

What We Know

ARTICLES & INSIGHTS

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Creditors' Rights Collection Industry Update

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The Courts have repeatedly rebuffed the specious defense that securitizing credit card account receivables in essence denies creditors legal standing to pursue their claims. The latest example comes from a recent decision of Third Circuit Court of Appeals in *Scott v. Bank of Am.*, 580 Fed. Appx. 56 (3d Cir. Pa. 2014)[\[1\]](#)

Put forth by debtor advocacy groups and circulated on dubious consumer-debt chat forums, this erroneous proposition alleges that a creditor's assignment of credit card receivables signifies that the creditor is no longer the real party in interest to any debt obligation created by the account. Pro se debtor-litigants, and often debtor-counselors, either misunderstand this practice or seek to confuse Courts intentionally through references to an arcane process. Their central theory posits that the securitization of receivables is the legal equivalent of selling the entire credit card account. Creditor-attorneys must remain vigilant against this argument premised solely on obfuscation. Each time this argument arises, an opportunity emerges to educate the Courts about the securitization process and the type of ownership interest retained by their clients in the underlying accounts.

For those unfamiliar with this practice, securitization in this context is a process by which large credit card issuers convert the expectation of incoming cash (i.e. receivables) into immediate capital. Credit card issuers will pool credit card receivables from various credit card accounts into a large portfolio and transfer this portfolio into a special purpose vehicle (usually a trust). This trust then issues collateral certificates backed by the cash flow of those pooled receivables. In turn, a second trust (often called a qualified special purpose entity or issuance trust) will then sell notes at a public offering to investors using these collateral certificates as surety to enhance the value of the notes.

The card issuers continue to service the accounts: send out monthly bills, deposit payments, forward relevant consumer notices, and will retain the right to modify/adjust terms of the accounts. The card issuers also supply the accounts with new credit so long as the balance remains under a specified credit limit. With such continuing rights, duties, and obligations in the underlying account as evidence, it is clear that card issuers maintain ownership of the account and as such have standing to bring a collections action.

This is precisely what the Third Circuit's opinion found in the recent *Scott* decision. The Court held that the debtor "misapprehends the effect of securitizing a credit card receivable" and went on to note that "[t]he courts that have considered the effect of securitizing credit card receivables are *all in agreement* that it does not divest the issuer of its ownership interest in the credit card accounts." *Scott Id.* Appx. 56 (emphasis added).

Moreover, the governing language of most pooling trusts contain provisions stating that once the underlying credit account defaults, the receivables associated with that account revert to the originating creditor. This was true for the trust at issue in the *Scott* decision. Others trusts reserve for the originating creditor the express right to bring suit to collect on any defaulted account receivable.

While most litigation on defaulted credit card accounts lack significant complication, the utility of the securitization defense for debtor-litigants arises in the appearance of complication through reference to an esoteric process. Collections attorneys must be diligent when confronted with the securitization defense. This means that the collection attorney must first understand the securitization process utilized by a particular creditor and then be prepared to explain that process to a trial court in a clear and straightforward manner.

As the *Scott* decision shows, Courts who carefully consider these issues are likely to hand a clear and unambiguous defeat to litigants proffering misdirection as a legal defense. And, as more quality arguments are heard by Courts, the securitization defense will have less value as a means of confusion.

[\[1\]](#) *This disposition is not an opinion of the full Third Circuit Court and does not constitute binding precedent but should nevertheless be persuasive.*

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