Fsupp 315 (M.D.Pa, 1995); *Prudential Insurance v. Sipula*, 776 F2d 157 (CA7, 1985); *In Re Sulakshma*, 207 BR 422 (E.D.Pa, 1997).

[42] *See*: Gordon T (2000). Securitization Of Executory Future Flows As bankruptcy-Remote True Sales. *University Of Chicago Law Review*, 67:1317-1322.

- Transfer Agreement. The sponsor agrees to transfer the collateral to the SPV, and the SPV in return pays cash to the sponsor.

ii) *Illusory Promises*[43] – An illusory promise is not a valid consideration for a contract. The following are some illusory promises inherent in securitization transactions:

- The Subscription/purchase Agreement. The SPV's promises to acquire the collateral with the cash raised from investors are essentially illusory promises. These promises are embedded in the offering Prospectus, but are typically not included other corporate documents. In most cases, the offering prospectuses don't state the exact steps in the SPV's promised purchase of the collateral. Purchase/Subscription Agreement. The SPV's investors purchase beneficial interests in the SPV or the SPV's debt. These beneficial interest evidence: **a)** right to payments from the SPV, or **b)** an ownership interest in the underlying collateral, or **c)** a 'participation' in the underlying collateral. However, at the time of executing this agreement, the only consideration that the SPV can grant to investors in exchange for the purchase amount, consist of promises to purchase the collateral in the future, and to make payments from the SPV's assets. Hence, an existing asset is being exchanged for a future asset that does not exist as of the date of the purchase/subscription agreement.

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[43] *See*: *Valdiviezo v. Phelps Dodge*, 995 Fsupp 1060 (D.Ariz., 1997). *Johnson enterprises v. FPL Group*, 162 F3d 1290 (CA2, 1998). *Ryan v. Upchurch*, 474 Fsupp 211 (SND, 1979)(*reversed*) 627 F2d 836.

See: Rose J & Dawson P (Sept. 1997). Contingent Transfer - The Illusory Promise Of Structured Finance. *S&P Structured Finance*, page 10.

- Furthermore, all securitization offerings are done pursuant to 'Subscription Agreements' and Investor Questionnaires – the two documents have to be signed by the prospective investor. None of the agreements signed by the investor as part of his/her purchase of the SPV's ABS expressly incorporates the promises embodied in the Offering Prospectus. What typically exists is an implied agreement to subject the investor to the SPV's articles of incorporation, Trust Indenture, and or Trusteess'/board of directors' (or Board of Trustee's) decisions.

- The SPV's promise to pay interest/dividends on ABS IOs, Preferreds and POs are essentially illusory promises because the underlying collateral may not produce any cash flows, in which case there wont be any interest or dividend payments.

iii) *No Bargain* – some courts have held that there is no consideration (and hence, the contract is void) where one party was not allowed to bargain for the alleged agreement. [44]. In some securitizations, the process of setting offering prices for new ABS issues does not afford all parties the opportunity to negotiate terms of the offering, especially individual investors, because the price of the ABS is typically determined primarily by the sponsor and the lead-underwriters. Furthermore, in securitizations, the originator sets the terms of the SPV (trust documents, articles of incorporation, Bylaws, etc.).

[44] *Prudential Insurance v. Sipula*, 776 F2d 157 (CA7, 1985)(no consideration where party to contract could not bargain for alleged agreement).

2. *No mutuality* [45] – in the securitization context, for there to be mutuality: a) each party must have firm control of the subject matters of the contract and the underlying assets (consideration), and b) there should be a direct contractual relationship between the parties. At time of the Subscription Agreement, the SPV typically does not own or have rights to the collateral, and hence, there is not mutuality. Furthermore, the concept of 'piercing the SPV veil' is introduced here (and is similar to piercing the corporate veil) and applies since the following conditions exist:

- The economics of the transaction is an asset transfer from the sponsor/originator to the SPV investors, in exchange for a loan to the sponsor. However, there is no direct contractual relationship
- The sponsor typically controls the SPV before the ABS offering and determines (or substantially influences) the SPV's post-offering operating characteristics. Since prospective ABS investors don't have firm pre-offering control of the SPV and cannot influence its post-offering policies, there is no mutuality between the SPV and the ABS investors; and securitization is void.
- The sponsor influences the appointment of the SPV's trustees or board of directors.

Thus, under contract law, the use of the SPV in securitization effectively eliminates any mutuality between the two main contracting parties - the sponsor and the investors. Secondly, there is no mutuality between the SPV and the investors: a) the SPV corporate documents (trust indentures or bylaws or articles of incorporation) typically limits the rights of each ABS investors and the group of ABS investors. Thirdly, there is no

[45] See: *Tampa Pipeline Transport v. Chase Manhattan Service Corp*., 928 Fsupp 1568 (MD.Fla., 1995)(*affirmed*) 87 F3d 1329.

mutuality between the SPV and the sponsor/originality because both entities are essentially the same, and are controlled by the sponsor before and after the securitization.

3. *Illegal subject matter And Contravention Of Public Policy* [46] – as explained in preceding sections of this article, securitization constitutes violations of antitrust statues and federal RICO statutes, and hence, the contracts used to effect securitizations are void and illegal.

Conclusion

Under US laws, Securitization is clearly illegal. This requires the enactment of special federal securitization statutes; and changes in law enforcement patterns and practices.

[46] See: *Imel v. laborer's Pension Fund Trust*, 904 F2d 1327 (CA9, 1990)(*cert. den*.) 498 US 939 (contract should not alter statutory duties); *Truck Ins. Exchange v. Ashland Oil*, 951 F2d 787 (CA7, 1992); *Cramer v. Consolidated Freightways*, 255 F3d 806 (CA9, 2001)(*cert. denied*) 122 SCt 806; *Lake James Community v. Burke County NC*, 149 F3d 277 (CA4, 198) (*cert. denied*) 525 US 1106; *Davis v. Parker*, 58 F3d 183 (CA5, 1995); *In Re NWFx*, 881 F2d 530 (*on rehearing*) 904 F2d 469 (*cert. denied*) 498 US 941; *Biomedical Systems v. GE Marquette*, 287 F3d 707 (CA8, 2002)(*cert. denied*) 123 SCt 636 (post-contract formation failure to obtain statutorily required license invalidated agreement).

LIST OF ENFORCEMENT AUTHORITIES INVESTIGATING – EXHIBIT J

