

(H.B. 3015)

(No. 13)

(Approved February 23, 2007)

AN ACT

To create the “Financial Assets Transfer Special Act,” in order to establish that the intention of the parties concerning the characterization of a transfer of financial assets as a purchase and sale or assignment must prevail in the absence of bad faith or fraud, regardless of the incorporation of certain elements in the transfer documentation or of the existence of other elements.

STATEMENT OF MOTIVES

Financial markets are in constant evolution. Every day we are able to observe a greater degree of sophistication in the offer of financial products whose purpose is to meet the investment needs of the capital markets. It is mandatory for those countries who wish to participate in the benefits provided by these financial product offers to ensure that the prevailing body of laws is at par with modern financial trends so as to provide a juridical framework that would foster a favorable environment for investment.

In recent times a trend has been observed in the local market towards transactions for the transfer of assets for the purpose of providing financial institutions with the necessary liquidity to allow greater sources for financing and thus serve the various sectors of our economy more effectively. In consideration of the above, it is necessary to provide

assurance and security from a juridical perspective to the capital markets where said transfer transactions are conducted.

The purpose of the present measure is to firmly establish that the presence of the elements listed in the present Act, and others similar, within the context of a transfer of assets whereby the contracting parties have consigned their intention in clear terms of transferring the ownership of an asset through the purchase and sale or assignment, shall not be characterized anew as other juridical business in the absence of bad faith or fraud. In such a case it shall then be indispensable that the intention of the parties to the juridical business that motivates the transfer of the assets be a purchase and sale or assignment through which the ownership of the aforementioned asset is transferred, thus allowing that the intention of the parties is clearly expressed in the contract without the intervention of bad faith or fraud. After these requirements have been met it shall be understood that the intention of the parties is clear and leaves no doubt and that therefore it shall not be subject to interpretation.

It is important to make clear that the provisions of the present measure are consonant with and reaffirm the fundamental principle that governs the interpretation of contracts as provided in Section 1233 of our Civil Code, to the effect that when interpreting any contract the will of the parties as it has been set forth in the contract must be mainly and especially considered. Thus, when the terms of the contract are clear and leave no doubt as to the intention of the contracting parties, the courts must limit themselves to applying their clauses in their literal sense.

It is the intention of the Legislature to be precise about and give juridical assurance to the transactions for the transfer of financial assets so as to make viable a secondary market for certain assets and clarify the

applicable norms for true sale determinations required by the applicable accounting rules or by any Commonwealth or federal law, judicial decision or regulatory scheme requiring a similar legal analysis.

It must be noted that certain state jurisdictions in the United States, such as Louisiana, Texas and Delaware have already approved this type of legislation so as to establish the juridical assurance needed for the transfer transactions described above. In that sense, Puerto Rico, answering to pressing economic needs, would be joining that group of state jurisdictions that have solidified the foundations upon which this secondary financial assets market rests and functions.

BE IT ENACTED BY THE LEGISLATURE OF PUERTO RICO:

Section 1.-Title of the Act

This Act shall be known and may be cited as the “Financial Assets Transfer Special Act.”

Section 2.-Definitions

For the purposes of this Act the following terms shall have the meaning stated below:

(a) Financial Asset – shall mean an Account, an Instrument, Financial Paper or any contract that gives a natural or juridical person the right to receive payments in cash or through an Instrument from another natural or juridical person.

(b) Instrument – shall mean an “Instrument” as said term is defined in the “Commercial Transactions Act.”

(c) Account – shall mean an “Account” as said term is defined in the “Commercial Transactions Act.”

(d) Valid Contract – shall mean a written contract that meets the applicable requirements for its juridical validity.

(e) Purchase and sale – shall mean a juridical business that meets the requirements imposed by the Puerto Rico Civil Code of 1930, as amended, in its Articles 1334 to 1427 relative to a “purchase and sale” or with the requirements imposed by the Commercial Code in the case of a “purchase for resale,” as said term is defined in the Commercial Code.

(f) Commercial Code – shall mean the Puerto Rico Commercial Code of 1932, as amended.

(g) Assignment – shall mean a juridical business that meets the requirements imposed by Articles 1417 to 1427 of Civil Code of the Puerto Rico of 1930, as amended, related to the “assignment” or “transfer of credits.”

(h) Documentation – shall mean the contract through which the transfer of Financial Assets is conducted as well as other documents related to such a transaction.

(i) Commercial Transactions Act – shall mean Act No. 208 of August 17, 1995, as amended, known as the “Commercial Transactions Act.”

(j) Financial Paper – “Financial Paper, as said term is defined in the “Financial Transactions Act.”

Section 3.-Elements that shall not affect the characterization of the parties to a transfer of Financial Assets as a Purchase and Sale or an Assignment.

In a Valid Contract through which one or more Financial Assets are transferred and which clearly and expressly sets forth the intention of the parties as to the fact that said transfer constitutes a Purchase and Sale or an Assignment of Financial Assets, said manifest intention of the parties shall be conclusive in the absence of bad faith or fraud. The Purchase and Sale or

Assignment of Financial Assets shall be deemed as such regardless of whether:

(a) the Documentation contemplates a guarantee agreement on the part of the seller or assignor or of a third party in favor of the purchaser or assignee relative to the solvency of the debtor under the credit that underlies the Financial Asset sold or assigned;

(b) the Documentation contemplates any guarantee agreement on the part of the seller or assignor or of a third party in favor of the purchaser or assignee relative to the existence or validity of the Financial Asset sold or assigned;

(c) the Documentation contemplates any term or agreement in the documentation that tends to indicate that the risk of loss under the Financial Asset sold or assigned has been retained, totally or partially, by the seller or assignor of said Financial Asset or by a third party;

(d) the Documentation contemplates any term that tends to indicate that the seller or assignor of the Financial Asset, or a third party has retained some interest on or right over: (i) the Financial Asset; (ii) the revenues generated by the Financial Asset; or (iii) the product resulting from the transfer of the Financial Asset;

(e) the Documentation contemplates any term through which the seller or assignor of the Financial Asset or a third party is obligated to correct any payments deficiency under the Financial Asset;

(f) the Documentation imposes an obligation or grants the right to the seller or assignor of the Financial Asset, or to a third party, to provide administration services or servicing and/or custody relative to the Financial Asset sold or assigned under terms and conditions that are usual for the industry;

(g) that the seller or assignor or a third party retains possession of the Financial Assets sold or assigned in the discharge of their rights or obligations for administering, providing, servicing or providing custody services;

(h) the accountable, taxable or regulatory treatment granted by the parties or by some other entity to the transfer of the Financial Assets; or

(i) the absence of a notice to the debtor under the Financial Asset sold or assigned of the transfer of said Financial Asset.

Section 4.-Relation to Other Types of Contracts

The provisions of this Act shall not affect the characterization of the transactions through which a seller sells one or more financial Assets to a purchaser subject to the obligation of repurchasing the same on a certain date or at the option of the purchaser through a repurchase agreement or through which a purchase buys one or more Financial Assets subject to the obligation of reselling the same to the seller on a certain date or at the option of the purchaser through a reverse repurchase agreement,

Section 5.-Relation to Tax Laws

The provisions of this Act shall not alter the tax treatment of the sales or assignments of the Financial Assets governed by this Act.

Section 6.-Relation to Accounting Norms

The provisions of this Act shall not alter the generally accepted accounting norms applicable to the sale or assignment of Financial Assets governed by this Act.

Section 7.-Construction Norms

The provisions of this Act shall be construed liberally with the purpose of promoting the development and implementation of the public policy enunciated in its Statement of Motives and achieving any other

purposes provided in this Act. In the case of any deficiency in the provisions of this Act, the same shall be supplied by the provisions of the Puerto Rico Civil Code, always taking into consideration the implementation and furthering of the public policy and the purposes expressed in the Statement of Motives and in the provisions of this Act.

Section 8.-Severability Clause

Should any provision of this Act were to be declared unconstitutional, illegal or null by a competent court with jurisdiction, said determination shall neither affect nor invalidate the remaining provisions of this Act, and the effect of such a declaration shall be solely limited to the article, section, paragraph, subsection, clause or subclause declared unconstitutional, illegal or null.

Section 9.-Effectiveness

This Act shall take effect immediately after its approval and shall not have any retroactive effect.

CERTIFICATION

I hereby certify to the Secretary of State that the following Act No. 13 (H.B. 1665) of the 5th Session of the 15th Legislature of Puerto Rico:

AN ACT to create the “Financial Assets Transfer Special Act,” in order to establish that the intention of the parties concerning the characterization of a transfer of financial assets as a purchase and sale or assignment must prevail in the absence of bad faith or fraud, regardless of the incorporation of certain elements in the transfer documentation or of the existence of other elements,

has been translated from Spanish to English and that the English version is correct.

In San Juan, Puerto Rico, today 31st of July of 2007.

Francisco J. Domenech
Director