

REAL ESTATE FINANCE OPINION REPORT OF 2012

STERLING SCOTT WILLIS

Fishman Haygood Phelps Walmsley Willis & Swanson, L.L.P.
201 St. Charles Avenue, 46th Floor
New Orleans, Louisiana 70170

State Bar of Texas
25th ANNUAL

ADVANCED REAL ESTATE DRAFTING COURSE

March 6-7, 2014
Dallas

CHAPTER 12

STERLING SCOTT WILLIS
Fishman Haygood Phelps Walmsley Willis & Swanson, L.L.P.
201 St. Charles Avenue, 46th Floor
New Orleans, Louisiana 70170
504-586-5252
swillis@fishmanhaygood.com

BIOGRAPHICAL INFORMATION

EDUCATION

Louisiana State University Law School, Baton Rouge, Louisiana, J.D. 1983, Order of the Coif,
Associate Editor – *Louisiana Law Review*, Phi Kappa Phi
Louisiana State University, Baton Rouge, Louisiana, B.A. in History 1980

PROFESSIONAL ACTIVITIES

Partner, Fishman Haygood Phelps Walmsley Willis & Swanson, L.L.P.

Real Property, Probate and Trust Section, American Bar Association Committee on Legal
Opinions in Real Estate Transactions (Chair, 1999-2003 and Vice Chair (1997-1999); Vice-
Chair, Standing Committee on Continuing Legal Education, Real Property, Probate and Trust
Section, American Bar Association (2011-Present)

Member and Former Chair (2011), Bank Counsel Committee of the Louisiana Bankers
Association (2003-Present)

Inaugural Member, ABA Working Group on Legal Opinions and Member of the Law Firm
Advisory Board (2006-present)

Fellow, American College of Real Estate Attorneys; Vice Chairman – Attorney's Opinion Letter
Committee (2009-Present); Member – Program Committee (2010-Present)

PUBLICATIONS, ACADEMIC APPOINTMENTS & HONORS

Chairman, Bureau of Governmental Research (2011-2012)

Instructor, LSU Law School (2014 – Negotiating and Drafting Commercial Leases)

Frequent Speaker at ABA and other real estate professional meetings on legal opinion topics

REAL ESTATE FINANCE OPINION REPORT OF 2012

A Report of

the American Bar Association Section of Real Property, Trust and Estate Law,
Committee on Legal Opinions in Real Estate Transactions

the American College of Real Estate Lawyers, Attorneys' Opinions Committee

the American College of Mortgage Attorneys, Opinions Committee*

* This Report was prepared by the "Joint Drafting Committee" comprised of: David L. Miller, McLean, Virginia (Reporter); William B. Dunn, Detroit, Michigan (Co-Editor); Robert A. Thompson, San Francisco, California (Co-Editor); Edward N. Barad, Denver, Colorado; Kenneth P. Ezell, Jr., Nashville, Tennessee; Catherine T. Goldberg, Albuquerque, New Mexico; Kenneth M. Jacobson, Chicago, Illinois; Robert J. Krapf, Wilmington, Delaware; Edward J. Levin, Baltimore, Maryland; and Lydia C. Stefanowicz, Madison, New Jersey. The Joint Drafting Committee consists of members of the following committees (the "Committees"): (1) the American Bar Association ("ABA"), Section of Real Property, Trust and Estate Law, Committee on Legal Opinions in Real Estate Transactions (the "RPTE Committee"), Edward J. Levin, Chair; (2) the American College of Real Estate Lawyers, Attorneys' Opinions Committee (the "ACREL Committee"), Kenneth P. Ezell, Jr., Chair until December 31, 2011 and Catherine T. Goldberg, Chair thereafter; and (3) the American College of Mortgage Attorneys, Opinions Committee (the "ACMA Committee"), Lydia C. Stefanowicz, Co-Chair. This Report does not render legal, tax, or accounting advice. This Report has not been adopted, approved, or endorsed by the governing bodies of the bar organizations of which the Committees are a part, or by any law firms or other entities. Further, this is a collaborative work reflecting an overall consensus of the Joint Drafting Committee and the Committees, but not necessarily reflecting the views of any given individual as to the treatment of any particular issue. The members of the Joint Drafting Committee and the Committees reserve the right to assert contrary or other positions with regard to the issues discussed in this Report.

TABLE OF CONTENTS

CHAPTER ONE: AN INTRODUCTION TO THE REAL ESTATE FINANCE OPINION REPORT

I.	BACKGROUND	1
II.	PROFESSIONAL RESPONSIBILITY	2
III.	CUSTOMARY PRACTICE	3
IV.	REAL ESTATE OPINION GUIDELINES	3
V.	LENGTH	4
VI.	LOCAL COUNSEL OPINION LETTERS	5
VII.	ILLUSTRATIVE LANGUAGE OF AN OPINION LETTER	5
VIII.	RELATIONSHIP TO OTHER BAR REPORTS, COMMENTARY	6

CHAPTER TWO: A PRACTITIONER’S GUIDE TO THE REAL ESTATE FINANCE OPINION LETTER

0.	PRELIMINARY MATTERS	
0.1	Context	7
0.2	Date	7
0.3	Addressee	7
0.4	Parties	7
0.5	Captions	7
I.	BACKGROUND	
1.0	Specific Role of Opinion Giver	7
1.1	Transaction Documents	7
1.2	Authority Documents	8
1.3	Opinion Jurisdictions	8
1.4	Scope of Review	9
1.5	Reliance on Other Sources Without Investigation	10
II.	ASSUMPTIONS	
2.1	Assumptions	11
III.	OPINIONS	
3.1	Status	13
3.2	Power	13
3.3	Authorization	14
3.4	Execution and Delivery	14
3.5	Enforceability	15
3.6	Form of Security Documents	16
3.7	No Breach or Violation	17
3.8	No Violation of Law	17
3.9	Choice of Law	18
3.10	Usury	19
3.11	Legal Proceedings Confirmation	20
IV.	CERTAIN LIMITATIONS	
4.1	Bankruptcy Exception	21
4.2	Equitable Principles Exception	21
4.3	Generic Enforceability Qualification, with Assurance	22
4.4	Other Transaction-Related Qualifications	23
4.5	Other General Qualifications	23
4.6	Exclusions	24
4.7	Knowledge	24

V. USE OF THE OPINION LETTER	
5.1 Use.....	25
5.2 Effective Date; No Obligation to Update	25
5.3 Governing Law	25
5.4 Disclaimer of Implied Opinions	26
5.5 Expression of Professional Judgment.....	26
5.6 Signatures	26

CHAPTER THREE: ILLUSTRATIVE LANGUAGE OF A REAL ESTATE FINANCE OPINION LETTER

I. BACKGROUND	
1.1 Transaction Documents	27
1.2 Authority Documents	27
1.3 Opinion Jurisdictions	28
1.4 Scope of Review	28
1.5 Reliance on Other Sources Without Investigation.....	28
II. ASSUMPTIONS	
2.1 Assumptions	28
III. OPINIONS	
3.1 Status	30
3.2 Power	30
3.3 Authorization.....	30
3.4 Execution and Delivery	30
3.5 Enforceability	30
3.6 Form of Security Documents.....	30
3.7 No Breach or Violation.....	30
3.8 No Violation of Law.....	30
3.9 Choice of Law	31
3.10 Usury	31
3.11 Legal Proceedings Confirmation	31
IV. CERTAIN LIMITATIONS	
4.1 Bankruptcy Exception	31
4.2 Equitable Principles Exception.....	31
4.3 Generic Enforceability Qualification, [with Assurance]	31
4.4 Other Transaction-Related Qualifications	32
4.5 Other General Qualifications	32
4.6 Exclusions.....	33
V. USE OF THIS OPINION LETTER	
5.1 Use.....	34
5.2 Effective Date; No Obligation to Update	34

CHAPTER ONE: AN INTRODUCTION TO THE REAL ESTATE FINANCE OPINION REPORT

I. BACKGROUND

This Real Estate Finance Opinion Report of 2012 updates and expands the Inclusive Real Estate Secured Transaction Opinion,¹ which was issued in 1998 by the RPTE Committee and the ACREL Committee. The Inclusive Opinion was centered on a sample form of an opinion letter, meaning, in that context and in this Report, a legal evaluation rendered in writing by a lawyer or law firm (the opinion giver)² to a third party (the opinion recipient) who is not a client of the opinion giver with respect to the subject matter of the evaluation, in a financing transaction secured by real estate in the United States.³

By design, for its sample form of opinion letter, the Inclusive Opinion drew on only two reports: (i) the American Bar Association Third-Party Legal Opinion Report, including the Legal Opinion Accord, published in 1991,⁴ and (ii) the report published in 1994, as a joint project of the RPTE Committee and the ACREL Committee,⁵ which adapted the Accord for loans secured by real estate. The Accord Opinion Reports provided that opinion letters issued pursuant to them incorporated the Accord Opinion Reports by reference and thus would be deemed to contain all of the many and detailed operative provisions of the Accord Opinion Reports. Therefore, the parties to an opinion letter would have to look outside the text of such an “Accord” opinion letter, to the Accord Opinion Reports, to understand such an “Accord” opinion letter. In contrast, the intent of the Inclusive Opinion was to provide a form of an opinion letter that included within its four corners all of the principal opinion letter concepts in the Accord Opinion Reports. The Inclusive Opinion referred to this as “one stop shopping” because there was no need to look (or shop) outside the Inclusive Opinion to see the sources on which it was based. Accordingly, the Inclusive Opinion was intended to be an educational tool, providing a more accessible way to understand the two Accord Opinion Reports. The Inclusive Opinion was “inclusive” in the sense of including the principal concepts of those two Reports. By design, the “inclusiveness” of the Inclusive Opinion was limited; it did not go beyond the two Accord Opinion Reports. It never was intended to be inclusive in the sense of reflecting other reports or approaches to opinion letter practice or every aspect of customary practice.

This updated Report goes beyond the Inclusive Opinion to reflect developments in opinion letter practice since the issuance of the Inclusive Opinion. Like the Inclusive Opinion, this Report is intended to be an educational tool and a framework for more general consideration of opinion letter issues. This Report is in

¹ See JOINT ABA/ACREL COMMITTEE, INCLUSIVE REAL ESTATE SECURED TRANSACTION OPINION (Feb. 2, 1999), [hereinafter INCLUSIVE OPINION] <http://meetings.abanet.org/webupload/commupload/RP213000/newsletterpubs/opinion.pdf>.

² The opinion letter usually is rendered by a law firm, and the law firm, not an individual lawyer working on the opinion letter, is the opinion giver unless the opinion letter is rendered by a sole practitioner.

³ Section of Real Property, Probate, and Trust Law of the ABA, and ACREL, *Report on Adaptation of the Legal Opinion Accord of the Section of Business Law of the American Bar Association for Real Estate Secured Transactions*, 29 REAL PROP. PROB. & TR. J. 569, 578 (1994) [hereinafter *ABA/ACREL Accord Adaptation Report*], used the term “real estate secured transaction” or “REST” to refer to a transaction involving a lien on real estate to distinguish its subject matter from other transactions that might involve real estate but were not directly secured by a mortgage, deed of trust, or similar document. Like the 1994 report, this current Report is intended to address only financing transactions secured by real estate in the United States.

⁴ The “Accord” is part of the *Third-Party Legal Opinion Report Including the Legal Opinion Accord of the Section of Business Law, American Bar Association*, 47 BUS. LAW. 167 (1991) [hereinafter *ABA Business Law Accord Report*] (reprinted in 29 REAL PROP. PROB. & TR. J. 487 (1994)). Subsequent citations to that Report will refer to the edition reprinted in the Real Property, Probate and Trust Journal.

⁵ The *ABA/ACREL Accord Adaptation Report*, *supra* note 3, together with the *ABA Business Law Accord Report*, *supra* note 4, are referred to in this Report as the “Accord Opinion Reports.”

three parts: Chapter One, this Introduction; Chapter Two, a more detailed Guide; and Chapter Three, illustrative language of an opinion letter (the “Illustrative Opinion Letter”).⁶

II. PROFESSIONAL RESPONSIBILITY

Many professional responsibility considerations apply to opinion letter practice. These considerations are introduced briefly in this section but are not discussed in depth in this Report. They include the need to obtain client consent to deliver an opinion letter; the protection of client confidences; the identification, appreciation, and resolution of conflicts of interest; and certain duties to third parties.

The clients involved should consent to the rendering of the opinion letter. Such consent may be implied by the execution of a commitment letter, by an agreement that requires an opinion letter, or by the context. Model Rule 2.3(a) in effect on the date of this Report⁷ allows a lawyer to provide an evaluation of a matter affecting a client for the use of another person if the lawyer “reasonably believes that making the evaluation is compatible with other aspects of the lawyer’s relationship with the client.” This Rule states the ethical basis of third-party opinion practice. It is not uniform as adopted among the states, however. Rules in several jurisdictions require consent of the client “after consultation” to any evaluation by a lawyer of a matter for someone other than the client.⁸ Model Rule 1.2(a) also permits a lawyer to take such action “as is impliedly authorized to carry out the representation,” premised on the lawyer’s having consulted with the client about the means by which the client’s interest is to be pursued, as required by Model Rule 1.4.

Model Rule 2.3(b) requires the lawyer to obtain the client’s informed consent if the lawyer “knows or reasonably should know” that providing the opinion would materially and adversely affect the client’s interests. This could occur, for example, if the opinion negotiations would reveal to the opinion recipient that a material remedy is not available in the transaction documents as drafted. In that case, the opinion giver would need to have the client’s consent to reveal that fact. Such consent may exist by implication under Model Rule 2.3(a), but whether it does may depend on the understanding between the lawyer and the client concerning the transaction.

The opinion letter often will involve disclosure of confidential information. Similar to the rule requiring consent of the client to the rendering of the opinion letter, Model Rule 1.6 provides that disclosure of confidential information requires client consent unless the disclosure is impliedly authorized to carry out the representation (or in certain other limited contexts where disclosure without consent is authorized).

Conflicts of interest among clients involved in a given transaction may give rise to a requirement under Model Rule 1.7 that the opinion giver obtain informed consent of each client involved in the transaction. For example, while the Illustrative Opinion Letter in Chapter Three below contemplates that the opinion giver represents both a borrower and a guarantor, this Report does not address, but notes with caution, the possibility that the interests of a borrower and a guarantor may not be aligned in every instance and conflicts of interest may arise in that context.

The rules of professional conduct also address the truth of communications by lawyers. Model Rule 1.2(d) prohibits a lawyer from assisting a client in conduct the lawyer “knows” is fraudulent. Model Rule 4.1 prohibits a lawyer, in the course of representing a client, from “knowingly” making a “false statement of a material fact or law to a third person.”

⁶ See *infra* ch. 1, section VII for a discussion of the Illustrative Opinion Letter.

⁷ See MODEL RULES OF PROF’L CONDUCT (2007) (“Model Rules”).

⁸ See William B. Dunn and Edward J. Levin, *Ethical Conduct and Liability to Third Persons in Legal Opinions Practice*, THE ACREL PAPERS 385 (ALI-ABA Fall 2002), <http://www.acrel.org/Documents/Seminars/2002%20Dunn%20-%20Ethical%20conduct%20to%20third%20persons.pdf>.

Beyond the few principles discussed in this section, there are many rules of professional responsibility and ethics that are relevant to opinion letter practice. Practitioners should consider the professional and ethical rules and principles that are in effect in their jurisdictions.

III. CUSTOMARY PRACTICE

Among the developments in opinion letter practice has been the recognition of the importance of custom and practice, or, as it often is referred to in this context, customary practice. The Accord Opinion Reports were designed to be an agreed protocol; that is, in large part, the meaning of the opinion letters and the diligence required to provide such opinion letters were set out in written form in the Accord Opinion Reports.

Customary practice takes a different approach. Under customary practice, the meaning of the words used in an opinion letter, and the diligence required to provide such an opinion letter, are determined by the customary practice of lawyers who give and receive such opinion letters. The Real Estate Opinion Guidelines⁹ provide valuable guidance regarding customary real estate opinion letter practice.

Criticisms of certain aspects of the “customary practice” approach include its potential lack of precision and the related concern that there may be regional, practice area, and other differences in customary practice across the country. It may not be possible to eliminate the lack of precision that concerns some, and it may not be possible to eliminate regional differences in customary practice. Nevertheless, published reports of bar associations and other professional groups provide some guidance as to the meaning of customary practice for different practice areas and geographical regions. The Customary Practice Statement,¹⁰ which was approved by a large number of bar associations and other professional groups, including the Committees, provides a brief summary of the context of customary practice in which opinion letters are prepared and interpreted.

IV. REAL ESTATE OPINION GUIDELINES

This Report is not intended to replace the Real Estate Opinion Guidelines. As just one example, even though the accompanying Illustrative Opinion Letter language includes an enforceability opinion (Chapter Three, Paragraph 3.5), such an opinion may not always be appropriate. The Real Estate Opinion Guidelines note:

The benefit of an opinion to the recipient should warrant the time and expense required to prepare it. In particular, opinions from borrower’s counsel in intrastate transactions (or a multistate transaction for which the lender has retained its own local counsel for the purposes of advising it) with respect to the enforceability of loan documents prepared by the lender normally should not be necessary and may not be cost justified.¹¹

⁹ ACREL Attorneys’ Opinion Committee and ABA Section of Real Property, Probate and Trust Law Committee on Legal Opinions in Real Estate Transactions, *Real Estate Opinion Letter Guidelines*, 38 REAL PROP. PROB. & TR. J. 241 (2003) [hereinafter *Real Estate Opinion Guidelines*]. The *Real Estate Opinion Guidelines* refer to and adapt, for real estate opinion letters, the Committee on Legal Opinions of the Section of Business Law of the ABA, *Guidelines for the Preparation of Closing Opinions*, 57 BUS. LAW. 875 (2002) [hereinafter *Business Opinion Guidelines*].

¹⁰ *Statement on the Role of Customary Practice in the Preparation and Understanding of Third-Party Legal Opinions*, 63 BUS. LAW. 1277 (2008) [hereinafter *Customary Practice Statement*]. For a discussion of certain aspects of customary practice from the standpoint of a business lawyer, see Committee on Legal Opinions of the Section of Business Law of the ABA, *Legal Opinion Principles* 53 BUS. LAW. 831 (1998) [hereinafter *Business Opinion Principles*]. The Working Group on Legal Opinions and the Committee on Legal Opinions of the ABA Business Law Section have begun a project that will work with other bar associations and professional groups to identify the extent of consensus as to various statements in the *Business Opinion Principles* and other aspects of customary practice. Some members of the Committees are participating in that project.

¹¹ *Real Estate Opinion Guidelines*, *supra* note 9, § 1.2, at 244–45 (internal citation and emphasis omitted).

V. LENGTH

The illustrative opinion letter that accompanied the Accord was extremely short because it incorporated the Accord by reference. Using a short opinion letter allows the parties to check quickly any variations in a given opinion letter from the recognized source on which it is based. This approach in the Accord never received broad acceptance, perhaps because, as demonstrated by the Inclusive Opinion, behind the short-form of an “Accord” opinion letter lay the Accord Opinion Reports with a complex set of code-like interpretive rules that were, to say the least, challenging to master. To understand an “Accord” opinion letter, one would need to be conversant with the incorporation by the Accord Opinion Reports of assumptions, exceptions, exclusions, limitations, qualifications, disclaimers, definitions, principles, and other matters. This Report uses the term “limitations” as the broad term to encompass exceptions, exclusions, qualifications, and other limitations. Practitioners sometimes include assumptions as limitations and sometimes use a different catch-all term to convey the broadest category of limitations of an opinion letter.¹²

More recently, the Customary Practice Statement notes that customary opinion letter practice provides content to abbreviated opinion letter language, thus allowing shorter forms of opinion letters. The Customary Practice Statement, however, does not require short opinion letters. The questions remain: How short is too short? And, how much precision in language is necessary to convey the meanings of the words used in an opinion letter? These questions pertain particularly to stated assumptions and limitations. As is noted in further discussion in Chapter Two, many assumptions and limitations can be implied through customary practice.¹³ Nevertheless, until customary practice that has established accepted and essential normative conduct in opinion practice has become so ingrained and judicially accepted that no arguable doubt can be cast on the effect of omission of an assumption or limitation, or unspoken limitation of diligence required to render an opinion, there is risk inherent—at least procedurally—in relying on customary practice to “fill in the blanks.”¹⁴

Real estate finance lawyers tend to use lengthier opinion letters than are used by many of their counterparts in other business transactions. This may result in part from the nature of the type of transaction, but it also may result in part from viewing matters through a different lens than other business lawyers, and from the nuanced legal issues that attend a sophisticated real estate secured financing transaction.

¹² Limitations, as that term is used in this Report, appear not just in Chapter Three, Article IV, but also in other sections of the Illustrative Opinion Letter. For further discussion see ROBERT A. THOMPSON, REAL ESTATE OPINION LETTER PRACTICE 82 (2d ed. 2009) [hereinafter THOMPSON].

¹³ For a discussion of implicit assumptions, see DONALD W. GLAZER, SCOTT FITZGIBBON & STEVEN O. WEISE, GLAZER AND FITZGIBBON ON LEGAL OPINIONS: DRAFTING, INTERPRETING AND SUPPORTING CLOSING OPINIONS IN BUSINESS TRANSACTIONS § 4.3.3 (3d ed. 2008 and Supp. 2011). That section refers to what it describes as a “trend” to streamline opinion letters by eliminating boilerplate. Implicit limitations are discussed throughout chapter nine of that treatise.

¹⁴ The value of reciting what to experienced practitioners may seem obviously implicit is demonstrated by the decision of the New York Supreme Court Appellate Division, First Department in *Fortress Credit Corp. v. Dechert LLP*, 934 N.Y.S.2d 119 (N.Y. App. Div. 2011). The court in *Fortress* ordered dismissal of the complaint, which alleged various breaches of duty arising from an opinion letter rendered by the Dechert LLP law firm in connection with a loan from Fortress Credit Corp., which was guaranteed by Marc Dreier. *Id.* at 121–22. While the same outcome might well have resulted had there been a trial, with evidence of customary practice, the opinion language afforded an early advantage on the motion to dismiss, and trial was avoided. Among other grounds for dismissal, the court cited language in the opinion letter itself:

Moreover, the opinion, by its very terms, provided only legal conclusions upon which plaintiffs could rely. The opinion was clearly and unequivocally circumscribed by the qualifications that defendant assumed the genuineness of all signatures and the authenticity of the documents, made no independent inquiry into the accuracy of the factual representations or certificates, and undertook no independent investigation in ascertaining those facts. Thus, defendant’s statements as contained in the opinion, were not misrepresentations (*see Prudential Ins. Co.*, 80 N.Y.2d at 386–387, 590 N.Y. S.2d 831, 605 N.E.2d 318).

Id. at 122.

Conversely, while supporting the use of somewhat longer opinion letters, the Committees recognize the opposite danger: that a lengthy opinion letter might give false comfort that it is completely comprehensive. As noted in the Customary Practice Statement, while an opinion letter might on the surface seem to be comprehensive, an opinion letter cannot express all of the gloss that customary practice will add to understanding an opinion letter.

VI. LOCAL COUNSEL OPINION LETTERS

This Report focuses on opinion letters of lead or sole counsel, not of local counsel. Although certain subjects are common to lead counsel and local counsel opinion letters, local counsel often are engaged to opine on discrete issues in complex multi-state financing transactions that are not discussed in this Report; and some opinions that are customary in lead counsel's opinion letter, such as entity formation, due authorization, and the like, are often not appropriate in a local counsel opinion letter. This Report does not purport to provide a comprehensive or focused resource for local counsel opinion letters—a project yet to be undertaken.

VII. ILLUSTRATIVE LANGUAGE OF AN OPINION LETTER

The Illustrative Opinion Letter language included below in Chapter Three of this Report illustrates how some of the fundamental issues that arise in opinion letter practice in real estate secured transactions may be addressed. Preceding that, Chapter Two of this Report discusses many of the issues that arise in opinion letter practice.

The specific opinion letter language included in this Report, however, calls for some important explanation and qualification. The purpose of including such language is not to prescribe, endorse, or in any way take a position as to what an appropriate opinion letter request might be or how any given issue should be expressed in an opinion letter. The inclusion of specific language is intended merely to put in a concrete context the consideration and discussion of issues that arise in certain opinion letter requests and responses.

In preparing the accompanying Illustrative Opinion Letter language, the Committees began with the language of the ABA/ACREL Inclusive Opinion, which, in turn, was based on the two Accord Opinion Reports. The ABA Business Law Accord Report itself has been effectively abandoned by its original author and sponsor, the ABA Business Law Section. As a result, many lawyers consider the Accord Opinion Reports and the Inclusive Opinion to be outdated. The reasons the Committees have chosen, nonetheless, to use this approach of updating the Inclusive Opinion to prepare this exemplar are that (i) the Inclusive Opinion is the only example of an opinion letter that has been widely read and commented on by a national real estate legal audience, (ii) it raises many of the same issues and requests commonly found in opinion practice that this Report addresses, and (iii) it offers a structure and terminology that commonly are used in existing real estate finance opinion practice.

The Committees do not recommend or endorse the Illustrative Opinion Letter as a model form. To the contrary, the Committees recognize that the form of opinion letter requested or offered by lawyers and law firms is a function and product of a variety of circumstances, including regional and local customary practice, which may vary among states, regions, firms, lawyers, clients, and transactions, and over time. Stated differently, while several state or local bar associations and professional groups have successfully pursued the development of model forms of opinion letters generally accepted by lawyers in their respective jurisdictions, a generally agreed-upon standard form of opinion letter for interstate transactions has not been achieved, and perhaps predictably and appropriately so. Customary practice in an interstate setting should be viewed as at best an emerging consensus as to how opinion letter parties respond to certain concepts and issues, and not, in the foreseeable future, as an effort to create comprehensive, nationally uniform opinion letter language or scope.

The Illustrative Opinion Letter language provided with this Report uses as its paradigm a commercial loan secured by a mortgage, deed of trust, or similar document encumbering real property—a real estate secured transaction—*with* a guaranty, and it is written as if given by the borrower’s lead counsel in the transaction. It is not designed for local counsel opinions, where additional assumptions and limitations will be appropriate.

The Illustrative Opinion Letter language includes many assumptions and limitations that the Committees believe would be implied by customary practice even if not expressly stated. By including in the Illustrative Opinion Letter language such customarily implied assumptions and limitations, the Committees intend to facilitate the consideration of issues that might otherwise go unnoticed in some contexts, but the Committees do not intend to diminish the convention that any such assumptions or limitations would be implied where not expressly stated.

The basic structure of an opinion letter usually includes (i) the name of the party who is intended to rely on the opinions expressed; (ii) a description of the role and of the diligence of the opinion giver in reviewing documents and ascertaining facts necessary to render the opinions, and any limitations of that diligence, including reliance on information supplied by others; (iii) assumptions of facts, or mixed factual and legal matters, where facts have not been independently ascertained or the legal matters are extraneous to the opinion; (iv) opinions about the legal effect of the documents and facts of the transaction based on the diligence and assumptions of the opinion giver; (v) limitations to legal conclusions expressed as the opinions; and (vi) other conditions or limitations to use of the opinion letter, such as restrictions on reliance. The material in this Report follows this structural flow. The order of the presentation can be varied at will, although the purpose of each element should not be overlooked.

VIII. RELATIONSHIP TO OTHER BAR REPORTS, COMMENTARY

This Report is a product of collaborative effort of members of the bar in many jurisdictions, and consideration by committees of three national professional associations. As such, it may serve to represent some consensus among practitioners representing both opinion recipients and opinion givers, although it may not speak officially on anyone’s behalf. The existence of numerous reports of state and local bar associations, treatises, and articles provides some harmonious but also some discordant views of opinion letter practice. State and local bar reports inform the practitioner and influence the practice within a jurisdiction, even enunciating customary practice within that jurisdiction. Although these reports provide thoughtful viewpoints worth consideration generally, they create potentially disparate understandings and negotiating positions that can impede interstate opinion letter practice, as common ground is uncertain. In addition to being, as noted above, an educational tool and a general framework, this Report describes how the profession has moved toward common understandings on the subjects considered. This Report is intended to assist in identifying potentially agreeable, nationally applicable standards, which may thereby bridge the particularities among local and state practices in multi-state transactions and even, perhaps, suggest standardization of intra-state practices.

CHAPTER TWO:
A PRACTITIONER'S GUIDE TO THE REAL ESTATE FINANCE OPINION LETTER

0.1 Context. This Guide, Chapter Two, discusses in some detail many of the common issues that arise in a lead counsel's opinion letter in a secured real estate financing. For convenience and context, the numbered paragraphs in this Guide correspond to the numbered paragraphs in the Illustrative Opinion Letter below in Chapter Three. Despite the references in this Guide to the Illustrative Opinion Letter, the Committees intend this Guide to apply broadly to opinion letters within the scope of this Report no matter what form they take.

0.2 Date. The opinion letter ordinarily is dated the date of the closing. As the practice has transitioned to a norm where face-to-face closings occur with declining frequency, opinion letters sometimes are dated the closing date and submitted in advance with an appropriate transmittal letter or e-mail authorizing release upon satisfaction of certain conditions. Some opinion givers prefer to deliver their opinion letters only upon closing. Regardless of when it is delivered or released, the opinion letter speaks only to matters as of its date.

0.3 Addressee. The precise addressee or addressees should be named carefully because that ordinarily will govern who may rely on the opinion letter. See Paragraph 5.1 as to reliance.

0.4 Parties. Where an opinion letter covers a principal obligor (the borrower) and a surety (the guarantor) they may be referred to collectively, for convenience, by a term such as "Credit Parties." The Illustrative Opinion Letter does not use a collective term. Although some assumptions, opinions, and limitations apply similarly to both, not all do, and use of a collective term could lead to unintended statements. As noted in Chapter One, Part II, the interests of the borrower and guarantor may differ. It is not unusual for separate opinion paragraphs to be provided for each of the parties for whom an opinion is provided.

0.5 Captions. The Illustrative Opinion Letter includes captions at the start of each section and paragraph. The captions are for convenient reference and not intended to give meaning to the text. Many practitioners prefer not to include captions in their opinion letters.

I. BACKGROUND

1.0 Specific Role of Opinion Giver. The opinion giver should, if appropriate, describe its limited or special role in the transaction that is the subject of the opinion letter. Opinion givers sometimes refer to themselves as "special" counsel, but this may be ambiguous and has no intrinsic meaning.¹⁵ The absence of words such as "special" modifying the word "counsel" should not be construed to imply a broader role, or greater expertise or knowledge, than that stated in the opinion letter.

1.1 Transaction Documents.

(a) An opinion letter should identify specifically any operative documents about which an opinion is to be rendered. Paragraph 1.1 of the Illustrative Opinion Letter language shows examples of documents commonly used in real estate secured transactions and defines them as "Transaction Documents" for purposes of reference in the opinion regarding enforceability of those documents, in the "enforceability opinion," and in other specific opinions. As to the scope of review, see discussion Paragraph 1.4.

(b) If a guaranty is to be one of the transaction documents that are the subject of the enforceability opinion, counsel should consider the particular issues raised as well as any additional assumptions and limitations that would be appropriate. Examples of such limitations might include principles of cases or statutes in a given state that, unless they can be and have been validly waived, might exonerate a surety due to modification of the original obligation of the principal without the consent of the surety; election of remedies;

¹⁵ Although lead counsel may wish to define its role clearly, beyond use of a term such as "special" counsel, limitation of role is more commonly expected in opinions of local counsel or of lawyers retained for a limited opinion on a specific legal matter.

actions materially prejudicial to the surety, without notice; or if suit or other remedies against the principal are not pursued first, or simultaneously with those against the surety, to the extent required in that state. Similar considerations apply to indemnities by a party other than the borrower under an environmental or other indemnity agreement. Most of these possible limitations are covered by the equitable principles exception and the generic enforceability qualification in discussion Paragraphs 4.2 and 4.3.

(c) Financing statements normally would not be included in the specified transaction documents as to which core¹⁶ opinions are rendered. In opinion letters where financing statements and other Uniform Commercial Code (“U.C.C.”) issues are covered, it is common to identify, in the list of documents reviewed by the opinion giver (but, again, not as specified transaction documents to be opined about), individual financing statements and where they are filed or to be filed, and other applicable matters. See discussion Paragraph 3.6.

1.2 Authority Documents.

(a) Some opinion givers prefer to identify each of the organizational and other specified authority documents reviewed, as the language in the text of the Illustrative Opinion Letter does, while others prefer to refer in more general terms to some or all of such documents. Unlike the transaction documents, which should be identified specifically, it is a matter of personal preference whether to identify specific authority documents reviewed. See discussion Paragraph 1.4(b) regarding the scope of review.

(b) If direct or indirect constituent member entities of the borrower or the guarantor are to be addressed, their organizational documents, consents, and the like, should be reviewed by the opinion giver, and (if authority documents are being listed) should be identified in the opinion letter along with the other authority documents. See discussion Paragraph 3.3(b).

(c) Practitioners should be careful to note the correct title of documents obtained from public authorities, called public authority documents. For example, in some places, certifications using the words “good standing” are provided by state officials; in others, the words “good standing” do not appear in the certifications. See discussion Paragraph 3.1.

1.3 Opinion Jurisdictions.

(a) In this Report, “law” refers broadly to the statutes, the judicial and administrative decisions, and the policies, rules, and regulations duly promulgated by governmental agencies and instrumentalities. Opinion letters sometimes use a more limited definition. Importantly, an opinion letter should specify which law it covers, as in Paragraph 1.3 of the Illustrative Opinion Letter, and the opinion letter may identify laws and legal issues that it excludes, as in Paragraph 4.6 of the Illustrative Opinion Letter. Covered law normally would include law of the state governing the transaction documents and the state of formation of each of the borrower and the guarantor.

(b) There appears to be a trend in real estate secured financing opinion letter practice to exclude coverage of federal law except where expressly identified federal law is relevant to the transaction or the parties. Federal law sometimes is stated to be included in opinion letters even though, after taking account of exclusions of the kind set forth in Paragraph 4.6 of the Illustrative Opinion Letter, it is difficult to identify any federal law that would be relevant in opinion letters given in most real estate secured transactions. If any federal law is to be considered, it should be identified and covered expressly; otherwise, no coverage of federal law should be implied or generally referred to. Federal law should be covered only if there is a reason to do so, such as if a federal issue is material to the transaction. To avoid any risk of misunderstanding, however, the Illustrative Opinion Letter language follows the general practice of expressly excluding bankruptcy and similar law pertaining to creditors’ rights even though many are federal and excluded already.

¹⁶ Core opinions are those relating to formation of the contract and its enforceability. See discussion *infra* ch. 2, paras. 3.1–3.5.

(c) If the borrower or the guarantor is an entity formed other than in the state whose law governs the transaction documents, then the opinion letter either should expressly address the entity law of the state of formation or should expressly assume compliance with such entity law. Of course, an opinion as to the entity law of another state should be considered carefully by the opinion giver, as it requires understanding of the entity law of the state of formation and of issues involving multi-jurisdictional practice. In addition, such opinions can be complex, as it is not always clear what applicable law is the basis of the opinions, and opinion recipients may have specific expectations of the scope of such opinions. For example, an opinion letter addressing such entity law sometimes will refer to a specific entity statute. In such a case, the opinion giver should consider whether the opinion letter is intended to address law of the state of formation other than the named statute, such as the case law interpreting the named statute or the law of contracts in the state of formation. In these cases, the opinion giver should consider specifying what law is intended to be addressed, such as the contractual aspects of the operating agreement governing the entity, and including any necessary assumptions about any such law that is not intended to be addressed in the opinion letter. By being clear as to the scope of the entity law being considered, the opinion giver is also providing the opinion recipient with the necessary information to allow the opinion recipient to determine whether to accept an opinion that is limited as indicated.

(d) The law of multiple jurisdictions may need to be considered in the opinion letter as appropriate. Opinions with respect to entity, transactional, or other issues governed by law of jurisdictions where the opinion giver does not practice may need to be covered by an appropriate assumption as to such law or, if necessary, by engaging other counsel to opine as to such law. By including separate terms for “Opinion Jurisdictions” and “State,” the Illustrative Opinion Letter language includes certain coverage limitations that might appropriately be specified in multi-state transactions. Where only one state is involved, an opinion letter normally would use only one term, such as “State,” to describe which law is addressed.

(e) By customary practice, an opinion letter covers only law that a lawyer in the jurisdiction or jurisdictions whose law is being covered by the opinion letter, exercising customary professional diligence, would reasonably be expected to recognize as being applicable to the entity, transaction, or agreements to which the opinion letter relates.¹⁷

(f) If the borrower or the guarantor is a regulated entity or participates in government programs, additional limitations may be appropriate when the need for governmental consents or approvals is the subject of an opinion or a necessary predicate to an opinion contained in the opinion letter.

1.4 Scope of Review.

(a) Opinion letters often include statements to the effect that, in addition to identified documents, the opinion giver has reviewed such matters as are necessary in the professional judgment of the opinion giver to render the opinion. Customary practice dictates that the opinion giver has undertaken a review of what is necessary to render the opinion letter.¹⁸ Such a statement, therefore, is unnecessary in the opinion letter, but an example nevertheless is included in Paragraph 1.4 of the Illustrative Opinion Letter.

(b) The opinion giver may limit the scope of inquiry to specific documents or other specific items, but such a limitation is effective only if it is explicit; e.g., “we have reviewed only the following documents and made no other investigation or inquiry.” Recitation of a list of documents without an express limitation as to the scope of review should not be relied upon as being effective to limit the scope of review. For this reason, the language in Paragraph 1.4 of the Illustrative Opinion Letter, if not changed, will be insufficient to limit the

¹⁷ This statement of what law is covered follows the formulation set forth in *Business Opinion Principles*, *supra* note 10, § II.B, at 832.

¹⁸ Accord section 2 says: “The Opinion Recipient may assume that the Opinion Giver has reviewed such documents and given consideration to such matters of law and fact (in accordance with the principles set forth in this Accord) as the Opinion Giver has deemed appropriate, in its professional judgment, to render the Opinion.” *ABA Business Law Accord Report*, *supra* note 4, § 2, at 504 (emphasis omitted).

scope of review to specific documents. However, limitation of the scope of review as to a given issue, such as “relying solely on our review of the good standing certificate of borrower issued by the State, the borrower is in good standing under the general corporation law of the State,” is effective as a limitation of the opinion giver’s duty as to the stated issue.

(c) On occasion, an opinion recipient might request that the opinion giver list in the opinion letter, as reviewed, transaction documents as to which the opinion giver is not providing any opinions and that are not otherwise necessary to support the express opinions that are being given. The opinion giver should not be expected to identify as reviewed any such documents. If any such documents are reviewed, whether at the request of the opinion recipient or at the election of the opinion giver, and whether or not identified in the opinion letter as reviewed, the opinion recipient should not infer from such review or identification that any opinions on those documents are implied by the opinion letter.

1.5 Reliance on Other Sources Without Investigation.

(a) The opinion giver may rely, without additional investigation, on information provided by others, including public authority documents and factual confirmations provided in client certificates and in transaction documents, unless the opinion giver has actual knowledge that the information is false or the opinion giver does not reasonably believe that the source is appropriate.¹⁹ Although such reliance would be within customary practice, a statement of such reliance is recommended.

(b) A related concept addresses misleading opinions. Section 1.5 of the Business Opinion Guidelines (and as included in the Real Estate Opinion Guidelines), says:

An opinion giver should not render an opinion that the opinion giver recognizes will mislead the recipient with regard to the matters addressed by the opinions given.

(c) Because certain aspects of the opinion letter may be based on the knowledge of the opinion giver, many opinion givers choose to define “knowledge” for purposes of the opinion letter. See Paragraph 4.7 below.

(d) Unjustified reliance is to be contrasted with the situation where reliance on assumptions that are contrary to fact is agreed upon to facilitate a given opinion and therefore is appropriate: if the opinion giver and recipient agree to an express hypothetical assumption contrary to facts (e.g., transaction documents are governed by New York law notwithstanding a contrary choice of law provision), which makes clear that the opinion giver is not stating whether it is reasonable to assume the assumed hypothetical fact. Sometimes opinion givers will phrase these hypothetical assumptions as being made with the “permission” of the opinion recipient.

(e) The Accord, § 4, and the Business Opinion Principles, § III.C, provide that a legal opinion should not be based on an assumption or factual representation that is tantamount to the legal opinion being expressed other than legal conclusions in a certificate of a government official. The exact line between fact

¹⁹ Sources vary in their descriptions of what information should not be relied upon, and some appear to expand the field of unjustified reliance to information the user should deduce to be unreliable even when furnished by an otherwise reliable source. Accord section 3 states that an opinion giver may rely without investigation on information provided by others only if (among other things) the provider of the information “is reasonably believed by the Opinion Giver to be an appropriate source for the information.” *Id.* at 505. Accord section 5 states: “As a general and overarching principle, the Opinion Giver may not rely on information (including certificates or other documentation) or assumptions, otherwise appropriate in the circumstances, if the Opinion Giver has Actual Knowledge that the information or assumptions are false or the Opinion Giver has Actual Knowledge of facts that under the circumstances would make the reliance unreasonable.” *Id.* at 513. *The Business Opinion Principles*, *supra* note 10, § III.A, at 833, provides: “Customary practice permits such reliance [on factual information obtained from others] unless the factual information on which the lawyers preparing the opinion letter are relying appears to be irregular on its face or has been provided by an inappropriate source.” The difference between having knowledge that would make reliance unreasonable and the facial appearance of irregularity may be significant (emphasis within original quotations omitted).

and law may not always be an obvious one. See discussion Paragraph 3.11(a) below as to a factual confirmation.

(f) If certain legal issues that are not addressed in a given opinion letter are addressed in another opinion letter separately provided to the opinion recipient by another counsel, then it is preferable for the opinion giver to assume the issues as necessary for its opinion letter rather than for the opinion giver to rely on the opinion letter of the other counsel or otherwise to provide a conduit opinion letter in stated reliance on another opinion letter.²⁰ In the unusual case where the opinion giver obtains legal advice from other counsel on which the opinion giver's own opinion letter is based, there is no need to indicate reliance on such advice.

II. ASSUMPTIONS

2.1 Assumptions.

(a) Opinion letters usually identify assumptions that support the opinions given, but the practice of determining which assumptions are stated in opinion letters and which assumptions should be implied as a matter of customary practice is inconsistent. Paragraph 2.1 of the Illustrative Opinion Letter includes assumptions that are common in opinion letter practice, but not all of the assumptions stated there need be included in all opinion letters. Most of the assumptions are relatively self-explanatory; however, some warrant further commentary. Those listed are commonly understood and accepted. If they are not responsive to an opinion recipient's request, the recipient would need to make that known and justify variance.

(b) Assumptions are made "without investigation," whether or not the opinion letter expressly so states. The same principles governing justifiable reliance discussed above in Paragraphs 1.5(a) and (b) apply to assumptions, which form additional factual bases for the opinions expressed in the opinion letter. That is, the opinion giver may rely, without additional investigation, on assumptions unless the opinion giver has actual knowledge that the assumed information is false or will mislead the opinion recipient.

(c) Customary practice implies the assumptions stated in the language of Paragraph 2.1(a)–(o) of the Illustrative Opinion Letter, whether or not expressly stated. The practice of reciting implied assumptions is inconsistent. Not all those recited in the Illustrative Opinion Letter necessarily apply to every opinion, although each of them relates to the scope of a lead counsel opinion. On the other hand, an opinion giver may choose to add additional assumptions, depending on the specific circumstances, the role of the opinion giver (e.g., local counsel; see Chapter One, Part VI), the terms of the transaction documents, and the nature of the opinions being rendered. The apparent comprehensiveness of the assumptions set forth in the language of Paragraph 2.1(a)–(o) of the Illustrative Opinion Letter should not be construed as suggesting that others that may be implied by customary practice (or others stated elsewhere in the opinion letter) are not applicable; nor should anything within the stated assumptions imply in any way any expansion of the scope of the opinions set forth elsewhere in the Illustrative Opinion Letter language. Although certain assumptions may be implicit, as discussed in Chapter One, Part V, recitation of them makes their inclusion clear and may serve an evidentiary purpose.

(d) Most opinion letters assume that all signatures are genuine, as stated in the language of Paragraph 2.1(e) of the Illustrative Opinion Letter. Opinion recipients occasionally request that an assumption that signatures are genuine not apply to signatures on behalf of the borrower or the guarantor. In effect, such a request might be construed to require the opinion giver to assure that the signatures of the opinion giver's clients are not forgeries and that the persons signing are in fact the persons they purport to be. Such an assurance is not an opinion of law but is a matter of a fact that is outside of the knowledge and professional competence of the opinion giver. Even familiarity with the signatory over years of representation may not necessarily support a factual determination that, as a legal certainty, the person is who the person purports to be. As noted above in discussion Paragraphs 1.5(a) and 2.1(b) concerning assumptions generally, assuming

²⁰ For further discussion, see THOMPSON, *supra* note 12, at 253–54.

that the signatures are genuine would be inappropriate if the opinion giver may know otherwise, and this should be sufficient comfort to the opinion recipient. If greater assurance is required, it should be specifically discussed, and the protocol upon which to establish such an assurance should be clearly established.

(e) Organizational documents and other agreements governed by law that is not addressed by a given opinion letter can present special challenges. This would arise, for example, where the opinion letter addresses the Delaware Limited Liability Company Act, but not the contractual elements of a Delaware limited liability company operating agreement, which are governed by Delaware contract law (see discussion Paragraph 1.3 above). See discussion of choice of law, Paragraph 3.9.

(f) Assumptions in Paragraphs 2.1(j)–(o) of the Illustrative Opinion Letter are bracketed to indicate that an opinion giver may choose to recite only the assumptions in Paragraphs 2.1(a)–(i) of the Illustrative Opinion Letter as those that may be regarded as actually applying to the transaction documents and actions opined about, while those in Paragraphs 2.1(j)–(o) of the Illustrative Opinion Letter are applicable to the way parties have dealt and are anticipated to deal with each other in any transaction. The distinction may be elusive, but some opinion givers will commonly recite the first group but not the second. Although all the listed assumptions are considered implicit, recitation of the entire list is preferred by some opinion givers as providing more certain notice to the opinion recipient of the assumptions underlying the opinions expressed. Some opinion givers are concerned that the assumptions included in Paragraphs 2.1(j)–(o) of the Illustrative Opinion Letter could imply a scope of the opinion letter's assurance outside the responsibility undertaken in a legal analysis, and several of the assumptions would be swept up in the equitable principles exception (see discussion Paragraph 4.2).

(g) The Accord includes the following three assumptions, which are not included in the language of the Illustrative Opinion Letter:²¹

(i) The Client will not in the future take any discretionary action (including a decision not to act) permitted under the Transaction Documents that would result in a violation of law or constitute a breach or violation of any Other Agreement or Court Order.

(ii) The Client will obtain all permits and governmental approvals required in the future, and take all actions similarly required, relevant to subsequent consummation of the Transaction or performance of the Transaction Documents.

(iii) All parties to the Transaction will act in accordance with, and will refrain from taking any action that is forbidden by, the terms and conditions of the Transaction Documents.

Although unnecessary, these three assumptions may have been thought to provide support for no breach or violation opinions such as those in Paragraphs 3.7 and 3.8 of the Illustrative Opinion Letter. Note, however, that the no breach or violation opinions as written in the Illustrative Opinion Letter, and as understood in most real estate finance opinion letters, do not purport to extend to future acts or omissions and should not be read to do so, whether or not assumptions in the nature of the three above are included in the opinion letter.

(h) The language of the assumption in Paragraph 2.1(g) of the Illustrative Opinion Letter, assuming that documents are properly filed or recorded and indexed publicly, would be included where an opinion depends on proper filing or recording and indexing. It is unnecessary otherwise and would be inappropriate as written when an opinion confirming the proper place to file or record is given.²² (Opinion language as to the proper place to file or record does not appear in the Illustrative Opinion Letter.) This often is a matter of state law. In

²¹ See *ABA Business Law Accord Report*, *supra* note 4, § 4, at 510 (Accord sections 4(n)–(p)).

²² Even where the opinion is given as to the proper place to file or record, an assumption that the filing or recordation (at the stated place) has in fact occurred would be appropriate if an opinion is included as to which the fact of filing or recordation is a necessary predicate in a given state (including if necessary to provide certain of the assurances discussed below with respect to the generic enforceability qualification).

any event, inclusion of this assumption does not imply an opinion as to creation, perfection, or priority of liens or security interests, or as to any other issues not expressly included elsewhere in the opinion letter.

(i) In appropriate circumstances, an opinion giver may wish to consider adding an assumption that the borrower is not a regulated company or participating in government programs, if this cannot be efficiently verified. See discussion Paragraph 1.3(f) above.

(j) If a choice of law opinion (Paragraph 3.9 of the Illustrative Opinion Letter) is expressly given, or the enforceability opinion (Paragraph 3.5 of the Illustrative Opinion Letter) is regarded as implicitly giving a choice of law opinion, an assumption relating to the basis for that opinion is appropriate. See discussion Paragraph 3.9.²³

III. OPINIONS

3.1 Status.

(a) An opinion regarding good standing should be given only (i) if the applicable corporation, limited partnership, limited liability company, or other entity statute in the Opinion Jurisdictions defines good standing or (ii) in reliance on a public authority document confirming good standing. When given, such an opinion often is given solely in reliance on public authority documents. Such phrasing limits the duty of the opinion giver to make further inquiry. For that reason, many question the value of, and need for, such an opinion.

(b) An opinion that the borrower is qualified to do business in the state where the property is located is often requested if the borrower is not formed in that state. If the issue of existence is to be addressed by the opinion letter and the borrower is not formed in that state, it may be appropriate to include a statement as to qualification (or good standing as noted in the next paragraph) to do business in that state, such as the second sentence of the text of Paragraph 3.1 of the Illustrative Opinion Letter language. As a matter of customary practice, the opinion giver may rely solely on a certificate of qualification (or good standing as noted in the next paragraph) provided by the secretary of state or other applicable state official, again raising the question of the value of, and need for, such a legal opinion.

(c) As noted, in some cases, opinion givers make reference to a governmental certificate as the basis for the opinion on good standing (or qualification) regarding a borrower or a guarantor. The wording of the certificate from state authorities and the statutory basis for good standing (or qualification) in a given state will affect the scope and exact wording of this opinion. The requisite diligence for this opinion will vary by state. In most real estate secured transactions, it is unnecessary to opine about initial filings of documents with public authorities to create the entity (a duly formed opinion) or the initial organizational matters relating to events and circumstances at the time the entity was formed (a duly organized opinion), as opposed to its current existence. See Real Estate Opinion Guidelines § 1.5.b.

3.2 Power.

(a) Opinion letters often include opinions as to the company (or other entity) power of the borrower and the guarantor, such as the one in Paragraph 3.2 of the Illustrative Opinion Letter. Such an opinion on company (or other entity) power supplements, or may even be implicit in, other opinions, such as the authorization opinion in Paragraph 3.3 of the Illustrative Opinion Letter language. However, it is useful to state the company power opinion expressly as a reminder to the opinion giver to check applicable organizational documents and law (particularly in the case of certain regulated entities), and as comfort to the opinion recipient that the opinion giver has considered these issues. The formulation in the Illustrative Opinion Letter language covers the legal power of the borrower and the guarantor as entities under the

²³ In the Illustrative Opinion Letter at Paragraph 3.9, the assumptions as to choice of law appear as part of an express opinion statement. If the opinion giver accepts that the enforceability opinion (Paragraph 3.5) implies the choice of law opinion, the assumption would be appropriately placed along with other assumptions.

organizational documents of each entity and applicable law and not the financial or other ability to perform. The opinion letter language does not assure that there is no impediment to performance under law.

(b) Some opinion recipients request the opinion to include, more broadly, the power of the company to carry on its business wherever conducted or to own all of its properties. These are not ordinarily appropriate opinion requests in a real estate secured transaction.

(c) The expression originated as “corporate power,” but commercial real estate secured financings most often involve entities other than corporations, and some practitioners refer to “limited liability company power,” for instance. Some practitioners use the phrase “power and authority” instead of just “power.” These phrases generally are interpreted to have the same meaning.

3.3 Authorization.

(a) Opinion letters usually include opinions that the necessary corporate (or other entity) actions and approvals have been taken, such as the one in Paragraph 3.3 of the Illustrative Opinion Letter. The “actions or approvals by the borrower” referred to in that language include any necessary actions by the borrower’s management, such as the board of directors of a corporation.

(b) Where there are tiers of ownership between the borrower or the guarantor entity and the direct or indirect individual members, partners, shareholders, or other owners, opinion givers should expressly state the extent to which they have or have not reviewed and verified any necessary consents throughout the tiers of ownership or at specified levels of the organizational hierarchy. In the absence of an express statement in the opinion letter, it may not be clear whether the opinion giver is opining only on the borrower or the guarantor tier or has investigated all organizational tiers. The same issue arises concerning the power opinion discussed in Paragraph 3.2 above. Unless the opinion is expressly limited, the opinion giver must review what is necessary to render the authorization opinion (as it must for the entire opinion letter as noted in Paragraph 1.4(a) above).²⁴

(c) The authorization opinion does not apply to third-party or governmental approvals, but only to internal company or other entity approvals regarding a borrower or the guarantor.

3.4 Execution and Delivery.

(a) For this and related opinions, the opinion giver should establish that all of the conditions necessary under contract law for formation of a contract have occurred (except as covered by assumptions or limitations set forth elsewhere in the opinion letter). Although in other contexts oral contracts may be valid, in real estate finance transactions, the transaction documents generally must be executed and delivered, and opinion letters often include opinions confirming execution and delivery of transaction documents. Execution and delivery generally may be accomplished electronically or by other means; but, importantly, for purposes of the opinion letter, execution means only that a person purporting to be the person authorized to execute on behalf of the party has executed the applicable transaction documents. As discussed in Paragraph 2.1(e), the opinion giver assumes, whether impliedly or expressly, that the signatures are genuine. Delivery generally may occur in person, by mail, by electronic means, or by any other means as long as the relevant requirements of applicable law are met. An opinion giver should consider how best to assure that these requirements have been satisfied,

²⁴ The view of the level of required diligence of remote tiers of owners is not uniform. For a statement that authorization at remote tiers may be assumed, see TriBar Opinion Committee, *Third-Party Closing Opinions: Limited Liability Companies*, 61 BUS. LAW. 679, 689 n.52 (2006):

[T]he opinion preparers may assume, without so stating, that when an approval is given by a member or manager that is not a natural person, the member or manager is the type of entity it purports to be, that it was authorized to approve the transaction, and that those acting on its behalf had the approvals they required. As with any unstated assumption, opinion givers may not rely on this assumption if reliance is unreasonable under the circumstances in which the opinion is given or they know it to be false. [citation omitted] To avoid any misunderstanding, some opinion givers choose to state the assumption expressly.

especially where the closing is not in person and closing formalities cannot otherwise be verified satisfactorily.

(b) Delivery or other aspects of closing may be governed by the law of a state other than the Opinion Jurisdictions, in which case counsel should consider the extent to which it is appropriate to address the law governing delivery or such other aspects, but for routine closings, execution and delivery generally are not controversial. Although only applicable to some real estate finance documents (such as promissory notes) and using slightly different terminology, the U.C.C. definitions are instructive: “‘Signed’ includes using any symbol executed or adopted with present intention to adopt or accept a writing.”²⁵ “‘Delivery’, with respect to an electronic document of title means voluntary transfer of control and with respect to an instrument . . . means voluntary transfer of possession.”²⁶

3.5 Enforceability.

(a) Opinion letters ordinarily²⁷ include an opinion that the specified transaction documents are enforceable against the borrower and the guarantor.²⁸ Some view the enforceability opinion as addressing “each and every” provision of every specified transaction document. Others view the same language as addressing only the material provisions. As a practical matter, the debate may be academic because most opinion givers (whether or not they agree with the former interpretation) include in their opinion letters assumptions and limitations that would be appropriate regardless of which interpretation is correct. In addition, the generic enforceability qualification (discussed in Paragraph 4.3 below) has the potential to eliminate the practical difference between the two interpretations. Although the opinion does provide assurance that the contractual provisions are valid under applicable law, affording the legal right to pursue a given remedy, it does not address procedural actions necessary to enforce a remedy. For example, the need of the opinion recipient to take certain actions to comply with applicable court rules or law at the time of exercising a remedy is not addressed by the enforceability opinion.

(b) Inherently, the enforceability opinion assures that the transaction documents opined about are sufficient to meet their fundamental purpose. In other words, a mortgage that is enforceable meets the requirements of applicable law to be a mortgage that encumbers real estate interests. The enforceability opinion does not opine, and should not be read to imply, that the mortgage has actually encumbered the specific property (actual creation of a lien), that the lien has been perfected, or that it has actual priority over other liens. See discussion Paragraph 3.6. Also, the assurances to the generic enforceability qualification do not provide any such opinion.

(c) Choice of law issues may appear to be covered by the language of the enforceability opinion; but choice of law issues are complex, especially in multi-state transactions, and there is a division of view as to whether choice of law issues are addressed as an implied component of an enforceability opinion. This Report favors the view that a choice of law opinion should not be implicit in the enforceability opinion, but cautions the opinion giver to address the subject either by express exclusion or by an assumption or limitation. See discussion Paragraph 3.9.

²⁵ U.C.C. § 1-201(37), 1 U.L.A. 19 (2004).

²⁶ U.C.C. § 1-201(15) (Alternative B), 2C U.L.A. 198 (2005).

²⁷ There is a view that the enforceability opinion need not be given, and should not be requested, in purely intra-state transactions. See, e.g., *Real Estate Opinion Guidelines*, *supra* note 9, § 1.2, at 245: “In particular, opinions from borrower’s counsel in intrastate transactions (or in a multistate transaction for which the lender has retained its own local counsel for the purposes of advising it) with respect to the enforceability of loan documents prepared by the lender normally should not be necessary and may not be cost justified.” (emphasis omitted). This view is not uniform. The enforceability opinion ordinarily is given in lead counsel opinion letters in interstate or multi-state transactions.

²⁸ The enforceability opinion sometimes is expressed with a string of words, which are synonymous for this purpose: legal, valid, binding, and enforceable. The Illustrative Opinion Letter uses only “enforceable” but would not have a different meaning if any or all of the synonyms were used.

(d) Read literally, the enforceability opinion includes an opinion on the legality of interest charged for the loan, or usury, and opinion givers are well served to assume that is how enforceability opinions will be read. If coverage of usury is not intended, an express exception to the enforceability opinion statement should be made; for an example, see the exclusion in the language of Paragraph 3.10 of the Illustrative Opinion Letter.

The foregoing five opinions (Paragraphs 3.1–3.5) would be customary in a real estate finance opinion letter, and they provide the core opinions given by lead counsel. Other opinions may be requested. The following sections discuss a few examples of more common additional requested opinion subjects (one of which is not an opinion but a factual report), and all of which require further analysis beyond that made for the core opinions above. Inclusion of the opinions below in this Report does not endorse a request for or giving of the opinions or confirmations below.

3.6 Form of Security Documents.

(a) It is generally agreed that substantive opinions regarding the effectiveness of the mortgage, deed of trust, or other security document to “create” a lien on the real estate collateral by execution and delivery of the security document or effectively to “perfect” a lien on real property by recording are not appropriate, and they are clearly not implied in the enforceability opinion. It is nevertheless customary, although unnecessary, to disclaim opinions of title, creation, and perfection, as well as priority of the lien or security interest.²⁹ Matters concerning the creation, perfection, and priority of a lien on real property interests are covered in most states by title insurance. In response to requests for an opinion on these subjects, however, some lawyers give an opinion focusing on the legal sufficiency of the form of a mortgage, deed of trust, or other security document (i) to “create” a lien, and (ii) as suitable under applicable law for recordation or filing.³⁰ Paragraph 3.6 of the Illustrative Opinion Letter provides language for a focused opinion addressing the subject of the form of the document for lien creation.

(b) In opinion letters where financing statements and other U.C.C. issues are covered, it is common to identify where financing statements are filed or to be filed, and, as a variation on a “form of documents” opinion, whether recording of the mortgage or other security document will serve to “perfect by filing” the security interest in real estate collateral to the extent covered by Article 9 of the U.C.C. An encumbrance on goods that are or are to become fixtures, as defined in the U.C.C., may be “created” by a real estate security document that purports to create a lien on the fixtures as real property. This Report does not address separate U.C.C. perfection requirements.

(c) Express opinions on security interests in personal property other than goods that are or are to become fixtures are not appropriate in real estate secured financings unless the personal property is an important part of the collateral. In such instances, U.C.C. issues are to be separately and expressly addressed. Experienced practitioners regard U.C.C. personal property opinions as presenting unique issues requiring separate expertise in the subject,³¹ and this Report does not address this subject. A form of documents opinion may be provided as to personal property security interests, however, assuring only that the form of

²⁹ See, e.g. *infra* ch. 3, paras. 2.1(b), 4.6(i), and 4.6(u) of the Illustrative Opinion Letter.

³⁰ An opinion on the subject of (ii) covers recordability of the document. An additional opinion is sometimes given as to the sufficiency of recording the document. An example of such an opinion is: “The recording of the Mortgage with the Recorder in the office described herein is the only action, recording, or filing necessary to publish record notice and to establish of record the rights of the parties under the Mortgage in real property, including, without limitation, Leases and Rents, and the goods described therein that are or are to become fixtures.” Such an opinion would need, of course, to consider conditions of applicable law for establishing effective notice of record. Note that Assumption 2.1(g) of the Illustrative Opinion Letter (which assumes that documents have been or will be recorded in the future) would be inappropriate as written if this opinion is given.

³¹ See, e.g., TriBar Opinion Committee, *Special Report of The TriBar Opinion Committee: U.C.C. Security Interest Opinions – Revised Article 9*, 58 BUS. LAW. 1449 (2003).

grant of security interest in the personal property included in the transaction documents complies with requirements of the law of the Opinion Jurisdictions, if applicable to the transaction, for such purpose.

3.7 No Breach or Violation.

(a) Opinion letters often include opinions to the effect that, in entering into the loan, the borrower and the guarantor do not violate their internal organizational documents or certain obligations to others, the no breach or violation opinion. An example is in Paragraph 3.7 of the Illustrative Opinion Letter. Because an opinion letter speaks only as of its date (see discussion Paragraph 5.2), the no breach or violation opinion should not be read to apply to any acts or occurrences after the date of the opinion letter. Even if the no breach or violation opinion uses the future tense (e.g., “will not breach”), the meaning is the same as when the present tense is used—that is, under the law in force on the date of the opinion letter, if an obligation under the transaction documents were to be performed on that date, that performance would not breach specified other agreements or specified court orders in effect on that date.

(b) Note that the use in Paragraph 3.7 of the Illustrative Opinion Letter of the words “payment obligations” as opposed to “agreements” is intended to provide that the no breach or violation opinion does not extend to performance of obligations other than payment obligations of the borrower or the guarantor. See Sections 14 and 15 of the ABA/ACREL Accord Adaptation Report. The request is often not so limited in scope, and if not, discussion of the scope of inquiry and the due diligence to pursue it is essential. Ordinarily, other means of satisfying a broader inquiry, such as reliance on representations and warranties of the client, should suffice.

(c) Even if not expressly stated, as it is in the language of Paragraph 3.7 of the Illustrative Opinion Letter, customary practice would imply that such opinions do not extend to any action or conduct of either the borrower or the guarantor that a transaction document may permit but does not require.

(d) It is preferable, and has become customary, to list for this opinion the specific documents and court orders to which the borrower is a party, rather than to refer to all material documents and orders to which the borrower is a party. The opinion giver should not make an independent judgment about what meets a standard of “materiality” in providing its opinions; in most instances, the opinion giver will rely on information provided by an appropriate source within the client identifying documents to be considered in this opinion. (See discussion Paragraphs 1.4 and 1.5.) Often the documents examined are specified in a separate client certificate, or a listing in the transaction documents, instead of in the opinion letter itself. Opinion givers ordinarily do not, and should not be asked to, opine as to compliance with financial covenants (e.g., debt service coverage ratio covenants); instead, the opinion recipient normally relies on a certification by the chief financial officer or equivalent official of the borrower and the guarantor.

3.8 No Violation of Law.

(a) A seemingly similar opinion to the no breach or violation opinion is an opinion to the effect that the borrower’s execution and delivery of the transaction documents and performance of certain loan covenants do not violate law. Although often requested, it is not obvious what the purpose of this opinion is; what, as a practical matter, it adds to the enforceability opinion, if one is being given; and whether it belongs in a typical real estate finance opinion letter as opposed to inclusion in a corporate merger or acquisition transaction, where it may be more applicable. Some opinion givers limit the no violation of law opinion to specifically identified law. However, whether or not the no violation of law opinion states that it addresses only the enacted statutes and regulations of the state, it should be read to include judicial and administrative decisions interpreting those statutes and regulations, but it should not be read otherwise to include common law. Also, the law covered by this Paragraph (and the others) excludes law of subordinate jurisdictions (e.g., local government). An opinion assuring no violation of such law would require separate, specific statements, or often, a separate opinion. Paragraph 4.6 of the Illustrative Opinion Letter, as discussed in Paragraph 4.6 of this Chapter, contains exclusions of law and legal issues considered implicitly excluded, but often expressed. For a regulated borrower or the guarantor entity, the opinion giver should consider whether any governmental

approvals or filings are needed to borrow money, enter into the transaction, or make the transaction documents enforceable against a borrower or the guarantor.

(b) A no violation of law opinion may include by implication a usury opinion. Because it is important that opinions not be given inadvertently, consideration should be given to excluding usury from the breadth of a no violation of law opinion (such as the example in Paragraph 3.8 of the Illustrative Opinion Letter) in states where usury may be a significant analytical issue for the opinion giver. See discussion Paragraph 3.10 below.

(c) Again, note the above discussion in Paragraph 3.7(a) and (b) disclaiming opinions about future acts or occurrences. Also, note the use of the words “payment obligations” as opposed to “agreements” to provide that the opinion does not extend to performance obligations of the borrower. See Sections 14 and 15 of the ABA/ACREL Accord Adaptation Report.

3.9 Choice of Law.

(a) In financing transactions, it is not uncommon for the law of more than one state to apply, necessitating consideration of the effectiveness of the choice of law; that is, which law is designated to apply to a given document, provision, or issue. A sample choice of law provision in a mortgage might read:

The provisions of this Mortgage regarding the creation, perfection, and enforcement of the liens and security interests herein granted shall be governed by and construed under the law of the state in which the Mortgaged Property is located. All other provisions of this Mortgage shall be governed by the law of the State of New York (including, without limitation, Section 5-1401 of the General Obligations Law of the State of New York), without regard to choice of law principles.

(b) The ABA/ACREL Accord Adaptation Report provides that, in a real estate secured transaction, an opinion letter excludes certain aspects of the choice of law opinion described in Accord § 10(d)(i). After noting several elements of a choice of law analysis, including the need to confirm that the chosen state has a sufficient nexus to the transaction and the choice does not violate a fundamental policy of a relevant state, the ABA/ACREL Accord Adaptation Report, at 582, disclaims the policy element from the opinion as follows: “The Remedies Opinion is qualified to exclude any opinion implied pursuant to Accord § 10(d)(i) that application of the Law of the Opining Jurisdiction is not contrary to a fundamental policy of the Law of an Other Jurisdiction.”

That Report goes on to note that other choice of law issues may be excluded as appropriate. The Real Estate Opinion Guidelines, at 257, say that a “general enforceability” opinion includes choice of law but that choice of law coverage often is disclaimed and should be separately requested and stated. The 1998 TriBar “Closing” Opinions Report³² takes a similar approach, that choice of law coverage is implicit in an enforceability opinion, and it notes specific limitations on the enforceability of a choice of law provision.

(c) Opinion reports and authorities take different approaches to whether and to what extent the enforceability opinion includes, by implication, a choice of law opinion. The Committees question whether choice of law should be covered by implication because, in many states, a choice of law opinion is inherently a complex, reasoned opinion that is fact driven and not a simple matter of contract law. Accordingly, the Committees believe that the proper rule should be that the choice of law opinion should not be implied as part of the enforceability opinion. Nevertheless, to avoid confusion, choice of law issues should be dealt with expressly in the opinion letter.

(d) Where choice of law is an issue, it may be appropriate to qualify the enforceability opinion to reflect the concern. For example: “To the extent the law of the State applies, excluding choice of law rules, the Transaction Documents are enforceable . . .” so as not to imply a choice of law opinion.

³² TriBar Opinion Committee, *Third-Party “Closing” Opinions*, 53 BUS. LAW. 591, 634–636 (1998) [hereinafter *TriBar Closing Opinions Report*].

(e) If an opinion on the effectiveness of the choice of law provisions is to be rendered, the opinion giver must consider not only its scope but the law of the Opinion Jurisdiction. The Illustrative Opinion Letter at Paragraph 3.9 provides an alternative lead-in that may accommodate express opinions to this effect. Where the law of the Opinion Jurisdiction supports it, such an opinion might read, for example: “A federal court sitting in the State and the state courts in the State, applying the conflict of law rules of the State [would] [should]³³ give effect to the choice of law provisions contained in section [] of the Mortgage.” In those circumstances, in states where there is a statute that clearly gives effect to the rights of the parties to choose the law of the Opinion Jurisdictions, some opinion givers will rely on such a statute in the opinion letter. If the issue is whether the courts of the Opinion Jurisdictions will enforce the parties’ stated intention that the law of another jurisdiction will govern, such an opinion often is provided as a reasoned opinion that requires additional factual assumptions and an analysis of statutes, cases, and other law in the Opinion Jurisdictions and perhaps other sources, such as Restatements.

(f) Such an express opinion needs to be accompanied by an assumption that reflects the Opinion Jurisdiction’s choice of law principles supporting it. For example, if such principles were those of the Restatement (Second) Conflict of Laws, the assumption would read:

To the extent governed by the Law of any jurisdiction other than the State (an “Other Jurisdiction”), including conflicts of law principles thereof, we have assumed that: (i) the Transaction Documents are enforceable against the parties thereto in accordance with their respective terms under the Law of each Other Jurisdiction; (ii) the Other Jurisdiction has a substantial relationship to the parties or the Transaction, or there is other reasonable basis for the choice by the parties, and application of the Law of an Other Jurisdiction would not be contrary to a fundamental policy of the State; and (iii) the selection of application of the Law of the Other Jurisdiction will be honored by courts in the Other Jurisdiction.

In addition to the assumption, depending on the language of the transaction documents and the opinion letter, it may be appropriate to add to the opinion letter an exclusion that makes clear that certain issues (such as mandatory issues of judicial procedure) are not covered by the choice of law opinion, but this ordinarily will be unnecessary as the exclusion is implicit. If the Opinion Jurisdiction has not adopted the Restatement or another well-defined choice of law rule by statute or judicial decision, the opinion giver may decline to give a choice of law opinion or may couch it in less affirmative terms than in the example.

3.10 Usury.

(a) As discussed in discussion Paragraphs 3.5(d) and 3.8(b) above, an opinion on usury is implied in the language used in most enforceability opinions and in most no violation of law opinions, so if usury law is to be excluded from coverage in the opinion letter, as may be customary practice in certain states, that should be disclosed expressly in the opinion letter. Where it is appropriate to do so under applicable law in the Opinion Jurisdictions, the usury opinion may need to be qualified by reference to the effect of rate limitations, adjustments of rate, criminal maximums, compounding, the identity of the holder of the debt, and other issues uniquely involved in the subject. A separate usury opinion may be provided or requested when appropriate.

(b) The approach to usury in opinion letters, including the various assumptions and limitations and the diligence necessary to support a usury opinion in a specific situation, is state-specific. Usury issues may vary by state. However, the implicit nature of such an opinion in the enforceability opinion should be assumed in multi-state opinions and disclaimed if not intended to be given.

³³ Some opinion givers prefer the use of “should” when referring to likely actions of a court; some opinion recipients prefer the use of “would.” Practitioners differ on whether the two words have different meanings in the context of such an opinion. Whichever word is used, the opinion almost always will be given in reliance on an assumption such as the assumption provided in subparagraph (f). Moreover, there is authority for the position that such an opinion has the same meaning whether stated as “would” or “should.” See THOMPSON, *supra* note 12, at 13; *Real Estate Opinion Guidelines*, *supra* note 9, § 3.5, at 250. Regardless of the choice of words, as discussed *infra* ch. 2, para. 5.5, opinions letters are expressions of professional judgment and not guarantees of particular results.

3.11 Legal Proceedings Confirmation. [Note: This is a factual confirmation only, and not a legal opinion.]

(a) Opinion givers sometimes are asked to provide a statement as to the absence of litigation and similar proceedings that affect the borrower, the guarantor, or the security property. A statement of the absence of litigation is not an opinion; it is a report of facts based upon the knowledge of the opinion giver. Many opinion givers question the appropriateness of such a purely factual confirmation and resist including such statements in opinion letters. This resistance is in part because of the possibility that, if the opinion recipient were to sue, alleging that the opinion giver had knowledge contrary to the factual confirmation, even if the opinion giver in fact lacked any such knowledge, such allegations might not be disposed of readily or inexpensively. In addition, some opinion givers are concerned that such statements could be argued to constitute waivers of the attorney-client privilege or work-product doctrine. The request for confirmations regarding legal proceedings increasingly is recognized as an inappropriate request for opinion letters, and this Report recommends that it should be resisted.

(b) Some opinion givers will provide information, but ordinarily with limitations. Some limit such information only to litigation matters to which they have been engaged by the client to give substantive attention, which is a concept similar to the response lawyers give to auditors under the American Bar Association Statement of Policy Regarding Lawyers' Responses to Auditors' Requests for Information (December 1975). Some further limit the information to litigation affecting the transaction. An example of such a confirmation is:

We hereby confirm to the Lender that, except as disclosed in [the Agreement], we have not been engaged to give substantive attention to any litigation or arbitration proceedings against the Borrower or the Guarantor, pending or overtly threatened in writing, which seeks to enjoin the Transaction, or challenge the validity, or enforceability of the Transaction Documents, or the performance by the Borrower or the Guarantor of their respective obligations thereunder. Except for the information disclosed in this Opinion Letter, the Borrower and the Guarantor, in requesting us to issue this Opinion Letter, did not intend to waive the attorney-client privilege. Moreover, please be advised that our response to you should not be construed in any way to constitute a waiver of the protection of the attorney work-product doctrine with respect to any of our files involving the Borrower or the Guarantor.

A danger in using this approach without careful consideration of the opinion language and attendant diligence is that the "knowledge" limitation often used (*see* discussion Paragraph 4.7) may be inconsistent with the standard of diligence inherent in the audit letter process, which would ordinarily include requests for information firmwide.

(c) Instead of the phrase that the opinion giver has not been engaged in connection with certain litigation, where such confirmation is provided, some opinion givers refer to their "Actual Knowledge" of certain litigation. See discussion Paragraph 4.7. Depending on whether the confirmation (i) covers all litigation, (ii) is limited to matters handled by the opining law firm, or (iii) is limited to matters affecting the transaction, different standards or definitions of knowledge may be appropriate and subject to negotiation.

(d) If such a confirmation is to be provided as to litigation meeting a stated objective materiality standard, the opinion giver should exercise care in how the objective standard is stated and applied. For example, some opinion givers believe it is prudent to disclose litigation even if the identified litigation falls short of an objective materiality standard. The opinion giver should not venture a materiality standard not established by the transaction parties or otherwise clearly defined.

(e) In cases where such a factual confirmation is given, the opinion giver should consider whether the statement should be segregated from the portion of the opinion letter that provides legal opinions. Providing such a separate confirmation is the currently preferred approach in those cases where the opinion giver is

unable to resist the request. Consider, however, whether the standard of care, and potential claims and defenses, are any different if the opinion recipient later alleges a misrepresentation (if a factual confirmation) as opposed to professional negligence (if a legal opinion).

IV. CERTAIN LIMITATIONS

The first three limitations, discussed in Paragraphs 4.1–4.3, relate to core opinions pertaining to contract formation and enforceability. Further limitations are often added either out of necessity or custom. Those that pertain to specific transactional considerations are discussed in Paragraph 4.4, and those of a more general nature are discussed in Paragraph 4.5. In the presentation of an opinion letter, as illustrated by the language of the Illustrative Opinion Letter, these latter two are not treated discretely, but in a single section encompassing those limitations commonly referred to as qualifications, exceptions, and exclusions.

4.1 Bankruptcy Exception.

(a) Opinion letters exclude the effect of bankruptcy and similar law, the bankruptcy exception. An example is in Paragraph 4.1 of the Illustrative Opinion Letter. The bankruptcy exception applies to all opinions, not only to the enforceability opinion.

(b) The bankruptcy exception is so universally used and accepted that, under customary practice, this exception is deemed to be implied even if not expressly stated. Whether or not expressly stated, and whether or not the wording of the exception includes reference to any or all of these issues, this exception includes (to the extent these issues otherwise might be covered in the opinion letter) (i) the federal Bankruptcy Code, including, among others, matters of turn-over, automatic stay, avoiding powers, fraudulent transfer, preference, discharge, conversion of a non-recourse obligation into a recourse claim, limitations on *ipso facto* and anti-assignment clauses, and the coverage of pre-petition security agreements applicable to property acquired after a petition is filed; (ii) all other federal and state bankruptcy, insolvency, reorganization, receivership, moratorium, arrangement, and assignment for the benefit of creditors law that affects the rights and remedies of creditors generally (not just creditors of specific types of debtors); (iii) all other federal and state bankruptcy, insolvency, reorganization, receivership, moratorium, arrangement, and assignment for the benefit of creditors law that has reference to or affects generally only creditors of specific types of debtors and state law of like character affecting generally only creditors of financial institutions and insurance companies; (iv) state fraudulent transfer and fraudulent conveyance law; (v) state insolvency law; and (vi) judicially developed doctrines relevant to any of the foregoing law, such as substantive consolidation of entities. As noted above, as a matter of customary practice, a bankruptcy exception almost always is included in an opinion letter, even if the opinion letter excludes federal law. In referring to federal law concerning bankruptcy and related matters in the foregoing list, an opinion letter should not be read to limit the exclusion of federal law stated elsewhere in the opinion letter.

4.2 Equitable Principles Exception.

(a) Opinion letters exclude the effect of equitable and similar principles. An example is in Paragraph 4.2 of the Illustrative Opinion Letter. As in the case of the bankruptcy exception, the equitable principles exception is so universally used and accepted that, under customary practice, this exception is deemed to apply even if not expressly stated. Many opinion givers use a shorter version of this exception than the one in the Illustrative Opinion Letter language, referring only to “equitable principles.” Whether or not expressly stated, and whether or not the wording of the exception includes reference to any or all of the listed items, this limitation includes principles (i) governing the availability of specific performance, injunctive relief, or other equitable remedies that generally place the award of such remedies in the discretion of the court to which application for such relief is made; (ii) affording equitable defenses (e.g., waiver, laches, and estoppel) against a party seeking enforcement; (iii) requiring reasonableness, diligence, good faith, and fair dealing in the entering into, performance, and enforcement of a contract by the party seeking its enforcement; (iv) requiring consideration of the materiality of (a) the borrower’s breach, and (b) the consequences of the breach to the party seeking enforcement; (v) requiring consideration of the impracticability or impossibility of performance

at the time of attempted enforcement; (vi) affording defenses based upon the unconscionability of the documents or the enforcing party's conduct; and (vii) limiting the effectiveness, validity, or enforceability of waivers of any of the foregoing. This exception states an expansive concept, not limited to the transaction documents themselves or to acts and omissions that occur at any particular time, whether at, before, or after formation of the contract.

4.3 Generic Enforceability Qualification, with Assurance.

(a) Most opinion letters include generic qualifications to the effect that certain—unspecified—provisions of the transaction documents may not be enforceable, but then provide assurance that certain key rights and remedies are available, subject to limitations. An example of the generic enforceability qualification is in Paragraph 4.3 of the Illustrative Opinion Letter. Read literally and expansively, the limitation that begins the generic enforceability qualification (that “certain provisions of the transaction documents may not be enforceable”) could eviscerate the enforceability opinion. Hence, the limitation generally is accompanied by an assurance, in the case of this example, that certain remedies will be available to the opinion recipient involving judicial enforcement of payment obligations, acceleration upon default, and foreclosure upon a material breach of a material covenant.

(b) By customary practice, it is understood that the “assurance” added to the generic enforceability qualification is subject to all of the other limitations in the opinion letter; nevertheless, the Illustrative Opinion Letter contains express language to this effect. By reference to “limitations,” the assurance incorporated in this paragraph of the opinion letter is intended to be subject to all assumptions, qualifications, exceptions, exclusions, and other limitations in the opinion letter, wherever they may appear.³⁴ It is not appropriate to request, and ill-advised to provide, an “assurance” that in effect overrides all limitations in the opinion letter (e.g., one that begins with the words “notwithstanding the limitations otherwise expressed”).

(c) The language of an assurance as to judicial enforcement of payment obligations (clause (i) of the assurance in the Illustrative Opinion Letter) may have to be limited for states with single form of action rules and for states that impose other limitations on deficiency judgments.

(d) The opinion giver should consider separate treatment of any guaranty since the generic enforceability qualification does not adequately address exceptions to enforcement of a guaranty (e.g., an unenforceable waiver of the defense of material modification of the underlying debt), and this can result in the complete exoneration of the guarantor, leaving nothing to enforce. As a result, such exceptions, where they exist, should be separately stated.

(e) Some opinion givers would limit the language of an assurance as to acceleration of indebtedness (clause (ii) of the assurance in the Illustrative Opinion Letter) to provide comfort only that the loan can be accelerated for a material breach of the obligation to pay principal and interest, and they stop short of providing assurance with reference to a “material breach of a material provision.” Some argue that this phrase can be a trap for the unwary, in view of an uncertainty as to what constitutes a material covenant, and that if the assurance is to be given concerning “material provisions” such material provisions would need to be specifically identified. Others would respond that this would just replace one laundry list (the provisions that may not be enforceable, prepared by the opinion giver) with another laundry list (the provisions important enough to merit specific treatment in the opinion letter, prepared by the opinion recipient). Regardless of which approach is taken, if comfort is given about a breach of material provisions, the opinion giver should consider what likely is material and, as necessary, address specific exceptions separately.

(f) The assurance that foreclosure is an available remedy (see the language of clause (iii) of the assurance in the Illustrative Opinion Letter) provides an assurance that some type of foreclosure will be available, but not an assurance that any particular type of foreclosure (such as a power of sale or other non-

³⁴ The Inclusive Opinion used the word “qualifications,” which was intended to convey the same broad meaning as the word “limitations” used in this Report.

judicial foreclosure) will be possible. Some opinion recipients request that the opinion giver add a reference to the availability of non-judicial foreclosure. Depending on the law of the Opinion Jurisdictions, and recognizing that the comfort is subject to applicable law, such a reference may be able to be easily provided by the opinion giver or it may require a lengthy, reasoned opinion.³⁵ The opinion giver also should be aware of the ethical issues attendant to disclosing remedies not covered properly in transaction documents as initially drafted by counsel for the opinion recipient. See Section 1.1.b of Real Estate Opinion Guidelines.

(g) An alternative to the more specific language of the assurance in this qualification, such as that in clauses (i) through (iii) in the Illustrative Opinion Letter, is what is known as the practical realization approach. For example: “such unenforceability does not make the Transaction Documents legally inadequate for the practical realization of the principal benefits or security intended to be provided thereby, subject to the economic consequences of any delay which may result from applicable law.” While this is sometimes referred to as the traditional approach³⁶ and is still sometimes encountered in opinion letters in unsecured transactions, its use has been criticized for, among other things, its apparent ambiguity and subjectivity. Where used, it is often accompanied with exceptions as to delay and cost, which also are unnecessary and may be confusing because such cautions relate to exigencies in the actual exercise of remedies, not to the subject of the opinion, which is the legal availability of them. The Committees discourage the use of the traditional practical realization assurance language.

4.4 Other Transaction-Related Qualifications.

(a) State law applicable to the transaction documents may require limitations for subjects that are of commonly recognized significance (materiality) and that can be addressed by appropriate drafting or negotiation of transaction terms, the “other transaction-related qualifications.” Matters such as usury limitations and choice of law may be qualified here, as well as effectiveness of provisions for assignment of rents, yield maintenance, and prepayment. Note that these matters do not relate to means or manner of exercise of rights, but to the existence of the right itself. This Report does not purport to provide examples, as these matters are ordinarily governed by varying state law. The qualifications noted in Paragraph 4.4 of the Illustrative Opinion Letter are meant merely to prompt consideration of the subjects.

(b) Opinion letters often exclude coverage of rights to release or indemnification due to a party’s own gross negligence or other bad actions. In some states, waiver or indemnity for negligence may be a concern, even if not gross negligence, and in those states the exception should cover all negligence and not be limited to gross negligence.

(c) A limitation as to assignments of rents might be expanded, in appropriate circumstances, to exclude any “true sale” or “true lease” opinion, as well as to disclaim any opinion that a purported absolute assignment of rents would be enforced as such and to note that the remedy for enforcement may be limited to the application for judicial appointment of a receiver.

4.5 Other General Qualifications.

In addition to the limitations provided by the bankruptcy exception, the equitable principles exception, the generic enforceability qualification, and other transaction-related qualifications, opinion letters often include qualifications thought generally applicable—the “other general qualifications”—that often pertain to the means or method of pursuing remedies. Examples are in Paragraph 4.5 of the Illustrative Opinion Letter.

³⁵ Assurance that the security document may be foreclosed relates to the content of the document. It does not assure that any particular holder of the document, whether the addressee or a person permitted to rely on the opinion as an assignee or successor of the addressee, satisfies requirements of applicable law to pursue the remedy. Thus, for example, if a holder of the mortgage is not the holder of the debt secured, and such status is required to foreclose, the assurance that the document can be foreclosed should not be read as meaning that the holder of the mortgage is qualified to foreclose it. If an assurance or opinion is intended to cover the rights of a particular holder of the mortgage, it is to be separately and expressly addressed.

³⁶ This approach was referred to as “encrusted with tradition.” *TriBar Closing Opinions Report*, *supra* note 32, § 3.4.1, at 626.

However, many practitioners are more selective in adding limitations, and do not use an exhaustive “laundry list” of qualifications or other limitations because the bankruptcy exception, the equitable principles exception, and the generic enforceability qualification, if written properly, perhaps along with a selective list, may be sufficient. Furthermore, their use should avoid the need for an exhaustive laundry list of standardized qualifications or other limitations.

4.6 Exclusions.

(a) Opinion letters also will exclude coverage of certain law. As in the case of assumptions (see discussion Paragraph 2.1(c) above), the exclusion from the opinion letter of the items identified as exclusions in Paragraph 4.6 of the Illustrative Opinion Letter language may be implied by customary practice whether or not the opinion letter so states, and some opinion givers therefore believe it is unnecessary to state such exclusions in their opinion letters. The legal issues covered in Paragraph 4.6 of the Illustrative Opinion Letter must be explicitly addressed if at all—opinions on such subjects are never implied. It follows that if an opinion on such a subject is explicitly addressed, the implicit exclusion no longer applies; and if the opinion sets forth the list of exclusions explicitly, the exclusion pertaining to the subject must be deleted or adapted into a specific limitation to the explicit opinion. Notable within the exclusions in the Illustrative Opinion Letter Paragraph 4.6 are items (g), (j), and (k), which exclude matters of local law, zoning and land use matters, and environmental matters.

(b) The opinion giver should consider whether any exclusions relating to federal law are needed if federal law is not generally covered pursuant to the definition of law discussed in Paragraph 1.3 above. Omission of any exclusion listed in the Illustrative Opinion Letter should not be taken to imply that coverage of the omitted subject is intended.

(c) Exclusion (h) of the Illustrative Opinion Letter language excludes an opinion as to the characterization of the transaction. Some opinion givers prefer to be more specific as to possible characterization issues than the general statement in the example. Characterization issues may include whether the transaction constitutes a financing as opposed to a joint venture, lease, assignment, or sale; whether an assignment of rents effects an absolute assignment as opposed to an encumbrance; whether a lease or sale constitutes a true lease or true sale; or other characterizations. Some may limit this exclusion by adding after Exclusion (h): “except to the extent that the enforceability of remedies against the borrower or the guarantor set forth in the transaction documents is dependent on the characterization of the transaction expressed by the parties to it.” The latter phrase, or another statement addressing the issue, might add to the assurance within the generic enforceability qualification. See discussion Paragraph 4.3 above. On the other hand, where judicial recharacterization of some or all of a transaction is a real possibility, an unqualified exception (or, where cost justified, a “reasoned” opinion analyzing the issues) may be appropriate.

4.7 Knowledge.

(a) Opinion givers have become less comfortable relying on the position that limiting a statement to the “knowledge” of the opinion giver provides sufficient protection from a claim—even an unfounded claim—based on facts later discovered. At a minimum, such a claim might be expensive and time consuming because it might be difficult to defeat on a motion to dismiss or a motion for summary judgment. For that reason, opinion givers have moved away from providing confirmations that are purely factual, such as the absence of litigation (see Paragraph 3.11 above).

(b) Whether or not specifically referred to in the opinion letter itself, the knowledge of the opinion giver may be relevant to considerations of professional responsibility such as those discussed in the Introduction above, and to issues of justifiable reliance discussed in Paragraph 1.5 above.

(c) Where the concept of the “knowledge” of the opinion giver is used in the opinion letter, it is useful to include a definition specifying whose knowledge is relevant. In the event the word “knowledge” is used in an opinion letter, a sample formulation follows:

As used in this Opinion Letter, “Actual Knowledge” means, without investigation, analysis, or review of court or other public records or our files, or inquiry of persons, with respect to the undersigned law firm (the “Opinion Giver”), the conscious awareness of facts or other information by the Primary Lawyer or Primary Lawyer Group. “Primary Lawyer” means [the lawyer in the Opinion Giver’s organization who signs the Opinion Letter;] any lawyer in the Opinion Giver’s organization who has active involvement in negotiating the Transaction, preparing the Transaction Documents, or preparing the Opinion Letter; and, solely as to information relevant to a particular opinion issue or confirmation regarding a particular factual matter (*e.g.*, pending or threatened legal proceedings), any lawyer in the Opinion Giver’s organization who is primarily responsible for providing the response concerning that particular opinion issue or confirmation. “Primary Lawyer Group” means all of the Primary Lawyers when there is more than one.

V. USE OF THE OPINION LETTER

5.1 Use.

(a) An opinion giver’s liability under an opinion letter is grounded in the reasonable and foreseeable reliance of the opinion recipient. Such reliance is dependent on the nature and context of the opinion letter, as well as the identity of the opinion recipient, the opinion recipient’s (and its counsel’s) pre-existing knowledge of the relevant law, its familiarity with applicable customary practice, the passage of time, and other relevant circumstances, each of which may be significantly different for a subsequent investor than for the original addressee. That such interests and circumstances may vary should remind the opinion giver to prepare the opinion letter in light of such potential reliance, avoiding shortcuts or employment of some convention understood by or acceptable to the recipient but not meeting commercial standards of customary practice.

(b) Concern over the disparate interests and circumstances of reliance by an indeterminate group may lead opinion givers to restrict reliance on an opinion letter to a limited group, such as the named addressee and other specifically identified parties or classes of persons such as assignees from time to time of the named recipient’s interest in the note and security documents; and sometimes even to state that the opinion letter only may be delivered to such named or identified persons. A compromise sometimes struck is to allow the opinion letter to be delivered to assignees but not relied on by them. If there may be more than one assignee, whether all may rely should be specifically addressed. In such cases, especially if there may be numerous opinion recipients or assignees, the opinion giver should consider whether to require that a single party be appointed as the agent or representative of claimants in the event of any action regarding the opinion letter or as the person to settle any potential claims.

(c) It is not appropriate to request that counsel to the opinion recipient be entitled to rely on the opinion letter.

5.2 Effective Date; No Obligation to Update.

(a) An opinion letter speaks only as of its date and should not be implied to cover acts, omissions, or other matters occurring after the delivery of the opinion letter.

(b) An opinion giver has no duty to notify the opinion recipient of any changes to applicable law after the date of the opinion letter, or of other circumstances occurring after such date that might affect the opinions in the opinion letter.

(c) The points above in this Paragraph 5.2 are implied and, although often expressed in opinion letters, do not need to be stated expressly in an opinion letter. See discussion Paragraphs 3.7 and 3.8.

5.3 Governing Law.

The law governing the opinion letter and potential liability under it will not necessarily be the same as the law governing the transaction documents. Although this issue is implicit in every opinion letter, it generally

has not been the subject of express treatment within opinion letters that the Committees have seen. From the standpoint of professional liability, the standard of care of the opining lawyer ordinarily would be the standard recognized in the opinion giver's practice jurisdiction.

5.4 Disclaimer of Implied Opinions.

(a) An opinion letter should be read as dealing only with the legal issues expressly stated in the opinion letter. The opinion recipient should not read into the opinion letter any implied or inferred opinions.

(b) Further, as stated in the Customary Practice Statement, a "departure from customary practice is not implied and should not be inferred unless the departure is clear in the opinion letter."

5.5 Expression of Professional Judgment.

Customary practice provides that opinion letters are expressions of professional judgment and not guarantees of particular results. Some practitioners prefer to expressly incorporate this concept into the text of the opinion letter, but it is unnecessary. Whether or not stated in the text of the opinion letter, an opinion letter is an expression of professional judgment and not a guarantee that a court or other tribunal will reach a particular result.

5.6 Signatures.

(a) How an opinion is signed will vary from opinion giver to opinion giver, but an opinion recipient will generally expect that the opinion letter is the expression of the entire firm and not solely of the individual who signs the opinion letter on the firm's behalf. It is often the practice to sign the name of the firm and designate the author, and perhaps other key transaction participants, with initials at the left margin.

(b) Electronically provided signatures generally are effective, but current custom still dictates an ink-signed original to be delivered at closing.³⁷

³⁷ See Electronic Records and Signatures in Commerce Act, 15 U.S.C. §§ 7001–7006 (2006); UNIF. ELEC. TRANSACTIONS ACT, 7A pt. 1 U.L.A. 211–299 (2002 & Supp. 2012).

CHAPTER THREE:
ILLUSTRATIVE LANGUAGE OF A REAL ESTATE FINANCE OPINION LETTER

[date]

[Name and Address of Opinion Recipient]

Re: \$[] Loan (the “**Loan**” or the “**Transaction**”) from [] (the “**Lender**”) to [] (the “**Borrower**”) [guaranteed by [] (the “**Guarantor**”).

Ladies and Gentlemen:

We provide to you this letter (this letter, including any attachments, this “**Opinion Letter**”) at the request of the above-referenced Borrower and the Guarantor pursuant to Section [] of the [Agreement] described below.

I. BACKGROUND

1.1 Transaction Documents. We have acted as counsel to the Borrower and the Guarantor in connection with the preparation of the following documents relating to the Transaction:

- (a) Promissory Note dated as of _____, made by the Borrower (the “**Note**”).
- (b) [Mortgage/Deed of Trust/Deed to Secure Debt] dated as of _____, executed by the Borrower (the “**Mortgage**”) with respect to certain property including real property located [briefly describe location of property] and more particularly described in the Mortgage (such real property, the “**Real Property**”).
- (c) Assignment of Leases and Rents dated as of _____, executed by the Borrower (the “**Assignment of Leases**”).
- (d) Security Agreement dated as of _____, executed by the Borrower (the “**Security Agreement**”).
- (e) Loan Agreement dated as of _____, executed by the Borrower and the Lender (the “**Agreement**”).
- (f) Guaranty dated as of _____, executed by the Guarantor (the “**Guaranty**”).

The documents described in items (a) through (f) above are referred to in this Opinion Letter as the “**Transaction Documents**.” The Transaction Documents described in items (a) through (e) above are referred to in this Opinion Letter as the “**Borrower Transaction Documents**.” The Transaction Documents described in items (b) through (d) above are referred to in this Opinion Letter as the “**Security Documents**.” The Real Property, together with all other property described in any of the Security Documents in respect of which provision is made by the Security Documents for a lien or security interest, is referred to in this Opinion Letter as the “**Collateral**.”

1.2 Authority Documents. In connection with this Opinion Letter we also have reviewed the following documents (collectively, the “**Authority Documents**”):

- (a) (i) [Certificate of Formation] of Borrower as filed in the office of the [Secretary of State of []] and certified in the Public Authority Documents described below; and (ii) Operating Agreement of Borrower dated [] as certified to us in the Client Certificates described below (collectively, the “**Borrower Organizational Documents**”).
- (b) [Consent/Resolution of partners, members, board of directors, or other necessary persons of Borrower] as certified to us in the Client Certificates.
- (c) (i) [Certificate of Formation] of the Guarantor as filed in the office of the [Secretary of State of []] and certified in the Public Authority Documents described below; and (ii) Operating Agreement of the

Guarantor dated [] as certified to us in the Client Certificates described below (collectively, the “**Guarantor Organizational Documents**”).

(d) [Consent/Resolution of partners, members, board of directors, or other necessary persons of the Guarantor] as certified to us in the Client Certificates.

(e) (i) [certificate of status of Borrower issued by state of Borrower’s organization, dated []]; (ii) [certificate(s) of status of Borrower in any other states in which the Real Property is located, dated []]; and (iii) [certificate of status of the Guarantor issued by state of the Guarantor’s organization, dated []]; and (iv) [where relevant, certificates concerning tax status, certificates concerning Uniform Commercial Code filings, or certificates concerning title registration or ownership] (collectively, the “**Public Authority Documents**”).

(f) Certificate of Borrower and Certificate of the Guarantor attached hereto (the “**Client Certificates**”).

1.3 Opinion Jurisdictions. The statutes, the judicial and administrative decisions, and the policies, rules, and regulations duly promulgated by the governmental agencies (collectively “**Law**”) covered by the opinions expressed in this Opinion Letter are limited to the Law of the State of [] (the “**State**”), [and the [Limited Liability Company Act and General Corporation Law] of the State of [Insert name of state where entity was formed] (“**Entity State**”)] (such jurisdictions, collectively, the “**Opinion Jurisdictions**”), in each case as currently in effect. [Except as set forth in Paragraphs 3.1, 3.2, and 3.3 below,] we express no opinion concerning the Law of any other jurisdiction, [the other Law of [Entity State,] or the effect thereof. Further, and without limiting the foregoing provisions of this Paragraph or other limitations on coverage, our opinions in this Opinion Letter relate only to such Law of the Opinion Jurisdictions that we, in the exercise of customary professional diligence, would reasonably recognize as being directly applicable to any or all of the Borrower, the Guarantor, or the Transaction. [References in this Opinion Letter to the “**Uniform Commercial Code**” or “**U.C.C.**” refer to the Uniform Commercial Code as in effect in the State.]

1.4 Scope of Review. [In connection with the opinions hereinafter set forth, we have reviewed copies or originals of the Transaction Documents and the Authority Documents, and we have given consideration to such matters of Law [and facts], as we have deemed appropriate, in our professional judgment, to render such opinions.]

1.5 Reliance on Other Sources Without Investigation. We have relied, without investigation or analysis, upon information in the Public Authority Documents. Except to the extent the information constitutes a statement, directly or in practical effect, of any legal conclusion at issue, we also have relied, without investigation or analysis, upon the information contained in representations and warranties made by both the Borrower and the Guarantor in the [Transaction Documents] and on information provided in the Client Certificates.

II. ASSUMPTIONS

2.1 Assumptions. In rendering this Opinion Letter, we have relied, without investigation, upon the assumptions set forth below:

(a) A Borrower or Guarantor who is a natural person, and natural persons who are involved on behalf of either of the Borrower or the Guarantor, have sufficient legal capacity to enter into and perform the Transaction or to carry out their role in it.

(b) The Borrower holds the requisite title and rights in and to any property involved in the Transaction.

(c) Each party to the Transaction (other than the Borrower and the Guarantor) has satisfied those legal requirements that are applicable to it to the extent necessary to make the Transaction Documents enforceable against it, and each such party’s obligations set forth therein are enforceable against it in accordance with all stated terms.

(d) Each party to the Transaction (other than the Borrower and the Guarantor) has complied with all legal requirements pertaining to its status as such status relates to its rights to enforce the Transaction Documents against the Borrower and the Guarantor.

(e) Each Transaction Document, Authority Document, and other document submitted to us for review is accurate and complete, each such document that is an original is authentic, each such document that is a copy conforms to an authentic original, and all signatures on each such document are genuine. The form and content of all Transaction Documents submitted to us as unexecuted drafts do not differ in any respect relevant to this Opinion Letter from the form and content of such Transaction Documents as executed and delivered.

(f) Each Public Authority Document is accurate, complete, and authentic, and all official public records (including their due and proper recordation or filing, and their due and proper indexing) are accurate and complete.

(g) The Security Documents have been or will be duly and properly recorded or filed and duly and properly indexed in all places necessary (if and to the extent necessary) to create the encumbrance and lien as provided therein.

(h) The description of the Collateral is accurate and reasonably identifies the Collateral.

(i) Legally adequate consideration has been given for the Transaction and the obligations of the Borrower and the Guarantor in the Transaction Documents.

(j) [There has not been any mutual mistake of fact or misunderstanding, fraud, duress, or undue influence.]³⁸

(k) [The conduct of the parties to the Transaction has complied and will continue to comply with any requirement of good faith, fair dealing, and conscionability.]

(l) [The Lender and any agent acting for the Lender in connection with the Transaction have acted in good faith and without notice of any defense against the enforcement of any rights created by the Transaction, or of any adverse claim to any property, lien, or security interest transferred, or created as part of the Transaction, or of any agreement, or court or administrative order, writ, judgment, or decree that would be violated by entering into the Transaction, or by execution, delivery, or performance of the Transaction Documents.]

(m) [There are no agreements or understandings among the parties, written or oral, and there is no usage of trade or course of prior dealing among the parties that would, in either case, define, supplement, or qualify the terms of the Transaction Documents.]

(n) [All statutes, judicial and administrative decisions, and rules and regulations of governmental agencies, constituting the Law of the Opinion Jurisdictions are generally available (i.e., in terms of access and distribution following publication or other release) to lawyers practicing in the Opinion Jurisdictions, and are in a format that makes legal research reasonably feasible.]

(o) [The constitutionality or validity of a relevant statute, rule, regulation, or agency action is not in issue unless a reported decision in the Opinion Jurisdictions has specifically addressed but not resolved, or has established, its unconstitutionality or invalidity.]

(p) [Placeholder if necessary and appropriate for other state, entity, or transaction-specific assumptions, such as choice of law.]

³⁸ Many opinion givers include assumptions as to the issues in some or all of the bracketed assumptions, Paragraphs (j) and following. Please refer to the corresponding sections of Chapter Two above for a full explanation of these bracketed assumptions, and more generally for a discussion of all of the provisions of this Illustrative Opinion Letter, bracketed and not.

III. OPINIONS

Based upon and subject to the foregoing assumptions and other matters, and to the exceptions, exclusions, qualifications, and other limitations set forth in this Opinion Letter, we are of the opinion that:

3.1 Status. The Borrower is a [limited liability company], validly existing in [its jurisdiction of organization]. [Based solely on the Public Authority Documents, the Borrower is in good standing in [its jurisdiction of organization, and the Borrower is qualified to do business in] the State.] The Guarantor is a [corporation], validly existing in [its jurisdiction of organization]. [Based solely on the Public Authority Documents, the Guarantor is in good standing in [its jurisdiction of organization].]

3.2 Power. The Borrower has the [limited liability company] power to execute and deliver the Borrower Transaction Documents. The Guarantor has the [corporate] power to execute and deliver the Guaranty.

3.3 Authorization. All [limited liability company] actions or approvals by the Borrower, [and its [members/managers],] necessary to bind the Borrower under the Transaction Documents have been taken or obtained. All [corporate] actions or approvals by the Guarantor, [and its [directors/shareholders],] necessary to bind the Guarantor under the Guaranty have been taken or obtained.

3.4 Execution and Delivery. The Borrower has duly executed and delivered the Borrower Transaction Documents. The Guarantor has duly executed and delivered the Guaranty.

3.5 Enforceability. The Borrower Transaction Documents are enforceable against the Borrower in accordance with their terms. The Guaranty is enforceable against the Guarantor in accordance with its terms.

3.6 Form of Security Documents. The Mortgage is in a form sufficient to create a lien on all right, title, and interest of the Borrower in and to the Real Property. Further, the [Security Agreement] is in a form sufficient to create a security interest in those items of the personal property stated as constituting part of the Collateral in which a security interest can be created under Article 9 of the Uniform Commercial Code.

3.7 No Breach or Violation. The borrowing of the Loan, and the execution and delivery by the Borrower of, and performance of its payment obligations in, the Borrower Transaction Documents, do not: (i) violate the Borrower Organizational Documents, (ii) breach any existing obligation of the Borrower under any of the agreements and documents specified in Attachment [] hereto, or (iii) violate any existing obligation of the Borrower under any orders, if any, which are identified as such in Attachment [] hereto, which the Borrower has confirmed to us are the only court and administrative orders that name the Borrower and are specifically directed to it or its property. Execution and delivery by the Guarantor of, and performance of its payment obligations in, the Guaranty, do not: (x) violate the Guarantor Organizational Documents, (y) breach any existing obligation of the Guarantor under any of the agreements and documents specified in Attachment [] hereto, or (z) violate any existing obligation of the Guarantor under any orders, if any, which are identified in Attachment [] hereto, which the Guarantor has confirmed to us are the only court and administrative orders that name the Guarantor and are specifically directed to it or its property. Our opinions in this Paragraph do not extend to any action or conduct of either the Borrower or the Guarantor that a Transaction Document may permit but does not require. In this Opinion Letter, the agreements and documents referred to in clauses (ii) and (y) above in this Paragraph sometimes are referred to as “**Other Agreements**,” and the orders referred to in clauses (iii) and (z) above in this Paragraph sometimes are referred to as “**Court Orders**.” For purposes of this Paragraph, in addition to the other assumptions in this Opinion Letter, we assume that Other Agreements and Court Orders, if any, governed by Law other than that of the Opinion Jurisdictions, would be enforced to the same extent, and only to the same extent, as under the Law of the Opinion Jurisdictions.

3.8 No Violation of Law. The execution and delivery by the Borrower of, and performance by the Borrower of its payment obligations in, the Transaction Documents, neither are prohibited by applicable provisions of Law comprising statutes or regulations duly enacted or promulgated by the State (“**Statutes or**

Regulations”) nor subject the Borrower to a fine, penalty, or other similar sanctions, under any Statutes or Regulations. Execution and delivery by the Guarantor of, and performance by the Guarantor of its payment obligations in, the Guaranty, neither are prohibited by applicable provisions of Statutes or Regulations nor subject the Guarantor to a fine, penalty, or other similar sanctions, under any Statutes or Regulations. Our opinions in this Paragraph do not extend to any action or conduct of either the Borrower or the Guarantor that a Transaction Document may permit but does not require.

3.9 Choice of Law. [Except as expressly stated below in this Paragraph, this] [This] Opinion Letter does not express any opinion as to the enforceability of any choice of law or analogous provisions in the Transaction Documents. [If the first optional beginning to this paragraph is chosen, insert a specific choice of law opinion here, as appropriate. See discussion, Chapter Two. If no choice of law opinion is given, an express exclusion of choice of law might be stated in Paragraph 4.6 below instead of in this part of the opinion letter (as might an exclusion as to usury).]

3.10 Usury. [No opinion is expressed by this Opinion Letter with respect to usury or whether any amounts might constitute unenforceable penalties.] [In the alternative, if necessary, qualify the opinion because a usury opinion is implied by most Enforceability Opinions and most No Violation of Law Opinions. See discussion, Chapter Two.]

3.11 Legal Proceedings Confirmation. [In addition to the foregoing opinions, we inform you that, based solely on a review of our litigation docket, [except as disclosed in Schedule ☐ to ☐] we are not representing the Borrower or the Guarantor in any pending litigation, in which either is a named defendant, in which the pleadings request as relief that any of the obligations of the Borrower or the Guarantor under the Transaction Documents be declared invalid or subordinated or that the performance by either of the Borrower or the Guarantor of the Transaction Documents be enjoined.]

IV. CERTAIN LIMITATIONS

The opinions set forth in this Opinion Letter are subject to the following exceptions, exclusions, qualifications, and other limitations:

4.1 Bankruptcy Exception: The effect of bankruptcy, insolvency, fraudulent transfer, reorganization, receivership, moratorium, and other similar Law affecting the rights and remedies of creditors generally.

4.2 Equitable Principles Exception: The effect of general principles of equity, whether applied by a court of law or equity, including, without limitation, principles governing the availability of specific performance, injunctive relief, and other equitable remedies, and principles of diligence, good faith, fair dealing, reasonableness, conscionability, materiality, and other equitable defenses.

4.3 Generic Enforceability Qualification[, with Assurance]: Certain provisions of the Transaction Documents may not be enforceable; nevertheless, subject to the other limitations set forth in this Opinion Letter, any such unenforceability will not render the Transaction Documents invalid as a whole or preclude (i) the judicial enforcement in accordance with applicable Law of the obligation of the Borrower to repay as provided in the Note the principal, together with interest thereon (to the extent not deemed a penalty), and the judicial enforcement in accordance with applicable Law of the obligation of the Guarantor to repay as provided in the Guaranty the amounts set forth in the Guaranty (to the extent not deemed a penalty and subject to defenses of a surety that have not been or cannot be waived); (ii) the acceleration of the obligation of the Borrower to repay such principal, together with such interest, upon a material default by the Borrower in the payment of such principal or interest [or upon a material default by the Borrower in any other material provision of the Transaction Documents]; and (iii) the foreclosure in accordance with applicable Law of the lien on and security interest in the Collateral created by the Security Documents upon maturity or upon acceleration pursuant to clause (ii) above.

4.4 Other Transaction-Related Qualifications: The opinion given in Paragraph 3.5 is further limited by the effect of Law that:

(a) [consider: assignment of rents issues, usury, guaranties, environmental indemnities, jury trial waivers, special issues in arbitration, foreign trustees, real party in interest law, etc.]

4.5 Other General Qualifications: The effect of generally applicable rules of Law that:

- (a) limit or affect the enforceability of a waiver of a right of redemption;
- (b) limit or affect the enforceability of any provision that purports to prevent any party from becoming a mortgagee in possession, notwithstanding any enforcement actions taken under the Security Documents;
- (c) limit or affect the enforceability of provisions for late charges, prepayment charges, or yield maintenance charges; acceleration of future amounts due (other than principal), without appropriate discount to present value; liquidated damages; penalties; or interest on interest;
- (d) limit or affect the enforceability of provisions that provide for the acceleration of indebtedness upon any transfer, encumbrance, or change in the control, ownership, or management of any party;
- (e) limit or affect the enforceability of provisions purporting to assign the rents, issues, and profits of the Collateral;
- (f) limit the enforceability of provisions releasing, exculpating, or exempting a party from, or requiring indemnification of a party for, liability for its own action or inaction, to the extent the action or inaction involves [gross] negligence, recklessness, willful misconduct, or unlawful conduct;
- (g) limit or affect the enforcement of provisions of a contract that purport to require waiver of the obligations of good faith, fair dealing, diligence, and reasonableness;
- (h) provide that forum selection clauses in contracts are not necessarily binding on the court(s) in the forum selected;
- (i) limit the availability of a remedy under certain circumstances where another remedy has been elected;
- (j) limit the right of a creditor to use force or cause a breach of the peace in enforcing rights;
- (k) relate to the sale or disposition of collateral, or the requirements of a commercially reasonable sale, including, without limitation, statutory cure provisions, rights of reinstatement, and limitations on deficiency judgments;
- (l) where less than all of a contract may be unenforceable, may limit the enforceability of the balance of the contract to circumstances in which the unenforceable portion is not an essential part of the agreed exchange;
- (m) govern and afford judicial discretion regarding the determination of damages and entitlement to attorneys' fees and other costs;
- (n) in the absence of a waiver or consent, may discharge the Guarantor to the extent that (i) action by a creditor impairs the value of collateral securing guaranteed debt to the detriment of the Guarantor, or (ii) guaranteed debt is materially modified;
- (o) may permit a party who has materially failed to render or offer performance required by the contract to cure that failure unless (i) permitting a cure would unreasonably hinder the aggrieved party from making substitute arrangements for performance, or (ii) it was important in the circumstances to the aggrieved party that performance occur by the date stated in the contract;
- (p) impose limitations on attorneys' or trustees' fees; or

(q) limit or affect the enforceability of provisions that provide for the application of insurance or condemnation proceeds to reduce indebtedness.

4.6 Exclusions. No opinions are implied beyond those expressly stated in this Opinion Letter. Without limiting the generality of the preceding sentence, unless explicitly addressed in this Opinion Letter, the opinions and confirmations set forth in this Opinion Letter do not address any of the following legal issues, and we specifically express no opinion with respect thereto:

(a) securities Law, “Blue Sky” Law, and Law relating to commodity (and other) futures and indices and other similar instruments;

(b) margin regulations;

(c) pension and employee benefit Law and regulations;

(d) antitrust and unfair competition Law;

(e) Law concerning filing and notice requirements, other than requirements applicable to charter-related documents such as a certificate of merger;

(f) compliance with fiduciary duty requirements;

(g) the statutes and ordinances, the administrative decisions, and the rules and regulations of counties, towns, municipalities, and special political subdivisions, and judicial decisions to the extent that they deal with any of the foregoing matters in this Paragraph (“**Local Law**”);

(h) the characterization of the Transaction;

(i) the creation, attachment, perfection, or priority of a lien, or security interest in, or to, Collateral, or enforcement of a security interest in Collateral comprising personal property;

(j) environmental Law;

(k) zoning, land use, condominium, cooperative, subdivision, and other development Law;

(l) tax Law;

(m) patent, copyright and trademark, state trademark, and other intellectual property Law;

(n) racketeering Law;

(o) health and safety Law;

(p) labor Law;

(q) Law concerning (i) national and local emergency, (ii) possible judicial deference to acts of sovereign states, and (iii) criminal and civil forfeiture;

(r) Law of general application to the extent it provides for criminal prosecution (e.g., mail fraud and wire fraud statutes);

(s) bulk transfer Law;

(t) Law concerning access by the disabled and building codes;

(u) title to any property, the characterization of any property as real property, personal property, or fixtures, or the accuracy or sufficiency of any description of collateral or other property; and

(v) [Placeholder if necessary and appropriate for possible others such as: anti-terrorism; anti-money laundering; arbitration; know-your-borrower; Equal Credit Opportunity Act; Fair Debt Collection Practices Act; consumer protection Law; Servicemembers Civil Relief Act; Troubled Asset Relief Program/Term Asset-Backed Securities Loan Facilities; Interstate Land Sales Act; federal Assignment of Claims/Contracts Acts; appointment of the Lender as attorney-in-fact; choice of law; usury; etc.].

V. USE OF THIS OPINION LETTER

5.1 Use. The opinions expressed in this Opinion Letter are solely for the Lender's use in connection with the Transaction for the purposes contemplated by the Transaction Documents. Without our prior written consent, this Opinion Letter may not be used or relied upon by the Lender for any other purpose whatsoever or relied on by any other person[, except that this Opinion Letter may be delivered by the Lender to an assignee from time to time for value in good faith of all right, title, and interest in and to the [Note][Transaction Documents], and such assignee may rely on this Opinion Letter as if it were addressed and had been delivered to it on the date hereof]. This Opinion Letter may be delivered (i) to a regulatory agency having supervisory authority over the Lender for the purpose of confirming the existence of this Opinion Letter; (ii) to the court or arbitrator and parties to a litigation or arbitration in connection with the assertion of a defense as to which this Opinion Letter is relevant and necessary; and (iii) to other parties as required by the order of a court of competent jurisdiction in the United States. Nothing in the preceding sentences, however, shall give any person entitled to rely upon this Opinion Letter any greater rights with respect to this Opinion Letter than those of the Lender as of the date hereof, or shall provide or imply any opinion being given with respect to an assignee that depends on the identity or characteristics of the named assignee or other circumstances than those of the original Opinion Letter.

5.2 Effective Date; No Obligation to Update. This Opinion Letter is rendered as of its date, and we express no opinion as to circumstances or events that may occur subsequent to such date. Further, we undertake no, and hereby disclaim any, obligation to advise you of any changes in the applicable Law or relevant facts or any new developments that might affect any matters or opinions set forth herein.

Very truly yours,
[SIGNATURE OF OPINION GIVER FIRM]

[PRIMARY LAWYERS INITIALS]

ATTACHMENTS:

Attachment []: Other Agreements of the Borrower
Attachment []: Court Orders Regarding the Borrower
Attachment []: Other Agreements of the Guarantor
Attachment []: Court Orders Regarding the Guarantor