

# The Indenture Trust

*By James McGuire 8-13--2011*

The Investors (Owner-Secured Creditor) of a Secured Indenture Trust (Certificates - UCC Article 9 Note – Intangible - Personal Property of the owners) only have rights to collect payments under the terms of the Certificates. Herewith, the Secured Indenture Trust (“Trust”) is a Debtor to the Investors of the Trust. Would not the Debtor himself, his agent, or all the Debtors and/or their agents owe a duty to the Secured Creditor?

A right to payments proceeds (Payment Intangible) from an underlying contract is the Security for the Secured Indenture Trust. Attachment, perfection and assignment of the Payment Intangible for the payments proceeds to the Secured Indenture Trust are governed by the Uniform Commercial Code Article 9.

To facilitate payment to the Secured Creditor, provisions were made that a Secured Creditor servicing agent would be assigned to the Secure Indenture Trust to perform the accounting functions of a Secured Creditor Servicer for a fee.

For the Secured Creditor Servicer to disburse the Payment Intangibles payments to the Secured Creditor, the Secured Indenture Trust Servicer would first need to receive payments made on the underlying contracts. These payments are commonly received from another servicing agent who provides accounting functions for the underlying contracts. This underlying contract servicer is also provided for in the Secured Indenture Trust governing documents.

A number of people are now trying to explain how a Secured Indentured Trust is created. In short, original secured loans are aggregated (pooled), sold to a Sponsor/Seller/Securitizer then sold to the Depositor, after which the Depositor swaps Certificates and is funded from the Secured Creditor as a true sale. An interesting note: the Secured Creditors in purchasing the Secured Indenture Trust will immediately have funds removed to pay the fees for the

Underwriters, Rating Agencies, etc. Many of these Secured Indenture Trusts have been charged fees in the billions of dollars. Herewith, the creators (i.e. Underwriters) of these Secured Indenture Trusts have received payment in full for services and would like to claim they have no further skin in the game. As to ratings of the Secured Indenture Trusts, would a higher fee be paid the higher the rating of a Secured Indenture Trust?

Though this paper does not deal with creditors' or other parties' hedging to protect against alleged losses, but, a question must be asked: *If the Secured Indenture Trusts had been lawfully created, and as the creators of the Trusts have no actual participation except in the servicing, charging for and being prepaid their accounting creation fees, why hedge?*

I would bet a billion on #6 in the 5<sup>th</sup> at Housingdown.

### **Review:**

## **Investors Bought a Payment Intangible Secured by an Underlying Contract**

Contracts are required to comply with all applicable laws. The Secured Indenture Trust's governing documents state that all applicable laws will be adhered to. The underlying contract is security for the payment intangible, which is security to the Secured Indenture Trust, which is security to the Investors according to Uniform Commercial Code Article 9, and would follow the Note. So far it appears there has been compliance with applicable law. That is about to change as we start dwelling into the underlying contract.

### **underlying contract**

First, you cannot apply Uniform Commercial Code Article 9 (intangible) laws to a note that is governed by Uniform Commercial Code Article 3 (tangible.)

Second, you cannot apply Uniform Commercial Code Article 9 (intangible) laws to a lien (Mortgage, Deed of Trust, etc.) that is governed by Laws of Local Jurisdiction.

The underlying contract: Mortgage Note and its Security Instrument. The author has already explained<sup>1</sup> why Mortgage Notes endorsed “In Blank” have fatal errors when MERS (Mortgage Electronic Registration Systems, Inc) is involved. Actually, any indorsement in blank in relationship with a lien has a fatal flaw.

When ownership changes of either the Secured Trust Indenture collateral or of the underlying contract, local laws of jurisdiction apply to the real estate lien (real property) for continuous perfection. DO NOT confuse this with Investor ownership changes of the Secured Indenture Trust’s rights to the secured payment stream. Ownership of the Secured Trust Indenture would almost never change, but ownership of the underlying contracts does change in the creation of the Secured Trust Indenture. Even if ownership of the Secured Trust Indenture did change, it would not affect ownership rights of the underlying contracts.

### **What Should Have Been**

Investors own the Secured Indenture Trust that has rights to the payments intangible (UCC Article 9 Note) that is secured by a UCC Article 3 Note (tangible-personal property), which is secured by a real estate lien (tangible-personal property).

### **What It Is**

Investors own the Secured Indenture Trust that has “NO” rights to the payments intangible (UCC Article 9 Note) that is “NOT” secured by a properly indorsed UCC Article 3 Note (tangible-personal property), which is “NOT” secured by a continuous perfected real estate lien (tangible-personal property) under most laws of local jurisdiction.

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<sup>1</sup> <http://www.scribd.com/doc/45894095/Amicus-Curiae-NJ-R2-Lr1>