// THE JOURNAL OF CORPORATION LAW

Volume 27 **Winter 2002** **Number 2**

ARTICLES

Lurking in the Shadows: The Hidden Issues of the Securities and Exchange Commission's Regulation FD ....*Marc I. Steinberg & Jason B. Myers* 173

Viewing the LTV Steel ABS Opinion in its Proper Context ....*Robert Stark* 211

The Non-Correlation Between Board Independence and Long-Term Firm Performance .... *Sanjai Bhagat & Bernard Black* 231

NOTES

Dodging the Question: The Supreme Court's Refusal to Commit to a Universal Interpretation of the Accrual of the Statute of Limitations for Civil RICO................ ....*Meridyth Andresen* 275

Health Maintenance Organizations and Physician Financial Incentive Plans: Should Physician Disclosure Be Mandatory?..*Sara Reuland* 293

Medical Pornography or Fair Warning: Should the United States Adopt Canada's Gruesome New Tobacco Labels?...*John P. Strouss III* 315

Viewing the LTV Steel ABS Opinion in its Proper Context

Robert Stark*

I. INTRODUCTION 211
II. ASSET-BACKED SECURITIZATION AND ITS LEGAL FOUNDATION 213
A. The Basic ABS Model 213
B. Legal Foundation for the Basic ABS Model 216
1. Recognition of Separate Legal Identities 216
2. "True Sale" Analysis 217
III. THE LTV STEEL ABS OPINION 219
IV. ASSESSING THE IMPORTANCE OF THE LTV STEEL ABS OPINION 223
A. The LTV Steel ABS Opinion as Precedent 223
B. The Distinction Between an Interim and a Final Order 224
C. Unusual Factual Circumstances 226
V. CONCLUSION 228

I. INTRODUCTION

In early 2001, Wall Street was rocked by *In re* LTV Steel Company, Inc.[1] (hereinafter "LTV Steel ABS Opinion"), an opinion issued by the bankruptcy court adjudicating the Chapter 11 cases of LTV Steel Company, Inc.[2] and affiliated companies.[3] The opinion calls into question the legal foundation for a $6 trillion[4]

---

* Counsel, Financial Restructuring Department, Akin, Gump, Strauss, Hauer & Feld, L.L.P., New York, New York. The author is involved in his firm's representation of the Official Noteholders' Committee appointed in the jointly administered Chapter 11 cases of LTV Steel Company, Inc. and affiliated entities and, in that capacity, was involved in the litigation from which the LTV Steel ABS Opinion arose. A previous version of this Article was delivered at the University of Texas School of Law Twentieth Annual Bankruptcy Conference, November 16, 2001. This article is not an opinion of the author, his firm or any of his firm's clients respecting the legal implications of the LTV Steel ABS Opinion towards any particular ABS structure or any particular case or controversy.

1. *See In re* LTV Steel Co., No. 00-438866, 2001 Bankr. LEXIS 131 (Bankr. N.D. Ohio Feb. 5, 2001). Throughout this Article, the United States Bankruptcy Court for the Northern District of Ohio, Judge William T. Bodoh, is referred to as the "Bankruptcy Court."

2. Throughout this Article, LTV Steel Company, Inc. is referred to as "LTV Steel" and, collectively with affiliated debtors, as "LTV" or the "Debtors."

3. *See* Adam Tempkin, *Top Bond Players File Amicus Briefs in LTV Bankruptcy*, INVESTMENT DEALERS' DIG., Feb. 26, 2001, at 7-8; Michael Gregory, *ABS Finds It's By No Means Immune to Market Rumble*, INVESTMENT DEALERS' DIG., March 26, 2001; *LTV Decision Shakes Securitization Industry*, 37 BANKR. CT. DECISIONS: WKLY. NEWS & COMMENT, Mar. 27, 2001, at A1; *Section 912: "Good Law,"* BANKR. CT. DECISIONS: WKLY. NEWS & COMMENT, Mar. 27, 2001, at A5; *Section 912: "Potentially Evil,"* BANKR. CT. DECISIONS: WKLY. NEWS & COMMENT, Mar. 27, 2001, at A4; Barbara M. Goodstein, *How Secure Are Your Securitizations? LTV Case Raises Important Issues for Creditors*, BANKR. STRATEGIST, Apr. 2001, at 1; ALEXANDER DILL & LETITIA HANSON, MOODY'S INVESTORS SERVICE, STRUCTURED FINANCE SPECIAL

financing industry known as "asset-backed securitization" or "ABS" or "structured finance" (these phrases are used interchangeably throughout this article) and may have invigorated a push for amendments to the Bankruptcy Code[5] to protect this industry.[6]

Through structured finance arrangements, companies avail themselves of less expensive financing by "selling" assets to a special-purpose "bankruptcy-remote" entity that, in turn, pledges the assets as collateral for a loan and then conveys the borrowed funds to the "seller" as consideration for the sale. The transaction is intended to render the assets "bankruptcy-remote" so that, if the seller ever files for bankruptcy, the collateral is removed from its bankruptcy estate and, therefore, the automatic stay[7] will not prevent the lender from foreclosing on the assets held by the special purpose entity. In this way, the lender can reduce its repayment risks. Structured financing has, consequently, become an increasingly more common mechanism through which companies with low debt ratings tap into the capital markets.

Nevertheless, structured finance is not based on an entirely firm legal platform. It is premised on bankruptcy's general recognition of legal entities created under state law. Even under state law, a transfer of assets to a special purpose entity to enable financing for the "seller" may be attacked as a legal fiction and recharacterized as a secured loan disguised as a sale transaction. Moreover, bankruptcy courts are courts of equity and may rely upon their equity jurisdiction as grounds to deny recognition of a structured finance arrangement. Uncertainty is exacerbated by the fact that ABS is a relatively recent development in the world of corporate finance and, consequently, there does not appear to be any case law directly addressing whether a contested ABS transaction is a sale or a financing.[8]

Against this backdrop, the LTV Steel ABS Opinion appears to have critical importance. The opinion arose from the Debtors' argument, made on the first days of the Chapter 11 cases, that certain critical assets "sold" to non-debtor special purpose entities in connection with securitization arrangements still belonged to the Chapter 11 estates (and, therefore, could be used post-petition without creditor intervention) because the pre-petition transfers did not result in legally cognizable "true sales," but only artifice to disguise the true nature of the transactions—loans to LTV Steel secured by assets of LTV Steel. The bankruptcy court facially accepted the Debtors' argument and authorized their use of those assets on a post-petition basis. In other words, the bankruptcy court, in the LTV Steel ABS Opinion, collapsed the ABS structure, exerted jurisdiction over assets

---

REPORT: TRUE SALE ASSAILED: IMPLICATIONS OF IN RE LTV STEEL FOR STRUCTURED FINANCE (Apr. 27, 2001) [hereinafter MOODY'S SPECIAL REPORT].

4. MOODY'S SPECIAL REPORT, *supra* note 3, at 1.

5. Hereinafter, Title 11 of the United States Code is referred to as the "Bankruptcy Code" and individual sections of the Bankruptcy Code are referred to as "Bankruptcy Code Section ___." The Federal Rules of Bankruptcy Procedure are referred to herein as the "Bankruptcy Rules."

6. *See* Douglas L. Furth et al., *What Institutional Lenders Can Expect from the Business Aspects of the Pending Bankruptcy Legislation*, 118 BANKING L.J. 520, 533 n.86 (2001); Randolph J. Haines, *Business Bankruptcy Aspects of the Bankruptcy Reform Act*, NORTON BANKR. L. ADVISOR, June 2001, at 1; Kenneth N. Klee & Michelle C. Campbell, *The Bankruptcy Reform Act of 2001—Looming Business Bankruptcy Amendments*, SG001 ALI-ABA 1, 46-47 (2001).

7. *See* 11 U.S.C. § 362 (2000).

8. A. Brent Truitt & Bennett J. Murphy, *Bankruptcy Issues in Securitizations*, *in* SECURITIZATIONS: LEGAL AND REGULATORY ISSUES, at 2-13 (Patrick D. Dolan & C. VanLeer Davis III eds., 2000).

purportedly belonging to non-debtor special purpose entities and authorized the Debtors to use those assets on a post-petition basis.

This Article attempts to place the LTV Steel ABS Opinion in its proper context. Section II is a general discussion of asset-backed securitization and its legal foundation. Section III describes the LTV Steel ABS Opinion and the circumstances out of which it was issued. Finally, Section IV evaluates the importance of the LTV Steel ABS Opinion as precedent.

II. ASSET-BACKED SECURITIZATION AND ITS LEGAL FOUNDATION

A. The Basic ABS Model

The basic model for the asset-backed securitization involves five participants:

- First, there is the entity with financing needs that has assets that may be used for a structured finance arrangement.[9] The entity may be unable to access capital through more traditional financing arrangements (*i.e.*, direct bank loans, the offering or placement of debt or equity instruments) or may be able to access financing at lower relative interest rates or reduce other capital costs through a structured finance arrangement.[10] It may also desire certain flexibility that, due to a weak debt rating, it cannot achieve through more traditional financing arrangements, but can be obtained through a structured finance mechanism.[11] Moreover, the entity may only be able to access financing through an ABS arrangement that simplifies its capital structure, corporate structure and/or sharing arrangements respecting the ownership of assets. This entity is sometimes referred to as the "originator" or "transferor."[12]
- Second, a special purpose entity is created to effectuate the structured finance arrangement.[13] The entity is sometimes referred to as a special purpose vehicle (SPV) or the "issuer."[14] Often, the SPV is a wholly owned subsidiary of the originator.[15] The SPV will receive assets from the originator and issue securities backed by liens on these assets.[16] The SPV may play an active role in the structured

9. *See* Jeffrey E. Bjork, *Seeking Predictability in Bankruptcy: An Alternative to Judicial Recharacterization in Structured Financing*, 14 BANKR. DEV. J. 119, 123 (1997); Comm. on Bankr. & Corporate Reorganization, Ass'n of the Bar of the City of N.Y., *Structured Financing Techniques*, 50 BUS. LAW. 527, 529 (1995).

10. *See* Jerome F. Festa, *Introduction*, *in* SECURITIZATIONS: LEGAL AND REGULATORY ISSUES, 1-1 (Patrick D. Dolan & C. VanLeer Davis III eds., 2000); Comm. on Bankr. & Corporate Reorganization, *supra* note 9, at 530-31.

11. *See* Festa, *supra* note 10, at 1-2; Comm. on Bankr. & Corporate Reorganization, *supra* note 9, at 531.

12. *See* Bjork, *supra* note 9, at 123; Comm. on Bankr. & Corporate Reorganization, *supra* note 9, at 529.

13. *See* Truitt & Murphy, *supra* note 8, at 2-1; Bjork, *supra* note 9, at 123-24; Comm. on Bankr. & Corporate Reorganization, *supra* note 9, at 529.

14. *See* Truitt & Murphy, *supra* note 8, at 2-8; Bjork, *supra* note 9, at 123-24; Comm. on Bankr. & Corporate Reorganization, *supra* note 9, at 529.

15. *See* Comm. on Bankr. & Corporate Reorganization, *supra* note 9, at 556; TriBar Opinion Comm., *Opinions in the Bankruptcy Context: Rating Agency, Structured Financing, and Chapter 11 Transactions*, 46 BUS. LAW. 717, 725 (1991).

16. *See* Bjork, *supra* note 9, at 123-24; Comm. on Bankr. & Corporate Reorganization, *supra* note 9, at 529.

finance arrangement or, depending on the circumstances, may appear at times to be only a conduit through which the assets and capital flow to the intended recipients.[17]

- Third, an entity monitors the assets, collects cash generated by the assets, and ensures that this cash is distributed in accordance with the finance arrangement.[18] This entity is sometimes referred to as the "servicer."[19] The servicer may play a critical role in structured finance if the SPV does not have the personnel or resources to ensure that its assets are converted into cash and that the cash is then transferred to the intended recipients.[20] The originator sometimes acts as the servicer for the SPV.[21]
- Fourth, one or more recognized credit rating agencies (such as Standard & Poor's Rating Services, Fitch Investors Services, or Moody's Investors Services) will be asked to provide a rating for the securities issued by the SPV.[22] The rating agencies will base their ratings on the structure of the transaction and the quality of the assets transferred to the SPV that serve as collateral for the securities.[23] As a general rule, the sounder the structure and the higher the quality of the collateral, the better the credit rating afforded to the SPV's securities and, consequently, the more likely that the SPV will be able to place the securities at a lower interest rate.
- Fifth, there are the "investors"—entities that purchase the securities from the SPV.[24] Depending on the transaction structure, investors might be institutional or even "mom and pop" bondholders making one-time cash outlays for the SPV's securities.[25] They may also be banks that, through the structure, provide working capital on a revolving loan basis to the originator.[26] Regardless of their relative sophistication and the transaction structure, investors tend to rely on the credit rating of the securities as determined by the credit rating agencies[27] in making the decision to invest in the SPV's securities.[28]

---

17. *See* Comm. on Bankr. & Corporate Reorganization, *supra* note 9, at 546.

18. *See id.* at 529.

19. *See id.*

20. *See id.*

21. *See id.* at 548.

22. *See* Comm. on Bankr. & Corporate Reorganization, *supra* note 9, at 529.

23. *See* Festa, *supra* note 10, at 1-1; TriBar Opinion Comm., *supra* note 15, at 720.

24. *See* Bjork, *supra* note 9, at 124; Comm. on Bankr. & Corporate Reorganization, *supra* note 9, at 529.

25. *See* Bjork, *supra* note 9, at 124.

26. *See* Comm. on Bankr. & Corporate Reorganization, *supra* note 9, at 577-78. Structured finance arrangements may involve a one-time "block" conveyance of assets that have a long life duration, such as truck and automobile chattel paper, certain leases, and consumer loans. *Id.* at 576. On their own, assets with a short life duration, such as trade receivables with a thirty or sixty day payment term, are not well-suited for block conveyances. *Id.* For short-term assets, structured finance arrangements can be established by selling these assets to the SPV on a periodic basis. *Id.* at 577. Under this type of transaction, investors (typically, lending institutions) commit funds to be paid to the SPV on a revolving basis pursuant to a committed facility. *Id.* In other words, the SPV will draw on the revolving account for funds to pay the originator its consideration for the conveyance of shorter-term assets. *See* Comm. on Bankr. & Corporate Reorganization, *supra* note 9, at 577.

27. *Id.* at 535.

28. Any given structured finance deal may involve a myriad of permutations of the basic model, requiring the participation of additional parties. For example, if there are repayment issues stemming from the collateral (*i.e.*, the collateral does not always efficiently and predictably turn into cash), "credit enhancers" or "liquidity

The model involves the following components. The originator conveys to the SPV assets that will serve as collateral for the SPV's securities.[29] Such assets generate regular and predictable cash flows.[30] The conveyance is intended to be and is structured as a "true sale" of the assets to the SPV.[31] The SPV issues debt securities.[32] The repayment of the securities is secured by a lien on the assets conveyed by the originator to the SPV.[33] The cash generated by the sale or placement of the securities is transferred by the SPV to the originator as consideration for its original transfer of assets.[34] Thereafter, the cash flow generated by the collateral is used to pay the investors interest and amortized principal on the securities.[35]

Bankruptcy-related repayment risks are reduced in two ways. First, the conveyance of assets to the SPV is intended to reduce repayment risks associated with the originator filing for or being forced into bankruptcy.[36] In other words, if the originator finds itself in bankruptcy, the automatic stay should not prevent the investors from foreclosing on their collateral because title to these assets no longer belongs to the originator (and, by extension, its bankruptcy estate) but rather, the SPV.[37]

Second, repayment risks associated with the SPV filing for or forced into bankruptcy are reduced by special provisions in the SPV's origination documents.[38] These provisions make it very difficult for the SPV to incur obligations other than those evidenced by the securities or for the SPV's board of directors[39] to vote in favor of a voluntary bankruptcy filing. In particular, the SPV's articles of incorporation generally contain the following provisions:

providers" may be necessary to help ensure that the SPV makes its future payments. *Id.* at 529. Additionally, if the SPV's securities are sold to the public, one or more underwriters will be necessary to purchase and distribute the securities. *Id.*

29. *See* Truitt & Murphy, *supra* note 8, at 2-1; Bjork, *supra* note 9, at 123-24; Comm. on Bankr. & Corporate Reorganization, *supra* note 9, at 529; TriBar Opinion Comm., *supra* note 15, at 725.

30. Festa, *supra* note 10, at 1-1. Assets conveyed to the SPV generally do not include "core" assets of the originator's business. Core assets, such as the originator's trademark, may be critical to the originator's business and, if they were conveyed to the SPV, a court adjudicating the originator's bankruptcy would face significant pressure to employ its equity jurisdiction to break down the walls separating the originator's bankruptcy estate and the SPV and pull the collateral into the estate. The conveyance of critical assets could also result in an undue "entanglement" of the originator and the SPV that would frustrate the intended purposes of the separate identification of the two entities. *See* Bjork, *supra* note 9, at 125; Comm. on Bankr. & Corporate Reorganization, *supra* note 9, at 558-60.

31. *See* Truitt & Murphy, *supra* note 8, at 2-7; Bjork, *supra* note 9, at 124-25; Comm. on Bankr. & Corporate Reorganization, *supra* note 9, at 542-47.

32. *See* Truitt & Murphy, *supra* note 8, at 2-2.

33. *See id.*; Comm. on Bankr. & Corporate Reorganization, *supra* note 9, at 555.

34. *See* Truitt & Murphy, *supra* note 8, at 2-2; Bjork, *supra* note 9, at 124; TriBar Opinion Comm., *supra* note 15, at 725.

35. *See* Comm. on Bankr. & Corporate Reorganization, *supra* note 9, at 575-82.

36. *See* TriBar Opinion Comm., *supra* note 15, at 725.

37. *See* Truitt & Murphy, *supra* note 8, at 2-5 to -6.

38. *See id.* at 2-6; TriBar Opinion Comm., *supra* note 15, at 725.

39. SPVs may be entities other than single-purpose corporations, such as partnerships and limited liability companies. Since the various permutations of SPVs and the manners in which asset-back securitizations may be effectuated is beyond the scope of this Article, the following discussion presumes the SPV as a single-purpose corporation, which is a "very familiar form of special purpose vehicle." Comm. on Bankr. & Corporate Reorganization, *supra* note 9, at 569.

- the SPV's purpose is limited solely to owning and managing the collateral, entering into the transaction closing documents, and engaging in activities incidental to the foregoing;
- the SPV may not incur indebtedness other than that which is evidenced by the securities or incurred in the ordinary course of business related to the ownership and management of the collateral;
- the SPV is prohibited from dissolving, liquidating, consolidating, merging, or selling assets for as long as the securities remain outstanding;
- the SPV's ability to transact with affiliates (including the originator) must be according to arm's-length and commercially reasonable terms;
- the SPV's board must include one "independent" director, which is a person unaffiliated with the SPV or the originator;
- the unanimous consent of the SPV's board of directors (including the consent of the independent director) is necessary for the SPV to file for bankruptcy, receivership or take any other "Bankruptcy Action";
- the SPV is obligated to maintain a separate corporate existence from any other entity (especially the originator) by, among other things, maintaining separate books and records, accounts, and employees and observing all corporate formalities; and
- after the issuance of the securities, the SPV may not amend its articles of incorporation respecting any of the above without first obtaining (a) approval of the investors and (b) confirmation from the rating agencies that such amendment would not result in a qualification, withdrawal, or downgrade of the rating for the securities.[40]

B. Legal Foundation for the Basic ABS Model

1. Recognition of Separate Legal Identities

Structured finance is fundamentally based on the principle that bankruptcy recognizes the separation of legal entities. When an entity files for or is forced into bankruptcy, only its legal and equitable interests in property form the bankruptcy estate.[41] The property interests vested in the bankruptcy estate are defined by state law as those belonging to the debtor immediately prior to bankruptcy.[42] The bankruptcy estate does not acquire any property rights that are any greater than those that belonged to the debtor under state law immediately prior to bankruptcy.[43] Moreover, a bankruptcy court will not break down separate legal entities and substantively consolidate two separate legal entities absent extraordinary circumstances.[44] Thus, presuming that the financing

40. Truitt & Murphy, *supra* note 8, at 2-8 to -9; Comm. on Bankr. & Corporate Reorganization, *supra* note 9, at 554-58.

41. 11 U.S.C. § 541(a) (2000).

42. Butner v. United States, 440 U.S. 48, 55 (1979).

43. Chicago Bd. of Trade v. Johnson, 264 U.S. 1, 8 (1924).

44. The equitable doctrine of "substantive consolidation" permits a bankruptcy court to disregard two separate legal identities and consolidate their assets and liabilities. Substantive consolidation has been found to

arrangement is made in good faith and that there is adequate public disclosure of the same, the legal entities and property rights belonging to both the originator and the SPV should be recognized in a bankruptcy scenario.

2. "True Sale" Analysis

Characterization of the transfer of assets to the SPV is often thought to be the single most important legal issue respecting structured finance.[45] If the transfer is not a "true sale": the transaction will be deemed a secured lending arrangement;[46] the investor's collateral will be deemed property of the originator's bankruptcy estate;[47] the automatic stay will prevent the investors from foreclosing on their collateral;[48] and the investors are subject to payment delays and claim impairments as set forth in the Bankruptcy Code.[49]

The closing documents establishing the ABS arrangement are not determinative. Rather, "courts will determine the true nature of a security transaction, and will not be prevented from exercising their function of judicial review by the form of words the parties may have chosen."[50] The court will examine "the parties' practices, objectives, business activities and relationships" to determine the legal characterization of the transaction.[51]

As noted above, there does not appear to be any case law directly addressing whether a contested securitization transaction is a sale or a financing.[52] Nevertheless, case law in analogous areas has resulted in the development of points of inquiry that courts have used to distinguish sales from secured financings. Commentators and practitioners have relied upon these same points when evaluating whether an asset-

---

be appropriate: (a) where the debtor is the instrumentality or alter ego of another, *see*, *e.g.*, Fish v. East, 114 F.2d 177, 191 (10th Cir. 1940); *In re* Vecco Constr. Indus., 4 B.R. 407, 410 (Bankr. E.D. Va. 1980); (b) where a separate corporate entity has been formed for the purpose of delaying, hindering or defrauding creditors, *see, e.g.*, *In re* Stop & Go of Am., Inc., 49 B.R. 743, 748 (Bankr. D. Mass. 1985); *In re* Tureaud, 45 B.R. 658, 659-61 (Bankr. N.D. Okla. 1985), *aff'd*, 59 B.R. 973 (N.D. Okla. 1986); (c) where the creditors have shown that they justifiably relied on the assets and credit of a group of entities or the credit of a parent when dealing with its subsidiary, *see, e.g.*, Soviero v. Franklin Nat'l Bank, 328 F.2d 446, 447-48 (2d Cir. 1964); *In re* Richton Int'l Corp., 12 B.R. 555, 558-59 (Bankr. S.D.N.Y. 1981); and (d) where there has been an intermingling and intertwining of corporate relationships, accounts and records of the debtors, *see, e.g.*, Chem. Bank N.Y. Trust Co. v. Kheel, 369 F.2d 845, 847 (2d Cir. 1966); *In re* 1438 Meridian Place N.W., Inc., 15 B.R. 89, 93-94 (Bankr. D.D.C. 1981).

45. *See* Bjork, *supra* note 9, at 127.

46. Truitt & Murphy, *supra* note 8, at 2-20.

47. *Id.* at 2-6.

48. *Id.*

49. *Id.*

50. *In re* Joseph Kanner Hat Co., 482 F.2d 937, 940 (2d Cir. 1973) (Friendly, J.) (quoting Professor Gilmore); *see also In re* The Woodson Co., 813 F.2d 266, 272 (9th Cir. 1987); Major's Furniture Mart, Inc. v. Castle Credit Corp., 602 F.2d 538, 542-45 (3d Cir. 1979).

51. *See Major's Furniture Mart*, 602 F.2d at 545; *see also In re* Golden Plan, 829 F.2d 705, 709 (9th Cir. 1986); *Joseph Kanner Hat Co.*, 482 F.2d at 940; *In re* Evergreen Valley Resort. Inc., 23 B.R. 659, 661 (Bankr. D. Me. 1982).

52. *See supra* note 8 and accompanying text.

backed securitization is likely to involve a "true sale" of assets to the SPV.[53] These points of inquiry include the following:

- *Which party bears the risk of loss in the transaction?* Several courts have indicated that this is the primary factor in determining whether a transaction is a sale or a secured financing.[54] A "true sale" is suggested where: the originator foists all of the risks of loss onto the SPV; the SPV assumes all risks, including all risks associated with the failure of the conveyed assets generating sufficient cash to satisfy the debt obligations owed to the investors; and the investors have recourse only against the SPV and its assets.[55] A secured loan, rather than a true sale, is suggested if the investors have any recourse against the originator upon default by the SPV or if there is other shifting of any of the repayment risks away from the SPV and to the originator.[56] Examples of direct or indirect recourse against the originator include: warranties as to collectibility; holdbacks from the purchase price; adjustments to the purchase price; guarantees by the originator; keep-well arrangements by the originator; collateral security from the originator; obligations to repurchase, or substitute for, underperforming receivables; and, retention by the originator of subordinated interests.[57]
- *Does the structure itself suggest a true sale or a secured lending arrangement?* For example, a "true sale" will be suggested where the manner of payment and amounts owed to the investors is reflective of a loan repayable from a segregated pool of assets. A secured loan is suggested where the manner of payment and amounts owed to investors is tied to the originator's performance or business activities.[58] A secured loan is also suggested where the originator retains any benefits of ownership over the assets conveyed.[59] Thus, if the originator acts as the servicer or if the transfer is not recorded, the transaction may suggest a secured loan.[60] Moreover, a secured loan is suggested where the originator is entitled to receive property back from the SPV if

53. *See, e.g.*, Truitt & Murphy, *supra* note 8, at 2-21; Comm. on Bankr. & Corporate Reorganization, *supra* note 9, at 542-47.

54. *See, e.g.*, Endico Potatoes, Inc. v. CIT Group/Factoring. Inc., 67 F.3d 1063, 1069 (2d Cir. 1995); *Golden Plan*, 829 F.2d at 709-10; McVay v. W. Plains Corp., 823 F.2d 1395, 1399 (10th Cir. 1987); *Woodson Co.*, 813 F.2d at 271-72; *Major's Furniture Mart*, 602 F.2d at 545; *In re* Executive Growth Inv., Inc., 40 B.R. 417, 422 (Bankr. C.D. Cal. 1984); *see also* Truitt & Murphy, *supra* note 6, at 2-21; Comm. on Bankr. & Corporate Reorganization, *supra* note 9, at 543.

55. *See McVay*, 823 F.2d at 1399; *Woodson Co.*, 813 F.2d 272; *Major's Furniture Mart*, 602 F.2d at 545.

56. *See, e.g.*, *Endico Potatoes*, 67 F.3d at 1068; *Golden Plan*, 829 F.2d at 709-10; *Executive Growth*, 40 B.R. at 422; *In re* O.P.M. Leasing Serv. Inc., 30 B.R. 642 (Bankr. S.D.N.Y. 1983); *Evergreen*, 23 B.R. at 661.

57. *See* Comm. on Bankr. & Corporate Reorganization, *supra* note 9, at 543-44.

58. *See Woodson Co.*, 813 F.2d at 272; *Major's Furniture Mart*, 602 F.2d at 546.

59. *See, e.g.*, *In re* Contractors Equip. Supply Co., 861 F.2d 241, 245 (9th Cir. 1988); *In re* Joseph Kanner Hat Co., 482 F.2d 937 (2d Cir. 1973); *In re* Bellanca Aircraft Corp., 56 B.R. 339, 374-76 (Bankr. D. Minn. 1985), *aff'd on this ground & rev'd on others*, 850 F.2d 1275 (8th Cir. 1988); *In re O.P.M. Leasing Servs. Inc.*, 30 B.R. at 642; *Evergreen*, 23 B.R. at 661; *In re* Hurricane Elkhorn Coal Corp. II, 19 B.R. 609 (Bankr. W.D. Ky. 1982), *aff'd in part & rev'd in part*, 32 B.R. 737 (Bankr. W.D. Ky. 1983), *aff'd*, 763 F.2d 188 (6th Cir. 1985); Comm. on Bankr. & Corporate Reorganization, *supra* note 9, at 546.

60. *See, e.g.*, *In re* Alda Commercial Corp., 327 F. Supp. 1315 (S.D.N.Y. 1971); *In re* Mid Atl. Fund, 60 B.R. 604, 608 (Bankr. S.D.N.Y. 1986).

the SPV's obligations to the investors are paid by another source or if assets remain following satisfaction of all obligations to the investors.[61]

- *What is the intent of the parties?* Many courts have closely examined the circumstances surrounding the transaction for evidence of intent.[62] Although not dispositive, courts have examined the transaction agreements for evidence of intent.[63] How the originator accounted for the transfer on its books and records may be probative.[64] Courts have also relied upon testimony offered by parties involved in the transaction regarding whether they viewed the transaction to be a sale or secured loan.[65] Moreover, other documentary evidence, such as letters between the parties, have been found persuasive reflections of intent.[66]

Presuming that the parties carefully structure the ABS arrangement to withstand "true sale" scrutiny under the above points of inquiry, the transfer should be recognized in the originator's bankruptcy case and the transferred assets should not be held part of the originator's bankruptcy estate.

III. THE LTV STEEL ABS OPINION

Prior to their Chapter 11 filings, the Debtors collectively operated as one of the nation's largest and most important steel companies.[67] As of the petition date, they were the "leading domestic producers of integrated steel, the largest producers of mechanical and structural steel tubing products in North America, the world's largest producers of bimetallic wire products and the second largest manufacturers of pre-engineered metal building systems in North America."[68] As of September 30, 2000, the Debtors collectively listed $5.8 billion in assets and $4.7 billion in liabilities.[69] They also employed 17,500 people, 12,300 of which were represented by unions.[70] "An additional 100,000 retirees and their dependents relied upon the Debtors to provide ongoing medical benefits."[71] Since many of the Debtors' employees and retirees were located in northern

61. *See, e.g.*, *Endico Potatoes*, 67 F.3d at 1068; *Contractors Equip. Supply Co.*, 861 F.2d at 245; *Woodson Co.*, 813 F.2d 271; *Evergreen*, 23 B.R. at 661.

62. *See, e.g.*, *In re* Yeary, 55 F.3d 504, 507 (10th Cir. 1995); *In re* Golden Plan of Calf., Inc., 829 F.2d 705, 708 n.2 (9th Cir. 1986); *In re* Drewry, 99 B.R. 906, 913 (Bankr. N.D. Ind. 1989), *aff'd*, 1991 U.S. Dist. LEXIS 20432 (N.D. Ind. Jan. 14, 1991), *aff'd*, 966 F.2d 236 (7th Cir. 1992); *In re* Armando Gerstel, Inc., 65 B.R. 602, 604-05 (S.D. Fla. 1986); *In re* Candy Lane Corp., 38 B.R. 571, 575-77 (Bankr. S.D.N.Y. 1984); *Evergreen*, 23 B.R. at 659.

63. *See, e.g.*, *Golden Plan*, 829 F.2d at 709; *Contractors Equip.*, 861 F.2d at 245; *Evergreen*, 23 B.R. at 661.

64. *See* Comm. on Bankr. & Corporate Reorganization, *supra* note 9, at 546-47.

65. *Golden Plan*, 829 F.2d at 710.

66. Major's Furniture Mart, Inc. v. Castle Credit Corp., 602 F.2d 538, 546 (3d Cir. 1979).

67. *In re* LTV Steel Co., No. 00-43866, 2001 Bankr. LEXIS 131, at *2 (Bankr. N.D. Ohio Feb. 5, 2001).

68. Aff. of Glenn J. Moran in Support of Chapter 11 Petitions and Requests for First Day Relief ¶ 5, *In re* LTV Steel Co., 2001 Bankr. LEXIS 131 (Bankr. N.D. Ohio Feb. 5, 2001) (No. 00-43866) (affidavit filed December 29, 2000) [hereinafter Moran Affidavit].

69. *Id.* ¶ 6.

70. *Id.* ¶ 7.

71. *Id.*

Ohio, a failed restructuring for LTV would have a particularly significant impact on the economy of northern Ohio.[72]

The LTV Steel ABS Opinion stemmed from two structured financing arrangements created by LTV Steel years before the Debtors filed for Chapter 11 protection. As part of the first arrangement, set up in 1994, LTV Steel created a wholly owned corporation, LTV Sales Finance Company ("Sales Finance"), to serve as the SPV.[73] The arrangement was set up to work like a revolving credit facility based on Sales Finance purchasing all accounts receivable from LTV Steel and certain other affiliated companies on a daily basis.[74] LTV Steel acted as the servicer.[75] To fund these daily purchases, Sales Finance issued debt securities that were secured by the accounts receivable, in the initial aggregate principle amount of $320 million (later increased to $345 million).[76] The securities received an AAA rating by Standard & Poor's Rating Service, suggesting a high quality, low risk investment.[77] The largest investment was made by Abbey National Treasury Services PLC ("Abbey National"), a United Kingdom bank with a very conservative investment agenda.[78]

Under the second financing arrangement, set up in 1998, LTV Steel created a limited liability company, LTV Steel Products, LLC ("Steel Products"), to serve as the SPV.[79] Under this arrangement, LTV Steel and certain of its affiliated companies sold their inventory to Steel Products.[80] LTV Steel again acted as the servicer, whose responsibility included such tasks as manufacturing raw materials into saleable products, transporting, storing and guarding the inventory, and marketing and selling the products.[81] Steel Products paid for its purchases by issuing notes to LTV Steel and affiliated companies. These notes were secured by liens on the inventory.[82] LTV Steel and affiliated companies, in turn, sold or pledged the notes to investors.[83] As of the petition date, these notes evidenced indebtedness of approximately $303.6 million.[84] The notes received a BBB rating from Fitch IBCA, Inc.,[85] suggesting a riskier investment.

72. *See LTV Steel Co.*, 2001 Bankr. LEXIS 131, at *15.

73. Emergency Mot. by Abbey National Treasury Services PLC for Modification of Interim Order Entered on December 29, 2000 and Objection to Such Order, at 4 n.2, *In re* LTV Steel Co., 2001 Bankr. LEXIS 131 (Bankr. N.D. Ohio Feb. 5, 2001) (No. 00-43866) (motion filed January 9, 2001) [hereinafter Abbey Emergency Motion].

74. *See id.* at 4.

75. Emergency Mot. for (1) Order Granting Interim Authority to Use Cash Collateral and (2) Scheduling and Establishing Deadlines Relating to a Final Hearing; Mem. of Points and Authorities and Affidavits of John Delmore and James W. Croll in Support Thereof, at 9, *In re* LTV Steel Co., 2001 Bankr. LEXIS 131 (Bankr. N.D. Ohio Feb. 5, 2001) (No. 00-43866) (motion filed Dec. 29, 2000) [hereinafter LTV Emergency Motion].

76. Abbey Emergency Motion, *supra* note 73, at 5.

77. *Id.* at 3.

78. *Id.* at 3.

79. LTV Emergency Motion, *supra* note 75, at n.1.

80. Abbey Emergency Motion, *supra* note 73, at 7.

81. LTV Emergency Motion, *supra* note 75, at 9-10.

82. Abbey Emergency Motion, *supra* note 73, at 7-8.

83. *Id.*

84. LTV Emergency Motion, *supra* note 75, at 1.

85. Abbey Emergency Motion, *supra* note 73, at 8.

The investors were comprised of a consortium of banks led by Chase Manhattan Bank, NA.[86]

Towards the end of 2000, LTV faced a severe liquidity problem, suggesting that the Debtors needed bankruptcy protection.[87] Nevertheless, as a consequence of the two ABS arrangements, LTV faced another dilemma: if LTV Steel no longer "owned" its receivables and inventory, LTV's integrated steel companies were hard pressed to look to Chapter 11 as a means of restructuring their liabilities and obtaining new financing. A Chapter 11 filing by LTV Steel would operate as an event of default under the financing arrangements[88] and, since LTV Steel could not compel the SPVs to also seek Chapter 11 relief, it could not rely upon bankruptcy's automatic stay to prevent the investors from foreclosing on the receivables and inventory. Thus, Chapter 11 could mean the end of LTV's integrated steel operations.[89]

Lacking any viable alternative, LTV Steel and its affiliated companies filed for Chapter 11 relief on December 29, 2000, with the United States Bankruptcy Court for the Northern District of Ohio.[90] Neither Sales Finance nor Steel Products filed for bankruptcy with the Debtors.[91]

To avail themselves of immediate working capital, the Debtors filed an emergency motion requesting an order granting the interim use of cash collateral (*i.e.*, the cash generated from the accounts receivable and inventory "sold" to Sales Finance and Steel Products, respectively) and the entrance of a subsequent, final order approving same.[92] In the emergency motion, the Debtors asserted that the pre-petition transfers of accounts receivable and inventory to Sales Finance and Steel Products were not, in fact and law, "true sales" but, rather, secured financing arrangements disguised as true sales.[93] Thus, argued the Debtors, this property belonged to the Chapter 11 estates and could be used by the Debtors on a post-petition basis.[94] The Debtors stipulated to adequately protect[95] the investors for the use of cash collateral by affording the investors senior liens on the inventory and receivables, weekly interest payments at the pre-petition, non-default rate and an administrative expense claim against the estates.[96] On the first day of the cases, the Bankruptcy Court entered an order approving the emergency motion, authorizing the Debtors' interim use of cash collateral, and scheduled a hearing for a final order approving the full usage of cash collateral.[97]

86. Aff. of John Delmore in Support of Emergency Mot. for (1) Order Granting Interim Authority to Use Cash Collateral and (2) Scheduling and Establishing Deadlines Relating to a Final Hearing Emergency Mot. [sic] ¶ 3, *In re* LTV Steel Co., 2001 Bankr. LEXIS 131 (Bankr. N.D. Ohio Feb. 5, 2001) (No. 00-43866) (affidavit filed Dec. 29, 2000).

87. Moran Affidavit, *supra* note 68, ¶ 26.

88. Abbey Emergency Motion, *supra* note 73, at 4.

89. *In re* LTV Steel Co., No. 00-43866, 2001 Bankr. LEXIS 131, at *15 (Bankr. N.D. Ohio Feb. 5, 2001).

90. Moran Affidavit, *supra* note 68, ¶ 26.

91. *LTV Steel Co*., 2001 Bankr. LEXIS 131, at *4.

92. *See* LTV Emergency Motion, *supra* note 75.

93. *See id.*

94. *See id.*

95. Bankruptcy Code Sections 363(c) and 363(e) require a debtor in bankruptcy to provide "adequate protection" to a secured creditor if the debtor intends to use cash collateral on a post-petition basis. *See* 11 U.S.C. § 363(c), (e) (2000).

96. *In re* LTV Steel Co., No. 00-43866, 2001 Bankr. LEXIS 131, at *6 (Bankr. N.D. Ohio Feb. 5, 2001).

97. *Id.* at *1.

When Abbey National subsequently learned of the Bankruptcy Court's order, it vigorously pressed the Bankruptcy Court to immediately vacate the order.[98] Among other things, Abbey National argued that the Bankruptcy Court lacked jurisdiction over the property of Sales Finance and Steel Products—non-Debtor entities—and, therefore, the court exceeded its authority by permitting the Debtors to use their property.[99] The Bankruptcy Court denied the motion.[100]

First, the Bankruptcy Court rejected the argument on procedural grounds. The court reasoned that it was not in a position to determine its jurisdictional limits prior to a trial on the Debtors' "true sale" claim:

> Abbey National's position in this regard is circular: we cannot permit Debtor to use cash collateral because it is not property of the estate, but we cannot determine if it is property of the estate until we hold an evidentiary hearing. We fail to see how we can conclude that the receivables are not property of Debtor's estate until an evidentiary hearing on that issue has been held. Because the determination of this issue must await further discovery, we decline to grant Abbey National relief from the interim order.[101]

Second, the Bankruptcy Court determined that LTV Steel's possession over the "sold" property afforded it an equitable interest in the property. Thus, held the Bankruptcy Court, it was part of the Chapter 11 estate:

> [T]here seems to be an element of sophistry to suggest that Debtor does not retain at least an equitable interest in the property that is subject to the interim order. Debtor's business requires it to purchase, melt, mold and cast various metal products. To suggest that Debtor lacks some ownership interest in products that it creates with its own labor, as well as the proceeds to be derived from that labor, is difficult to accept. Accordingly, the Court concludes that Debtor has at least some equitable interest in the inventory and receivables, and that this interest is property of the Debtor's estate. This equitable interest is sufficient to support the entry of the interim cash collateral order.[102]

Third, the Bankruptcy Court relied upon its powers as a court of equity to avoid what it viewed to be an inequitable result:

> [I]t is readily apparent that granting Abbey National relief from the interim cash collateral order would be highly inequitable. The Court is satisfied that the entry of the interim order was necessary to enable Debtor to keep its doors open and continue to meet its obligations to its employees, retirees, customers and creditors. Allowing Abbey National to modify the order would allow Abbey National to enforce its state law rights as a secured lender to look to the collateral in satisfaction of this debt. This circumstance would put an immediate end to Debtor's business, would put thousands of people out of work, would deprive 100,000 retirees of needed medical benefits, and would

98. *See* Abbey Emergency Motion, *supra* note 73.
99. *Id.* at 6-7.
100. *See LTV Steel Co.*, 2001 Bankr. LEXIS 131, at *24.
101. *Id.* at *19.
102. *Id.* at *19-20.

> have more far reaching economic effects on the geographic areas where Debtor does business. However, maintaining the current status quo permits Debtor to remain in business while it searches for substitute financing, and adequately protects and preserves Abbey National's rights. The equities of this situation highly favor Debtor. As a result, the Court declines to exercise its discretion to modify the interim order pursuant to Rule 60(b)(4).[103]

Prior to the hearing on the Debtors' request for a final order approving the use of cash collateral, the Debtors reached a settlement with the lenders under the Sales Finance and Steel Products arrangements—including Abbey National—involving the "roll-up" of the two ABS facilities into a post-petition, debtor-in-possession loan.[104] Accordingly, the Bankruptcy Court never reached the question of whether the Debtors transferred property to Sales Finance and Steel Products pursuant to "true sale" transactions.

IV. ASSESSING THE IMPORTANCE OF THE LTV STEEL ABS OPINION

The LTV Steel ABS Opinion is certainly a startling development in the world of structured finance. As noted above, this appears to be the first time an ABS structure has been tested in the bankruptcy context and, at least to Abbey National, the Bankruptcy Court did not render the optimal decision. As a result, investors in other ABS programs may question whether a rating assigned to the securities accurately reflects the risk/reward profile of the investment. Nevertheless, for the reasons discussed below, the LTV Steel ABS Opinion has only limited importance and should not necessarily be viewed as a dramatic event by the financing industry.

A. The LTV Steel ABS Opinion As Precedent

Under the principle of *stare decisis*, courts will abide by and adhere to a settled point of law established in a prior case.[105] The doctrine is, however, limited in scope.[106] It applies only to rules of law[107] and, therefore, does not dictate a court's factual analysis[108] or evaluation of the equities of a particular case.[109] Moreover, the doctrine only compels courts to follow precedent established by superior appellate courts in the same circuit or the Supreme Court.[110] Since bankruptcy courts do not review the

103. *Id.* at *20-21.

104. *See In re* LTV Steel Co., No. 00-43866, 2001 Bankr. LEXIS 635, at *17-20 (Bankr. E.D. Ohio Mar. 20, 2001).

105. Seminole Tribe v. Florida, 517 U.S. 44, 63 (1996); IRS v. Osborne (*In re* Osborne), 76 F.3d 306, 309 (9th Cir. 1996).

106. *Stare decisis* is a principle of policy and not an inexorable command. State Oil Co. v. Khan, 522 U.S. 3, 20 (1997); United States v. Int'l Bus. Mach. Corp., 517 U.S. 843, 856 (1996).

107. Beacon Oil Co. v. O'Leary, 71 F.3d 391, 395 (Fed. Cir. 1995); United States v. Nolan, 136 F.3d 265, 269 (2d Cir.), *cert. denied*, Mezzetta v. U.S., 524 U.S. 920 (1998).

108. Mendenhall v. Cedarapids, Inc., 5 F.3d 1557, 1570 (Fed. Cir. 1993), *cert. denied*, 511 U.S. 1031 (1994); Gately v. Mass., 2 F.3d 1221, 1226 (1st Cir. 1993), *cert. denied*, 511 U.S. 1082 (1994).

109. Lyons v. Jefferson Bank & Trust, 793 F. Supp. 989, 993 (D. Col. 1992).

110. Howard v. Wal-Mart Stores, Inc., 160 F.3d 358, 359 (7th Cir. 1998) (Posner, C.J.); *In re* Peterson, 222 B.R. 382, 385 (Bankr. M.D. Fla. 1998); First Nat'l Bank of Union Co. v. Shubert (*In re* Shubert), 147 B.R. 618, 619 (Bankr. N.D. Ga. 1992); Michelman v. Hanil Bank, Ltd. (*In re* Jee), 104 B.R. 289, 293 (Bankr. C.D. Cal. 1989).

decisions of any other court, their opinions do not establish precedent. Thus, a decision of a bankruptcy court is not binding on any other court.[111] It is only, at best, persuasive authority for another court to follow.[112]

The LTV Steel ABS Opinion turned largely on the facts, to wit, LTV's immediate financial troubles were so severe that, if the Bankruptcy Court granted Abbey National's motion, the Debtors would be forced to cease their integrated steel operations, resulting in mass layoffs and retirees losing benefits.[113] Furthermore, the opinion was issued by a bankruptcy court and the matter was settled before it could be raised on appeal. Thus, the LTV Steel ABS Opinion does not establish precedent binding on any other court evaluating a structured financing arrangement. It may only, at best, serve as persuasive authority for another court to follow and, as discussed below, there are aspects of the opinion that may lead other courts to find the opinion distinguishable on its facts.

B. The Distinction Between an Interim and a Final Order

To appreciate the relative importance of the LTV Steel ABS Opinion, it is necessary to understand the difference between an interim and a final order authorizing a debtor's use of cash collateral.[114] The Bankruptcy Code provides for the interim and then final approval of the debtor's use of cash collateral as a procedure to fairly marshal competing interests in cash collateral. Typically, a debtor in possession has a critical need for cash immediately upon the Chapter 11 filing.[115] If the debtor has pledged its cash flow as partial security for a pre-petition working capital loan, all of its cash is likely to be held by its pre-petition lender[116] because the UCC requires possession for perfecting a lien on cash.[117] Since a creditor's lien constitutes a property interest, the bankruptcy court cannot immediately order the lender to turn the cash over to the debtor without infringing on the lender's Fifth Amendment liberties.[118] Even if the cash is in the debtor's possession, the

---

111. *In re* McNichols, 255 B.R. 857, 868 (Bankr. N.D. Ill. 2000); *Shubert*, 147 B.R. at 619; *In re* Finley, Kumble, Heine, Underberg, Manley, Myerson & Casey, 160 B.R. 882, 898 (Bankr. S.D.N.Y. 1993).

112. *Finley*, 160 B.R. at 898; Perry v. Gen. Motors Accept. Corp. (*In re* Perry), 48 B.R. 591, 596 n.6 (Bankr. M.D. Tenn. 1985).

113. *See In re* LTV Steel Co., No. 00-43866, 2001 Bankr. LEXIS 131, at *20-21 (Bankr. N.D. Ohio Feb. 5, 2001).

114. "Cash collateral" is defined by Bankruptcy Code in section 363(a) to mean:

> cash, negotiable instruments, documents of title, securities, deposit accounts, or other cash equivalents whenever acquired in which the estate and an entity other than the estate have an interest and includes the proceeds, products, offspring, rents, or profits of property and the fees, charges, accounts or other payments for the use or occupancy of rooms and other public facilities in hotels, motels, or other lodging properties subject to a security interest as provided in section 552(b) of this title, whether existing before or after the commencement of a case under this title.

11 U.S.C. § 363(a) (2000). In LTV's case, the accounts receivable sold to Sales Finance and the proceeds of inventory sold to Steel Products would fall within this definition if the Court determined that the estate had an interest in such property.

115. Stephen A. Stripp, *Balancing of Interests in Orders Authorizing the Use of Cash Collateral in Chapter 11*, 21 SETON HALL L. REV. 562, 565 (1991).

116. *Id.*

117. U.C.C. § 9-305 (2001) (revised Article 9).

118. *See* U.S. CONST. amend. V ("No person shall . . . be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use, without just compensation."); United States v. Sec. Indus. Bank, 459 U.S. 70 (1982) (former Bankruptcy Act provision, which permitted a debtor to avoid

bankruptcy court cannot immediately authorize the debtor's use of the cash and, thereby, the dissipation of the lender's collateral[119] without also infringing on the lender's Fifth Amendment liberties.[120]

Bankruptcy Code Section 363 and Bankruptcy Rule 4001 obviate this inherent tension.[121] Section 363(c) prohibits a debtor from using cash collateral "unless (a) each entity that has an interest in the cash consents or (b) the bankruptcy court, after notice and a hearing, authorizes" the debtor's use of cash collateral.[122] If the pre-petition lender objects to the debtor's use of cash collateral, the debtor may file a motion requesting such authority over the lender's objection and the motion is treated as a "contested matter"[123] in the bankruptcy case.[124] Bankruptcy Rule 4001 requires the debtor to provide notice of its motion at least 15 days prior to a hearing on the issue.[125] This notice period may, however, be extended because the lender is entitled to reasonable discovery and to present evidence at a trial on the issue.[126]

Since the time gap between the filing of and a final hearing on the motion may unduly harm a debtor that has an immediate need to use cash collateral, Bankruptcy Code Section 363(c) authorizes the bankruptcy court to conduct a preliminary hearing on the debtor's motion.[127] The hearing may occur "in accordance with the needs of the debtor,"[128] often within days of the debtor's bankruptcy filing.[129] At the preliminary hearing, the court may authorize the debtor's interim use of cash collateral, but only in an amount "necessary to avoid immediate and irreparable harm to the estate pending the final hearing."[130] The bankruptcy court may not order the debtor's interim use of cash collateral unless (a) there is a reasonable likelihood that, at the final hearing, it will find that the lender's secured position has received "adequate protection"[131] and (b) the lender's secured position is adequately protected against the debtor's interim use of cash collateral, if the lender makes such a demand.[132]

liens on household property and treat the property as exempt from the bankruptcy estate, violated the lender's Fifth Amendment liberties); Wright v. Union Cent. Life Ins. Co., 304 U.S. 502, 516-17 (1938) (extending the time for a debtor to exercise redemption from a foreclosure sale does not constitute an impermissible modification of the creditor-mortgagee's property rights in violation of the due process clause of the Fifth Amendment).

119. The debtor is likely to use the cash to pay, among other things, administrative expenses, including professional fees and expenses and employee salaries. In other words, the debtor's use of cash collateral will not always be used to purchase other assets against which the lender's lien might attach.

120. *See supra* note 118.

121. *See* 11 U.S.C. § 363 (2000); FED. R. BANKR. P. 4001.

122. 11 U.S.C. § 363(c)(2) (2000).

123. FED. R. BANKR. P. 9014.

124. *See* FED. R. BANKR. P. 4001(b)(1) (invoking rule 9014, which concerns "contested matters").

125. FED. R. BANKR. P. 4001(b)(2).

126. *See* FED. R. BANKR. P. 9014 (invoking rules 7021, 7025, 7026, 7028-7037, 7041, 7042, 7052, 7054-7056, 7064, 7069, and 7071, which concern the conduct of discovery and a trial on the merits).

127. *See* 11 U.S.C. § 363(c)(3) (2000).

128. *Id.*

129. Stripp, *supra* note 115, at 566.

130. FED. R. BANKR. P. 4001(b)(2).

131. 11 U.S.C. § 363(c)(3) (2000).

132. 11 U.S.C. § 363(e) (2000).

Adequate protection may be in many forms, but it must provide the lender with at least the "indubitable equivalent" of the property interest lost from the debtor's use of cash collateral.[133] By ensuring that the lender's lien is adequately protected, the bankruptcy court does not infringe on the lender's Fifth Amendment liberties when it authorizes the debtor's interim use of cash collateral.[134] If the debtor does not prevail on its request for final approval of its use of cash collateral, the lender may rely on its adequate protection to make itself whole.[135] In other words, adequate protection is afforded to the lender at an interim stage to "undo the damage done" if the bankruptcy court ultimately denies the debtor's request to use cash collateral.

Against this backdrop, the LTV Steel ABS Opinion takes on a very different light. It arises under very unusual circumstances: a lender requested that the court reconsider an *interim* cash collateral order, before a trial on the merits of the debtor's request for a *final* cash collateral order, and after the court had determined that the lender was adequately protected in the interim period because it was provided with senior liens against the Debtors' accounts receivable and inventory, weekly cash payments and an administrative expense claim against the estates.[136] In a sense, the Bankruptcy Court decided nothing in the LTV Steel ABS Opinion; it simply declined Abbey National's request to overturn the interim order. In so doing, the Bankruptcy Court only maintained the status quo under the interim order, enabling the parties to take full discovery and present the "true sale" issue at the appropriate time—the hearing on the debtor's request for final approval of the use of cash collateral. If the debtor did not prevail on its "true sale" argument at trial, the Bankruptcy Court would "undo the damage done" by ensuring a proper allocation of value to Abbey National, through the various forms of adequate protection, to make it whole for its lost cash collateral. Thus, it would be incorrect to assert that, in the LTV Steel ABS Opinion, the Bankruptcy Court reached any substantive holding relating to the validity of ABS structures in bankruptcy.

C. Unusual Factual Circumstances

It is not common for Chapter 11 debtors to engage in the type of difficult, protracted, and expensive litigation involved in the LTV Steel ABS Opinion.[137] That is remarkable in light of the fact that, in recent years, it has become relatively common for large companies to seek Chapter 11 protection after having transferred critical assets to

133. *See* 11 U.S.C. § 361 (2000).

134. *See* Wright v. Union Cent. Life Ins. Co., 311 U.S. 273, 278 (1940) ("Safeguards were provided to protect the rights of secured creditors, throughout the proceedings, to the extent of the value of the property. There is no constitutional claim of the creditor to more than that." (internal citations omitted)).

135. *See* 11 U.S.C. § 361(1), (2) (2000) (authorizing forms of adequate protection to shore up "a decrease in the value of [the creditor's] interest in such property."); 11 U.S.C. § 361(3) (2000) (authorizing other forms of adequate protection "as will result in the realization by [the creditor] of the indubitable equivalent of such [creditor's] interest in such property."); *see also* Raymond T. Nimmer, *Adequate Protection, in* 3 CHAPTER 11 THEORY AND PRACTICE: A GUIDE TO REORGANIZATION, at 16:4-5 (James F. Queenan, Jr. et al. eds. 1994) ("The debtor must provide the holder of the property interest with protection against or compensation for the resulting loss in recoverable value in order to retain and use the property.").

136. *See supra* text accompanying note 103

137. As stated above, the LTV Steel ABS Opinion appears to be the first opinion stemming from a "true sale" challenge in a bankruptcy case. *See* Truitt & Murphy, *supra* note 8.

an SPV as part of a pre-petition ABS arrangement.[138] Debtors in such a circumstance will often enter into a post-petition debtor-in-possession financing facility and use part of the loan proceeds to "repurchase" the assets transferred to the SPV. These funds are then used to pre-pay the SPV's obligations to the investors.[139] In this way, Chapter 11 debtors like Fruit of the Loom, Carter Hawley Hale Stores, Inc., National Gypsum Co., and P.A. Bergner & Co. Holding Co. have avoided the difficult battle that plagued the early days of LTV's Chapter 11 cases, immediately focusing their efforts instead on fixing more fundamental problems towards a return to profitability.

LTV Steel's case is unusual. Prior to the petition date, the company not only transferred away its accounts receivable, it also transferred away all of its inventory, including raw materials to be manufactured into salable goods. Thus, prior to bankruptcy, LTV Steel placed in "bankruptcy-remote" vehicles virtually all of its assets that could be readily converted into cash. This left only large hard assets, like aging steel mills, which are difficult to liquidate and, therefore, not the kind of assets that banks prefer to take as collateral. Exacerbating the problem as a large integrated steel manufacturing operation, it would take LTV Steel a considerable amount of working capital to bring new products to market post-petition. Consequently, LTV Steel lacked the kind of asset base and financial flexibility to enable post-petition financing to solve its ABS problems. Unlike most Chapter 11 cases, LTV Steel's survival literally depended on its "true sale" argument.

Also unlike most issues in Chapter 11 cases, the resolution of Abbey National's motion in its favor would have had far reaching consequences. This was not simply a matter of how to appropriately allocate value among creditors. It would have resulted in the immediate cessation of LTV Steel as an operating entity, thousands of individuals losing their employment, and thousands of retirees losing their medical benefits. Many of these employees and retirees live in northern Ohio, not far from the Bankruptcy Court. Thus, resolution of Abbey National's motion in its favor would have had a dire economic impact on northern Ohio, perhaps prompting many bankruptcy filings with the Bankruptcy Court.

In sum, the LTV Steel ABS Opinion is predicated on unusual circumstances and, therefore, it is not likely to open the floodgates for ABS challenges in bankruptcy. The Bankruptcy Court's ruling stems from LTV Steel's unusually precarious financial

138. *See, e.g.*, Mot. of Debtors and Debtors in Possession for an Order (I) Authorizing Postpetition Financing on a Secured and Superpriority Basis Pursuant to 11 U.S.C. § 364; (II) Authorizing Use of Cash Collateral Pursuant to 11 U.S.C. § 363; (III) Granting Adequate Protection Pursuant to 11 U.S.C. §§ 363 and 364; and (IV) Scheduling a Final hearing Pursuant to Federal Rule of Bankruptcy Procedure 4001 ¶ 15, *In re* LTV Steel Co., 2001 Bankr. LEXIS 131 (Bankr. N.D. Ohio Feb. 5, 2001) (No. 00-43866) (motion filed Oct. 1, 2001); *In re* Federal-Mogul Global Inc., No. 01-10578 (Bankr. D. Del.); Mot. for Entry of Order Authorizing Postpetition Financing, Use of Cash Collateral, and Provision of Adequate Protection ¶ 22, *In re* Fruit of the Loom, Inc., (Bankr.D. Del. filed Dec. 29, 1999) (No. 99-04497); *see also* MOODY'S SPECIAL REPORT, *supra* note 3, at 3 (referencing pre-petition securitization arrangements "taken out" by debtor-in-possession financing facilities in the following cases: *In re* Carter Hawley Hale Stores, Inc., No. LA 91-64140, 1991 Bankr. LEXIS 2186 (Bankr. C.D. Cal. July 31, 1991); *In re* National Gypsum Co., No. 390-37213-SAF-11 (Bankr. N.D. Tex. filed Nov. 21, 1990); *In re* P.A. Bergner & Co. Holding Co., Nos. 91-05501 to 91-05516 (RAE) (Bankr. E.D. Wis. Apr. 16, 1992); Truitt & Murphy, *supra* note 8, at 2-28 (describing cases where pre-petition securitizations were not attacked post-petition, including the case of *In re* Carter Hawley Hale Stores, Inc.).

139. *See* cases discussed *supra* note 138.

situation and the harm to the public interest if it granted Abbey National's motion. These are not facts likely to be repeated on a regular basis.

V. CONCLUSION

The primary conclusion to be drawn from the above discussion is that the LTV Steel ABS Opinion has limited importance as a matter of law. Wall Street should not, therefore, view the opinion as likely to prompt many debtors to challenge ABS arrangements in bankruptcy or for many bankruptcy courts to unwind such structures.

Nevertheless, as a more general matter, the LTV Steel ABS Opinion raises important points to consider in connection with other structured finance arrangements. First, the opinion is a wake-up call for any financing institution that has grown to believe that ABS structures are "bankruptcy-proof." That structured financing arrangements do not necessarily wall off assets from bankruptcy court jurisdiction is a fact long noted by commentators[140] and courts.[141] Indeed, the LTV Steel ABS Opinion is a rare illustration of how bankruptcy courts, as courts of equity,[142] will use their equity jurisdiction to avoid what they deem to be an inequitable result, even if that means collapsing an ABS structure in contravention of basic tenets of state contract law. Participants in the financing industry should be educated by the LTV Steel ABS Opinion and base their expectations regarding the "bankruptcy-remote" nature of any particular ABS arrangement on a full understanding of the risks that are inherent in these structures.

Second, the LTV Steel ABS Opinion demonstrates the role that investors will be required to play in bankruptcy cases if the ABS structure is challenged post-petition. Fundamentally, bankruptcy is about allocating value appropriately among creditors.[143] To effectuate that result, Congress embraced an adversarial process in which creditors must appeal to the bankruptcy court to protect their interests.[144] If the debtor seeks to deprive certain creditors of their rightful stake, those creditors must quickly come to the bankruptcy court to protect their interests.[145] That was the difficult role Abbey National was forced to play in LTV Steel's Chapter 11 case. In other words, investors should not presume that, because their collateral is placed in an SPV, they can dispassionately watch the Chapter 11 case from the sidelines without worrying that their interests may be compromised.

---

140. *See, e.g.*, Teresa N. Kerr, *Bowie Bonding in the Music Biz: Will Music Royalty Securitization Be the Key to the Gold for Must Industry Participants?*, 7 UCLA ENT. L. REV. 367, 373 (2000); Robert Dean Ellis, *Securitization Vehicles, Fiduciary Duties, and Bondholders' Rights*, 24 J. CORP. L. 295, 304 (1999); Sheryl A. Gussett, *Bankruptcy Remote Entities in Structured Financings*, AM. BANKR. INST. J., March 15, 1996, at 14.

141. *See, e.g., In re* Kingston Square Assoc., 214 B.R. 713, 737 (Bankr. S.D.N.Y. 1997); *see also* Truitt & Murphy, *supra* note 8, § 2.05[1] at 2-19 (describing the treatment of ABS arrangements in *In re* Buckhead Am. Corp., Nos. 91-978 to 91-986 (Bankr. D. Del. filed Sept. 27, 1991).

142. *See* 11 U.S.C. § 105(a) (2000).

143. *See, e.g.*, 11 U.S.C. §§ 362, 547, 1122, 1124, 1129 (2000); *see also* Elizabeth Warren, *Bankruptcy Policy*, 54 U. CHI. L. REV. 775, 785 (1987) ("In bankruptcy, with an inadequate pie to divide and the looming discharge of unpaid debts, the disputes center on who is entitled to shares of the debtor's assets and how these shares are to be divided. Distribution among creditors is not incidental to other concerns; it is the center of the bankruptcy scheme.").

144. *See* FED. R. BANKR. P. 7001, 9014.

145. *See id.*; *see also* 11 U.S.C. § 1109(b) (2000) (stating that creditors have standing to be heard on any issue in the case).

Finally, the LTV Steel ABS Opinion proves that the post-petition treatment of any particular ABS structure will turn largely on the extent to which the debtor can operate as a going concern if deprived of the assets transferred to the SPV.[146] Fundamentally, Chapter 11 seeks to maximize and distribute to creditors a reorganized debtor's enterprise value.[147] As a consequence, structures that oppose a debtor's ability to reorganize and remain an operating enterprise are not likely to be favorably received by a bankruptcy court. Investors should, therefore, be certain that any particular ABS structure does not go so deeply to the core of the originator's business that, if the originator files for bankruptcy, a bankruptcy court would be compelled to disregard the ABS structure simply to allow the originator to survive as a going concern. Additionally, investors should ensure that they have covenant protections that prevent the originator from entering into other financing arrangements preventing it from reorganizing in bankruptcy. In the end, the LTV Steel ABS Opinion cautions that observance of the lending maxim "know your borrower" may be the surest method to protect the integrity of the loan structure.

146. *See also* G. Ray Warner, *The Anti-Bankruptcy Act: Revised Article 9 and Bankruptcy*, 9 AM. BANKR. INST. L. REV. 3, 78-83 (2001).

147. NLRB v. Bildisco & Bildisco, 465 U.S. 513, 528 (1984) ("The fundamental purpose of reorganization is to prevent a debtor from going into liquidation, with an attendant loss of jobs and possible misuse of economic resources."); United States v. Whiting Pools, Inc., 462 U.S. 198, 203 (1983) ("Congress presumed that the assets of the debtor would be more valuable if used in a rehabilitated business plan that if 'sold for scrap.'").

THE UNIVERSITY OF IOWA COLLEGE OF LAW

ADMINISTRATIVE OFFICERS

N. WILLIAM HINES, JR., *A.B.*, *LL.B.*, *Dean of the College of Law and Joseph F. Rosenfield Professor of Law*
ERIC G. ANDERSEN, *B.A.*, *J.D.*, *Associate Dean of Academic Affairs and Professor of Law*
ARTHUR E. BONFIELD, *B.A.*, *J.D.*, *LL.M.*, *Associate Dean for Research and John F. Murray Professor of Law*
LINDA MCGUIRE, *B.S.*, *M.A.*, *J.D.*, *Associate Dean for Student Affairs and Lecturer in Law*
JOHN C. REITZ, *B.A.*, *J.D.*, *Associate Dean for International Programs and Professor of Law*
PATRICIA A. CAIN, *A.B.*, *J.D.*, *Acting Associate Dean for Admissions and Financial Aid*

FACULTY

PATRICIA N. ACTON, *B.A.*, *J.D.*, *Professor of Law*
JOHN S. ALLEN, *B.A.*, *J.D.*, *Clinical Associate Professor of Law*
DAVID C. BALDUS, *A.B.*, *M.A.*, *LL.B.*, *LL.M.*, *Joseph B. Tye Professor of Law*
PATRICK B. BAUER, *B.A.*, *J.D.*, *Professor of Law*
RANDALL P. BEZANSON, *B.S.*, *J.D.*, *Charles E. Floete Distinguished Professor of Law*
STEPHANOS BIBAS, *B.A., M.A.*, *J.D., Associate Professor of Law*
PETER D. BLANCK, *B.A.*, *Ph.D.*, *J.D.*, *Professor of Law*
WILLARD L. BOYD, *B.S.L.*, *LL.B.*, *LL.M.*, *S.J.D.*, *Professor of Law and President Emeritus*
MARGARET F. BRINIG, *B.A.*, *M.A.*, *Ph.D.*, *J.D.*, *Edward F. Howry Professor of Law*
STEVEN J. BURTON, *B.A.*, *J.D.*, *William G. Hammond Professor of Law*
WILLIAM G. BUSS, *B.A.*, *LL.B.*, *Otis K. Patton Professor of Law*
PATRICIA A. CAIN, *A.B.*, *J.D.*, *Aliber Family Professor of Law*
JONATHAN C. CARLSON, *B.A.*, *J.D.*, *Professor of Law*
ENRIQUE R. CARRASCO, *B.A.*, *J.D.*, *Professor of Law*
ROBERT C. CLINTON, *B.A., J.D., Professor of Law*
LOIS K. COX, *B.A.*, *M.A.*, *J.D.*, *Clinical Professor of Law*
MARCELLA DAVID, *B.S.*, *J.D.*, *Professor of Law*
ANN L. ESTIN, *A.B.*, *J.D.*, *Professor of Law*
JOSEPHINE GITTLER, *B.A.*, *J.D.*, *Professor of Law*
HERBERT J. HOVENKAMP, *B.A.*, *M.A.*, *Ph.D.*, *J.D.*, *Ben and Dorothy Willie Professor of Law*
MARK D. JANIS, *B.S.*, *J.D.*, *Professor of Law*
KENNETH J. KRESS, *B.A.*, *M.A.*, *Ph.D.*, *J.D.*, *Professor of Law*
SHELDON F. KURTZ, *A.B.*, *J.D.*, *Percy Bordwell Professor of Law*
MARC LINDER, *B.A.*, *M.A.*, *J.D.*, *Professor of Law*
JEAN C. LOVE, *B.A.*, *J.D.*, *Martha Ellen Tye Professor of Law*
BARRY D. MATSUMOTO, *B.A.*, *J.D.*, *Associate Professor of Law*
RETA R. NOBLETT-FELD, *B.A.*, *J.D.*, *Clinical Professor of Law*
MARK J. OSIEL, *B.A.*, *J.D.*, *Ph.D.*, *Professor of Law*
TODD E. PETTYS, *B.A.*, *J.D.*, *Associate Professor of Law*
MARGARET RAYMOND, *B.A.*, *J.D.*, *Professor of Law*
HILLARY A. SALE, *B.A.*, *M.A.*, *J.D.*, *Professor of Law*
LEONARD A. SANDLER, *B.S.*, *J.D.*, *Clinical Professor of Law*
BARBARA A. SCHWARTZ, *B.A.*, *M.A.*, *J.D.*, *Clinical Professor of Law*
MARK SIDEL, *A.B.*, *M.A.*, *J.D.*, *Associate Professor*
JOHN-MARK STENSVAAG, *B.A.*, *J.D.*, *Professor of Law*
JAMES J. TOMKOVICZ, *B.A.*, *J.D.*, *Professor of Law*
LEA S. VANDERVELDE, *B.A.*, *J.D.*, *Josephine R. Witte Professor of Law*
DAVID H. VERNON, *A.B.*, *LL.B.*, *LL.M.*, *S.J.D.*, *D.C.L. (Hon.)*, *Allan D. Vestal Professor of Law*
LARRY D. WARD, *B.S.*, *J.D.*, *M.Acc.*, *Orville and Ermina Dystra Professor of Law*

GERALD B. WETLAUFER, *B.A.*, *J.D.*, *Professor of Law*
JOHN WHISTON, *B.A.*, *J.D.*, *Clinical Associate Professor of Law*
ADRIEN K. WING, *A.B.*, *M.A.*, *J.D.*, *Bessie D. Murray Professor of Law*

ADJUNCT FACULTY

S. JAMES ANAYA, *B.A.*, *J.D.*, *Lecturer in Law*
KRISTIN J. BRANDSER, *B.A.*, *M.A.*, *J.D.*, *Lecturer in Law*
CHRISTINE BOHANNAN, *B.S.*, *J.D.*, *Resident Lecturer in Law*
JAY CHRISTENSEN-SZALANSKI, *A.B.*, *Ph.D.*, *M.P.H.*, *Lecturer in Law*
JUSTICE RANDY J. HOLLAND, *B.A.*, *J.D.*, *LL.M.*, *Lecturer in Law*
HENRY G. HORWITZ, *B.A.*, *D. Phil.*, *J.D.*, *Professor of History, Lecturer in Law*
GARY HOWELL, *B.A.*, *J.D.*, *Lecturer in Law*
ANDREW M. IVES, *A.B.*, *J.D.*, *Lecturer in Law*
HON. JOHN A. JARVEY, *B.S.*, *J.D.*, *Lecturer in Law*
LINDA KERBER, *A.B.*, *J.D.*, *Lecturer in Law*
RICHARD KOONTZ, *B.A.*, *J.D.*, *Lecturer in Law*
PHILIP A. LEFF, *B.A.*, *J.D.*, *Lecturer in Law*
BARRY LINDAHL, *B.A.*, *J.D.*, *Lecturer in Law*
CASEY B. MAHON, *B.A.*, *J.D.*, *Lecturer in Law*
JOHN D. MACQUEEN, *B.A.*, *M.D.*, *Lecturer in Law*
MARC MILLS, *B.A.*, *J.D.*, *Lecturer in Law*
MATTHEW J. NAGEL, *B.A.*, *J.D.*, *Lecturer in Law*
GAY D. PELZER, *B.S.N.*, *J.D*, *Lecturer in Law*
HAROLD ROCHA, *B.S..*, *J.D.*, *L.L.M.*, *Faculty Fellow*
MARK E. SCHANTZ, *B.A.*, *B.A.*, *L.L.B.*, *Lecturer in Law*
DOUGLAS R. SMITH, *B.S.*, *J.D.*, *Lecturer in Law*
JOHN L. SOLOW, *B.A.*, *M.A.*, *Ph.D.*, *Associate Professor of Economics, Lecturer in Law*
LEON L. SPIES, *B.B.A.*, *J.D.*, *Lecturer in Law*
HON. GEORGE L. STIGLER, *B.A.*, *J.D.*, *Lecturer in Law*

VISITING FACULTY

ALEXANDER N. DOMRIN, *S.J.D.*, *Visiting Professor of Law*
MICHAEL D. GREEN, *B.S.*, *J.D.*, *Visiting Professor of Law*
NICHOLAS JOHNSON, *B.A.*, *LL.B.*, *L.H.D.*, *Visiting Professor of Law*
CHRISTOPHER LIEBIG, *B.A.*, *J.D.*, *M.F.A.*, *Visiting Associate Professor of Law*
SIR GEOFFREY W. PALMER, *B.A.*, *LL.B.*, *J.D.*, *Visiting Professor of Law*
DON C. PETERS, *B.S.*, *LL.M.*, *J.D.*, *Visiting Professor of Law*

EMERITUS FACULTY

DAVID C. BAYNE, *S.J.*, *A.B.*, *M.A.*, *LL.B.*, *LL.M.*, *S.J.D.*, *S.T.L.*, *Professor Emeritus of Law*
CHARLES W. DAVIDSON, *B.S.*, *J.D.*, *LL.M.*, *Professor Emeritus of Law*
SAMUEL M. FAHR, *A.B.*, *LL.B.*, *Professor Emeritus of Law*
PAUL M. NEUHAUSER, *A.B.*, *LL.B.*, *LL.M.*, *Professor Emeritus of Law*
BURNS H. WESTON, *B.A.*, *LL.B.*, *J.S.D.*, *Director of the University of Iowa Center for Human Rights and Bessie Dutton Murray Professor Emeritus of Law*

ADMINISTRATIVE & PROFESSIONAL STAFF

PATTY ANKRUM, *B.A.*, *Video Facilities Coordinator*
JAN BARNES, *B.A.*, *Admissions Assistant*
KEITH BLAIR, *Electrician; Building Maintenance*
JILL E. DE YOUNG, *A.B.*, *J.D.*, *Acting Associate Director of Career Services*
LORIE HINES, *B.A.*, *Computer Network Manager*
NANCY JONES, *B.A.*, *M.A.T.*, *Ph.D.*, *Director of Writing Resources Center*
KAREN K. KLOUDA, *B.A.*, *J.D.*, *Director of Career Services*
CHRISTOPHER LIEBIG, *B.A.*, *J.D.*, *M.F.A.*, *Writing Resource Center*
RISA LUMBLEY, *B.A.*, *M.A.*, *Project Analyst, Information Technology*
MARY ANN NELSON, *B.A.*, *M.L.S.*, *J.D.*, *Executive Law Librarian*
SUSAN E. PALMER, *B.A.*, *M.A.*, *Director of Financial Aid and Associate Director of Admissions*
DEBRA S. PAUL, *Registrar*
MARTHA PETERS, *B.A.*, *M.Ed.*, *Ph.D.*, *EDS*, *Academic Achievement Director*
ROBERT L. RAMSEY, *B.A.*, *M.A.*, *Computer Technical Support*
MATTHEW STILWELL, *B.B.A.*, *Director of Technology*
CAROLYN J. TAPPAN, *Program Coordinator, Continuing Legal Education, Assistant to the Dean*
GORDON S. TRIBBEY, *B.B.S.*, *M.B.A.*, *Business Manager*
MARK WUNDER, *B.A.*, *J.D.*, *Director of Development, Iowa Law School Foundation*

THE JOURNAL OF CORPORATION LAW

Volume 27 | **Spring 2002** | **Number 3**

EDITORIAL BOARD

Editor in Chief
SCOTT J. HOFER

Managing Editors
SARAH L. MALCOLM
JOEL D. VOS

Articles Editors
JOHN C. PIETILA
AMY L. THOMAS
BRIAN A. WHITE

Senior Note & Comment Editor
SARA E. REULAND

Note & Comment Editors
DAVID T. BROWN
SCOTT M. DAY
JANEL S. DOHRN
DEANNA J. REICHEL

Senior Associate Editor
MERIDYTH M. ANDRESEN

Associate Editors
MATTHEW J. ADAM
TRACY L. DEUTMEYER
BRIAN M. KUETHE
LIANDRA L. MARTINEZ

Business Manager
JANE C. CHESTERMAN

Faculty Advisors
MARK D. JANIS
HILLARY A. SALE