

The Transactional Lawyer

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Secondary Offering Opinions

Sandra M. Rocks
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Legal opinions are typically required in initial public offerings and other offerings in which a company is issuing new securities. Without doubt, the vast majority of transactions involving the purchase and sale of already-issued securities among securityholders -- so-called "secondary" transactions -- do not involve the delivery of legal opinions. However, underwriters typically request opinions in the context of a secondary offering of a significant number of securities by a shareholder that is an affiliate of the company. These shareholders will often hold certificates evidencing the securities, which will then be deposited into The Depository Trust Company ("DTC") at the closing of the offering and traded thereafter in book-entry form through DTC's facilities. The opinion requests, which typically relate to the shareholder's rights in and power to transfer the stock, are not always framed utilizing legal language applicable to the realities of modern securities holding practices, and time is often spent negotiating for, or acceding to, the same types of deviations from form documents time after time. Although many law firms undoubtedly have developed their own practices in this regard, it is not uncommon in the context of secondary sales which form part of a registered initial public offering for the seller's counsel to be facing the opinion request for the first time. This may be due, in part, to the fact that many of the registered offerings, of which the secondary offerings of the shares form a part, "close" in New York -- with the shares being transferred through DTC -- but the sellers of the secondarily offered shares may not reside or conduct

business in New York and may not have retained New York counsel in connection with the transaction. This fact also raises choice of law issues which are discussed briefly below.

Recognizing this, the TriBar Opinion Committee recently published an appropriately detailed report entitled "Special Report of the TriBar Opinion Committee: Opinions on Secondary Sales of Securities." [66 Bus. Law. 625 \(2011\)](#). It may seem surprising, but by the fifth paragraph of the TriBar Report, the committee notes that, given the nature and importance of the factual assumptions that underlie these opinions, the opinions themselves may not be worth the time and expense involved in preparing them. Nevertheless, since requests for opinions in this context do not yet appear to be an endangered species, it was thought that a comprehensive treatment of the practice in this area was warranted. Given the highly technical nature of the report, the authors of this article thought a very brief "plain English" foray into this still somewhat arcane territory might also be worthwhile (leaving the heavy lifting to the TriBar Report, on which the article necessarily relies and to which our dear readers are commended).

The purpose of this article is to provide a summary overview of the nature of the opinion being requested and how practitioners should generally approach it. In order to maintain as much of a user-friendly approach as possible, we will sometimes refer to "shares of stock" as the subject of the sale transaction -- in keeping with the way in which the transaction documents typically refer to what's being sold -- even though that may not be the correct commercial law terminology. In addition, we will paraphrase in certain cases and not include every variant of each legal component addressed -- again the TriBar Report does all these matters justice.

Briefest of Backgrounds

For commercial law purposes, the nature of a person's interest in shares of corporate stock, how that interest may be acquired and whether adverse claims can successfully be asserted against that interest depends on whether the shares of stock are registered in the name of that person on the books of the issuer (or its transfer agent) or are reflected by entries in the person's account on the books of a broker or bank. In

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the former case the person is said to hold “directly” and in the latter “indirectly.” The commercial law provisions – found in Article 8 of the Uniform Commercial Code (“U.C.C.”) – that apply to acquisitions of interests in shares of stock are tailored to these two holding patterns.

Although in many sale transactions a purchaser may care about the state of the seller’s title (and representations to this effect are often sought and given), legal opinions are a different matter. An opinion giver cannot know who owns shares of stock – even if the seller’s name appears on the books of the issuer. There is simply no commercial law basis on which the opinion giver can reach a conclusion as to who is the owner without making assumptions that no purchaser would have the wherewithal to investigate. On the other hand, in some cases the commercial law provides methods for purchasers to acquire property in a manner that will shield them from competing claims of third parties, irrespective of their seller’s “title.” Happily, Article 8 falls into this category and therefore, although underwriters may initially request opinions regarding the seller’s “title” or ownership of the shares of stock being sold, an opinion about what the purchaser will obtain when the transaction closes is typically all that counsel can really give and all that the purchaser really needs.

Direct Holdings

In the direct holding system, the purchaser can become a “protected purchaser.” In so doing, the purchaser will acquire all of the seller’s rights in the shares, and no adverse claims can be asserted against the purchaser. In order to achieve this status, the purchaser would need to (i) give value, (ii) not have notice of any adverse claim to the security, and (iii) obtain “control” of the shares of stock. See U.C.C. § 8-303. See also U.C.C. § 8-106 (defining “control”). For certificated securities, “control” can be obtained by receiving physical delivery of share certificates that are indorsed to or registered in the name of the purchaser. As noted above, in the typical secondary offering, the seller might deliver certificates to the underwriter, indorsed or accompanied by stock powers (in both cases typically in blank), so that the underwriter can then proceed to deposit the shares with DTC and provide for further credit to the accounts of customers or other investors. The opinion giver would typically make the necessary factual assumptions to support the conclusion that the purchaser qualifies as a “protected purchaser” or, stated differently, that “no adverse claim may be asserted against” the purchaser. Typical factual assumptions include: (i) that the purchase price is in

fact paid; (ii) that the underwriter does not (and others in the deal whose notice might be attributed to the underwriter such as the representative of the underwriters do not) have notice of an adverse claim; and (iii) that the certificates are in fact delivered and that any indorsements are effective (receipt of physical certificates delivered in this way would constitute obtaining “control” under Article 8, see § 8-106(b)). As none of these assumptions should be considered problematic by the underwriter, an opinion formulated relying on such assumptions (explicit or not) and reaching the “protected purchaser” or “no adverse claim” conclusion is generally acceptable.

Indirect Holdings

In many secondary offerings, the manner in which the purchasing underwriter takes delivery of the shares of stock involves having those shares credited to its account at DTC. This can occur either as a second step following a physical delivery of certificates evidencing those shares to the underwriter or, more likely, to DTC itself. In the former case, the opinion described above under “direct holdings” could be the end of the opinion line. In the latter case, a different formulation is required. In this circumstance, DTC – a clearing corporation and thus a “securities intermediary” in Article 8 nomenclature – becomes (via its nominee, Cede & Co.) the record owner of the shares. DTC may therefore become a “protected purchaser,” but the underwriter would not. The underwriter can acquire an interest in the specified number of shares of stock, but there is no legal link in Article 8 between what DTC acquires by receiving delivery from the selling shareholder and reregistering the shares and what the underwriter acquires. The interest the underwriter can acquire when shares are credited to its securities account – a combination of pro rata property interests in the shares of stock held by DTC and a series of legal and contractual rights against DTC called a “security entitlement,” see U.C.C. §§ 8-102(a)(17), 8-501 – has a separate legal status under Article 8. The underwriter can acquire this interest “free of an adverse claim” if (i) value has been given, (ii) the underwriter does not (and others in the deal whose notice might be attributed to the underwriter such as the representative of the underwriters do not) have notice of the adverse claim to any financial asset, compare U.C.C. § 8-502 with § 8-303(a)(2), and (iii) the underwriter has acquired a “security entitlement” to the specified number of the shares of stock. In this context, the opinion giver can assume (explicitly or not) that DTC is in fact a securities intermediary, the shares of stock have been credited to the underwriter’s account at DTC and that account is a securities account, and on that basis

conclude that the underwriter has acquired a “security entitlement” to the specified number of the shares of stock. Further, the opinion giver can assume that the purchase price has been paid and that the underwriter has no notice of “an” adverse claim to any financial asset, and on that basis can conclude that no action based on “the” adverse claim may be asserted against that underwriter with respect to the shares of stock. Again, as none of these assumptions should be considered problematic by the underwriter, an opinion formulated relying on such assumptions (explicit or not) and reaching the “no adverse claim” conclusion is generally acceptable.

Opinion Limited to Article 8

Although many practitioners giving security interest opinions under Article 9 of the U.C.C. often expressly limit the coverage of those opinions to the U.C.C. itself, to date that has not been common in the secondary sale opinion practice. As noted in the TriBar Report, it would appear to be advisable to include such a limitation, given the possibility that Article 8 may not affect the right to assert adverse claims based on federal law, such as the Civil Asset Forfeiture Reform Act of 2000 (“CAFRA”).

Which State’s UCC Article 8 Applies?

Because there are no material differences between the versions of Article 8 adopted by each state insofar as purchases of ordinary corporate stock are concerned, opinion recipients may be comfortable receiving an opinion from counsel under the law of a jurisdiction other than the jurisdiction in which the closing is taking place. However, Article 8 does contain mandatory choice-of-law rules that specify, among other things, what law governs whether adverse claims can be asserted against certain purchasers. See U.C.C. § 8-110(a)(5), (b)(4). Depending on the circumstances, the law determined to be applicable to the underwriter’s freedom from adverse claims may not be the law covered by the opinion provided by the selling shareholder’s counsel. In such cases, it would seem advisable for the opinion to either expressly address the choice-of-law issue or indicate that the opinion is provided “as if” the law covered by the opinion were the applicable law. According to the TriBar Report, an opinion containing neither formulation is understood as being given “as if” the law covered by that opinion governed the U.C.C. matters as well. The TriBar Report provides examples of various formulations that can be used to reflect these approaches.

Conclusion

Transactional attorneys should be careful when asked to provide an opinion in connection with a secondary offering of securities. Particularly when the securities are held indirectly, it is impossible to opine about the seller’s title to or ownership of the securities. For a more comprehensive analysis of the issues discussed in this article, look to the TriBar Report. (Please!)

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The Efficacy and Risk of Usury Savings Clauses

Amy Carter

To avoid the consequences of a usurious loan, transactional lawyers occasionally include a usury savings clause in their loan agreements. When triggered, such a clause reduces the interest charged to the maximum permissible amount. Such a clause can be useful because it is not always clear which fees and expenses (*e.g.*, late charges, commitment fees, points, or origination fees) the law regards as equivalent to interest. In other words, it is not always clear when the loan agreement charges usurious interest and when it does not. Moreover, the consequences of charging usurious interest can be harsh, ranging from (i) forfeiture of only the excessive interest, (ii) forfeiture of all interest; (iii) voidability of the loan; (iv) damages calculated as some multiple of the excessive interest amount, to (v) criminal penalties.

However, drafters of loan agreements should use caution before relying on a usury savings clause. Several states treat a usury savings clause as ineffective to prevent the loan from being usurious. See, *e.g.*, *Dupree v. Virgil R. Coss Mortgage Co.*, [267 S.W. 586](#) (Ark. 1925); *Simbury Fund, Inc. v. New St. Louis Associates*, [611 N.Y.S.2d 557](#) (N.Y. App. Div. 1994); *Swindell v. FNMA*, [409 S.E.2d 892](#) (N.C.1991). Cf. *Herkimer Investment, LLC v. Goldstein*, [2012 WL 2923342](#) at *7 (N.J. Super. Ct. App. Div. 2012)

(suggesting that the nature of the transaction and the sophistication of the parties is relevant to whether a usury savings clause is effective).

Other states give effect to a usury savings clause. In Texas, for example, courts have allowed such a clause to avoid a usury violation, at least in some cases. For a comprehensive list of such cases, see *Woodcrest Associates, LTC v. Commonwealth Mortgage Corp.*, [775 S.W.2d 434](#), 437-38 (Tex. Ct. App. 1989); *In re Perry*, [425 B.R. 323](#) (Bankr. S.D. Tex. 2010). However, if the loan agreement or promissory note is usurious on its face, or the lender does not invoke the clause when needed, the clause will not rescue the lender from the consequences of usury. See, e.g., *Armstrong v. Steppes Apartments, Ltd.*, [57 S.W.3d 37](#), 47 (Tex. Ct. App. 2001).

Of course, this discussion indicates merely that a usury savings clause might be ineffective. If that were the only potential downside, there would be no reason – other than perhaps professional ethics – not to include such a clause in a loan agreement. However, there is at least one significant potential downside to placing a usury savings clause in a loan agreement. While some courts have stated that a usury savings clause evidences the lender’s intent not to charge usurious interest, see, e.g., *Kennon v. McGraw*, [281 S.W.3d 648](#), 652 (Tex. Ct. App. 2009), others have suggested that a usury savings clause actually manifests the lender’s intent to charge usurious interest and the lawyer’s knowledge of such intent. See, e.g., *514 Broadway Investment Trust, ex rel. Blechman v. Rapoza*, [816 F. Supp. 2d 128](#) (D.R.I. 2011). See also *Jersey Palm-Gross, Inc. v. Paper*, [639 So. 2d 664](#), 671 (Fla. Ct. App. 1994), in which the court indicated that a usury savings clause may be “determinative” on the issue of intent if the interest charged is close to the legal rate or the transaction is not clearly usurious at the outset but becomes usurious after the occurrence of a future contingency, but not stating whether the clause tends to prove or disprove intent. The clause would seem to disprove intent in the latter case but may tend to prove it in the former.

Further Reading

<http://www.blankrome.com/index.cfm?contentID=37&itemID=2560>

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Avoiding the Eternal Standstill

Stephen L. Sepinuck

Consider a situation in which the debtor has a junior and a senior lender. An intercreditor agreement provides that the senior indebtedness will be paid first and that the junior will not receive or retain payment by or on behalf of the debtor, in cash or in kind, until the senior indebtedness has been paid in full. Such a clause is referred to as a “standstill.” The debtor defaults and the guarantors – or a subset of them – purchase the senior debt. The junior may be in a difficult spot. The guarantors may make sure that at least some portion of the senior debt remains outstanding so that the standstill agreement of the junior lender remains in place . . . permanently.

These are loosely the facts of *MB Financial Bank v. Paragon Mortgage Holdings, LLC*, [89 So.3d 917](#) (Fla. Ct. App. 2012), in which the junior lender sued the four guarantors of a loan, two of whom had formed a new entity that had purchased the senior debt. The trial court treated the purchase of the senior debt as payment of the debt, freeing the junior lender from the standstill. The appellate court reversed. It ruled that even if the guarantors were trying to exploit the terms of the subordination agreement when they purchased the senior debt, a fact that had not actually been proven, the junior had not shown why this would justify treating the transaction as the equivalent of a payment of the senior debt. It noted that the intercreditor agreement contained an express provision regulating the assignment of the junior debt, but none restricting assignment of the senior debt. Instead, the agreement contained a rather standard clause making its terms binding on any successor or assign. The court did allow the junior to proceed to judgment against the guarantors, and thus avoid a later potential problem with the statute of limitations, but not to enforce the judgment. See also *Abed, Inc. v. Saraiya*, [85 So.3d 1132](#) (Fla. Ct. App. 2012) (ruling similarly in a related case).

The case nicely illustrates one potential danger of a standstill agreement. Admittedly, there are some facts that may alleviate the danger somewhat. First, only two of the four guarantors formed the entity that purchased the senior debt. When analyzing the effect of the purchase, the court summarily stated that “[n]o one has cited any case holding that a transfer of a note to a corporation or other legal entity, owned by some but not all of the guarantors on the note, acts as a

satisfaction of the note.” It is not clear why the case should turn on whether all or only some of the guarantors are involved. Perhaps the court was thinking about suretyship cases in which some but not all of several co-sureties purchase a guaranteed loan from the creditor and then seek to collect from the non-purchasing co-sureties. In such a case, even though the transaction is structured as an assignment of the loan, rather than as payment of it, courts uniformly hold that the transaction does not circumvent the rules of suretyship and, as a result, the assignees cannot collect the entire debt from the non-purchasing co-sureties, merely a contributive share of it. *See, e.g., Mandolfo v. Chudy*, [573 N.W.2d 135](#) (Neb. 1998). However, such cases among co-sureties would not seem relevant to the rights of multiple creditors under an intercreditor agreement. Moreover, if the law did regard as important whether all the guarantors purchased the loan, and treated a purchase by all of them as payment, the guarantors could easily manipulate the rule by ensuring that one or more of them did not participate in the transaction in order to keep the junior lender subject to the standstill.

A second reason why the case may be readily distinguishable from others is that the entity that purchased the debt in *MB Financial* did so by paying roughly 25% in cash and funding the remainder with a loan from the senior lender. Thus, the senior lender had really not been paid off at all, although that fact did not play a part in the appellate court’s analysis.

It is also worth noting that an even more recent case seems to have ruled differently. In *Arrowhead Capital Finance, Ltd. v. Seven Arts Pictures PLC*, [2012 WL 2478306](#) (N.Y. Sup. Ct. 2012), a junior lender sought to enforce its rights after the senior lender sold its loan to an affiliate of the borrowers. The court ruled that the junior lender was, despite a standstill agreement, entitled to a judgment against the debtor and to foreclose on the collateral. In doing so, the court stated that “[i]t would offend notions of fairness and justice to allow a debtor to step into the shoes of a senior lender to which it owed money and use that position to indefinitely refuse to pay monies owed to a junior lender.”

Unfortunately, the decision is not a model of clarity and the cases it cites for this position are not really on point. More important, there are at least two reasons why the ruling in *Arrowhead Capital* cannot really be regarded as contrary to the decision in *MB Financial Bank*. First, the sale of the senior loan was consummated without the consent of the junior lender that the intercreditor agreement required. In contrast,

no such consent was needed in *MB Financial*. Second, the sale agreement expressly provided that “all obligations owed to the Seller under the Loan Documents will be deemed paid in full.” The court interpreted this clause to mean not merely that all obligations to the seller were discharged, but that all obligations on the senior loan were discharged, thereby terminating the standstill. In *MB Financial*, the assignment agreement contained no such statement and, as noted above, the senior lender had not really been paid because it had provided the financing to the entity that purchased the debt.

In any event, counsel for junior lenders should be careful when drafting the intercreditor agreement to avoid the possibility of a standstill that becomes permanent if someone friendly to the debtor acquires the senior debt. There are several ways this can be accomplished. For example, the agreement could give the junior lender a right to purchase the senior loan after a default on or acceleration of the senior loan. This is the approach taken in the [ABA Model Intercreditor Agreement](#), *see* § 5, even though the standstill in that agreement is not permanent, *see* § 3.1(b); *cf.* § 4.3 (requiring the junior lender to turn over collateral or proceeds received in any enforcement action prior to full payment of the senior loan). Similarly, the agreement could provide the junior lender with a right of first refusal on sale of the senior loan or a right to approve any sale of the senior loan, and provide that any breach of these terms by the senior lender automatically terminates the standstill. Alternatively, the intercreditor agreement could provide that the standstill ends if the note is transferred to the debtor, a guarantor, (*i.e.*, a primary or secondary obligor) or any entity controlled by them.

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Recent Cases

SECURED TRANSACTIONS

GMAC v. Everett Chevrolet, Inc.,

[2012 WL 3939863](#) (Wash. Ct. App. 2012)

Secured party whose security agreement provided that the secured obligation was due on demand had no duty of good faith to avoid or delay exercising the right to demand payment.

United States v. Montesinos,

[2012 WL 4054132](#) (S.D.N.Y. 2012)

Notice of federal tax lien against Israel Montesinos that misspelled his first name as “Isreal” was nevertheless valid against mortgagee because it was indexed in a real property system that permitted searching by last name, by last and partial first name, by partial last name and partial first name, or with a “sounds like” feature that captures names spelled differently but that sound similar to the name being searched, and thus a reasonably diligent searcher would have discovered the notice.

SSI Holdco, Inc. v. Mourtou,

[2012 WL 4094301](#) (N.D. Okla. 2012)

Although a guaranty agreement that covered the interest due on a secured loan required the creditor to apply to the guaranteed obligation “[a]ll payments received from [the debtor] or on account of the Guaranteed Indebtedness from whatsoever source,” the secured party’s credit bid at a foreclosure sale did not result in a “payment received,” and thus the secured party was free to apply the credit bid to the principal portion of the secured obligation rather than to the guaranteed interest obligation.

BANKRUPTCY

In re Wallett,

[2012 WL 4062657](#) (Bankr. D. Vt. 2012)

While a creditor holding fully secured claim is entitled to post-petition attorney’s fees if such fees are authorized under its contract with the debtor, because the loan agreement obligated the debtor to pay the creditor’s attorney’s fees only in the event of default, and there was no default, the creditor was not entitled to post-petition attorney’s fees incurred in reviewing the plan and preparing a proof of claim.

In re Brooke Corp.,

[2012 WL 3066706](#) (Bankr. D. Kan. 2012)

Bankruptcy trustee that had abandoned interest in debtor’s wholly owned subsidiary and allowed bank to conduct strict foreclosure against the debtor’s interest in the subsidiary could later maintain \$8.6 million avoidance action against the subsidiary and its successor even though the trustee had asserted that the debtor’s interest had no value to the estate and the successor later allegedly invested substantial sums to resurrect the subsidiary’s business.

In re Bataa/Kierland, LLC,

[2012 WL 3801329](#) (Bankr. D. Ariz. 2012)

Even if the debtor’s purpose for incurring a small, prepetition secured debt was to create a class that would likely satisfy § 1129(a)(10) and therefore render the plan confirmable, such a motive is not a basis for re-designating the claimant’s vote.

GUARANTIES & RELATED MATTERS

Mid-Wisconsin Bank v. Koskey,

[2012 WL 2094339](#) (Wis. Ct. App. 2012)

Although bank’s statement to guarantor that it would pay off the existing lender and obtain a first lien on the collateral was not an actionable promise because of the integration clause in the guaranty, the statement was a misrepresentation that entitled the guarantor to rescind the guaranty.

Porter Capital Corp. v. Thomas,

[2012 WL 3139871](#) (Ala. Civ. App. Ct. 2012)

Guarantor was not a third-party beneficiary of loan agreement and thus was not bound by the arbitration clause in that agreement. Guarantor was also not compelled to arbitrate his claims against the lender based on the arbitration clause in guaranty agreement because that clause defined arbitrable claims to “mean” those between the lender and borrower, even though the clause then went on to indicate that it “includes” claims “arising out of, in connection with, or relating to” the guaranty.

Haggard v. Bank of Ozarks Inc.,
[668 F.3d 196](#) (5th Cir. 2012)

Unconditional guaranty that did not require the lender to first seek payment from the borrower but which was “limited to the last to be repaid \$500,000” of a \$1.6 million loan and which also provided that “until the principal balance of the Loan is reduced to less than \$500,000, there will be no reduction in the amount guaranteed hereunder” was ambiguous as to whether the creditor could pursue the guarantor before the balance of the loan was reduced to \$500,000.

LENDING, CONTRACTING & COMMERCIAL LITIGATION

JCC Development Corp. v. Levy,
[2012 WL 3776544](#) (Cal. Ct. App. 2012)

Promissory note that authorized the lender to accelerate the debt upon the borrower’s default and, in the same paragraph, provided that “[t]hereafter, interest shall accrue at the maximum legal rate” did not call for default-rate interest after the note matured. The default-rate interest applied only after acceleration and, upon maturity, there was nothing to accelerate.

Bayerische Landesbank v. Aladdin Cap. Mgmt. LLC,
[2012 WL 3156441](#) (2d Cir. 2012)

Investors in collateralized debt obligation that sold interests in a credit default swap sufficiently alleged that they were third-party beneficiaries of the portfolio management agreement entered into between CDO issuer and the registered investment adviser because the agreement specifically delineated the adviser’s obligations and liabilities to the investors. Although the agreement identified the swap counter-party as an intended third-party beneficiary and disclaimed the existence of other third-party beneficiaries “except as otherwise specifically provided herein,” the exception might refer to the entire agreement, not merely the clause on third-party beneficiaries.

Cataphora Inc. v. Parker,
[848 F. Supp. 2d 1064](#) (N.D. Cal. 2012)

Although parties are free to contract around federal law on post-judgment interest in diversity actions, language in an agreement that merely provided for 18% interest on late payments did not apply post-judgment because it did not expressly so state or evidence an intent to contract around 28 U.S.C. § 1961.

Lane v. U.S. Bank,
[2012 WL 3670467](#) (Cal. Ct. App. 2012)

Clause in deed of trust entitling lender to attorney’s fees “in connection with Borrower’s default” and “for the purpose of protecting Lender’s interest in the Property and rights under this Security Agreement” was broad enough to cover quasi-contract claims for unjust enrichment and imposition of a constructive trust, and such claims were “on the contract” within the meaning of California’s reciprocity statute. Thus, the lender was liable for the attorney’s fees incurred by the borrower’s representative in successfully defending against those claims of the lender.

FH Partners, LLC v. Complete Home Concepts, Inc.,
[2012 WL 4074530](#) (Mo. Ct. App. 2012)

Entity that contracted with FDIC to purchase a loan participation that the FDIC had previously sold to a different buyer, did not acquire any interest even though the FDIC attempted to cure the defect by contracting with the other buyer to reacquire the participation interest retroactively to immediately before the second sale because it was not shown that both parties intended the transaction to be retroactive and, even if they had, retroactive effect between the parties would not have affected the rights of a third party so as to automatically give the second buyer rights in the participation interest.

■ ■ ■

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