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Research

True Sale of German Loans to SPE Valid Despite Court Ruling

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FRANKFURT (Standard & Poor's) Nov. 16, 2004—The validity of the "true sale" of the assets in a securitization of German loans was thrown into doubt earlier this year following a controversial decision by the Frankfurt Court of Appeal. However, based on discussions with the German legal community and a review of a number of legal opinions relating to this court decision, Standard & Poor's Ratings Services has concluded that a properly structured true sale transaction that complies with the so-called "BAKred Release" is capable of reaching the highest rating categories (up to and including 'AAA'). The reasons for this conclusion are given below but the court's decision is first explained in greater detail.

In May 2004, the Frankfurt Court of Appeal adjudicated on a point of law arising from the sale of a loan (WM 2004, p. 1386 et seq.). In this case, the court stated that where a loan had been sold in breach of the lending bank's duty of confidentiality, the transfer of this loan would be void. In its decision, the court confirmed the grant of an injunctive relief. The court also made some statements regarding whether the lending bank's duty of confidentiality contained an implied prohibition on the assignment of a loan. The case caused a substantial amount of legal thinking in the context of securitization with a true sale of the assets. In particular, the German legal community wondered about the interaction between this Frankfurt case and the 1997 release from the Bundesaufsichtsamt für das Kreditwesen (BAKred, now BaFin) setting out the circumstances in which a financial institution was able to sell assets in the context of a securitization while complying with its duties of confidentiality (the BAKred Release).

The issues flowing from the Frankfurt court's decision are complex. Standard & Poor's has had extensive discussions with the major German law firms operating in the securitization field. From these discussions a clear and unanimous consensus has emerged. This consensus revolves around two propositions. First, that the Frankfurt court's decision is almost certainly technically erroneous and is unlikely to be followed by other courts. This view is based, inter alia, on other decisions taken by German courts, including the Federal Supreme Court. The second proposition, and for Standard & Poor's more importantly, is that a transaction that complies with the BAKred Release would not in most circumstances result in a breach of the bank's duty of confidentiality and, therefore, would not result in the sale of the securitized assets to the SPE being struck down. This second proposition is independent of whether any specific court follows the Frankfurt court's decision.

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