PROPERTY AND THE TRUE-SALE DOCTRINE

Heather Hughes*

ABSTRACT:

The true-sale doctrine governs financial transactions involving hundreds of billions of dollars each year. Yet this doctrine is confused, unsettled and subject to differing approaches from state to state: it lacks normative foundation and it lacks coherence. The true-sale doctrine determines the fate of investors asserting ownership of securitized assets at the expense of unsecured creditors, such as employees. It distinguishes assignments to secure loans (leaving assets potentially reachable by unsecured creditors), from outright sales (making assets the exclusive property of investors). A rich literature addresses the efficiency of securitization. But scholars and policy-makers have failed to sufficiently relate positions on securitization's efficiency to normative positions on the true-sale doctrine. This Article maps arguments about securitization's efficiency to formulations of the true-sale doctrine, to enable normative direction. It then relates true-sale rules to property-law concepts as strategy for coherence. The true-sale doctrine has not received scholarly attention in accord with its importance. This Article, through mapping descriptions of securitization's efficiency to formulations of true-sale rules, demonstrates why the doctrine matters. Successful true-sale rules must be grounded in a conception of property that can explain and justify investors' rights of exclusion against a company's unsecured creditors. States' property laws should confer rights of exclusion in securitized assets in a way that is (i) justified, given potential effects of exclusion on creditors in weak bargaining positions, and (ii) clear, given the costs of uncertainty in the legal foundations of market-dominant transactions.

* Professor, American University, Washington College of Law. I am grateful for helpful comments and suggestions from Thomas Plank, David Snyder, Michael Carroll, Andy Pike, Ezra Rosser, Nancy Abramowitz, Ben Leff, Emma Coleman Jordan, Ken Anderson, and Steven Schwarcz; and to Shelley Han for research assistance.

INTRODUCTION

The true-sale doctrine has been described as "the holy grail of the securitization market, a market in which hundreds of billions of dollars flow in transactions structured around constantly evolving ideas of what a true sale means."[1] This doctrine determines whether securitized assets constitute part of a company's bankruptcy estate. It distinguishes assignments to secure loans from true sales, after which assets are the property of a special purpose entity[2] and belong exclusively to investors. The true-sale doctrine is at the heart of receivables securitizations.[3] Bankruptcy and, in some instances, accounting outcomes[4] affecting employees, retirees and other creditors hinge

1. Peter V. Pantaleo et al., *Rethinking the Role of Recourse in the Sale of Financial Assets*, 52 BUS. LAW. 159, 161 (1996).

2. This entity isolates assets from bankruptcy risk. *See infra* text accompanying notes 19, 58. In some instances, the entity is also off-balance sheet. *See also* Thomas E. Plank, *Securitization of Aberrant Contract Receivables*, 89 CHICAGO-KENT L. REV. 171, 187 n. 56 (2013).

3. *See infra* Part I.A. for a definition and description of receivables securitization.

4. *See* Fin. Accounting Standards Bd. [hereinafter FASB], Accounting Standards Codification, Topic 860, *Transfers and Servicing* (2009) (replacing FASB, Statement of Financial Accounting Standards [hereinafter FAS] No. 166, which replaced FAS 140); Summary of Statement of No. 140: *Accounting for Transfers and Servicing of Financial Assets and Extinguishments of Liabilities – A Replacement of FASB Statement No. 125*, FASB (Sept. 2000), http://www.fasb.org/summary/stsum140.shtml [https://perma.cc/N896-ADWP] (last visited June 24, 2016).

on its correct administration.[5] Yet this doctrine is confused, unsettled and subject to differing approaches from state to state.[6]

The true-sale doctrine has not received scholarly attention in accord with its importance. The doctrine can appear to be of little consequence: when a court interprets a deal that purports to sell assets to be instead a loan secured by the assets, the result is that the investors who claimed an ownership interest have instead a first-priority security interest. The investors "win" anyway. They just have to contend with bankruptcy procedures that impose costs on them. This view underestimates the true-sale doctrine. First, recent literature has shown that whether parties make assets bankruptcy remote (by assigning them in a true sale) affects the efficiency of decisions about continuation and liquidation in bankruptcy.[7] Second, assets included in a bankruptcy estate, even if subject to a first-priority security interest, may be reachable to secure continuation financing or to support operations of the debtor—such as wage and benefits obligations and payments to suppliers—for some period of time, so long as investors have adequate protection.[8]

5. For discussion of the centrality of the true-sale concept to securitization, *see infra* text accompanying notes 53-57.

6. *See infra* Part II. The laws governing secured transactions are highly uniform, thanks to Uniform Commercial Code (UCC) Article 9. UCC Article 9 governs receivables securitizations, in the sense that all conveyances of receivables must comply with UCC Article 9 formalities to be enforceable. *See* U.C.C. § 9-109(a)(1), (3) (stating that Article 9 applies to transactions, regardless of form, that create a security interest by contract, and also to sales of accounts, chattel paper, payment intangibles, and promissory notes). But the question of whether a given receivables conveyance constitutes an assignment that secures an obligation—as opposed to an outright sale—is governed by the true-sale doctrine, apart from UCC Article 9. *See* U.C.C. §9-109 cmt. 4 (noting that "neither this Article nor the definition of 'security interest' . . . delineates how a particular transaction is to be classified," and as such "[t]hat issue is left to the courts"). *See generally* U.C.C. § 9 (2010). The National Conference of Commissioners on Uniform State Laws (NCCUSL) drafted and periodically revises the model UCC in conjunction with the American Law Institute (ALI). All U.S. jurisdictions have enacted UCC Article 9. Unless otherwise indicated, citations herein to the UCC are to the official text and comments of the ALI and NCCUSL. Note that some may question whether Article 9 governs receivables securitizations in which the transfer of receivables from the originator to the special purpose entity (SPE) takes the form of a capital contribution in exchange for equity in the SPE, as opposed to a sale for cash. *See* Kenneth C. Kettering, *True Sale of Receivables: A Purposive Analysis*, 16 AM. BANKR. INST. L. REV. 511, 513 n.5 (2008). This Article does not engage this question of statutory construction, other than to note that UCC Article 9 does not limit "sales" to transactions in which parties exchange assets for cash.

7. *See, e.g.*, Kenneth Ayotte & Stav Gaon, *Asset-Backed Securities: Costs and Benefits of Bankruptcy Remoteness*, 24 REV. FIN. STUD. 1299 (2011) (arguing that bankruptcy remoteness is valuable to ABS investors, based on findings that, after *LTV Steel*, Chapter 11-eligible originators saw an increase in spreads that Chapter-11 ineligible originators did not).

8. *See* 11 U.S.C. § 361 (adequate protection may be established with "an additional or replacement lien to the extent that such stay, use, sale, lease, or grant results in a decrease in

A rich literature addresses the efficiency and desirability of securitization, taking on the question of whether and when securitized assets should be bankruptcy-remote.[9] Yet scholars and policy-makers have largely failed to relate positions on securitization's efficiency to normative positions on the true-sale doctrine.[10] This Article relates scholars' arguments about the value of bankruptcy remoteness and the desirability of securitization to different formulations of true-sale rules.

Many identify securitization as integral to the causes of the 2008 financial crisis.[11] Lawmakers have largely focused, since then, on federal regulation designed to: minimize moral hazard associated with off-balance sheet financing; require that originators and underwriters keep "skin in the game" when creating and marketing asset-backed securities; and ensure that consumers can make informed choices about financial products inspired by

value of such entity's interest in such property"); § 363(b)-(c) (allowing the bankruptcy trustee to use or assign property of the estate in certain circumstances); § 363(e) (providing that the court will prohibit or condition such use of property of the estate as is necessary to provide adequate protection to an entity that has an interest in property used or assigned); § 364(d)(1) (allowing the bankruptcy court to "authorize the obtaining of credit or the incurring of debt secured by a senior or equal lien on property of the estate that is subject to a lien only if (A) the trustee is unable to obtain such credit otherwise; and (B) there is adequate protection of the interest of the holder of the lien on the property of the estate on which such senior or equal lien is proposed to be granted."). *See also* Melissa B. Jacoby & Edward J. Janger, *Tracing Equity: Realizing and Allocating Value in Chapter 11* at 3, 11, 13-24 (challenging the contention that there is no need to consider unsecured creditors' claims given the prevalence of under-secured "blanket liens"); Plank, *supra* note 2, at 177-78.

9. *See infra* Part I.B.

10. Scholars discuss the efficiency and desirability of securitization, and they discuss the true-sale doctrine and the fact that securitization's efficiencies are a function of the legal isolation of securitized assets. But they do not analyze or make explicit the relationship between positions on securitization's efficiency and formulations of true-sale rules, as this Article does. *See, e.g.*, Steven L. Schwarcz, *Securitization Post-Enron*, 25 CARDOZO L. REV. 1539, 1543-48, 1553-74 (2004); Thomas E. Plank, *The Security of Securitization and the Future of Security*, 25 CARDOZO L. REV. 1655, 1667-69, 1675 (2004). The most direct analysis of the relationship between true-sale rules and policy arguments about securitization is found in Edward J. Janger, *The Death of Secured Lending*, 25 CARDOZO L. REV. 1759 (2004). Janger focuses on the dangers and costs of statutory efforts to abolish the true-sale doctrine, pointing out that this doctrine prevents negative externalities such as excessive cost transfer to unsecured creditors, concealed liens, and balance sheet distortion. *See id.* at 1773. This Article departs from Janger's in that it (i) more extensively maps arguments about the efficiency of securitization and bankruptcy remoteness to formulations of true-sale rules, (ii) focuses on the relevance of property-law concepts for developing more coherent and justifiable true-sale rules, and (iii) incorporates recent literature and developments.

11. *See, e.g.*, Lipson, *infra* note 50, at 1249 (noting that "even those who are not hostile to securitization would now seem to support this view" that "'while there were multiple causes of the subprime boom and collapse, securitization itself was a significant cause of both,'" quoting Kurt Eggert). *See also* Kurt Eggert, *The Great Collapse: How Securitization Caused the Subprime Meltdown*, 41 CONN. L. REV. 1257, 1262 (2012).

and funded through capital markets.[12] Meanwhile, the state-level, private-law infrastructure of financial transactions, such as the true-sale doctrine, contains under-explored opportunities to improve market governance.[13] True-sale rules should be clarified and fortified to facilitate positive—and mitigate negative—externalities of securitization.[14] This Article is a type of rule-of-law project. Federal regulatory priorities will fluctuate. States' property laws should determine the bankruptcy-remoteness of securitized assets in a way that is (i) justified, given the effects of such determination on creditors in weak bargaining positions (such as employees); and (ii) clear, given the volatility that can follow from uncertainty surrounding the legal underpinnings of market-dominant transactions.

As discussed below, recently, commentators have called for a "property-based" standard for identifying true sales of receivables.[15] A true-sale doctrine explicitly rooted in property law would be better than formulations currently in force in various jurisdictions. But a successful approach to the true-sale doctrine must be grounded in a conception of property that can explain and justify investors' rights of exclusion against a company's unsecured creditors.[16]

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12. *See* Dodd-Frank Wall Street Reform and Consumer Protection Act, 12 U.S.C. § 5301 (2006 & Supp. 2011).

13. *See* Heather Hughes, *Financial Product Complexity, Moral Hazard, and the Private Law*, 20 STAN. J. L. BUS. & FIN. 179, 206, 220 (2015). *Compare* Ronald J. Mann, *The Rise of State Bankruptcy-Directed Legislation*, 25 CARDOZO L. REV. 1805 (2004) (discussing who should decide, as between state commercial law and federal bankruptcy law, policy issues surrounding securitization), *with* Janger, *supra* note 10 (discussing the importance of the true-sale doctrine, asserting that it "has a crucial regulatory component that enhances both financial transparency and helps maintain proper investment incentives").

14. Positive externalities of securitization are the efficiencies it can produce. *See infra* text accompanying note 66. Negative externalities of securitization include costs externalized to unsecured creditors in some contexts, raising both efficiency and fairness concerns. *See infra* text accompanying note 69. Different formulations of true-sale rules affect the extent to which legal isolation of securitized assets produces efficiencies, or conversely, aggravates negative externalities. *See infra* Part I.B. When securitization transactions involve an assignment that is a disguised security interest (not a true sale), negative externalities also include secret liens and accounting distortions. *See* Janger, *supra* note 10, at 1773.

15. *See* Steven L. Harris & Charles W. Mooney, Jr., *When Is a Dog's Tail Not a Leg?: A Property-Based Methodology for Distinguishing Sales of Receivables from Security Interests That Secure an Obligation*, 82 U. CIN. L. REV. 1029 (2014). *See infra* Part II.C. Rather than consider factors such as recourse or price to classify a receivables conveyance, these scholars argue, we should ask only whether the originator retains an interest in the receivables that secures an obligation. *Id.* The term "originator" refers in this Article to a company generating and securitizing assets. *See infra* Part I.A for a description of receivables securitization and the various parties thereto.

16. Such justification may be, for example, that the efficiencies securitization produces benefit investors and unsecured creditors alike; therefore, minimizing re-characterization risk with statutory true-sale safe harbors that exclude unsecured creditors from securitized assets is justified. By contrast, if securitization inefficiently extracts a subsidy from non-adjusting

In other words, the true-sale doctrine lacks clear connection to a policy justification (such as efficiency), and is inconsistent and sometimes incoherent. This Article maps arguments about securitization's efficiency and desirability to formulations of the true-sale doctrine to enable policy or values-driven understandings of the doctrine.[17] It then situates true-sale rules vis-à-vis the property-law concepts of *numerus clausus* and rights of exclusion, as a strategy for both coherence and normative direction.[18]

"Securitization" is a broad and diverse category of transactions.[19] Different types of securitization present different policy concerns.[20] The relevance and consequences of the true-sale doctrine are greater in some securitization contexts than in others.[21] This Article focuses on true sales of receivables[22] for creation of asset-backed securities or "ABS." Whether a financial transaction is an outright sale of assets, rather than a security interest that secures an obligation (a "SISO"),[23] has important consequences

creditors in some contexts, then in order to justify exclusion of such creditors from securitized assets, true-sale rules could require fair-market-value pricing and terms for the assets. *See* text accompanying notes 99, 105.

17. *See infra* Part I.

18. *See infra* Part III.

19. Securitization is the practice of selling assets to an SPE and then having the SPE issue securities backed by the assets. Securitization can reduce costs of capital for the seller; once the assets are transferred to the SPE they are isolated from other creditors of the seller. The SPE is set up to be bankruptcy remote from the seller. For more precise and thorough definitions and discussion, *see infra* Part I.

20. For example, securitization of residential mortgages facilitates originate-to-distribute lending practices that can aggravate moral hazard and create concerns for consumers entering into mortgage loans. Synthetic securitizations—re-securitizations or "ABS CDOs"—can be very complex and can create securities of specious value, undermining financial transparency and stability among the institutions that create and trade them. *See infra* text accompanying notes 22, 56.

21. For example, in a remittance or future flow securitization the true-sale opinion serves a different purpose than it does in a receivables securitization—namely, to establish that under the laws of the originator's jurisdiction the transfer of the first right to receive remittances accomplished a sale to a foreign purchaser. The goal is to minimize political risk, not to isolate the assets from those of the originator such that a U.S. court would find the assets to be unreachable by the originator's creditors. *See* Heather Hughes, *Securitization of Worker Remittances*, *in* MOBILISING CAPITAL FOR EMERGING MARKETS: WHAT CAN STRUCTURED FINANCE CONTRIBUTE 101 (Doris Köhn ed., 2011).

22. "Receivables" refers to all monetary obligations owed to a company by its debtors or customers. These can include invoices for sales of goods, credit card payments, loan obligations, contracts for services, or the like. This category typically does not include mortgage loans. Receivables securitizations, creating ABS, are similar, but distinct from securitization of real estate mortgages, creating mortgage-backed securities ("MBS"). *See infra* Part I.A. Further, ABS are typically collateralized by primary payment rights—a company's actual receivables—rather than by synthetic or derivative rights, which typically back collateralized debt obligations ("CDOs"). *See infra* text accompanying note 56.

23. The Uniform Commercial Code definition of "security interest" includes interests that do not secure obligations, such as consignments and sales of certain financial assets

for creditors such as employees or retirees with interests in a company's bankruptcy estate. Assets assigned to secure a loan are part of the estate. Even though a secured investor may have a first priority claim, pending resolution of the proceedings the bankruptcy trustee or debtor-in-possession can (i) permit the company to draw on the assets to service wage and benefit obligations,[24] (ii) offer adequate protection to investors, and (iii) assign interests in the assets to continuation financers.[25] Assets sold, however, are no longer property of the company; the company no longer has any property interest in the assets to which a bankruptcy trustee's lien could attach.[26]

In most jurisdictions, the true-sale doctrine is governed by confusing and divergent case law.[27] Some states override the doctrine with "Asset-Backed Securities Facilitation Acts," or "ABS statutes," that deem all assignments of receivables for purposes of securitization to be sales, regardless of economic substance.[28] These statutes confer "sale" status on transactions the economic substance of which would not otherwise warrant that status.[29] In securitizations in which the originator is a bank subject to the Federal Deposit Insurance Act, FDIC rules, which contain safe-harbor provisions and reference accounting standards, may determine the status of securitized assets.[30]

In an attempt to clarify and improve this area of law, Steven L. Harris and Charles W. Mooney, Jr., propose what they call "a property-based methodology" for distinguishing sales of receivables from SISOs.[31] While

included within the scope of Article 9, under § 9-109(a). As such, it is necessary to distinguish "security interests," as defined by the code, from SISOs. *See* U.C.C. § 1-201(b)(35). Some readers may assume that the term "security interest" implies an assignment that secures an obligation, but this is not the case in commercial law.

24. *Cf.* Plank, *infra* note 132, at 630-31.

25. *See* 11 U.S.C. §§ 364(d)(1), 541.

26. Note that a bankruptcy trustee may claim broad, equitable powers in initially finding "property interests" for purposes of attachment pending resolution of state-law questions about the status and scope of a debtor's property interests. *Compare* 11 U.S.C. § 541(a)(1) (stating that upon filing of a bankruptcy petition an estate is created that consists of "all legal or equitable interests of the debtor in property as of the commencement of the case"), *with* United States v. Whiting Pools, Inc., 462 U.S. 198, 204-06 (1983), *and* In re LTV Steel Company, Inc., 274 B.R. 278 (2001).

27. *See* Harris & Mooney, *infra* note 31, at 1031. *See also infra* Part II.

28. *See* ALA. CODE § 35-10A-2(a)(1) (West 2016); DEL. CODE ANN. tit. 6, §§ 2701A-2703A (West 2016); LA. REV. STAT. ANN. § 10:9-109(e) (West 2016); OHIO REV. CODE ANN. § 1109.75 (West 2016); N.C. GEN. STATE. §§ 53-425, 53-426 (West 2015); S.D. CODIFIED LAWS § 54-1-10 (West 2016); TEX. BUS. & COM. CODE ANN § 9-109(e) (West 2015).

29. *See infra* Part II.B.1.

30. *See* 12 CFR 360.6(b). *See also infra* text accompanying notes 214-219; comments from T. Plank (noting that FDIC rules govern only a minority of bank-sponsored securitizations).

31. *See* Steven L. Harris & Charles W. Mooney, Jr., *When Is a Dog's Tail Not a Leg?: A Property-Based Methodology for Distinguishing Sales of Receivables from Security*

many consider the level of recourse between the seller and purchaser of receivables, and the adequacy of purchase price, to be central factors in determining whether a transaction is a sale or a loan,[32] Harris and Mooney argue that these factors are not sufficient grounds for characterizing a deal. The only relevant questions, they assert, are whether the purported seller has retained an "economic interest" in the assets and whether the interest transferred to the purchaser secures an obligation.[33] This standard is established in the true-lease context and should, they argue, apply to receivables transactions as well.[34]

Harris and Mooney find a property interest wherever the purported seller retains an economic interest in receivables, and finds no property interest where the seller retains no economic interest. But they fail to offer sufficient explication of, or justification for, such interest, or to adequately address important distinctions between equipment leasing and receivables securitization.[35] This Article finds Harris and Mooney's proposal to be promising but incomplete; they are correct to argue for an approach to true sales that is explicitly rooted in property law.[36]

Part I defines "receivables securitization." It then presents literature on efficiency and bankruptcy remoteness, and on the relationship between accounting standards and legal rules. It explains why the true-sale doctrine matters, the policy issues that it implicates, and the bankruptcy and accounting outcomes it affects. An extensive body of literature discussing the efficiency of securitization reveals conflicting viewpoints.[37] So far, scholars have not explicitly analyzed the relationship between arguments about the efficiency of securitization and normative positions on the true-sale doctrine. For example, one might think that if securitization is efficient, in a Kaldor-Hicks sense,[38] then ABS statutes that eliminate re-characterization risk would promote efficiency. This view, however, fails to consider the (i) dynamic relationship between law and markets,[39] and (ii) inefficiencies in bankruptcy that an over-broad ABS statute can aggravate, surrounding decisions about continuation versus liquidation and debtor-in-possession financing.[40] Part I presents this and other observations concerning the relationship between arguments about securitization and

Interests That Secure and Obligation, 82 U. CIN. L. REV. 1029 (2014).

32. *See infra* Part II.A.
33. *See* Harris & Mooney, *supra* note 31.
34. *Id.*
35. *See infra* text accompanying notes 232, 234-36.
36. *See infra* Part III.
37. *See infra* text accompanying notes 66-72.
38. *See infra* text accompanying note 70.
39. *See infra* text accompanying note 79.
40. *See infra* text accompanying notes 87-92.

policy justifications for different forms of true-sale rules.

Part II presents current approaches to the true-sale doctrine and explains why they are problematic. It analyzes recourse and price as crucial factors in true-sale determinations, and discusses existing statutory approaches. It then describes and critiques Harris and Mooney's "property-based methodology" for making true-sale determinations, finding it to be an important, but incomplete, contribution.

Part III discusses the value of establishing a method for making true-sale determinations that is more overtly "property-based." Deal provisions that create recourse, express purchase price, or ensure that one or the other party receives surplus collections are enforceable as a matter of contract law. The true-sale doctrine is necessarily a matter of property law: it delineates the scope of interest that a transaction creates. A more explicit, property-based framing of true-sale rules would improve the doctrine's coherence and normative grounding.[41] Part III identifies two property-law concepts—*numerus clausus* and rights of exclusion—that are integral to the true-sale doctrine, and describes their relevance in receivables conveyances. Understanding how these concepts apply in the receivables securitization context could lead to the development of better approaches to true-sale questions.

Part IV identifies Uniform Commercial Code (UCC) Article 9 and bankruptcy law as potential sites for clarification of the true-sale doctrine. Two states already enact true-sale rules within UCC Article 9.[42] To provide an alternative example, Part IV.A sketches possibilities for Article 9 provisions that would codify the relevance of price in true-sale determinations. This Article does not seek to establish that price should be determinative in true-sale analyses. Rather, it relates positions on securitization's efficiency and the value of bankruptcy remoteness to normative positions on true-sale rules. For example, if lawmakers sought to assure a fair purchase price for securitized assets, because they believed that doing so would protect the interest of unsecured creditors, they could pursue this objective by revising UCC Article 9. Part IV.A identifies sections of UCC Article 9 in which lawmakers could express such objectives. Part IV.B then discusses the relationship between bankruptcy law and property law (including proposed section 912[43] of the 2001 bankruptcy reform bill[44]). Federal bankruptcy law could be a viable site for clarification of true-sale

41. *See infra* Part III.

42. Texas and Louisiana enacted ABS statutes as non-uniform UCC Article 9 section 9-109(e).

43. This section was rescinded in 2002. *See infra* text accompanying note 281.

44. Bankruptcy Reform Act of 2001, S. 220, H.R. 333, 107th Cong.; H.R. 333, 107th Cong. § 912(i) (2001).

rules, despite the general principle, in bankruptcy, of looking to state law for determination of property interests.[45]

Ultimately, the true-sale doctrine is meant to align property rights and risk. Characterizing a deal according to its economic substance prevents parties from engaging in regulatory arbitrage. Transacting parties should not be able to avoid bankruptcy rules or UCC Article 9 rules for disposition of collateral by simply calling their transaction by the form that gives the investor the most advantageous legal position, despite the rights and obligations of the parties and impacts on any third parties affected by the deal.

I. WHY THE TRUE-SALE DOCTRINE MATTERS

Some downplay the importance of the true-sale doctrine, pointing out that regardless of how true-sale disputes are resolved, investors prevail. They prevail either because they purchased assets in a true sale such that the assets are bankruptcy-remote, or because they purchased a security interest in the assets that entitles them to recovery, in bankruptcy, in advance of all other creditors.[46] This part explains how this view underestimates the consequences of true-sale rules. It relates true-sale rules to arguments about efficiency, securitization, and bankruptcy-remoteness—a task that legal scholars have largely neglected.[47]

People use the term "securitization" to refer to deals involving many different types of assets,[48] from tangible property, such as inventory, to rather abstract intangibles, such as remittance cash flows.[49] This part defines "receivables securitization"—a concept that is more precise than the general (and sometimes loosely used) term "securitization."[50] It presents current

45. *See infra* text accompanying note 266.

46. *See* Jacoby & Janger, *supra* note 8 (presenting the concept of "equitable realization" to describe how Chapter 11 treats realization value in bankruptcy, finding that value created or preserved by Chapter 11 benefits all stakeholders).

47. *See* Janger, *supra* note 10 (noting how, unlike other scholars, Janger analyzes the relationship between true-sale rules and the efficiency effects of securitization transactions). Again, to date, scholars focus on efficiency and fairness questions surrounding securitization, and they discuss the true-sale doctrine, but they leave largely to un-vetted implication the relationship between these rules and the efficiency effects that follow. For a summary of how this Article's scope and analysis departs from Janger's, see *supra* note 10.

48. Jonathan Lipson succinctly states that the essential elements common to all securitization are three: "(1) inputs, (2) a particular structure, and (3) outputs." Lipson, *infra* note 50, at 1239.

49. For a description of remittance securitizations (i.e., securitization of "diversified payment rights," or "future flow" transactions), as compared to more common receivables securitizations, see Hughes *supra* note 21.

50. *See* Jonathan C. Lipson, *(Re)Defining Securitization*, 85 S. CAL. L. REV. 1229, 1232-

literature on the efficiency of securitization and the value of bankruptcy remoteness.[51] Finally, it discusses the relationship between the law governing receivables securitizations and the accounting treatment of these deals.[52]

A. *Receivables securitization*

"Receivables" refers to all monetary obligations owed to a company by its debtors or customers. These can include invoices for sales of goods, credit card payments, loan obligations, contracts for services, or the like.[53] Receivables appear on a company's balance sheet; and they include all debts owed to the company, even if they are not currently due. While "receivables" includes loans owed to a company, mortgage loans[54] typically are not included in definitions of receivables.[55] Mortgage loans are frequently pooled and securitized, creating "mortgage-backed securities" or "MBS." "Asset-backed securities" or "ABS" refer to securities collateralized by receivables or other financial assets, other than mortgage loans. In this Article, "receivables securitization" means a securitization of primary payment rights,[56] derived from financial assets other than mortgages, to create ABS.

In the wake of the 2008 financial crisis, mortgage securitization received much attention, due to its relationship to the residential housing market. Mortgage-backed securities have always been a significant part of

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33 (2012) (identifying a lack of definition for the term "securitization" in secondary sources and in laws governing securitization, and arguing for a coherent definition). Lipson finds "over two dozen regulatory and statutory definitions of the word 'securitization'," compounded by various definitions used by market actors and commentators. *Id.* at 1257.

51. Kenneth Ayotte & Stav Gaon, *Asset-Backed Securities: Costs and Benefits of Bankruptcy Remoteness*, 24 REV. FIN. STUD. 1299 (2011) (arguing that bankruptcy remoteness is valuable to ABS investors, based on findings that, after *LTV Steel*, Chapter 11-eligible originators saw an increase in spreads that Chapter-11 ineligible originators did not).

52. *See infra* text accompanying notes 122-50.

53. *See* U.C.C. § 9-102(a) (defining of accounts, chattel paper, general intangibles, etc.).

54. These are loans secured by real property, governed by state mortgage law, as opposed to loans that are unsecured or that are secured by personal property, governed by UCC Article 9.

55. John Downes & Jordan Elliot Goodman, *Receivables*, DICTIONARY OF FINANCE AND INVESTMENT TERMS (7th ed. 2006).

56. Receivables are primary payments rights that back ABS, as opposed to synthetic or derivative rights that back collateralized debt obligations or CDOs. *See* Lipson *supra* note 11, at 1233-35, 1271-72 (defining true securitization as a transaction in which an SPE buys primary payment rights); Steven L. Schwarcz, *Essay: Protecting Financial Markets: Lessons from the Subprime Mortgage Meltdown*, 93 MINN. L. REV. 373, 376-77 (2008) (describing distinctions among types of collateralized debt instruments by sketching the procedures in securitization and ABS CDO transactions).

the securitization market. But by the early 2000s, receivables securitizations (involving various kinds of payment rights) had overtaken residential real property mortgages as a generator of new securitizations.[57]

"Receivables securitization" refers to transactions in which a company (i) forms a legally distinct entity, called a "special purpose entity" or "SPE"[58]; (ii) conveys receivables to the SPE; and (iii) raises capital by having the SPE issue securities collateralized by the receivables to investors. The company securitizing its receivables is called the "originator"—it is originating the assets conveyed to the SPE for purposes of securitization. The SPE is bankruptcy remote from the originator—it is a legally separate entity that meets standards for independence that assure it would not be consolidated with the originator in bankruptcy. In order to be bankruptcy remote, the SPE must (among other things) have at least one independent director. Investors may rely on "non-consolidation" legal opinion letters from counsel to the originator, in determining that an SPE is in fact bankruptcy remote from the originator parent company.

In order for the receivables themselves to be bankruptcy remote, the originator must convey them to the SPE in a sale transaction (rather than a transaction that creates a SISO). This is the aspect of receivables securitization that is governed by the true-sale doctrine and discussed throughout this Article.

In order to raise capital, the SPE issues debt collateralized by the receivables it acquired from the originator, in the form of asset-backed securities. Securitizations involve the issuance of shares, bonds, trust certificates, or other instruments, so long as they are recognizable to capital markets and have secondary market value.[59] This Article uses the term "asset-backed securities" to refer to any of these. The SPE acquires and holds a pool of receivables and then issues securities to investors. Investors purchase the securities, giving the SPE cash that it passes through to the originator as the purchase price for the receivables.

Receivables finance has long been a crucial source of capital for business.[60] In recent decades, receivables securitization has become integral

57. *See* Lipson, *supra* note 10, at 1248, citing *Credit Risk Retention*, 76 Fed. Reg. 24,094, tbl. B (Apr. 29, 2011) (depicting "Securitization Market Share by Asset Class" between 2005-2009, and noting that new securitizations had overtaken the RMBS market share).

58. We might also refer to this entity as a special purpose vehicle or "SPV." In some contexts, one might use terms such as "securitization trust," or simply "issuer," to refer to the special purpose entity in a securitization facility.

59. *See* Lipson *supra* note 10, at 1240-41 (discussing how securitizations involve the issuance of bonds and shares, among other financial instruments, that are deemed to have a secondary market value).

60. *See* White & Brunstad, *infra* note 156, at 158.

to capital markets.[61] This development raises specific policy concerns. Originators that generate and securitize receivables can have many employees and retirees who are unsecured creditors in bankruptcy. Numerous commentators question the efficiency of receivables securitization, arguing that it permits originators and investors to extract a subsidy from, or artificially depress interest rates at the expense of, unsecured creditors.[62] Others defend receivables securitization on efficiency terms.[63] In addition, some maintain that it is unfair to permit originators and investors to externalize costs on to third parties, such as employees or tort claimants, who lack the capacity to alter their rate of return in response to the presence of investors with a superior claim to assets.[64] Others disagree and do not find that securitization presents fairness concerns: these deals involve assignments of assets that exclude third parties just like any other property conveyance, such that there is no fairness concern specific to this deal type that justifies questioning its structure.[65] Such policy concerns implicate the true-sale doctrine, as elaborated below.

B. *Bankruptcy remote finance: costs and benefits*

This section relates scholars' arguments about the value of bankruptcy remoteness and the efficiency of securitization to the true-sale doctrine.

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61. *See e.g.*, Iman Anabtawi & Steven L. Schwarcz, *Regulating Ex Post: How Law Can Address the Inevitability of Financial Failure*, 92 TEX. L. REV. 75, 110 (2013) (discussing ABS and the regulatory reaction to the financial crisis:

> The Federal Reserve further undertook to support the consumer asset-backed securities (ABS) market through the Term Asset-Backed Securities Loan Facility (TALF). ABS are securities similar to MBS but collateralized by nonmortgage loans, such as automobile, credit card, and student loan receivables. The ABS markets historically have funded a substantial share of credit to consumers and businesses. Concerned that 'continued disruption of [the ABS] markets could significantly limit the availability of credit to households and . . . businesses and thereby contribute to further weakening of U.S. economic activity,' the Federal Reserve used TALF to provide nonrecourse funding to borrowers willing to issue new ABS.

(*quoting* Press Release, Bd. of Governors of the Fed. Reserve Sys. (Nov. 25, 2008), http://www.federalreserve.gov/newsevents/press/monetary/20081125a.htm [https://perma.cc/4YV6-HSUS] (citations omitted)).

62. *See infra* text accompanying note 68.

63. *See infra* text accompanying note 66.

64. *See infra* text accompanying note 67.

65. *See infra* text accompanying note 66.

1. Securitization and efficiency generally

Securitization transactions produce efficiencies. They enable lower costs of capital, risk pooling, and liquidity for originators; they enable precise matching of risk profiles to risk preferences, diversification and risk spreading for investors.[66] At the same time, securitization transactions can produce inefficiencies arising from the exclusion of originators' non-adjusting creditors[67] from securitized assets.[68] This Article does not seek to advance the debate over whether, and when, securitization is efficient. Rather, it seeks to align arguments about the efficiency of securitization with formulations of the true-sale doctrine in order to facilitate policy discussions about what true-sale rules should look like.

In a nutshell, some commentators contend that securitization is inefficient because it permits originators and investors to extract a subsidy from the originators' non-adjusting creditors, externalizing costs onto them.[69] Others argue that because securitization lowers costs of capital, it is

66. *See, e.g.*, Steven L. Schwarcz, *Securitization Post-Enron*, 25 CARDOZO L. REV. 1539, 1541 (2004) (describing the benefits securitization can have for originators, such as lower-cost financing, preferable risk allocation, and liquidity); Janger *supra* note 10, at 1770 (arguing that securitization benefits investors and borrowers).

67. Non-adjusting creditors are unsecured creditors who are not in a position to adjust their rate of return in response to changes in capital structure or financial condition of the debtor. Non-adjusting creditors include employees and many trade creditors. Tort claimants are non-adjusting creditors that are also non-consenting—that is, they do not consent to extend credit to the debtor in the first place.

68. *See* Lynn M. LoPucki, *The Death of Liability*, 106 YALE L.J. 1, 23–30 (1996) (describing how a company could divest itself of its assets through asset securitization but still use those assets during the course of its business); Lynn M. LoPucki, *The Irrefutable Logic of Judgment Proofing*, 52 STAN. L. REV. 55, 59–67 (1999) (analyzing Steven L. Schwarcz's response to LoPucki's *The Death of Liability* to refute the argument that the costs of judgement-proofing outweigh the benefits). *But see* Steven L. Schwarcz, *The Inherent Irrationality of Judgment Proofing*, 52 STAN. L. REV. 1 (1999) (arguing, through an economic analysis, that judgment-proofing techniques, such as LoPucki's, may not be standard practice); James J. White, *Corporate Judgment Proofing: A Response to Lynn LoPucki's The Death of Liability*, 107 YALE L.J. 1363 (1998) (arguing that American businesses are making themselves increasingly judgment-proof). *See also* Yair Listokin, *Is Secured Debt Used to Redistribute Value from Tort Claimants in Bankruptcy? An Empirical Analysis*, 57 DUKE L.J. 1037 (2008) (finding that firms with high uninsured tort risk do not issue more secured debt than other firms, negating the redistribution theory of secured credit). *Cf.* Richard Squire, *The Case for Symmetry in Creditors' Rights*, 118 YALE L.J. 806, 838-42 (2009) (stating that debtor opportunism in shifting costs to non-adjusting creditors is the most likely explanation for the persistence of asymmetrical asset partitioning).

69. *See, e.g.*, Lois R. Lupica, *Asset Securitization: The Unsecured Creditor's Perspective*, 76 TEX. L. REV. 595 (1998) (identifying arguments against the efficiency of structured finance). This critique is rooted in "the puzzle of secured credit." The puzzle grew out of applications to secured lending of Franco Modigliani's and Merton Miller's theory that the value of a firm is not affected by its capital structure in a perfect market. *See* Franco

efficient in Kaldor-Hicks terms, and benefits originators, investors, and unsecured creditors as well.[70]

Note that the arguments referenced here about efficiencies and inefficiencies of securitization pertain, to a large extent, to secured loans as well.[71] Debates over the efficiency of UCC Article 9's full-priority secured

Modigliani & Merton Miller, *The Cost of Capital, Corporation Finance, and the Theory of Investment*, 48 AM. ECON. REV. 261 (1958) (arguing that, under certain assumptions, the value of the firm does not change based on whether it is financed by debt or equity). For a concise summary, *see* William W. Bratton, CORPORATE FINANCE CASES AND MATERIALS 481–85 (5th ed. 2003) (summarizing the Modigliani-Miller thesis and assumptions by comparing it to the traditional approach in forming valuations and leverage). It may appear that secured credit lowers costs of capital by lowering interest rates available to debtors that issue collateral. However, in theory, altering the capital structure of a corporate entity should not change its value. *Id.* Investors adjust the interest rate charged for debt and the amount they will pay for an equity interest to reflect the riskiness of the investment. *See* Modigliani & Miller, *supra* note 69 (supporting the theory that debtors have no interest rate based reason to borrow on a secured basis if capital costs are the same). This raises the question: if an entity cannot change its average costs of capital by altering its capital structure, then why do debtors take on the transaction costs associated with issuing security for loans? *See generally* Alan Schwarz, *The Continuing Puzzle of Secured Debt*, 37 VAND. L. REV. 1051 (1984) (analyzing academic arguments about justifications for security in an effort to find answers to the secured debt puzzle). Two general possibilities may explain this puzzle: (1) secured credit produces efficiencies (*see* Schwarcz, *supra* note 66); and (2) secured credit exports costs to third parties (*see* Bebchuck & Fried, *infra* note 71, at 864 (arguing that security interests under the full priority rule have distributional effects that create inefficiencies)). David Carlson has rejected the "puzzle of secured credit." He contends that (1) Modigliani and Miller's theorem itself is flawed because it disregards the effect of capital structure on debtor behavior, and (2) in the context of secured lending, the theorem's application depends upon several irrational assumptions about secured loans. *See* David G. Carlson, *On the Efficiency of Secured Lending*, 80 VA. L. REV. 2179 (1994) (arguing that the most ordinary price theory shows that secured lending is rational). *See also* Michael C. Jensen & William H. Meckling, *Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure*, 3 J. FIN. ECON. 305, 332–33 (1976) (using proofs to determine the optimal level of investment by firm managers, taking agency costs into consideration). Additionally, since the irrelevance theorem (like many economic theorems) assumes a perfect capital market, other real-world factors also affect the puzzle of secured credit. For example, lenders do not decide what rates to charge given a debtor's value in a vacuum. Rather, interest rates are heavily determined by regulatory forces. Modigliani and Miller's theorem has inspired extensive debate. The possibility that some debtors will use security interests to shift down-side risk to unsecured creditors persists, regardless of whether the prospect of exporting costs explains the prevalence of secured lending generally.

70. *See, e.g.*, Steven L. Schwarcz, *Securitization Post-Enron*, 25 CARDOZO L. REV. 1539, 1553-69 (2004) (arguing that securitization is efficient). Cf. Steven L. Schwarcz, *The Easy Case for the Priority of Secured Claims in Bankruptcy*, 47 DUKE L.J. 425, 429 (1997) (discussing scholars who found that secured credit benefits the debtor but can increase the risk to non-adjusting creditors, who are not compensated for taking on this additional risk).

71. *See e.g*., Lucian A. Bebchuck & Jesse M. Fried, *The Uneasy Case for the Priority of Secured Credit in Bankruptcy*, 105 YALE L.J. 857 (1996) (analyzing full priority secured credit to show that costs of full priority can result in inefficient contracting between borrowers and lenders); Jacoby & Janger, *supra* note 8, at 48-52.

lending rules apply to, and are exaggerated by, securitization transactions.[72] Commercial law literature discusses extensively the critique that secured lending—and securitization—persist because they enable debtors to transfer costs to non-adjusting creditors.

Kaldor-Hicks efficiency and ABS statutes. If securitization is efficient because it lowers costs of capital and produces other efficiencies in capital markets, then the true-sale doctrine, it seems, facilitates efficiency to the extent that it solidifies the bankruptcy-remote status of assets. This observation would appear to be the impetus behind the ABS statues and other legislative safe harbor provisions designed to create certainty and reduce or eliminate re-characterization risk.[73]

But it is not necessarily true that if securitization is efficient and therefore desirable, then an ABS statute is the best approach to true-sale rules. ABS statutes are over-broad and may undermine efficiency, even if we start from the premise that, in a Kaldor-Hicks sense, securitization generally is efficient. This section sets aside the question of uncertainty of the current ABS statutes' effects in bankruptcy (which is discussed below),[74] and focuses instead on two points. First, the relationship between law and markets is dynamic. The current legal landscape contemplates re-characterization risk.[75] Securitization may be efficient currently, but could become inefficient in a different legal landscape. In the absence of re-characterization risk, market actors may structure deals in ways that aggravate the possibility of negative externalities.[76] Second, if an ABS statute is desirable, the formulation enacted in Texas,[77] as non-uniform UCC section 9-109(e), is better than the broader formulation enacted in

72. *See* Heather Hughes, *Creditors' Imagined Communities and the Unfettered Expansion of Secured Lending*, 83 DENV. U. L. REV. 425, 436-39 (2005) (describing how securitization amplifies scholars' concerns about full-priority secured lending).

73. *See infra* Part II.B. There is no extensive legislative history illuminating lawmakers' objectives in enacting ABS statutes. However, some state laws may be instructive: Texas Bar commentary notes the need for certainty with respect to Texas usury law, and Delaware's ABS statute facilitates accounting treatment as sales in transactions where lawyers cannot issue a true-sale opinion letter. *See* Plank, *supra* note 10, at 1733-34 (arguing that the statutes' relevance extends beyond bankruptcy cases and may encourage courts to uphold sales in close cases).

74. *See infra* Part II.B.1.

75. This is true even in jurisdictions that enact ABS statutes, given the possibilities of preemption or other, equitable qualifications of property interests in bankruptcy. *See infra* text accompanying notes 81-86.

76. Janger has made this point as well. *See* Janger, *supra* note 10, at 1775 (arguing that, in the absence of substantive true-sale rules, parties may not be as concerned with how a judge may characterize the transaction after the fact, resulting in a greater number of inefficient transactions).

77. Louisiana enacted a provision similar to the Texas statute. LA. REV. STAT. ANN. § 10:9-109(e) (West 2016); TEX. BUS. & COM. CODE ANN § 9-109(e) (West 2015).

Delaware,[78] as the free-standing "Asset Backed Securities Facilitation Act," because of implications for decision-making in bankruptcy. These points are discussed in turn below.

Markets are legally constructed in the sense that legally enforceable contractual obligations and property rights link market actors to one another and provide crucial infrastructure for market activity. The law-finance dynamic is a complex subject.[79] The relevance of this dynamic, here, is to observe that securitization—to the extent it is efficient—would not necessarily be more efficient if the law eliminated re-characterization risk in any and all transactions in which the parties call their conveyance a "sale," regardless of economic substance. It is an unanswered empirical question, and a shifting one over time, whether securitization is efficient despite costs to third parties, or whether it is inefficient because it externalizes costs.[80] Those who claim securitization is inefficient base their reasoning on the effects securitization can have on unsecured creditors. Considering this, true-sale rules that eliminate re-characterization risk regardless of economic substance could aggravate the volume of instances in which securitization externalizes costs, such that in the aggregate securitization no longer creates wealth (through reduced costs of capital) in excess of such externalized costs.

In distinguishing "legitimate securitization transactions from judgment proofing,"[81] for example, Steven Schwarcz explains that in a securitization, originators receive value in exchange for assets securitized. "[T]he goal of judgment proofing," he states, "is to impose externalities on a firm's creditors, preventing them from enforcing their claims against assets that otherwise should be available for payment."[82] Securitization is distinct from judgment proofing because the firm exchanges assets for cash, substituting

78. Other states have enacted free-standing ABS statutes similar to the Delaware statute. *See, e.g.*, ALA. CODE § 35-10A-2(a)(1) (West 2016); DEL. CODE ANN. tit. 6, §§ 2701A-2703A (West 2016); OHIO REV. CODE ANN. § 1109.75 (West 2016); S.D. CODIFIED LAWS § 54-1-10 (West 2016); N.C. GEN. STATE. §§ 53-425, 53-426 (West 2015).

79. Scholars such as Katharina Pistor, for example, assess the relationship between law and markets. *See* Katharina Pistor, *A Legal Theory of Finance*, 41 J. COMP. ECON. 315 (2013) (stating a legal theory of finance (LTF) in which markets are legally constructed and occupy a hybrid public-private space). Law and finance may be in tension when enforcement of obligations threatens the financial system. Pistor describes a law-finance paradox in which markets are legally constructed, but legal elasticity at the apex of the financial-legal system demarcates power. Law tends to be binding at the periphery of the financial system and elastic at its apex. *Id.* The securitization market and the true-sale doctrine would provide an apt context in which to explore Pistor's legal theory of finance. However, this Article does not undertake that analysis.

80. *Cf.* White, *supra* note 68 (responding to LoPucki's claim that corporations are using securitization to evade creditor liability).

81. Steven L. Schwarcz, *Ring-Fencing*, 87 S. CAL. L. REV. 69, 83 n.94 (2013).

82. *Id.* at 83.

one asset for another in a sale transaction rather than shifting assets off-balance sheet to prevent recovery by unsecured creditors.[83] "Securitization, much like a new-money loan, would not have a net adverse impact on non-adjusting creditors of a company to the extent it entails the exchange of one type of asset (e.g., mortgage loans, automotive loans, or other financial assets) for another asset, cash."[84] Non-adjusting creditors are only harmed, he argues, to the extent the originator over-invests the cash or the risk of insolvency increases.[85]

Schwarcz's distinction between judgment proofing and legitimate securitization, however, assumes true-sale rules that require a fair exchange of assets for cash in receivables securitizations. In a jurisdiction that enacts an ABS statute, or that does not rigorously analyze recourse and price provisions to establish that receivables assignments have the economic substance of sales, companies could securitize assets on terms that externalize costs onto non-adjusting creditors.[86]

Again, this Article does not argue that securitization is efficient or inefficient. It illuminates the relationship between positions on securitization's efficiency and formulations of the true-sale doctrine.

If one nonetheless takes the position that the benefits of lower costs of capital will always outweigh costs to third parties, then an ABS statute that eliminates re-characterization risk would seem desirable. However, the form of ABS statute enacted in Delaware and other states raises a different set of efficiency questions concerning decisions about continuation versus liquidation in bankruptcy.[87] Unlike in Delaware, the ABS statute in Texas is a non-uniform provision of UCC Article 9.[88] Section 9-109(e), enacted in Texas, better facilitates efficiency than the Delaware statute, because its

83. *See* Schwarcz, *supra* note 68, at 12-17 (explaining that an arm's length transaction does not necessarily result in judgment proofing). *But cf.* Lynn M. LoPucki, *The Death of Liability*, 106 YALE L. J. 1, 6 (1996) (finding that "currently effective judgment-proofing strategies are fully capable of defeating the liability system").

84. Steven L. Schwarcz, *The Conundrum of Covered Bonds*, 66 BUS. L. 561, 584 (2011).

85. *Id.* at 583.

86. Similarly, in discussing the differences between securitization and covered bond transactions, Schwarcz assumes a substantive true-sale doctrine. Two crucial differences between covered bonds and securitizations are that (i) covered bonds have full recourse to the issuer, whereas securitization financing is non-recourse; and (ii) covered bonds involve a dynamic asset pool that remains on the issuer's balance sheet, whereas securitization effectively fixes a segregated asset pool. *See* Schwarcz, *The Conundrum of Covered Bonds*, *supra* note 84, at 571, 586. These differences assume that the assignment of receivables and accompanying servicing arrangement for securitization do not contain provisions creating a level of recourse that is inconsistent with substantive segregation and sale treatment. An ABS statute enacts true-sale rules that would recognize a legal sale despite recourse level. An incoherent, poorly administered common-law approach could do so as well.

87. *See infra* text accompanying notes 198-99.

88. *See infra* note 197.

scope is limited to assets contemplated in UCC 9-109(a)(3)—receivables and the like.[89] As such, Texas's ABS statutory provisions eliminate re-characterization risk[90] only in securitizations of "replaceable" or "non-essential" assets.[91] As discussed below, Ayotte and Gaon find that bankruptcy remoteness of replaceable assets facilitates efficient disposition of assets in bankruptcy. This is because the assets are not available for assignment in a debtor-in-possession financing, forcing financers to rely on the value of the firm's projects; at the same time, the holders of replaceable, securitized assets do not have undue hold-out power over the firm, as they do in cases of securitization of essential assets.[92]

Inefficiencies and the relevance of price. Though many commentators argue that securitization is efficient, numerous others contest this position. Dissenters argue that securitization is inefficient because it involves extraction of a subsidy from unsecured creditors, artificially depressing interest rates by externalizing costs.[93] Scholars expressed this position succinctly in a letter to Congress opposing proposed bankruptcy law section 912, which would have functioned much like the state ABS statutes, eliminating re-characterization risk for ABS investors. Their letter states:

> [Credit groups claim that] financing costs will be reduced [if lawmakers eliminate re-characterization risk] because of greater 'predictability.' Unfortunately, it is not possible to lower total costs when total risks remain the same. Instead, §912 simply gives one group of lenders a much better position than all others, driving up the costs for all other parties. . . . Favored institutions may charge less to make loans if they know they will be given a substantial advantage over all the other creditors. Yet there is no reason that these securitized creditors should be given special preference over banks, bondholders, suppliers, tort victims, pension funds and employees who will be forced to bear the increased risks, whether they can afford it or not.[94]

89. *Id.*

90. Again, this section forgoes discussion of uncertainty surrounding the effects of ABS statutes in bankruptcy. For such discussion, see *infra* text accompanying notes 204-12.

91. *See infra* text accompanying notes 198-99.

92. *See* Ayotte & Gaon, *supra* note 7 (finding that bankruptcy remoteness helps prevent inefficiencies when replaceable assets are securitized); *infra* text accompanying notes 235-236 (noting that a "securitization" of essential assets would be a deal that is distinct in important ways from a securitization of receivables). This Article follows Ayotte and Gaon's terminology for purposes of this part of the Article's analysis.

93. *See supra* note 69.

94. Letter from Allan Axelrod, Professor Emeritus, Rutgers School of Law – Newark, et al., to Sen. Patrick Leahy and Rep. F. James Sensenbrenner, AM. BANKR. INST. (Jan. 23, 2002), http://www.abi.org/abi-journal/legislative-update-proposed-rules-amendments-published-for-public-comment [https://perma.cc/KCH2-QAQ6].

To the extent that securitization externalizes costs to other creditors, the true-sale doctrine can potentially aggravate—or mitigate—this effect. Some critics contend that efficiency and fairness concerns surrounding securitization are inherent in the structure of these deals. From this vantage point, the true sale doctrine may not significantly affect securitization's consequences. Others, however, point out that securitization may be problematic in some situations but not others—deal terms can make a securitization more or less efficient, or more or less fair.

To the extent deal terms can affect the efficiency and fairness of a receivables securitization, purchase price, it would seem, is a deal term of significant consequence. The true-sale doctrine could aggravate negative effects on third parties in contexts where it finds assets to be bankruptcy remote despite an inadequate purchase price.[95] The doctrine could mitigate such effects, conversely, to the extent that it assures a fair and financially sound relationship between the value of the assets sold and the proceeds of the financing.[96] For commentators who are concerned that securitization extracts a subsidy from non-adjusting creditors, fortifying a true-sale doctrine that assures adequate compensation to the originator could minimize this subsidy.

Again, whether adequate purchase price (enforced with true-sale rules) would actually mitigate efficiency concerns depends on one's opinion of securitization. Some argue that the structure of securitization and first-priority secured lending *depend* upon extraction of a subsidy from non-adjusting creditors.[97] From this perspective, securitization will artificially depress interest rates (externalizing costs), making it unfair to non-adjusting creditors, regardless of the adequacy of the purchase price an originator received for securitized assets. (Also, even assignments that involve a fair purchase price for securitized assets exchange valuable assets for cash that the originator may then use in ways that do not add value to the firm or are disadvantageous to unsecured creditors.[98]) Others, however, would consider whether assuring a fair price for assets securitized could enlist the true-sale doctrine in minimizing concerns about externalizing costs onto non-adjusting creditors.

For example, as noted above, Schwarcz's distinction between judgment proofing and legitimate securitization turns on a fair exchange of assets for

95. Note that technically, the purchase price should never be "inadequate," because the seller both receives proceeds of the financing and holds the equity of the SPE. The adequacy of compensation question turns on valuation of the equity, not just the amount of the proceeds versus the valuation of the assigned assets.

96. For discussion of the complexity of determining adequate price in this context, *see infra* text accompanying notes 183-87.

97. *See e.g.*, LoPucki, *The Death of Liability*, *supra* note 68.

98. *See* Schwarcz, *supra* note 84, at 583 (discussing harms of over-investment).

cash.[99] Schwarcz, in discussing externalities of transactions, uses the term "responsibility failure" to describe a firm's ability to externalize costs of taking an action.[100] "Focusing on responsibility failure," he writes, helps to "shift attention back to the fundamental cause of the externalities: in this case, the government's failure to impose laws that limit the ability of firms to externalize those costs."[101] Following this line of thinking, we could conceive of true-sale rules that exclude non-adjusting creditors from assets despite inadequate purchase price as a responsibility failure on the state's part.

Scholars such as Robert D. Aicher and William J. Fellerhoff have argued that true-sale determinations should turn on whether the buyer has paid a fair market value for the package of rights and recourse received.[102] The main challenge to effectuating this approach lies in the complexity of determining an adequate price, given the number of factors that valuation of a receivables conveyance involves. Such a conveyance may include various kinds of recourse provisions, servicing obligations, and complex discounting, as well as disparate information available to buyer and seller, disparate bargaining positions, and changing market trends[103]—all of which make it difficult for courts to determine the adequacy of a price.[104]

The role of price in factors-based approaches to the true-sale doctrine is more thoroughly discussed in Part II.A.2. The point, here, is to observe that to the extent commentators or policymakers believe that securitization is inefficient because it externalizes costs to non-adjusting creditors, true-sale rules that are designed to minimize such "subsidy" by promoting fair pricing could mitigate inefficiencies.[105]

To date, literature on the efficiency of securitization exists largely apart from literature analyzing the true-sale doctrine. Making explicit the implications of varying views on securitization's efficiency for formulations of true-sale rules enables a more informed, policy-based approach to these rules.

2. Ayotte and Gaon on the value of bankruptcy remoteness

The consequences of re-characterization may seem minor, given that

99. *See supra* text accompanying notes 66, 68-69.

100. *See* Schwarcz, *Ring-Fencing*, *supra* note 81, at 84, 93-94 (discussing the role externalities play in market failure).

101. *Id.* at 93.

102. *See* Aicher & Fellerhoff, *infra* note 168 (discussing ways to analyze securitizations and true sales in bankruptcy cases).

103. *Id.*

104. *See infra* Part II.A.2.

105. Part IV.A sketches a proposal for a partial codification of this approach.

investors in securitized assets still have a first-priority lien, pursuant to UCC Article 9. But the difference between having investors that hold a first-priority security interest in bankruptcy, versus an interest in assets that are bankruptcy remote, affects whether an originator can obtain new financing or must liquidate. Ayotte and Gaon analyze the value of bankruptcy remoteness, given sources of possible inefficiency in bankruptcy rooted in decisions about continuation, versus liquidation, of the bankrupt firm.[106]

Ayotte and Gaon find bankruptcy remoteness (of securitized assets) to be the feature that distinguishes ABS from secured debt.[107] They then assert the value of bankruptcy remoteness in two ways. First, they explain that because securitized assets are not part of an originator's bankruptcy estate, they leave the originator with fewer assets that are assignable to raise debtor-in-possession (DIP) financing, which "reduces the incentives of the DIP lender to provide new funds, which can mitigate the excess continuation problem inherent in the bankruptcy law."[108] Second, they compare ABS spreads over maturity-matched swap rates in the six-month period leading up to, and following, *In re LTV Steel Company, Inc.*[109]—a case in which a bankruptcy judge allowed an originator (LTV Steel) to use securitized assets as cash collateral during its Chapter 11 reorganization process.[110] Their comparison finds that ABS spreads for Chapter 11-eligible originators increased significantly, as compared to spreads for originators that were not Chapter 11-eligible (and therefore subject to true-sale rules contained in FDIC regulation, rather than those applied in Chapter 11 proceedings, for which *In re LTV Steel* is relevant).[111] To the extent that Ayotte and Gaon's findings are accurate, they attest to the importance of legal true sales.

Ayotte and Gaon discuss efficiencies surrounding continuation and liquidation in bankruptcies of Chapter-11 eligible securitizers. They explain that the "key economic difference between 'continuation' and 'liquidation' is that the former (a) requires new financing, and (b) involves a delayed resolution, which may reduce the value of assets-in-place. These conditions give rise to a conflict of interest between the manager/DIP lender coalition

106. *See* Ayotte & Gaon, *supra* note 7 (concluding that bankruptcy remoteness is worthwhile to investors).

107. *Id.* at 1300. Other commentators focus on benefits of pooling assets together and selling them to investors in tranches, or on securitization's capacity to enable economizing on regulatory capital requirements. *Id.*

108. Ayotte & Gaon, *supra* note 7, at 1302.

109. In re LTV Steel Co., 274 B.R. 278 (Bankr. N.D. Ohio 2001). *See also infra* text accompanying notes 159-64 (discussing *LTV Steel Co.*).

110. *See* Ayotte & Gaon, *supra* note 7, at 1303 (discussing *LTV Steel Co.*)

111. *See id.* (noting that "spreads on ABS issued by non-depository institutions increased by approximately 25 basis points more than the control group in the period following LTV.")

and the initial investors in bankruptcy."[112] The capacity of the bankrupt entity to obtain continuation funding will be determined by the quality of its projects and its existing capital structure. Managers, Ayotte and Gaon state, are biased towards continuation.[113] This bias, along with the fact that existing claims are costly to renegotiate, leads to two possible sources of inefficiency.[114]

First, a firm that has negative-value projects may continue inefficiently if it can obtain continuation financing.[115] DIP financing is entirely senior to unsecured creditors, and can partially dilute interests of secured creditors—a fact that several scholars have shown can lead to overinvestment and excess continuation.[116] A firm's capacity to obtain continuation financing depends on whether assets are included in the bankruptcy estate, and therefore available for assignment to a continuation lender (potentially diluting existing secured creditors). Hence, to the extent that securitization involves a true sale of assets to a bankruptcy remote SPE, it lessens the capacity of the DIP to dilute pre-bankruptcy lenders, leaving continuation financers to look more fully at the value of the firm's ongoing projects.[117]

Second, a firm may liquidate inefficiently if it has positive-value projects but cannot obtain continuation financing.[118] Whether securitization aggravates or mitigates inefficiency depends upon the type of assets securitized. If the firm has securitized necessary assets, such as equipment, inventory, or intellectual property, then the hold-up power of ABS investors may impede efficient continuation financing.

Ayotte and Gaon find that securitization is most valuable when the assets involved are replaceable assets, such as receivables. "In such circumstances," they state, "ABS provides maximal protection to creditors and subjects the bankrupt firm to a more stringent market test in order to receive new funds."[119] Secured debt, in contrast, can be preferable to ABS when the assets involved are necessary assets, because the investors have less hold-up power when they are secured creditors rather than ABS investors.[120]

112. *Id.* at 1301 n.3.
113. *Id.*
114. *Id.*
115. *Id.*
116. *See* Ayotte & Gaon, *supra* note 7, at 1302 (citing G. G. Triantis, *A Theory of the Regulation of Debtor-in-Possession Financing*, 46 VANDERBILT L. REV. 901-34 (1993); R. Gertner & D. Scharfstein, *A Theory of Workouts and the Effects of Reorganization Law*, 46 J. OF FIN. 1189-222 (1991); M. J. White, *The Corporate Bankruptcy Decision*, 3 J. OF ECON. PERSP. 129-51 (1989)).
117. Ayotte & Gaon, *supra* note 7, at 1301-02.
118. *Id.* at 1301.
119. Ayotte & Gaon, *supra* note 7, at 1302.
120. *Id.*

Ayotte and Gaon measure the value of bankruptcy remoteness by comparing credit spreads in the ABS market before and after *In re LTV Steel* (and the increased risk of re-characterization that it presented). They find that "increased risk of [re-characterization] results in lower overall efficiency and higher interest rates for ABS investors in equilibrium."[121] This Article does not vet Ayotte and Gaon's empirical results. Rather, their results are offered here as findings that—to the extent true—attest to the value of bankruptcy remoteness and therefore importance of the true-sale doctrine.

For purposes of the true-sale doctrine, it is of utmost interest that Ayotte and Gaon find that bankruptcy remoteness has measurable value as compared to secured debt, when the assets securitized are receivables. If bankruptcy remoteness in receivables securitization promotes efficient outcomes in bankruptcy, and re-characterization risk imposes costs, then a clear and well-administered true-sale doctrine would contribute to efficient outcomes. Re-characterization risk can arise from either (i) substantive true-sale rules that favor finding security interests when transactions are hybrid or complex, or (ii) uncertainty and lack of clarity surrounding the true-sale doctrine. As such, the ABS statutes may, under Ayotte and Gaon's model, facilitate efficient outcomes in bankruptcy to the extent they apply to securitizations of replaceable assets.

C. *Legal rules and accounting standards*

The accounting profession has a different orientation than the legal profession. Accountants seek to have the books of a firm accurately reflect the firm's practical economic position—not necessarily the firm's legal position.[122] Yet a firm's practical economic position and its legal position are inter-related. In the context of true sales of receivables, accounting standards consider legal isolation of assets.

A true-sale legal opinion letter from counsel to an originator that is securitizing assets, in favor of investors, accompanies asset-backed securities.[123] The Financial Accounting Standards Board (FASB)[124]

121. *Id.* at 1303, 1322-26.

122. *See* Aicher & Fellerhoff, *infra* note 168, at 204 (noting the distinct differences in accountants' versus banking regulators' practices).

123. *See infra* text accompanying note 127.

124. FASB operates under the Financial Accounting Foundation, a private, non-profit organization. Established in 1973, FASB replaced AICPA's Accounting Principles Board as the official source of accounting standards for non-governmental entities. These standards are referred to as GAAP—generally accepted accounting principles; they are published in FASB's "Statement of Financial Accounting Standards No. xxx." Since July 2009, FASB has issued Accounting Standards Codification (ASC), to make standards more accessible. The ASC, and Securities Exchange Commission guidance, represent the only authoritative sources

articulates—in FAS 140 and amendments—accounting rules for determining when securitized assets belong off of an originator's balance sheet.[125] The American Institute of Certified Public Accountants (AICPA)[126] considers the true-sale legal opinion to be evidential in determining correct accounting treatment for a receivables financing.[127]

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of U.S. GAAP. *About the FASB*, FIN. ACCOUNTING FOUNDATION BD. (FASB), http://www.fasb.org/cs/ContentServer?c=Page&pagename=FASB%2FPage%2FSectionPage&cid=1176154526495 [https://perma.cc/4CK5-96T2] (last visited June 18, 2016). *See also*, *Policy Statement: Reaffirming the Status of the FASB as a Designated Private-Sector Standard Setter*, SEC. EXCH. COMM'N (Apr. 25, 2003), https://www.sec.gov/rules/policy/33-8221.htm [https://perma.cc/C5FD-7RYJ] (designating FASB's financial accounting and reporting standards as "generally accepted"); *Digital Timeline: 40 Years of FASB*, FASB, http://www.fasb.org/jsp/FASB/Page/TimelinePage&cid=1175805309640 [https://perma.cc/K3FD-AG3G] (lasted visited June 18, 2016) ("In 2002, FASB and AICPA agreed that AICPA's Accounting Standards Executive Committee will no longer issue guidance that is considered authoritative US GAAP").

125. *See* FASB, Accounting Standards Codification, Topic 860, *Transfers and Servicing* (2009) (replacing FASB, Statement of FAS No. 166, which replaced FAS 140); Summary of Statement of No. 140: *Accounting for Transfers and Servicing of Financial Assets and Extinguishments of Liabilities – A Replacement of FASB Statement No. 125*, FASB (Sept. 2000), http://www.fasb.org/summary/stsum140.shtml [https://perma.cc/N896-ADWP] (last visited June 24, 2016); G. Wogan Bernard, *Update on the Amendments to FAS 140 – Accounting for Transfers of Financial Assets and Repurchase Financing Transactions* (June 2009), https://www.americanbar.org/content/dam/aba/publications/rpte_ereport/2009/june/rp_g_wogan_bernard. authcheckdam.pdf [https://perma.cc/L7XY-Q293]; *Project Update: Transfer of Financial Assets*, FASB (June 22, 2009), http://www.fasb.org/project/transfers_of_financial_assets.shtml#due_process [https://perma.cc/95FH-C9DG]; *Revised Exposure Draft for Proposed Amended to FAS-140*, FASB (No. 1610-100), http://www.fasb.org/draft/ed_transfers_financial_assets_amend_st140.pdf [https://perma.cc/6XNS-65YX]; *General Summary of Comment Letters to the Proposed Amendments to FAS-140*, FASB, http://www.fasb.org/project/cl_summary_transfers_of_financial_assets.pdf [https://perma.cc/BM44-FLN7] (last visited June 24, 2016).

126. The AICPA is the largest U.S. professional organization of CPAs. It establishes the professional code of ethics for accountants. AICPA supports FASB's standard-setting efforts with its publications: the Financial Reporting Executive Committee (FinREC) issues Comment Letters, which discuss financial reporting policies and AICPA's positions on various proposals presented by FASB. *About the AICPA*, AM. INST. OF CERTIFIED PUB. ACCOUNTS (AICPA), http://www.aicpa.org/About/Pages/About.aspx [https://perma. cc/RJ6D-GJXU] (last visited June 22, 2016). *Financial Reporting Advocacy*, AICPA, https://www.aicpa. org/Advocacy/FinancialReporting/Pages/FRAdvocacy.aspx [https://perma.cc/2HV7-33JH] (last visited June 22, 2016). *See also Accounting and Financial Reporting – Positions and Comment Letters*, AICPA, https://www.aicpa.org/Advocacy/FinancialReporting/Pages/FinRECPositions.aspx [https://perma.cc/7WTP-366B] (last visited June 22, 2016).

127. *See* Am. Inst. of Certified Pub. Accountants [hereinafter AICPA], AU-C §9620, Interpretation No.1: *The Use of Legal Interpretations as Audit Evidence to Support Management's Assertion That a Transfer of Financial Assets Has Met the Isolation Criterion in Paragraphs 7–14 of Financial Accounting Standards Board Accounting Standards Codification 860-10-40* (2015), https://www.aicpa.org/Research/Standards/AuditAttest/DownloadableDocuments/AU-C-00620_9.pdf [https://perma.cc/MLE9-5EXU]; FAS 166 , §4(h) (June 2009) (suggesting a legal opinion letter of broader scope than before, covering

Accounting is central to financial reporting, and as such, the Securities and Exchange Commission affects accounting criteria for moving assets off-balance sheet. FAS 166 and 167 (amending FAS 140) seek to limit "sale" accounting treatment to instances in which the seller truly surrenders control of the assets.[128] In any given receivables securitization, there may be a true sale for legal purposes, but not accounting purposes.[129] In some instances, accounting treatment may be a motivation for securitization itself.[130]

Legal isolation of securitized assets, for accounting purposes,[131] is often established with true-sale opinion letters from attorneys—letters that are complicated by the convoluted nature of the true-sale doctrine and the uncertainties of bankruptcy. In this sense, accounting practices are affected by the state of the true-sale doctrine. True-sale opinion letters serve a variety of functions in the context of receivables securitization. They are issued by counsel to the originator, for the benefit of investors, to assure investors that the assets backing the securities they purchase have been conveyed to the SPE in a true sale, such that they are not reachable by creditors of the originator in bankruptcy.[132] Though these letters are issued to investors,

all aspects of legal isolation instead of just the "true sale" component). The AICPA and the ABA Committee on Legal Opinions have collaborated in the process of delineating guidelines for reliance on legal opinions in connection with "legal isolation"; following the financial crisis the AICPA as revisited its requirements for legal opinions on true-sale treatment. *See* Steven O. Weise, *AICPA Proposes Expansion of Form of True Sale Opinion*, ABA BUS. LAW SEC., 12 IN OUR OPINION: THE NEWSLETTER OF THE COMMITTEE ON LEGAL OPINIONS, 13–17 (2012), http://www.americanbar.org/content/dam/aba/administrative/business_law/newsletters/CL510000/full-issue-201212.authcheckdam.pdf [https://perma.cc/5HQV-4BBG] (evaluating the form opinion proposed by the AICPA that would expand the scope of its standard true-sale opinion).

128. Reza Dibadj, *Four Key Elements to Successful Financial Regulatory Reform*, 6 HASTINGS BUS. L.J. 377, 381 n.17 (2010).

129. *See* Schwarcz, *What is Securitization?* at 1286 n.18 (noting that a sale may transpire for accounting purposes but not for other purposes, such as bankruptcy).

130. *See* Patricia M. Dechow, Linda A. Myers & Catherine Shakespeare, *Fair Value Accounting and Gains from Asset Securitizations: A Convenient Earnings Management Tool with Compensation Side-Benefits*, 49 J. ACCT. & ECON. 2 (2010). Accounting treatment may provide motivation to securitize assets, but current accounting rules are meant to discourage manipulation. *See* FAS 140, 166, 167, *supra* note 125; Lipson, *supra* note 50, at nn. 10, 130.

131. Fin. Accounting Standards Bd., Statement of Financial Accounting Standards No. 140, at 70-72, available at http://fasb.org/pdf/fas140.pdf [https://perma.cc/G455-HGDN].

132. *See* Kenneth C. Kettering, *Securitization and its Discontents*, 29 CARDOZO L. REV. 1553, 1681-87 (2008) (discussing rating agencies' role in the securitization market); Thomas E. Plank, *Sense and Sensibility in Securitization: A Prudent Legal Structure and a Fanciful Critique*, 30 CARDOZO L. REV. 617, 632-40 (2008) (rebutting Kettering's article by arguing that securitization as a financial product is not "too big to fail"); Steven L. Schwarcz, *The Limits of Lawyering: Legal Opinions in Structured Finance*, 84 TEX. L. REV. 1, 5-6 (2005) (remarking that true sale and nonconslidation opinions are issued by most major law firms) Tribar Opinion Comm., *Special Report by the Tribar Opinion Committee: Opinions in the*

rating agencies, and originators, the letters typically allow originators to provide copies to accountants to support an originator's assertion that the transfer meets the legal isolation requirements for sale accounting treatment.[133]

True-sale opinions are typically reasoned opinions.[134] They include a host of exceptions, and an analysis of current law, based on which the issuing law firm opines that transferred assets would not be included in the assets of the originator (seller) if the originator becomes a debtor in bankruptcy or the FDIC appoints a receiver.[135] Critics of rating agents' practices in the wake of the financial crisis observe that rating agents (and other third parties relying on legal opinion letters) often focus simply on the opinion's conclusion, without fully considering or understanding the substance and implications of the various qualifications the opinion contains.[136]

The accounting profession and the legal profession have worked together to devise a form of true-sale opinion that can support the "legal isolation" requirement for accounting purposes.[137] The AICPA proposed in

Bankruptcy Context: Rating Agency, Structured Financing, and Chapter 11 Transactions, 46 BUS. LAW. 717 (1991) (discussing generally legal opinions concerning bankruptcy law issues offered in the context of financial and commercial transactions).

133. Along with a true-sale legal opinion, investors typically require an enforceability opinion (attesting to the legal enforceability of the deal documents), and a non-consolidation opinion (attesting to the legal separateness of the SPE, as an entity, such that it would not be consolidated with the originator in bankruptcy).

134. For a general discussion of opinions practice, and reasoned opinions, versus unqualified opinions, see DONALD W. GLAZER ET AL., GLAZER & FITZGIBBON ON LEGAL OPINIONS (2d ed. 2001 & Cum. Supp.); LEGAL OPINION LETTERS FORMBOOK (A. Sidney Holderness, Jr. & Brooke Wunnicke eds., 3d ed. 2010); Thomas L. Ambro & Arthur Norman Field, The Legal Opinion Risk Seminar Papers, 62 BUS. L. 397 (2007).

135. *See* Lois R. Lupica, *Revised Article 9, The Proposed Bankruptcy Code Amendments and Securitizing Debtors and Their Creditors*, 7 FORDHAM J. CORP. & FIN. L. 321, 331 (2002) (discussing the difficulty of definitively concluding that a particular asset transfer is a true sale, and resulting unwillingness among law firms to issue unqualified legal opinions to that effect). *See also* Kenneth C. Kettering, *Securitization and Its Discontents: The Dynamics of Financial Product Development*, 29 CARDOZO L. REV. 1553, 1684 (2008) (noting that opinion letters in securitization opinions can contain so many caveats that they are virtually ineffectual); Jeffrey Manns, *Rating Risk After the Subprime Mortgage Crisis: A User Fee Approach for Rating Agency Accountability*, 87 N.C. L. REV. 1011, 1070 n.242, 1080 (2009) (referring to transactional lawyers' opinion letters as attorney work product loaded with ad nauseum caveats). Attorneys distinguish qualified opinions from "non-opinions"-opinions that are so extensively qualified that they do not actually give the opinion they purport to render. ABA Guidelines advise against issuing "non-opinion" letters in favor of more explicitly expressing to the client and third party that the attorney cannot give the requested opinion. *See, e.g.*, THOMAS L. AMBRO ET AL., CERTAIN GUIDELINES FOR THE NEGOTIATION AND PREPARATION OF THIRD-PARTY LEGAL OPINIONS II.C. (4) (1991) (accompanying the 1991 Third-Party Legal Opinion Report and Accord).

136. *See e.g.*, Kettering, *supra* note 135, at 1681-87.

137. *See* Steven O. Weise, *AICPA Proposes Expansion of Form of True Sale Opinion*, *in*

2012 a suggested legal opinion letter that is much broader in scope than earlier forms, in that it covers all aspects of legal isolation (rather than just the "sale" question).[138] The Business Law Section of the American Bar Association formed a group to address the AICPA's proposal.[139] The 2015 adoption of the AU-C sec. 9620 appears to have ended discussion of broader opinion coverage.[140] The AU-C sec. 9620 addresses an "auditor's responsibilities relating to the work of an individual or organization possessing expertise in a field other than accounting or auditing when that work is used to assist the auditor in obtaining sufficient appropriate audit evidence."[141]

Accounting and legal standards for true sales are most explicitly intertwined in the context of the FDIC rules.[142] These rules create a safe harbor from re-characterization risk for investors buying ABS from FDIC-regulated issuers.[143] They require that assignments of securitized assets meet accounting standards for sale treatment, other than the "legal isolation" element.[144] The FDIC securitization rule was originally adopted in 2000, in reference to FAS 140.[145] The rule both contemplated technical requirements of FAS 140, and assured investors that securitized assets would not be reclaimed by the FDIC in receivership or conservatorship of an FDIC-regulated originator.

The evolution of both FAS 140 and the FDIC rules after the 2008 financial crisis, however, is complex. In 2009, the FASB adopted FAS 166 and FAS 167, amending FAS 140.[146] These amendments substantially

ABA BUS. LAW SEC., 12 IN OUR OPINION: THE NEWSLETTER OF THE COMMITTEE ON LEGAL OPINIONS, 13–17 (2012), http://www.americanbar.org/content/dam/aba/administrative/business_law/newsletters/CL510000/full-issue-201212.authcheckdam.pdf [https://perma.cc/J3CR-42DW] (noting that the accountants may obtain support through a legal opinion for their proposition that an asset has been "legally isolated" from the transferor).

138. *Id.*

139. *Id.*

140. *See* comments from T. Plank.

141. *See* "Using the Work of an Auditor's Specialist: Auditing Interpretations of Section 620," available at https://www.aicpa.org/research/standards/auditattest/pages/clarifiedsas.aspx [https://perma.cc/Q7JM-TQV4].

142. *See infra* Part II.B.2 (discussing the FDIC rules surrounding the true-sale doctrine).

143. *See infra* Part II.B.2 (detailing the safe harbors created by the FDIC rules); 12 CFR 360.6.

144. 12 CFR 360.6(b); *see infra* text accompanying note 215.

145. *See* Morrison & Foerster, "FDIC Issues Final Safe Harbor Rule," News Bulletin, Oct. 5, 2010, available at https://media2.mofo.com/documents/101005-fdic-issues-final-safe-harbor-rule.pdf [https://perma.cc/9YKF-VCGZ] (discussing the history of the FASB securitization rule).

146. *Id.*

narrow the instances in which an assignment of financial assets in a securitization transaction may be accounted for as a sale.[147] After 2009, many deals that previously would have been accounting sales are treated as secured loans for accounting purposes.[148] Lawmakers, then, revisited the FDIC securitization rule, taking the position that the safe harbor should apply differently depending on whether a transfer is a secured loan or a sale under the new accounting standards.[149] The revised FDIC rules also require that securitizations meet other, reform-oriented qualitative standards.[150]

II. THE TRUE-SALE DOCTRINE: PROBLEMATIC, EXISTING APPROACHES

This part describes existing approaches to the true-sale doctrine. It discusses the limitations of these approaches, highlighting the importance of bringing a more thorough and theoretically grounded analysis to this area of law. Sections A and B summarize common-law and statutory true-sale rules, respectively. Section C presents and critiques an approach recently proposed by two prominent commercial law scholars. Considering how much is at stake surrounding accurate administration of the true-sale doctrine, the confusion and lack of uniformity it entails are surprising (and disturbing).

Before delving into descriptions of current approaches to true-sale rules, however, two points of context warrant mentioning: (i) the relationship between true-sale rules and UCC Article 9, and (ii) the case of *In re LTV Steel Company, Inc.* UCC Article 9 provides a uniform body of law governing receivables conveyances generally. However, the Uniform Commercial Code does not contain provisions stating when an assignment of receivables constitutes a sale, rather than an interest securing an obligation. The code leaves to case law or other statutes the question of how to characterize transactions.[151]

UCC Article 9 states the steps that parties must take to create an enforceable receivables assignment, including that they follow Article 9's notice requirements.[152] A purchaser of receivables must perfect its interest pursuant to UCC Article 9, regardless of whether it is acquiring an ownership

147. *See* Schwarcz, *supra* note 84, at 572; Sidley Austin LLP, *FDIC Adopts Final Securitization Safe Harbor Rule*, Oct. 4, 2010, available at http://www.sidley.com/news/structured_finance_and_securitization_100410 [https://perma.cc/K77L-B74P].

148. *Id.*

149. *Id.*

150. *See infra* text accompanying notes 213-18.

151. *See* U.C.C. § 9-109 cmt. 4

152. U.C.C. § 9-203(b). This is the effect of U.C.C. § 9-109(a)(3).

interest or a SISO.[153] Article 9 governs conflicting claims to securitized receivables.[154] In addition, it makes contractual restrictions on assignment ineffective to prevent enforceable assignments of receivables.[155]

The intent of the parties, as established pursuant to laws apart from the UCC, determines the status of a transaction as a sale or loan.[156] The difficulty comes in determining the parties' intentions. Generally speaking, the law infers intent from the economic substance of a transaction—not from the transaction's form, meaning the language the parties use in describing their respective interests.[157] Otherwise, parties could engage in regulatory arbitrage just by calling their transaction by the form that gives the investor the most advantageous legal position despite the rights and obligations of the parties, and any third parties affected by the deal.

Given the complexity of receivables securitizations, it may be difficult to determine, before conducting a deal-specific analysis, whether a given transaction in fact involves a true sale. UCC Article 9 contributes to opacity surrounding the legal nature of assignments of receivables to off-balance-sheet entities for purposes of securitization, by making sales and SISOs indistinguishable in public records.[158]

Judge Bodoh, in the (in)famous bankruptcy proceedings in *In re LTV Steel Company, Inc.*,[159] stated that LTV Steel Company's creditors retained a property interest in securitized assets pending determination of the true-sale nature of LTV Steel Company's assignment of assets to its off-balance-sheet subsidiaries, LTV Steel Products and LTV Sales Finance.[160] In the course of the bankruptcy proceedings, Judge Bodoh denied an emergency motion by investors to modify an interim order permitting the creditors of LTV Steel Company to draw on assets that had been assigned to LTV Sales Finance pending resolution of the case. Judge Bodoh stated: "there seems to be an element of sophistry to suggest that [LTV] does not retain at least an equitable interest in the property that is subject to the interim order."[161] Describing the basis for this property interest, he writes: "[t]o suggest that [LTV] lacks some ownership interest in products that it creates with its own

153. U.C.C. § 9-203(b). This is the effect of U.C.C. § 9-109(a)(3), including sales of receivables in the scope of Article 9.

154. U.C.C. § 9-317(a), § 9-322(a).

155. U.C.C. § 9-408.

156. *See* JAMES J. WHITE AND G. ERIC BRUNSTAD, JR., SECURED TRANSACTIONS TEACHING MATERIALS, Fourth Edition (2013) at 365-70.

157. *Id.*

158. *See* U.C.C. § 9-109(a)(3) (extending the scope of Article 9 to sales of receivables) and § 9-505 (confirming that use of terminology designating parties as "seller" and "buyer" in a UCC-1 financing statement does not affect substantive transaction classification).

159. 274 B.R. 278 (2001).

160. *Id.*

161. *Id.* at 285.

labor, as well as the proceeds to be derived from that labor, is difficult to accept."[162] Judge Bodoh's concern was for the approximately 17,000 workers and 100,000 retirees that LTV Steel Company could potentially continue to support, at least through the bankruptcy proceedings, if it could access cash flows from receivables it assigned to LTV Sales Finance, generated by sales of inventory it assigned to LTV Steel Products.

This concern from the bench sent shock waves through the securitization industry, causing market actors and lawmakers to fret over the legal underpinnings of securitization.[163] LTV Steel Company withdrew its challenge and settled with the investor that claimed that LTV Steel Company retained no interest in the securitized assets to which a bankruptcy trustee's lien could attach.[164] The legislature in Ohio, where LTV was located, passed an ABS statute in order to try to override the true-sale doctrine and the complex questions that it presents.[165] In addition, Congress contemplated a safe-harbor provision, proposed section 912 of the bankruptcy code,[166] which failed surrounding concerns about securitization practices following the demise of Enron.[167]

A. *Factors-based approaches*

Case law addressing the true-sale doctrine is confusing, inconsistent, and sometimes incoherent.[168] Courts refer to multiple factors in assessing

162. *Id.*

163. *See* White & Brunstad, *supra* note 156, at 372. Commentators disagree, however, on whether the shock waves and concerns about legal uncertainty were warranted. For example, Thomas Plank has observed that but for the unique structure of LTV's inventory financing, its receivables financing would not have been questioned in court, and that the case does not threaten the legal foundations of securitization. *See* Plank, *supra* note 2, at 191-92.

164. Note that this investor, Abbey National, funded LTV Steel Company's operations with the securitization transaction at issue to rescue it from a prior bankruptcy. *See* In re LTV Steel Co., Inc., *supra* note 159, at 280-82.

165. It is unclear whether the ABS statutes succeed in replacing the true-sale doctrine. Bankruptcy courts might refuse to recognize a form of interest that runs afoul of well-worn characterization doctrines establishing the scope of ownership of securitized assets. *See infra* text accompanying notes 204-12.

166. *See infra* Part IV.B.

167. *See* Sarbanes-Oxley Act of 2002, Pub. L. 107-204, 116 Stat. 745 (2002); In re Enron Corp. Sec., Derivative & ERISA Litigation, 235 F. Supp. 2d 549, 610 (S.D. Tex. 2002); Jonathan C. Lipson, *Enron, Asset Securitization and Bankruptcy Reform: Dead or Dormant?*, 11 J. BANKR. L. & PRAC. 101(2002) (commenting on the significant problems with proposed section 912 especially as applied to Enron-type transactions); Steven L. Schwarcz, *Enron and the Use and Abuse of Special Purpose Entities in Corporate Structures*, 70 U. CIN. L. REV. 1309, 1314-18 (2002) (describing concerns post-Enron, as well as risk of "overreaction" and "consequent over-regulation.").

168. Harris & Mooney, *supra* note 31, at 1040. *See also* Robert D. Aicher & William J. Fellerhoff, *Characterization of a Transfer of Receivables as a Sale or a Secured Loan Upon*

whether a given assignment of receivables is a true sale.[169] These factors include: (i) recourse to the seller, (ii) seller retention of servicing and commingling of proceeds, (iii) failure to investigate the credit of account debtors, (iv) seller rights to excess collections, (v) seller repurchase options, (vi) rights to unilaterally adjust pricing terms, (vii) rights to unilaterally alter other terms of the transferred assets, and (viii) language of documents and conduct of parties.[170] There is no standardized list of factors. Commentators observe, however, that the two most important factors are price and recourse. This section discusses arguments for both price and recourse as bases for making true-sale determinations.

1. Recourse

True-sale analyses often focus on recourse—the extent to which the seller of receivables remains liable for the receivables' performance.[171] A high level of recourse, the logic goes, indicates that the purchaser did not acquire risk that is consistent with ownership.[172] However, sales of many

Bankruptcy of the Transferor, 65 AM. BANKR. L.J. 181, 186-98 (1991) (detailing the various factors courts use in examining sale and loan determinations for purposes of the true-sale doctrine).

169. *See* In re Woodson Co., 813 F.2d 266, 272 (9th Cir. 1987) ("Simply calling transactions 'sales' does not make them so. Labels cannot change the true nature of the underlying transactions."); In re Golden Plan of California, Inc., 829 F.2d 705, 709 (9th Cir. 1986) ("Whether the parties intended outright sales or loans for security is determined from all the facts and circumstances surrounding the transactions at issue."); Major's Furniture Mart v. Castle Credit Corp., 602 F.2d 538, 544 (3d Cir. 1979) ("The question for the court then is whether the nature of the recourse, and the true nature of the transaction, are such that the legal rights and economic consequences of the agreement bear a greater similarity to a financing transaction or to a sale."); In re Commercial Loan Corp., 316 B.R. 690, 700 (Bankr. N.D. Ill. 2004) (noting that courts do not rely on "any universally accepted set of factors" and instead "different courts consider different factors and give those factors different weight").

170. *See* Aicher & Fellerhoff, *supra* note 168, at 186-94.

171. *See, e.g.*, Peter V. Pantaleo, et al, *Rethinking the Role of Recourse in the Sale of Financial Assets*, 52 BUS. LAW. 159 (1996) (discussing how a buyer retaining recourse complicates whether to view the transaction as a sale or a secured loan); Thomas E. Plank, *The True Sale of Loans and the Roles of Recourse*, 14 GEO. MASON U. L. REV. 287 (1991) (highlighting the uncertainty of true-sale determinations when an owner conveys loans with credit recourse).

172. *See generally*, In re Qualia Clinical Serv., Inc., 441 B.R. 325, 329–32 (B.A.P. 8th Cir. 2011); Nickey Gregory Co. LLC v. AgriCap, LLC, 597 F.3d. 591, 599–603 (4th Cir. 2010); In re Commercial Money Ctr., Inc., 350 B.R. 465, 480–85 (B.A.P. 9th Cir. 2006); In re Contractor's Equipment Supply Co., 861 F.2d 241, 245 (9th Cir. 1988); In re Woodson Co., 813 F.2d 266, 270–72 (9th Cir. 1987); Major's Furniture Mart, Inc. v. Castle Credit Corp., 602 F.2d 538, 543–46 (3d Cir. 1979); In re Major Funding Corp., 82 B.R. 443, 447 (Bankr. S.D. Tex. 1987); In re S.O.A.W. Enterprises, 32 B.R. 279, 281–83 (Bankr. W.D. Tex. 1983); In re Evergreen Valley Resort, Inc. 23 B.R. 659, 661–62 (Bankr. D. Me. 1982); People v. Service Institute Inc., 421 N.Y.S.2d 325, 326–27 (Sup. Ct. 1979).

kinds of assets come with warranties of quality and other seller obligations to ensure that assets meet purchasers' requirements. The fact of recourse in most contexts, standing alone, does not indicate a SISO rather than a true sale.[173]

Commentators and securitization industry participants draw distinctions among types of recourse—distinguishing credit recourse, from warranty recourse, from guaranties of market value or yield.[174] Collectability recourse refers to provisions under which the seller guarantees assigned receivables or agrees to repurchase receivables if the account obligor defaults. These kinds of provisions are analogous to warranties of quality, and therefore are consistent with true-sale characterization of the receivables' assignment. The buyer's return is tied to performance of the assets, in accordance with their terms; collectability recourse provisions are like performance guarantees.

In contrast, economic recourse refers to provisions that warrant a return to the buyer. Economic recourse indicates that the assignment is a SISO and not a true sale. Provisions providing economic recourse to the buyer concern more than just the quality of the assets; they warrant a return of the buyer's purchase price, plus a yield, that is unrelated to the receivables' payment terms.[175]

2. Price

Many consider price to be the most important factor to consider in making a true-sale determination.[176] Price can be complex to assess in the receivables securitization context, which involves servicing arrangements, recourse, etc., creating challenges to administering price-based true-sale

173. *See, e.g.*, In re Commercial Loan Corp., 316 B.R. at 700–03 (noting that some courts might find the recourse aspect of a transaction significant, while others may not); Goldstein v. Madison Nat'l Bank, 89 B.R. 274, 276–79 (D.D.C. 1988) (determining that the existence of a recourse provision is not dispositive).

174. *See, e.g.*, Pantaleo, et al., *supra* note 1, at 162-63 (discussing two different types of recourse – recourse for collectability and economic recourse). Some courts distinguish between economic recourse and recourse for a breach of warranty, while other courts simply identify "recourse provisions" without further explanation. *See also* In re Doctors Hosp. of Hyde Park, Inc., 507 B.R. 558, 711-12 (Bankr. N.D. Ill. 2013) (acknowledging that "recourse can take the form of a repurchase obligation or a guaranty of collectability by the seller, among other forms."); In re Major Funding Corp., 82 B.R. 443, 448 (Bankr. S.D. Tex. 1987).

175. Pantaleo, et al., *supra* note 1, at 162-63.

176. *See, e.g.*, Aicher & Fellerhoff, *supra* note 168, at 206-10 ("If the effective price paid (accounting for all recourse, purchase price holdbacks, overcollateralization with a retained seller interest and similar devices) reasonably approximates what a willing buyer would pay a willing seller, the court should not decide that such recourse devices require characterization of the transaction as a loan.").

analyses.

If intent of the parties controls the characterization of a transaction, property law considers the relationship between the purchase price and the fair market value of the assets conveyed to illuminate the parties' intent. Price, for example, is a factor in equitable mortgage doctrine. If the price paid looks like a sale price—meaning, there is not a material disparity between the price and the value of the asset—then that seems like excellent evidence that the parties intend a sale. The Restatement 3rd of Property observes:

> A substantial disparity between the value received by the grantor and the fair market value of the land at the time of the conveyance is strong evidence that security was intended. . . . Normally rational people, other than in gift transactions,[177] do not transfer land without receiving a purchase price that approximates its fair market value.[178]

Thomas Plank references equitable mortgage doctrine in his argument for the relevance of price in true-sale analyses.[179] He directs courts to look to the parties' characterization of the transaction, and assuming this threshold criterion is met, "[t]he first and most significant element of economic substance is the price paid for the loans."[180] Courts must assess the allocation of burdens and benefits of ownership, and analyze the value of the consideration for the transaction. Plank presents a methodology in which courts would determine which party has the preponderance of burdens and benefits of ownership.[181] The adequacy of the purchase price, then, relates to the allocation of burdens and benefits.[182]

Similarly, Aicher and Fellerhoff argue that levels and type of recourse, per se, should not be determinative in true-sale cases. The issue, rather, is whether recourse is reasonably priced into the transaction. As they put it, the relevant question is:

> [W]hat would an informed and willing buyer pay a willing seller

177. Property law recognizes transfers without any consideration at all—donative transfers or gifts. In these cases, price is irrelevant, of course, to intent to effectuate a conveyance. The type of property interest at issue here, though, is governed by UCC Article 9, which requires, among other things, that value be given in order to create an enforceable security interest (whether SISO or sale). *See* U.C.C. § 9-203(b)(1) (requiring that value be given to create a security interest enforceable against the debtor). Security interests under UCC Article 9 cannot be donated or transferred as gifts; the codification of requirements for recognition of this type of property interest precludes the possibility.

178. Restatement (Third) of Property: Mortgages § 3.2 (Am. Law Inst. 1997).

179. Plank, *supra* note 171, at 334-35.

180. *Id.* at 334.

181. *Id.* at 337-39.

182. *Id.*

> for a transfer of the entire bundle of risks and benefits embodied in the cash flow represented by the receivables? If the ultimate price that the transferee pays, taking into account the presence of any direct and indirect recourse provisions, is notably less than this amount, a court should conclude that the transaction is a secured loan.[183]

The difficulty that their approach—along with Plank's—presents is the complexity of pricing a transfer involving complex valuations. As Aicher and Fellerhoff acknowledge, the "ultimate price arrived at in a non-collusive, arms-length bargain is the result of many factors, such as information available to buyer and seller, diligence of seller in soliciting bids, relative bargaining strength, and prevailing economic conditions and trends."[184]

Buyers may demand discounts from the face value of receivables for the time value of money and the risk of non-collection. This discount should reflect a return greater than existing rates available on investment of the purchase price in money market or other funds. Even this discounting may be complex—the risk of non-collection, or default by account debtors, may not be easy to determine based on historical default rates. These default rates may not be relevant in current or future market conditions.

In addition to basic discounting for time value of money and predicted default rate, other discounts may be desirable. There are efficiencies, for example, surrounding seller risk retention. Sellers are in a better position than buyers to know and minimize risk of default by account debtors. If the seller did not have economic incentive to minimize this default risk, the buyer would insist on a larger discount in the purchase price.[185] By retaining risk, a seller gets a more favorable overall price than if the buyer assumed all risk.[186]

In other words, recourse can produce efficiencies. As such, recourse should not, standing alone, be a basis for re-characterizing a receivables conveyance. The task is to determine whether the price a seller receives reflects a sale price, or is so heavily discounted and misaligned with risk retention, that the transaction should be treated as a loan.

Despite the complexity of looking to price in true-sales determinations, price remains a prominent component among commentators and appears to be relevant to courts.[187] If courts were to adopt Plank's methodology, for example, over time a more coherent doctrine could emerge, grounded in holdings on what constitutes a preponderance of benefits or burdens of

183. Aicher & Fellerhoff, *supra* note 168, at 207.
184. *Id.* at 209.
185. Aicher & Fellerhoff, *supra* note 168, at 209-10.
186. *Id.*
187. *Id.*

ownership, and what percentages of face value of receivables tend to correlate to such allocations of benefits and burdens. Parties arguing for a characterization other than what these factors indicate, can then argue that their deal is distinct and bear the burden of explaining and justifying their specific allocation of risk and pricing. Part IV.A below raises the possibility of codifying true-sale rules within UCC Article 9 that could facilitate this kind of doctrinal development.[188]

An additional reason to consider price is fairness to unsecured creditors of the seller. Commentators and lawmakers must consider when and why purchasers of receivables *should* enjoy rights of exclusion against seller's creditors, especially non-adjusting creditors. A true-sale doctrine that contemplates the value an originator receives in exchange for assets sold to an SPE better protects third-party concerns than one that recognizes the bankruptcy remoteness of assets that were assigned without a corresponding infusion of comparable value to the originator.

B. *Statutory approaches*

In some jurisdictions, state statutes override the common-law true-sale doctrine.[189] With respect to originators that are banks subject to the Federal Deposit Insurance Act, FDIC rules that override the common-law true-sale doctrine may apply.

1. ABS statutes

In jurisdictions that enact an asset-backed securities facilitation act,[190] investors may enjoy rights of exclusion in receivables backing securities despite the fact that the transaction pursuant to which the issuer acquired the receivables would not be a true sale at common-law. ABS statutes respond to concerns about the legal foundations of the multi-trillion dollar securitization industry, especially following *In re LTV Steel Company, Inc.*[191] Lawmakers worry that the securitization market could collapse if courts were to find that assets assigned to collateralize securities are not the property of the issuer, under the true-sale doctrine.[192] ABS statutes attempt to override

188. *See infra* text accompanying notes 254-62.

189. *See* Thomas E. Plank, *The Erie Doctrine and Bankruptcy*, 79 NOTRE DAME L. REV. 633, 653-58 (2004).

190. *See* ALA. CODE § 35-10A-2(a)(1) (2016); DEL. CODE ANN. tit. 6, §§ 2701A-2703A (West 2016); LA. STAT. ANN. § 10:9-109(e) (2016); OHIO REV. CODE ANN. § 1109.75 (West 2016); N.C. GEN. STAT. ANN. §§ 53-425, 53-426 (West 2015); S.D. CODIFIED LAWS § 54-1-10 (2016); TEX. BUS. & COM. CODE ANN § 9-109(e) (West 2015).

191. *See supra* text accompanying notes 159-167.

192. *See* Mann, *supra* note 13, at 1817 (relating the LTV Steel proceedings to a continuing

this possibility, by sanctioning an ownership interest in receivables despite the substantive scope of legal rights and obligations of the parties.[193]

In Delaware, for example, the ABS statute provides that "any property, assets or rights purported to be transferred, in whole or in part, in . . . securitization transactions shall be deemed to no longer be the property, assets or rights of the transferor."[194] The statute does not define "securitization" and indicates that the term is to be construed broadly. To the extent that—as Ayotte and Gaon assert—securitization of necessary assets can cause inefficient outcomes in bankruptcy, the Delaware ABS statute could compound that inefficiency by fortifying investors' hold-up power vis-à-vis continuation funding for positive-value projects that require collateral.[195] To the extent that—as many commentators assert—securitization can create inefficiencies by permitting investors and originators to externalize costs into non-adjusting and non-consenting creditors, this ABS statute could compound such inefficiencies. The statute sanctions the bankruptcy-remote status of assets even in context where levels of recourse and price indicate that the firm did not receive fair market value for the assignment (thus aggravating the subsidy-from-unsecured-creditors problem).[196]

Taking a slightly different approach, Texas has enacted non-uniform UCC 9-109(e), which provides that:

> The application of this chapter to the sale of accounts, chattel paper, payment intangibles, or promissory notes is not to re-characterize that sale as a transaction to secure indebtedness but to protect purchasers of those assets by providing a notice filing system. For all purposes, in the absence of fraud or intentional misrepresentation, the parties' characterization of a transaction as a sale of such assets shall be conclusive that the transaction is a sale and is not a secured transaction and that title, legal and equitable, has passed to the party characterized as the purchaser of those assets regardless of whether the secured party has any recourse against the debtor, whether the debtor is entitled to any surplus, or any other term of the parties' agreement.[197]

This form of ABS statute makes more sense than does Delaware's free-standing statute. Texas's UCC 9-109(e) ties ABS statute provisions to transactions governed by Article 9, under 9-109(a)(3). In other words, this

push for legislative action on true sales); Janger, *supra* note 10, at 1776 (noting that the clamor for ABS statutes became deafening after LTV).

193. *See* Mann, *supra* note 13, at 1818 (observing the striking effects of the ABS statutes).

194. DEL. CODE ANN. tit. 6, §§ 2701A-2703A.

195. *See supra* text accompanying notes 106-21.

196. *See supra* text accompanying notes 66, 69, 71.

197. TEX. BUS. & COM. CODE ANN § 9-109(e) (West 2015).

statute applies to sale of "accounts, chattel paper, payment intangibles, or promissory notes"—receivables and other replaceable assets. It does not apply to any and all securitizations. Again, applying Ayotte and Gaon's assertions, this approach to true-sale rules could promote efficient outcomes in bankruptcy. The assets subject to the statute are replaceable (meaning that their bankruptcy-remote status does not create hold-up problems and forces continuation lenders to look to the value of projects, rather than the capacity to dilute existing lenders[198]), and the statute sets out to eliminate re-characterization risk. However, this section 9-109(e) sanctions the bankruptcy-remote status of assets in a way that could aggravate inefficiencies in the same way as other ABS statutes: by potentially aggravating the extent to which securitization enables extraction of a subsidy from non-adjusting creditors.[199]

These ABS statutes are the equivalent of passing a law stating that all cars are blue for certain purposes.[200] Not all cars are blue, but for legal purposes in a specific context, all cars are now blue as a matter of law.[201] In fact, if we consider the ABS statutes in light of the property concept of *numerus clausus*,[202] "we can view [them] as legislative recognition of a heretofore unknown form of property interest."[203]

Given the incongruity between the substance of the ABS statutes and doctrinal approaches to characterization of commercial transactions, the effectiveness of these statutes is uncertain.[204] In bankruptcy court, an

198. *See supra* text accompanying notes 117-20.

199. *See supra* text accompanying notes 68, 69, 71.

200. *See* Jeffrey M. Carbino & William H. Schorling, *Delaware's Asset-Backed Securities Facilitation Act: Will the Act Prevent the Recharacterization of a Sale of Receivables in a Seller's Bankruptcy?*, 6 DEL. L. REV. 367, 384-86 (2003) (noting explicitly in the Delaware ABS statute that "[n]othing contained in this chapter shall be deemed to require any securitization transaction to be treated as a sale for federal or state tax purposes or to preclude the treatment of any securitization transaction as debt for federal or state tax purposes . . . ."); DEL. CODE ANN. tit. 6, § 2703A(b) (West 2003).

201. *See* Reaves Brokerage Co. Inc. v. Sunbelt Fruit and Vegetable Co. Inc. (336 F.3d 410, 417 (5th Cir. 2003) (exemplifying the fifth circuit's decision not to apply UCC 9-109(e), and thus finding a loan transaction rather than a sale despite the parties' express designation). The characterization at issue was not for purposes of securitization, but rather for purposes of the Perishable Agricultural Commodities Act.

202. *See infra* text accompanying notes 240-45.

203. Hughes, *supra* note 13, at 220.

204. A handful of cases cite to various ABS statutes, but none challenges the characterization of a transaction arguing that bankruptcy law, equity, or other property principles warrant a characterization that contravenes an ABS statute. *See* Brothers. v. Saag, No. 4:13-CV-466-VEH, 2014 WL 7330869, at *6 (N.D. Ala. Dec. 19, 2014) (rejecting the argument that after the securitization transaction the defendant had no authority to foreclose); In re Doctors Hosp. of Hyde Park, Inc., 507 B.R. 558 (Bankr. N.D. Ill. 2013); In re Argo Fin., Inc., 337 F.3d 516 (5th Cir. 2003); Tetra Applied Techs., Inc. v. H.O.E., Inc., 878 So. 2d 708 (3d Cir. 2004); Express Working Capital, LLC v. Starving Students, Inc., 28 F. Supp. 3d 660

originator (either as DIP or via its bankruptcy trustee) could assert that securitized assets were not conveyed to the SPE in a true sale, despite the applicability of an ABS statute.[205] The bankruptcy court could, potentially, make a substantive determination on the true-sale status of the transaction,[206] rather than a determination based on application of an ABS statute. As a practical matter, the impact that the ABS statutes have on securitization transactions depends upon the extent to which bankruptcy courts determine that the bankruptcy code or other federal law or policy does not preempt the ABS statutes.

Bankruptcy courts generally look to state law to determine the scope of property interests held by the debtor.[207] The basic rule is that state law governs, but a bankruptcy court could find a property interest in contravention of state law if it finds a countervailing federal interest[208] as it "ascertain[s] and give[s] effect to congressional intent."[209] In addition to bankruptcy courts' power to find a property interest in securitized assets despite applicability of an ABS statute, some commentators suggest that the plain language of Bankruptcy Code section 541[210] expressly preempts state ABS statutes.[211]

Others, however, contest this assertion, stating that while bankruptcy law permits adjustment of the state law rights of insolvent debtors and their creditors, bankruptcy law may not constitutionally impair the state law rights

(N.D. Tex. 2014).

205. *See* Mann, *supra* note 13, at 1806-07 (discussing federalism and the tension between state statutes, such as ABS statutes, and bankruptcy policy in the commercial finance context).

206. *See* Plank *supra* note 189 (observing that bankruptcy courts differ from Article III courts with powers of equity, such that it is inaccurate to describe bankruptcy courts as exercising equitable powers when they modify creditors' and debtors' interests).

207. *See* Butner v. United States, 440 U.S. 48, 50 (1979) (using state law to resolve the question of "whether a security interest in property extends to rents and profits derived from the property"). *Cf. infra* text accompanying notes 265-70.

208. *Id.* at 55. *See also* In re Omegas Group, Inc. 16 F.3d 1443, 1450 (6th Cir. 1994) (stating that "just because something is so under state law does not necessarily make it so under the Bankruptcy Code" as after state property law questions are determined, bankruptcy law dictates to what extent property is part of the estate).

209. Matter of Roach, 824 F.2d 1370, 1374 (3d Cir. 1987).

210. *See* 11 U.S.C. § 541(c)(1).

211. *See supra* Carbino & Schorling, note 200, at 384-85 (asserting that "an argument exists that the plain language of Bankruptcy Code section 541 expressly preempts the Securitization Act"). *See also* Edward M. Iacobucci and Ralph A. Winter, *Asset Securitization and Asymmetric Information*, 34 J. LEGAL STUD. 161, 186 (2005) (stating that "[w]hile there is authority supporting the notion that federal bankruptcy proceedings should respect state law sales definitions that affect third parties . . . courts may conclude that federal bankruptcy law preempts these state law reforms"); Kenneth C. Kettering, *True Sale of Receivables: A Purposive Analysis*, 16 AM. BANKR. INST. L. REV. 511, 524-26 (2008) (arguing "there is a powerful argument that these state anti-[re-characterization] statutes would be preempted by the Bankruptcy Code in any adjudication of what constitutes property of the debtor's estate.").

of third parties.[212] Whether this view precludes an express-preemption-based rejection of an ABS statute in bankruptcy, however, seems to turn on whether the conveyance at issue was a sale. If the assignment of assets securitized was a sale, then investors are third parties, who invested in assets owned by an SPE. If the assignment is not a sale, then they are construed as creditors. This question needs further illumination by lawmakers. As of yet, the only conclusion we can draw is that the ABS statutes' effects in bankruptcy are unsettled.

2. FDIC rules

When a securitization originator is a bank subject to FDIC regulations, those regulations may determine the scope of the bank's bankruptcy estate.[213] These regulations state that the FDIC shall not re-characterize as property of the institution any financial assets transferred by an insured depository institution in connection with a securitization or participation, provided that such transfer meets all conditions for sale accounting treatment under generally accepted accounting principles, other than the "legal isolation" condition.[214]

"Legal isolation" under the FDIC rules means "that transferred financial

212. *See* Thomas E. Plank, *The Constitutional Limits of Bankruptcy*, 63 TENN. L. REV. 487, 559-81 (1996) (discussing the limits of bankruptcy power); Plank *supra* note 189.

213. *See* Julian B. McDonnell & James P. Nehf, SECURED TRANSACTIONS UNDER THE UCC § 34.05 (2015) (stating that:

> The FDIC principally regulates securitizations originated by insured institutions through its Securitization Rule, which is stated at 12 CFR Section 360.6. Prior to the 2007–2008 financial crisis, this regulation provided that the FDIC would not use its authority as receiver or conservator under 12 U.S.C. Section 1821(e)(1) to disaffirm or repudiate securitizations provided they met the conditions for sale accounting treatment under generally accepted accounting principles (GAAP). Before the meltdown of 2007–2008, the GAAP were found in FAS 140 issued by the Financial Accounting Standard Board.)

214. This regulation states:

> [T]he FDIC as conservator or receiver shall not, in the exercise of its statutory authority to disaffirm or repudiate contracts, reclaim, recover, or recharacterize as property of the institution or the receivership any such transferred financial assets, provided that such transfer satisfies the conditions for sale accounting treatment under generally accepted accounting principles, except for the "legal isolation" condition that is addressed by this section. The foregoing paragraph shall apply to a last-in, first-out participation, provided that the transfer of a portion of the financial asset satisfies the conditions for sale accounting treatment under generally accepted accounting principles that would have applied to such portion if it had met the definition of a "participating interest," except for the "legal isolation" condition that is addressed by this section.

12 CFR § 360.6(d)(1).

assets have been put presumptively beyond the reach of the transferor, its creditors, a trustee in bankruptcy, or a receiver, either by a single transaction or a series of transactions taken as a whole."[215]

Like the ABS statutes, the FDIC rules create a safe harbor for sale treatment. They are more complex than those enacted in state ABS statutes, however, because the FDIC rules limit the scope of economic interest the safe harbor creates in reference to other, federal regulations concerning risk retention in securitization transactions. Since their enactment in 2000, the FDIC rules have been revised twice. They were revised in 2010 in response to 2009 revisions to accounting standards[216] and the 2010 passage of The Dodd-Frank Wall Street Reform and Consumer Protection Act.[217] The rules were revised again in 2015 in response to promulgation of new risk-retention regulations under Section 15G of the Securities Exchange Act.[218]

Federal regulations regarding risk retention in securitization are designed, among other things, to mitigate moral hazard concerns associated with originate-to-distribute lending models. These regulations that the FDIC true-sale rules coincide with are not designed to (and do not accomplish) improving the coherence of the true-sale doctrine. As far as true-sale rules are concerned, the FDIC approach is problematic for the same reasons that the ABS statutes are: they create rights of exclusions in an originator's assets without sufficient regard for why and when investors should have such rights, given efficiency or fairness considerations.[219]

C. *Harris and Mooney property-based approach*

Harris and Mooney state that price should not be relevant in a property-based approach to characterizing true sales.[220] They also eschew the relevance of recourse.[221] This section presents their approach, finding that it lays a useful foundation for a more coherent doctrine, but ultimately is incomplete. Their "property-based methodology" for true-sale determinations does not sufficiently substantiate the concept of "economic interest." Their analogy between the true-sale context and the true-lease context does not fully illuminate important differences between these two

215. 12 CFR § 709.10(a)(3).

216. *See* FAS 166, 167, *supra* note 145-50.

217. 12 U.S.C. § 5301 (2006 & Supp. 2011).

218. 15 U.S.C. 78a et seq., added by Section 941(b) of the Dodd-Frank Wall Street Reform and Consumer Protection Act, 12 U.S.C. § 5301 (2006 & Supp. 2011).

219. *See supra* text accompanying notes 66-121, 237-49.

220. *See* Harris & Mooney, *supra* note 31, at 1044-47, 1062, 1074-75.

221. *See* Harris & Mooney, *supra* note 31, at 1042, 1072 (explaining that while a buyer's reliance on recourse may prompt further analysis of a transaction, it should not carry any weight in the actual analysis itself).

deal types. Harris and Mooney imply that classifying an approach as "property-based" is dispositive on the relevance of deal characterization to third parties.[222] Yet much of property law concerns the question of when and why private law rules should recognize rights of exclusion.[223]

Harris and Mooney argue that "a transaction should be re-characterized as a SISO if the interest transferred to the purported buyer is in fact not the functional and economic equivalent of ownership but rather the functional and economic equivalent of a security interest that secures an obligation."[224] To determine whether the buyer has the functional and economic equivalent of ownership, they argue, the only relevant questions are whether the purported seller has retained a meaningful interest in the receivables, and whether the interest transferred to the purported buyer secures an obligation.[225] They state that their approach is property-based: it focuses solely on whether the seller retains an economic interest in the receivables that secures an obligation—not on factors such as recourse or price.[226]

In order to determine if a seller retains an economic interest, they argue, we should look to established rules in the true-lease context.[227] The law governing whether a lease of goods creates a true lease or a security interest is well-developed and mostly codified in UCC Article 1-203.[228] Transactions that cannot be classified by application of UCC 1-203 alone, however, still require factors-based, case-by-case analysis.[229] The key feature defining a true lease is that the lessor enjoys a meaningful residual interest; the asset has continuing economic life after the end of the lease term, giving value to the lessor's residual interest. If the transaction is structured in such a way that the lessor does not expect to recover the goods unless the lessee defaults on payments, then the lessee has the functional and economic equivalent of

222. *See* Harris & Mooney, *supra* note 31; *see also* Steven L. Harris & Charles W. Mooney, Jr., *A Property-Based Theory of Security Interests: Taking Debtors' Choices Seriously*, 80 VA. L. REV. 2021 (1994).

223. Enforcement of a property interest requires attention to the bases for rights of exclusion. Numerous theories of property focus on rights of exclusion. *See* Singer, *supra* note 12. Property theorists, though, are not unanimous on the centrality of exclusion. *Cf.* Gregory S. Alexander, *Governance Property*, 160 U. PENN. L. REV. 1853, 1854-60 (2012) (describing property in terms of mechanisms of internal governance and arguing that we can no longer regard the right to exclude as the single most important aspect of ownership).

224. Harris & Mooney, *supra* note 31, at 1050.

225. *Id.* at 1032.

226. *Id.*

227. *Id.* at 1049-56.

228. For a summary of true-lease doctrine, see JAMES J. WHITE & G. ERIC BRUNSTAD, JR., SECURED TRANSACTIONS TEACHING MATERIALS 117-21 (4th ed. 2013).

229. *See, e.g.*, Duke Energy Royal, LLC v. Pillowtex Corp., 349 F.3d 711, 719 (3d Cir. 2003) (stating that where statutory factors are not met, courts will look to "the economic reality of the transaction in order to determine" whether the transaction is a true lease).

ownership (encumbered by the lessor's security interest).[230]

Harris and Mooney argue that true-lease laws provide the appropriate framework for undertaking true-sales analyses for securitized receivables. "The analysis of a purported true sale of receivables," they state, "is the mirror image of the true lease analysis."[231] Their analysis proceeds, however, without sufficient discussion of the different purposes, contexts, and effects of equipment leases, as opposed to receivables securitizations. Their objective is to identify economic interests in receivables (that secure obligations), based on an analogy to residual interests in leased equipment, without discussion of the different implications of these deal types.

An "economic interest" in leased equipment, in Harris and Mooney's analysis, is a residual interest—the value of the equipment at the end of the lease. An "economic interest" in receivables, in their view, is any retained or re-acquired rights, of the seller, to collect on receivables.[232] They do not explain or justify when and why "economic interests" are property interests. For example, lessees have an "economic interest"—a present possessory interest and use rights—in equipment that they have leased (in a true lease). We can describe originators as having an "economic interest" in securitized receivables, in the sense that they rely on proceeds of a securitization facility and retain equity of the SPE. Originators may also have an "economic interest" in the sense that they may have exposure to risk through recourse provisions. Harris and Mooney state conclusively that any economic interest associated with recourse provisions is not a property interest, just as a surety acquires no property interest in the obligation it guarantees absent assignment or subrogation.[233]

The question for policy-makers is: what should the scope of property rights be, given the economic substance of a transaction? The mere assertion that true-sale status should turn on whether a seller retains an "economic interest" in receivables is incomplete. Policy-makers should undertake the task of elucidating what it means to have a property interest in receivables and when and why such an interest exists. Harris and Mooney approach this question as if it were a purely descriptive one, when, in actuality, property law is rich with differing concepts and theories on which lawmakers may draw in determining the proper scope of any given type of interest. The purpose here is to argue that true-sale rules should reflect normative commitments that are in accord with policy-makers' views on the efficiency and desirability of securitization. If Harris and Mooney's proposal is driven

230. *See* Harris & Mooney, *supra* note 31, at 1051; White & Brunstad, *supra* note 228, at 118.

231. Harris & Mooney, *supra* note 31, at 1052.

232. *See* Harris & Mooney, *supra* note 31, at 1053.

233. *See* Harris & Mooney, *supra* note 15, at 1072.

by a particular view of property, or by normative commitment to a policy on securitization, these aspects of their thinking are undisclosed.

As discussed above, Ayotte and Gaon assess how the implications of bankruptcy remoteness differ, depending on whether the bankruptcy remote asset is replaceable or, conversely, necessary to the firm's operations.[234] Receivables are a replaceable asset—their value functions like cash. Equipment, on the other hand, is a necessary asset. Bankruptcy remoteness of replaceable assets promotes efficient commitments to re-organization, versus liquidation, in bankruptcy.[235] Bankruptcy remoteness of necessary assets, on the other hand, can promote inefficient liquidations.[236] From the vantage point of Ayotte and Gaon's findings, the true-lease/true-sale analogy that Harris and Mooney support becomes more complex.

Ayotte and Gaon are discussing the value of bankruptcy remoteness in the context of securitization of different types of assets, whereas Harris and Mooney are comparing securitization of receivables to a lease of equipment (in which the asset is bankruptcy remote in the sense that it is property of a lessor, not in the sense that it has been sold to an SPE). The mechanism by which bankruptcy remoteness occurs in these two deal types, however, is not consequential for this analysis. If efficiency in bankruptcy is an important policy consideration, then before we can conclude that the true-sale doctrine for receivables should track the true-lease doctrine, we should consider the objectives and implications of such an approach.

In addition to the different implications of equipment leases, versus receivables securitizations, for continuation-versus-liquidation decisions, these deals have different implications for unsecured creditors. A true-lease characterization of a deal in the context of a lessee bankruptcy entitles the lessor to continuing lease payments. The lessee can continue to use and generate income with the leased equipment so long as it makes payments to the lessor. In contrast, true-sale characterization of an assignment of receivables in the context of an originator bankruptcy means that only investors in asset-backed securities can reach the assets, depriving the bankruptcy estate of an important source of income.

Harris and Mooney claim to espouse a "property-based methodology" for distinguishing sales of receivables from SISOs.[237] What makes a methodology "property-based," and why is that designation important?

234. *See* Ayotte & Gaon, *supra* note 7, at 1312-16.

235. *See id.*

236. *See id.*

237. Harris and Mooney also argue, in the debate over UCC Article 9, for a property-law framework as justification for full-priority secured lending. *See* Harris & Mooney, *supra* note 15. Just as in the securitization context, the characterization of security interests as property conveyances does not warrant dismissal of policy concerns surrounding when and why property law bestows rights of exclusion.

They do not distinguish their "property-based" method from a "factors" method that considers distribution of surplus collections or seller retention of interests along with economic recourse provisions. They do not sufficiently define or theorize the "economic interest" that, along with an obligation secured, should be grounds for SISO classification. Nonetheless, Harris and Mooney are correct to argue for an approach to true sales that is explicitly rooted in property law.

III. PROPERTY AND RECEIVABLES CONVEYANCES: BETTER FRAMING FOR TRUE SALES

Current approaches to the true-sale doctrine do not squarely address the scope of the property interest the doctrine determines. Factors-based approaches suppress the centrality of property, focusing on the terms of deal documents as if the characterization question were a matter of contract interpretation of consequence only to the transacting parties. Statutory safe harbors deem transactions to be legal sales based on contract terms, rather than on substantive assessment of the interest created.

The true-sale doctrine implicates questions that are at the heart of property law—about exclusion, efficiency and information, governance, morality, etc. Framing this doctrine in property terms can facilitate a more coherent approach to distinguishing ownership interests from SISOs. So far, this Article has linked formulations of the true-sale doctrine to arguments about the efficiency and desirability of securitization, enabling lawmakers to make informed policy-based choices about the scope of property interest in receivables that constitutes an ownership interest conveyed in a sale. This part identifies two property-law concepts—*numerus clausus* and rights of exclusion—that are integral to the true-sale doctrine. It describes how these concepts apply in the receivables securitization context. Drawing on these concepts could lead to clearer formulations of true-sale rules.

In discussing the confused state of the common-law true-sale doctrine, Pantaleo, et al., state:

> Under contract law, parties generally are free to enter into and enforce any contract that is not illegal or against public policy; there is nothing about recourse, for example, that either is illegal or in violation of public policy. Common law favors the free transfer of rights to receive money where there are no significant externalities that have consequences to third parties. There is no legal or public policy which precludes a transfer from improving the value of an asset sold by adding its own guarantee.[238]

238. Pantaleo, et al., *supra* note 1, at 159-60.

The provisions of a securitization transaction that create recourse or express purchase price or ensure that one or the other party receives surplus collections are all, as a matter of contract law, perfectly enforceable. The question at issue in the true-sale doctrine is necessarily a property question: what scope of rights or interest does the transaction create? Yet, much of the literature on true-sale rules declines to discuss this—perhaps because it is obvious, or perhaps because of the notion that there is no viable or consequential distinction to be made between contract law and property law.[239]

Numerus clausus. We can understand the true-sale doctrine as an example of the concept of *numerus clausus*. Conceptually, we refer to "numerus clausus" to express the notion that property law permits only legally recognizable interests. The phrase *numerus clausus* means "the number is closed."[240] This phrase expresses a principle of property law that

239. *See* Hughes, *supra* note 13, at 184-86, 195-96. *See, e.g.*, Thomas C. Grey, *The Disintegration of Property*, 22 NOMOS 69 (J. Roland Pennock & John W. Chapman eds. 1980). The view that a contracts/property distinction lacks viability or consequence is contested. Hughes, *supra* note 13, at 184-85. For example, contemporary corporate law literature actively engages the question of whether property law—as distinct from contract law—matters. *Id.*

240. In case law and other legal materials, the principle of *numerus clausus* relates primarily to the rule against creation of new estates. *See, e.g.*, Johnson v. Whiton, 34 N.E. 542, 542 (Mass. 1893) (holding that "an estate descending only to heirs on the father's side was a new kind of inheritance" and therefore not enforceable by law). The most widely-cited explication of *numerus clausus* in U.S. property laws is by Thomas Merrill and Henry Smith, most notably in *Optimal Standardization in the Law of Property: The Numerus Clausus Principle*, 110 YALE L. J. 1 (2000) (explaining *numerus clausus* in economic terms). Because property rights are in rem, third parties must invest in determining the scope of these rights. *Id.* at 8. Property rights that are unusual are more costly to assess. *Id.* "Those creating or transferring idiosyncratic property rights cannot always be expected to take these increases in measurement costs fully into account," Merrill and Smith explain, "making them a true externality." *Id.* The rules that effectuate the *numerus clausus* principle in property law reduce these measurement costs. *Id.* Not all scholars agree with the view of *numerus clausus* presented by Merrill and Smith. These critics, however, do not reject the concept that standardization, or a stable set of forms of interest, is beneficial to markets and relates to the capacity of third parties to comprehend interests. For example, Hansmann and Kraakman concede that there must be some institution that enables third parties to determine who controls various incidents of ownership; this institution does not have to take the form of *numerus clausus* rules however. Lee Anne Fennell contends that a state-run "option exchange" for property interests would be superior to the rules of *numerus clausus* for balancing third-party information costs with the need for effectuating parties' interests. *See* Lee Anne Fennell, *Property and Precaution*, 4 J. TORTS L. 1, 53-59 (2011) (a government-run "option exchange" for property interests would better balance effectuating parties' intent with third party information costs than do rules of *numerus clausus*); Henry Hansmann & Reinier Kraakman, *Property, Contract, and Verification: The* Numerus Clausus *Problem and the Divisibility of Rights*, 31 J. LEGAL STUD. 373, 382-83, 398 (2002) (the state need not regulate the content of property rights, so long as some institution exists to enable third parties to identify those who control the various incidents of ownership); Tamar Frankel, *The Law of*

appears across legal systems—property interests must adhere to legally recognizable, standardized forms.[241] In terms of the true-sale doctrine, contracting parties cannot create a new, unrecognized form of property interest. The common law recognizes the conveyance of an ownership interest (rather than a SISO) only when the level of recourse, or the price, or other factors, or a statutory designation, create legal obligations consistent with an ownership interest in the purchaser.[242]

The explicit use of a *numerus clausus* framework for analyzing true-sale questions could potentially facilitate coherence.[243] Lawmakers could articulate packages of recourse and price that constitute sales as matter of law, and then test individual transactions against recognized templates.[244] Scholars have identified the potential of *numerus clauses* as a strategy to reduce information costs surrounding property interests in other contexts. For example, Jill Fisch discusses *numerus clausus* rules to argue that interests in mutual funds should come in standardized forms, to reduce information costs. She argues for a "conform or explain" approach, where

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Cross-Border Securitization: Lex Juris, 12 DUKE J. COMP. & INT'L. L. 475, 482-83 (2002) (where standardization is optimal, transacting parties tend to produce it regardless of legal restrictions on form); Nestor M. Davidson, *Standardization and Pluralism in Property Law*, 61 VAND. L. REV. 1597, 1600-03 (2008) (*numerus clausus* relates to the need for a stable set of forms through which to express property rules evolving in response to competing social goals); Avihay Dorfman, *Property and Collective Undertaking: The Principle of Numerus Clausus*, 61 U. TORONTO L. J. 467, 471-74, 478, 490, 405-05, 517 (2011) (criticizing Merrill and Smith for implying that a limited set of interests is superior to a larger one, for rooting property law in exclusive use, and for arguing that only legislators may create new property interests); Hanoch Dagan, *The Craft of Property*, 91 CALIF. L. REV. 1517, 1565-68 (2003) (departing from Merrill and Smith to argue that the *numerus clausus* principle works because parties to a transaction have expectations about how institutions work, rather than because of its external effects such as on information costs). *Cf.* Amnon Lehavi, *The Property Puzzle*, 96 GEO. L. J. 1987 (2008) (arguing that Merrill and Smith as well as viewpoints by others do not "capture the essence of property").

241. *See* Merrill & Smith, *supra* note 240, at 4 (claiming "the principle that property rights must conform to certain standardized forms" has no name in common law and adopting the phrase "numerus clausus").

242. Property law invokes a different justificatory framework than contract law. Lawmakers can become caught in a discourse which market regulation, or holdings that decline to enforce transactions, are viewed as interfering with markets by curtailing market actors' freedom of contract. From a property perspective, though, applying or developing legal rules to balance the intentions of market actors with collective and third-party concerns is just proper administration of the legal infrastructure of markets. Property law necessarily balances the need for liquidity with third-party concerns. *See* Hughes, *supra* note 13, at 182.

243. The concept of *numerus clausus*, in and of itself, does not speak to the issue of whether property consists of *in rem* rights in assets, or of aggregated legal relations. Hughes, *supra* note 13, at 211-16.

244. *Cf.* Jill E. Fisch, *Rethinking the Regulation of Securities Intermediaries*, 158 U. PA. L. REV. 1961, 2030 (2010) (referencing *numerus clausus* rules to argue that interests in mutual funds should only come in standardized forms in order to drive down information costs).

financial transactions either conform to a recognized, widely understood form or the parties explain—meaning make explicit—the differences.[245] Rules that encourage standardization of receivables assignments for securitization could potentially bring clarity to the true-sale doctrine, increasing certainty and thereby reducing re-characterization risk.

Some may object to this idea, on grounds that bespoke receivables securitizations involve complex, deal-specific negotiation surrounding allocation of risks and returns—and the parties' tolerance for re-characterization risk. (Bankruptcy and litigation of the true-sale question may be remote possibilities.) The capacity of transacting parties to create contracts that reflect preferences specific to a given deal or asset pool or counterparty contributes to lowering costs of capital for originators. Lower costs of capital benefit non-adjusting creditors as well as originators: any regulation of the parties' freedom of contract in securitizing receivables would potentially harm all relevant parties.

Such thinking deserves due consideration. However, the task here is to think through how to generate a more coherent, policy-based true-sale doctrine, given the doctrine's consequences. If lawmakers, through public discourse and policy debates, determine that the best approach to true sales is, for example, to permit transacting parties to elect the status of their transaction by contract, regardless of its economic substance, then so be it. But to date we have no record of any such deliberation, and we have true-sale rules that differ across jurisdictions, with no clear or consistent doctrinal indicia for characterizing a receivables conveyance. Given that true-sale rules are property rules, the concept of *numerus clausus* could very well facilitate a legal landscape in which third parties have better information about securitization transactions, administrative and transaction costs are lower, and bankruptcy outcomes are more predictable. Lower transaction costs contribute to lower costs of capital. Predictability and ease of administration of the doctrine lower costs of bankruptcy and litigation, potentially preserving assets for distribution to all creditors.

Rights of exclusion. A successful approach to the true-sale doctrine must explain and justify investors' rights of exclusion against a company's unsecured creditors. This justification may lie in the position that securitization is efficient and therefore benefits unsecured creditors along with investors and originators. Or, justification may be grounded in other concerns. Regardless of efficiency, policymakers may say, an originator and investors cannot claim rights of exclusion against unsecured creditors unless the scope of the interest conveyed to the SPE clearly warrants such exclusion based on public policy, or on moral theories or labor theories of property, for

245. *Id.*

example.

Property theorists debate the status of exclusion as the *sine qua non* of property interests.[246] It is not necessary here to engage the scholarly debate over whether rights of exclusion are central to property as a theoretical matter. The relevance of exclusion, here, is that the true-sale doctrine determines the extent to which investors may exclude unsecured creditors from securitized assets. This framing of the true-sale question emphasizes policy considerations concerning the efficiency and distributive impact of asset-backed securitizations.[247]

We may conceive of securitized receivables as 'things' from which property rights holders may exclude others,[248] or, conversely, as bundles of rights including the right of exclusion.[249] Either way, exclusion of unsecured creditors is (in any given context) efficient or inefficient, just or unjust. Approaching the true-sale analysis as a question about exclusion directs courts and lawmakers to consider when, why and how property interests should confer such rights. Such an approach differs from current approaches in which the law appears to consider the terms of transactions among sophisticated commercial actors in the abstract, as a set of contracts that results in one classification or the other depending on how the deal terms map onto a jurisdiction's true-sale rules.

Some may respond, here, that current true-sale rules do express policy determinations about rights of exclusion. The ABS statutes are explicitly designed to exclude unsecured creditors from originators' securitized assets, so long as transacting parties use certain contract terms. And regardless of any given state's approach to true-sale rules, bankruptcy law permits judges to exercise discretion.[250] A judge may, potentially, find an interest in securitized assets in situations where the judge finds exclusion of unsecured creditors from the bankruptcy estate to be unwarranted.[251]

246. *See e.g.*, Henry E. Smith, *The Thing about Exclusion*, 3 BRIGHAM-KANNER PROP. RTS. CONF. J. 95, 98-103 (2014) (arguing that the right to exclude is not the "*sine qua non* of property"); Henry E. Smith, *Property as the Law of Things*, 125 HARV. L. REV. 1691, 1693 (2012) (arguing that "[t]he purposes of property relate to our interest in using things" and "[t]here is no interest in exclusion per se"); Larissa Katz, *Exclusion and Exclusivity in Property Law*, 58 U. TORONTO L.J. 275, 275 (2008) (proposing a different model for understanding ownership); Shyamkrishna Balganesh, *Demystifying the Right to Exclude: Of Property, Inviolability, and Automatic Injunctions*, 31 HARV. J.L. & PUB. POL'Y 593, 593 (2008) (arguing that exclusion derives from the norm of inviolability); Thomas W. Merrill, *Property and the Right to Exclude*, 77 NEB. L. REV. 730, 730 (1998) (arguing that the right to exclude is the *sine qua non* of property).

247. *See supra* text accompanying notes 68-72.

248. *See e.g.*, Smith, 125 HARV. L. REV. 1691 (2012), *supra* note 246.

249. *See e.g.*, Grey, *supra* note 239.

250. *See infra* text accompanying notes 266-70. *Cf.* Plank, *supra* note 189, at 669.

251. *See, e.g.*, text accompanying notes 159-64 (discussing In re LTV Steel Co., Inc.) and

To the extent that true-sale and bankruptcy rules do contemplate the justification—on efficiency, fairness, or other grounds—for finding rights of exclusion in investors, against unsecured creditors, the true-sale doctrine would benefit from a more explicit statement to this effect. Lawmakers and judges have not explicitly considered the doctrine in terms of property and exclusion; doing so could help to add justificatory depth and normative direction to true-sale determinations.

IV. REFORM POSSIBILITIES

This part identifies possibilities for how lawmakers could approach reforming the true-sale doctrine in a way that considers the relationship between arguments about the efficiency of securitization and normative positions on true-sale rules.[252] Section A sketches an idea for codifying a new approach to true sales within UCC Article 9. Section B discusses the fact that true-sale doctrine codification at the federal level (in the bankruptcy code) has been proposed before and could be possible again.[253]

A. *U.C.C. Article 9*

Article 9 governs a particular type of property interest—the security interest—setting forth the rules for effective creation, enforceability and priority of such interests. Texas and Louisiana have already codified true-sale rules in UCC Article 9, as discussed above.[254] This section will not further discuss those rules. Commentators who take the position that it advances efficiency to eliminate re-characterization risk with an ABS statute may support enactment of non-uniform section 9-109(e).[255]

This section raises the possibility of looking to sections 9-203, 9-109, and UCC Article 1, to enact an approach to true sales of receivables that links true-sale status to the adequacy of purchase price. This discussion is preliminary: it is an idea for how we might use concepts in the U.C.C. to codify a more consistent and policy-based set of true-sale rules for the receivables securitization context.[256] In UCC Article 9 terms, the true-sale test determines when assignments of the assets covered by 9-109(a)(3)

206-14 (discussing possible federal pre-emption of ABS statutes in bankruptcy).

252. Any state-level codification of true-sale rules could face the same preemption possibilities in bankruptcy that the ABS statutes face. *See supra* text accompanying notes 204-12.

253. *See infra* text accompanying notes 271-85.

254. *See supra* text accompanying notes 42, 77.

255. *See supra* text accompanying notes 73-92.

256. A more complete proposal for Article 9 true-sale provisions is beyond this Article's capacity; it is the subject of a separate project.

constitute SISOs within the scope of 9-109(a)(1), versus when they constitute sales within the scope of 9-109(a)(3).

A thorough presentation of this idea would require analysis of: (i) why, from a policy standpoint, lawmakers should codify the relevance of price in true-sale determinations,[257] and (ii) the function and formulation of the UCC Article 9 provisions mentioned here, to explore whether they would be appropriate sites for true-sale law reform. Neither of these tasks is within this Article's capacity. The first task would involve taking the analysis that this Article provides, applying arguments about securitization's efficiency and fairness to build a position in favor of an approach that finds investors' rights of exclusion to be justified when investors have paid an adequate price for their interest. The second task involves detailed research into history, functionality, and policy objectives embodied in UCC sections 9-109 and 9-203, among others, along with the provisions of UCC Article 1.

As previously discussed, a true-sale doctrine that turns on price considerations is complex and potentially difficult to administer, given the various factors (recourse, market direction, bargaining position, historical default rates) that legitimately affect a fair price for receivables.[258] Given this complexity, a statutory formulation of complete true-sale criteria grounded in price may be infeasible. It is feasible, however, to consider provisions that codify the relevance of price and allocate burdens of proof with respect to the adequacy of price.

If lawmakers wanted to codify the relevance of price in true-sale determinations, they could draft provisions for UCC Article 1 that reference adequacy of price in defining a "true sale" of receivables.[259] Or, consider a provision linking the "value given"[260] for purposes of section 9-203(b)(1) to the distinction between deals covered by section 9-109(a)(1) (i.e., SISOs), versus those covered by 9-109(a)(3) (i.e., sales of receivables). UCC Article 9, in section 9-109, could establish that, in order to fall within the scope of section 9-109(a)(3)—and not 9-109(a)(1)—the value given, pursuant to 9-203(b)(1) must reflect a fair market price for the assets assigned, considering the terms of the assignment. The code could then allocate the burden of proof—to either the debtor or the purchaser—with respect to the adequacy of the purchase price for purposes of classifying a deal under 9-109(a).[261]

257. *Cf. supra* text accompanying notes 175-88.

258. *See supra* text accompanying notes 175-88.

259. Harris and Mooney's proposal depends on an analogy between true leases and true sales of receivables. *See* Harris & Mooney, *supra* note 15. UCC Article 1 provides a definition of true lease. See U.C.C. § 1-203. Lawmakers could elaborate on that analogy and undertake an Article 1 proposal for true sales.

260. *See* U.C.C. § 9-203(b)(1). The UCC defines "value" in section 1-204.

261. Again, a separate project undertakes the task of analyzing the relevant sections of UCC 9 in detail to present and assess this schema.

The "value given" requirement for attachment of a security interest is a consideration requirement. Contract law requires consideration to create a legally binding agreement. UCC Article 9 requires consideration to create a legally enforceable security interest—a contractual lien. Contract law does not test the adequacy of consideration. Property law, however, will consider the adequacy of consideration to determine the scope of property interest that a transaction creates. It does so, for example, when it considers the price of a real estate conveyance to determine whether equitable mortgage rules require treating a lease transaction as, instead, a sale with mortgage financing.[262]

The type of statutory approach sketched here would not eliminate the need for courts to consider factors in characterizing any given deal. It could, however, establish the relevance of one factor—price—and set burdens of proof in order to generate precedents that create useful categories for characterizing (and structuring) receivables securitizations going forward.

B. *Bankruptcy law*

Generally speaking, state property law determines the scope of a bankrupt entity's estate. In *Butner v. United States*[263] the Court expressed the principle that "property interests are created and defined by state law."[264] This principle suggests that bankruptcy law may not be an appropriate context in which to effectuate a property-based reform of the true-sale doctrine. If state law defines property interests, then bankruptcy is largely procedural.[265] State law establishes when a property interest confers rights of exclusion consistent with ownership (acquired in a sale), as opposed to security (acquired as collateral for a loan). Bankruptcy law, then, administers disposition of assets depending on whether, under state law, the bankrupt entity retains a property interest in assets sufficient for a bankruptcy trustee's lien to attach.

This general schema is over-simplified, however. Scholars such as Barry Adler and Edward J. Janger complicate the *Butner* principle by illuminating continuity between bankruptcy law and property law—and also

262. *See supra* text accompanying notes 179-80.

263. 440 U.S. 48, 55 (1979).

264. *Id. See also* Raleigh v. Illinois Dep't of Revenue, 530 U.S. 15, 20 (2000); BFP v. Resolution Trust Corp., 511 U.S. 531, 545 (1994); Nobelman v. American Savings Bank, 508 U.S. 324, 329 (1993); Barnhill v. Johnson, 503 U.S. 393, 398-99 (1992).

265. *See* Barry E. Adler, *Bankruptcy as property law*, in KENNETH AYOTTE AND HENRY E. SMITH EDS., RESEARCH HANDBOOK ON THE ECONOMICS OF PROPERTY LAW (2011) (contesting the *Butner* principle and arguing for expression of the property-law aspects of bankruptcy and the insolvency law aspects of property).

between property law and issues of insolvency.[266] The question of whether and when federal bankruptcy law does or should recognize legal rights of exclusion from assets is complex. Lawmakers could consider the bankruptcy code as a potential site for establishing a more coherent true-sale doctrine.[267] Excavating the questions of federalism that this position would raise is beyond this project's scope. Ronald Mann writes that "securitization raises difficult policy questions in part because it falls at the boundary between those two spheres"[268]—the sphere of Congress's power to enact bankruptcy laws,[269] on the one hand, and of states' traditional control over basic issues of commercial law, on the other.[270] As such, the purpose of this section is merely to identify this issue, and to include it in this Part's sketch of possible sites for reform of the true-sale doctrine.

A short-lived proposal to reform the bankruptcy code in the wake of *LTV Steel*—proposed section 912[271]—corroborates this observation. Proposed section 912 provides an example of an instance in which substantive questions about the scope of bankruptcy estates potentially involving securitized assets were considered for enactment in federal bankruptcy law.[272]

Section 541 of the Bankruptcy Act defines property that belongs to the bankruptcy estate.[273] In 2001, efforts to reform the Bankruptcy Act included an amendment to section 541 that would have removed from the bankruptcy estate:

266. *See* Adler, *supra* note 265; Janger, *supra* note 10, at 1785-87. *Cf.* Plank, *supra* note 212.

267. *Cf.* Janger, *supra* note 10, at 1785-87.

268. Mann *supra* note 13, at 1806.

269. *See* Plank, *supra* note 212 (discussing the scope of, and limitations, on this power).

270. *Id.*

> Mann observes that as globalization makes "the American business environment ever more competitive, . . . state legislatures will more frequently . . . be pressed to take sides in contentious issues about commercial finance." Mann, *supra* note 13, at 1828. As such, "the time will come when federal bankruptcy courts must draw the line somewhere between their deference to those enactments and the need to enforce uniform federal bankruptcy policy."

271. *See* Bankruptcy Reform Act of 2001, S. 220, H.R. 333, 107th Cong; H.R. 333, 107th Cong. § 912(i) (2001). The securitization industry responded quickly to the holding in *In re LTV Steel Company, Inc.*, instigating this effort to enact federal true-sale safe harbor rules for securitization. *See* Solomon, *infra* note 284, at 867.

272. Other proposals to reform priorities in bankruptcy that would affect bankruptcy estates of securitization originators have also arisen. *See, e.g.*, The Employee Abuse Prevention Act of 2002, S. 2798, 107th Cong. (2002); H.R. 5221, 107th Cong. (2002) (proposed by Senator Richard J. Durbin (D-Illinois) and Rep. William D. Delahunt (D-Massachusetts) in an effort to give greater priority in bankruptcy to workers and retirees in some circumstances).

273. 11 U.S.C. § 541 (2006).

> Any eligible asset[274] (or proceeds thereof), to the extent that such eligible asset was transferred by the debtor . . . to an eligible entity[275] in connection with an asset-backed securitization,[276] except to the extent such assets (or proceeds or value thereof) may be recovered by the trustee under section 550 by virtue of avoidance under section 548(a). . . .[277]

Section 912 would have functioned similarly to the state ABS statutes—it creates a safe harbor, from re-characterization—for securitization transactions.[278] Proposed section 912 was not quite as broad as the ABS statutes, however. It set two conditions for the applicability of its safe harbor: (i) the originator must represent and warrant under written agreement that assets were sold to the SPE with intention of making them bankruptcy remote, and (ii) at least one tranche of securities issued in the deal had to be rated investment grade at the time of the initial issuance.[279]

While the safe harbor would not have extended to fraudulent transfers under section 548(a), from the originator to the SPE, this exception did not alter the provision's overall intent. Fraudulent transfer law concerns transfers that are made for too little value by an insolvent debtor. The "reasonably equivalent value" tests in fraudulent transfer law prevent gifts or transfers for minimal value to avoid creditors; they do not police the

274. The bill defines "eligible asset" as financial assets, cash and securities. Bankruptcy Reform Act of 2001, *supra* note 44, at § 912(ii). This would include receivables.

275. "Eligible entity" is "an issuer" or "any "other entity engaged exclusively in the business of acquiring and transferring eligible assets directly or indirectly to an issuer." Bankruptcy Reform Act of 2001, *supra* note 44, at § 912(ii). This would include a securitization SPE.

276. The bill states:

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

Bankruptcy Reform Act of 2001, *supra* note 44, at § 912(ii). *See also* Lipson, *supra* note 50.

277. Bankruptcy Reform Act of 2001, S. 220, H.R. 333, 107th Cong; H.R. 333, 107th Cong. § 912(i) (2001).

278. *See* Jonathan C. Lipson, *Enron, Asset Securitization and Bankruptcy Reform: Dead or Dormant?*, 11 J. BANKR. L. & PRAC. 101 (2002); Lois R. Lupica, Revised Article 9, the Proposed Bankruptcy Code *Amendments and Securitizing Debtors and Their Creditors,* 7 FORDHAM J. CORP. & FIN. L. 321, 348–51 (2002); Jonathan C Lipson, *Section 912 is Dangerous*, BUS. L. TODAY, July/August 2002, at 33, available at http://www.americanbar.org/content/dam/aba/publications/blt/2002/07/two-views-200207.authcheckdam.pdf [https://perma.cc/JW9F-TPK9].

279. *See* Schwarcz, *infra* note 282, at 359.

boundary between sales and loans.[280]

By September 2002, Section 912 was deleted from both the House and the Senate versions of the Bankruptcy Abuse Prevention & Consumer Protection Act of 2001,[281] following Enron's bankruptcy.[282] Enron's misuse of securitization transactions[283] created doubt about the desirability of section 912.[284]

Assessment of the desirability of amending the Bankruptcy Act with the true-sale rules contained in proposed section 912 would follow the same analysis as above, regarding the ABS statutes. Since "eligible assets" under section 912 means financial assets, cash, and securities, the section would have involved securitizations of replaceable assets—not essential assets—for purposes of that analysis. In other words, section 912 reads more like a bankruptcy law version of Texas's UCC section 9-109(e) than of Delaware's Asset Backed Securities Facilitation Act.[285] The point, here, is merely to illustrate how, despite section 541 and the *Butner* principle, bankruptcy law has been, and can be again, a potential cite for codifying true-sale rules.[286]

CONCLUSION: AN ADDITIONAL TAKE ON WHY THE TRUE-SALE DOCTRINE

280. *See* Letter from Allan Axelrod, Professor Emeritus, Rutgers School of Law – Newark, et al., to Sen. Patrick Leahy and Rep. F. James Sensenbrenner (Jan. 23, 2002), available at http://www.abi.org/abi-journal/legislative-update-proposed-rules-amendments-published-for-public-comment [https://perma.cc/QT43-PR4B].

281. *Id. See* Bankruptcy Reform Act of 2001, S. 220, H.R. 333, 107th Cong. § 912 (2001). *See also* Appendix I (full text of § 912 as it was introduced in the House on Jan. 30, 2001; available at https://www.gpo.gov/fdsys/pkg/BILLS-107hr333ih/pdf/BILLS-107hr333ih.pdf [https://perma.cc/2VQX-9SMG]).

282. *See* Steven L. Schwarcz, *The Impact of Bankruptcy Reform on "True Sale" Determination in Securitization Transactions*, 7 FORDHAM J. CORP. & FIN. L. 353 (2002). *See* Jonathan C. Lipson, *Enron, Asset Securitization and Bankruptcy Reform: Dead or Dormant?*, 11 J. BANKR. L. & PRAC. 101, 101 (2002); Sarbanes-Oxley Act of 2002, Pub. L. 107-204, 116 Stat. 745; Steven L. Schwarcz, *Enron and the Use and Abuse of Special Purpose Entities in Corporate Structures*, 70 U. CIN. L. REV. 1309, 1314-18 (2002); In re Enron Corp. Sec., Derivative & ERISA Litigation, 235 F. Supp. 2d 549, 610 (S.D. Tex. 2002).

283. Note that there are differences between "securitization" in Enron context, and the securitizations (and true-sale doctrine) discussed here. *See* Schwarcz, *supra* note 167, and Lipson, *supra* note 50, at 1269-71.

284. Stephen J. Lubben, *Beyond True Sales: Securitization and Chapter 11*, 1 N.Y.U. J.L. & BUS. 89, 101 n.49 (2004); Dov Solomon, *The Rise of a Giant: Securitization and the Global Financial Crisis*, 49 AM. BUS. L.J. 859, 866 n.36 (2012).

285. *See supra* text accompanying notes 194-97.

286. *Cf.* Douglas G. Baird and Anthony J. Casey, *No Exit? Withdrawal Rights and the Law of Corporate Reorganizations*, 113 COLUM. L. REV. 1 (2013); Jodie A. Kirshner, *The Bankruptcy Safe Harbor in Light of Government Bailouts: Reifying the Significance of Bankruptcy as a Backstop to Financial Risk*, 18 N.Y.U. J. LEGIS. & PUB. POL'Y 795 (2015).

MATTERS

Since the 2008 financial crisis, public discourse has focused on federal financial regulation to respond to negative externalities associated with securitization. But choices of private-law rules also express policy objectives and effectuate market governance.[287] The state-level, private-law infrastructure of financial markets is an under-explored source of regulatory innovation.[288] The rules governing true sales of receivables provide exactly the type of context in which revisiting a private-law doctrine might improve market governance.

The literature on securitization and bankruptcy remoteness provides ample material for formulating approaches to true sales that could reflect and express policy objectives surrounding the securitization market. Relating this literature to the true-sale doctrine encourages a more informed, policy-driven approach to these rules. At the same time, making explicit that true-sale rules are about property—and relating them to the property concepts of *numerus clausus* and exclusion—can facilitate coherence and normative direction in formulating these rules.

In his work on finance and our republic, Robert Hockett has stated that the "nemeses Jefferson and Hamilton . . . appear to have shared a view of the place of remunerative individual endeavor and productive autonomy in an enduring republic and of the place of finance in assuring that both remain always available to productive-republican citizens."[289] He distinguishes a "productive-republican" view of finance that he finds expressed in our nation's founding, from a "liberal" view that has become prevalent more recently.[290] The productive-republican view regards financial activity as instrumentally good, enabling citizens to engage in market activity consistent with collective republic-making.[291] The liberal view, in contrast, "takes market activity to be intrinsically good, if not indeed a matter of inherent political-cum-moral right."[292] Hockett's presentation of these contrasting approaches to finance reminds us of the depth of implication that

287. Some commentators have related erosion of the true-sale doctrine to causes of the 2008 financial crisis. *See* Nate Oman, "Hayek, the True Sale Doctrine, and the Origins of the Financial Crisis," March 31, 2009, at http://concurringopinions.com/archives/2009/03/hayek_the_true.html [https://perma.cc/6ZYG-PJHR].

288. *See* Hughes, *supra* note 13. *Cf.* Janger, *supra* note 13; Mann, *supra* note 13.

289. Robert Hockett, *Preliberal Autonomy and Postliberal Finance*, 77 LAW & CONTEMP. PROB. 105 at 105 (2014) (discussing "productive-republican" versus "liberal" understandings of financial markets and regulation).

290. *Id.*

291. *Id.*

292. *Id.* at 106.

legal rules governing market activity can have.

A legal doctrine at the heart of capital markets, such as the true-sale doctrine, deserves substantive vetting. Virtually no legislative history surrounds enactment of the ABS statutes[293] and commentary on the common-law doctrine is sparse. Lawmakers who have reformed true-sale rules seem to have done so in accord with the proclivities of those seeking to minimize re-characterization risk without explication of efficiency or fairness considerations surrounding that policy choice. If, ultimately, lawmakers seek to enact safe-harbors in favor of investors, or to permit externalization of costs onto non-adjusting creditors, they should do so with explicit dedication to policy implications and with some conception of the function and value of finance. Otherwise, we leave in disarray an area of law with profound distributive and market effects.

293. *See supra* text accompanying note 190.