FINANCING LEGAL OPINIONS IN THE TIME OF COVID

MARILYN C. MALONEY, *Houston*
Liskow & Lewis

State Bar of Texas
14TH ANNUAL
ADVANCED REAL ESTATE STRATEGIES
December 10-11, 2020

CHAPTER 7.2

2020 Liskow & Lewis

TABLE OF CONTENTS

FINANCING LEGAL OPINIONS IN THE TIME OF COVID

I. INTRODUCTION

The coronavirus pandemic has changed every aspect of our lives, so it is no surprise that the practice of legal opinions has come into scrutiny. The paper will examine third party legal opinions in financing transactions to consider the effect of foreclosure moratoria, lockdown and "stay at home" directives, and force majeure, impossibility, impracticability, and frustration of purpose on those opinions.

Following the rapid lockdown that occurred in March and the resulting moratoria against foreclosures or evictions, a number of groups that give and receive third party financing opinions have held informal discussions by phone or Zoom, webinars, and formal committee meetings to identify any changes needed to be made to financing opinions as a result of these events. Those groups include, among others, the Working Group on Legal Opinions Foundation ("WGLO"), the Attorney's Opinion Committee of the American College of Real Estate Lawyers ("ACREL"), the Committee on Legal Opinions in Real Estate Transactions of the ABA Real Property, Trust and Estate Law Section ("RPTE") and the ABA Business Section Opinions Committee ("Business Law" and together with WGLO, ACREL, and RPTE, the "Opinion Groups"). These discussions have identified several issues that practitioners should consider when giving or accepting financing opinions after COVID.

II. AREAS OF CONCERN IN OPINIONS

Possible areas in which financing opinions might be impacted by the COVID pandemic include opinions as to enforceability of obligations, ability to enter into or perform obligations in accordance with law, and valid execution and delivery of documents. For instance, consider the various moratoria enacted in connection with the COVID epidemic, including provisions of the Coronavirus Aid, Relief, and Economic Security (CARES) Act that provided forbearance of enforcements against federally backed mortgage loans, the recent ban on residential evictions of the Center for Disease Control and Prevention of the US Department of Health and Human Resources in order to prevent the further spread of COVID 19, recent New York cases striking down UCC foreclosures of mezzanine debt due to the inability to conduct a commercially reasonable sale, local restrictions on evictions, such as those enacted in Austin prohibiting residential evictions through December 31, 2020, and the opinion of Texas Attorney General Ken Paxton regarding limitations on a trustee sale due to restrictions on public gatherings.

III. MORATORIA

Many members of the Opinion Groups believe that no revision to a financing opinion is required as a result of these and similar moratoria because they are already covered in the "bankruptcy exception" common in financing opinions, either as specifically listed in an opinion or impliedly included in an opinion based upon customary opinion practice. However, as noted below, some firms have made suggested additions to their opinions.

If a reference to a "bankruptcy exception" seems odd it is helpful to review the bankruptcy exception that many firms in the Opinion Groups use, discussed in Section V below. Also, if "customary opinion practice" is not clear, the review of several national reports regarding this supposedly common understanding of opinions will clarify the position of some firms in the Opinion Groups.

IV. OPINION REPORTS

A. 2012 Report

The Real Estate Finance Opinion Report of 2012, prepared by RPTE, ACREL, and the American College of Mortgage Attorneys, Opinions Committee ("ACMA") (the "***2012 Report***"), appears at 47 REAL PROP. TR. & EST. L. J. 213 (2012) and THE ACREL PAPERS 121 (SPRING 2013). The 2012 Report consists of a guide or commentary to a real estate finance opinion letter and also includes illustrative language of a real estate finance opinion letter (the "***2012 Illustrative Form***"). The 2012 Illustrative Form is attached to these materials as Schedule 1. The 2012 Report, as well as the other opinion reports cited in these materials, is also available at https://www.americanbar.org/groups/business_law/committees/opinions/tribar/.

B. Local Counsel Supplement

While the 2012 Report discusses issues that are of concern both to lead counsel and local counsel, it notes that it was not intended to address specific concerns of local counsel. The same groups that drafted the 2012 Report prepared a report focused specifically on local counsel issues. *Local Counsel Opinion Letters - A Supplement to the Real Estate Finance Opinion Report of 2012* (the "***Local Counsel Supplement***" and, together with the 2012 Report, the "***Real Estate Finance Reports***") was published at 51 REAL PROP. TR. & EST. L. J. 167 (2016). The Local Counsel Supplement is intended to be read in conjunction with the 2012 Report and also consists of a commentary and illustrative opinion.

C. Customary Practice Reports

Several reports addressing "customary practice" in the giving and receiving of third party opinions are

helpful in the preparation of real estate finance opinions. These reports were drafted by one or more of the Opinion Groups: *Real Estate Opinion Letter Guidelines*, 38 REAL PROP. PROB. & TR. J. 241 (2003), *Statement on the Role of Customary Practice in the Preparation and Understanding of Third-Party Legal Opinions*, 63 BUS. LAW 1277 (2008), and *Statement of Opinion Practices and Core Opinion Principles*, 74 BUS. LAW 801 (2019) (the "***Customary Practice Reports***"). Customary practice attempts to set forth the common understanding of opinion givers and opinion recipients in the rendition of third party closing opinions.

V. THE BANKRUPTCY AND GOVERNMENTAL ACTION EXCEPTIONS

The exception that is generally referred to as the "bankruptcy exception" is broader than the term would suggest. The formulation that appears in the 2012 Illustrative Form is:

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

Another exception of the 2012 Illustrative Form excludes any opinion on:

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

This form of bankruptcy exception includes the effect of a moratorium as well as the effect of bankruptcy laws generally. The 2012 Report identifies the scope of the bankruptcy opinion (and clarifies that it applies to the entire opinion and not just to the enforceability opinion):

> 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.

47 Real Prop. Tr. & Est. L. J. 213 at 251.

If a particular firm's bankruptcy exception is not as complete as that reflected in the 2012 Illustrative Form, customary practice may fill the gap. Customary practice is a concept that is addressed in the Customary Practice Reports as well as the Real Estate Finance Reports. Customary practice suggests that in the giving of third party opinions the terms commonly used by opinion givers and accepted by opinion recipients, as well as the level of diligence and review required, are subject to common understanding among opinion givers and recipients. As a result, the Customary Practice Reports identify certain assumptions, exceptions, and qualifications that they consider to be understood without the need to expressly state in an opinion. An example is the statement that "[t]he bankruptcy exception and equitable principles limitation apply to opinions even if they are not expressly stated." 74 Bus. Law 801 at 808.

Discussions among the various Opinion Groups indicate that a majority are comfortable that their standard opinion form already addresses moratoria. Practitioners may be hesitant to add a specific reference to a COVID moratorium as that might imply that the standard exception had not been adequate to cover the issue. However, other firms have decided to add a specific exception. At least one national law firm has added the following qualifier to its enforceability opinions regarding transactions in jurisdictions in which governmental actions have precluded evictions, foreclosures, or other actions:

> subject to the effect of any limitation on enforceability arising from the issuance or promulgation of executive or similar orders.

Another national law firm reports that it has included this qualification in its opinions:

> We express no opinion with respect to any laws, rules, regulations or orders concerning declared emergencies or the effect thereof on the opinions stated herein.

In determining whether to add a specific limitation to its opinions, a firm should be aware that the Real Estate Finance Reports and the Customary Practice Reports do not have the force of law. While they attempt to outline common understandings of opinion givers and recipients, a firm may be concerned that if a creditor is unable to enforce its lien due to a COVID moratorium it might argue that the general exception was too vague and did not call the creditor's attention to the particular issue. It may also be concerned that a judge handling such a case likely has no background in opinion practice generally, and surely has never studied these reports. This might be a particular concern for local counsel. Consider Texas counsel which is rendering an opinion to a New York lender. The Texas counsel is aware of the Attorney General's opinion limiting foreclosures due to Governor Abbott's limitations on outdoor gatherings, but doubtless the New York lender and its counsel will be unfamiliar with this local issue. Such a firm might take a more specific exception to avoid a dispute at a later time such as:

> The opinion contained above as to the enforceability of the Operative Documents is further subject to the qualification that the exercise of certain remedies under the Deed of Trust (including, without limitation, foreclosure) may be impacted by orders from federal, state, or local governmental authorities limiting (or purporting to limit) public or private gatherings (including, without limitation Executive Order GA-28 by the Office of the Governor of the State of Texas), whether in connection with the current COVID-19 pandemic or otherwise.

The Attorney General's opinion is attached as Schedule 2.

VI. FORCE MAJEURE, FRUSTRATION OF PURPOSE, IMPOSSIBILITY, IMPRACTICABILITY

Jason Bernhardt's paper, *Excuse Me! A Mixed Bag of Current Potential Issues Arising Due to COVID-19* included in the materials for this seminar, outlines the contractual and common law theories that are currently being used by lessees and others in an attempt to reduce or eliminate their obligations under leases and other contracts. These arguments seem to have been raised solely in the context of leases and operating contracts including sales contracts in which one party either cannot perform at all, or at least not as intended at the time of the execution of the contract. An opinion of lessee's or contractor's counsel as to the enforceability of a lease or major contract might be required in project financing and similar financings. If the impediment to performance is a governmental moratorium, it would seem that the same discussion in Section V should apply. While the 2012 Illustrative Form as well as Customary Practice Reports recognize express and implied limitations for "equitable remedies" it is not entirely clear that the force majeure/frustration of purpose/impossibility/impracticability arguments are equitable remedies. The stated language of the 2012 Illustrative Form is:

> "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."

However, the 2012 Report itself explains in greater detail the range of matters that might be considered incorporated into an equitable remedies exception, and specifically includes "requiring consideration of the impracticability or impossibility of performance at the time of attempted enforcement." 47 Real Prop. Tr. & Est. L. J. 213 at 252.

We are not aware of any consensus among the Opinion Groups on this issue. Again, an opinion giver should remember that the Real Estate Finance Reports do not have the force of law.

VII. UCC FORECLOSURES IN MEZZANINE DEBT

In a mezzanine financing the lender is not lending against a deed of trust on the real property but rather on a security interest in the equity interests of the owner of the real property. Two recent New York cases have issued preliminary injunctions halting UCC foreclosure sales of the equity interests under the applicable UCC. In *D2 Mark LLC v. OREI VI Investments, LLC* (Supreme Court of the State of NY, June 23, 2020) the court found that the creditor could not hold a sale that met the test of a commercially reasonable sale. In *Shelbourne BRF LLC v. SR 677 BWAY LLC* (Supreme Court of State of NY, August 3, 2020) the court issued a preliminary injunction against the UCC sale of equity interest on the grounds that a New York Administrative Order prohibiting the foreclosure of real property would apply to the sale of the borrower's equity interests. Even though the Administrative Order did not address UCC foreclosures, the court found that the value of the equity interests was directly tied to the value of the real estate.

Should an opinion giver make an express exception in its opinions for the inability to conduct an effective UCC sale of equity interests due to the pandemic? This would seem to be another instance in which the standard exceptions of a firm's financing opinions may address the issue. For instance, the 2012 Illustrative Opinion contains an express exception related 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." However, for the reasons noted above, a firm may decide to take a more specific exception in its opinion.

VIII. ELECTRONIC EXECUTION, NOTARIZATION, AND RECORDATION

After the initial orders restricting public gatherings and orders requiring all non-essential persons to remain at home, many transactions could not be completed with in-person closings and notarizations. The issue of whether execution of documents in remote (whether signed and scanned, signed with DocuSign, notarized in remote, or other methods) could be the subject of opinions that they were validly executed and in a form suitable for recordation. This issue was addressed in a recent webinar presented by WGLO on April 7, 2020 *COVID-19 Legal Opinion Considerations.* The panel discussed national issues including the issue of electronic execution, notarization, and delivery of documents during periods that parties were not allowed to attend closings in their offices either by company policies or due to local or state directives. Many of the concerns expressed on a national basis may not be concerns for purely Texas transactions, although multi-state transactions would still have to be considered for compliance with all applicable jurisdictions.

A. Texas UETA

Texas adopted the Texas Uniform Electronic Transactions Act in 2007, effective as of 2009, codified at Chapter 322 of the Texas Business and Commerce Code ("TUETA"). If both parties to a transaction agree that a transaction will be governed by TUETA, it would authorize execution of documents by electronic means. The definition is intentionally broad and includes "any technology having electrical, digital, magnetic, wireless, optical, electromagnetic, or similar capabilities." Tex. Bus. & Com. Code §322.002(5). Thus, if the parties consented to utilizing TUETA, it would be valid for loan documents to be executed in electronic form. It is important, however, to recall that the parties must consent in some fashion. An opinion giver may want to make assumptions in that regard.

B. Remote Online Notarization

Even if the parties have agreed to be governed by TUETA, the lockdown created difficulties in obtaining notarial acknowledgments. Texas is one of the states in the forefront of the adoption of the remote online notarization legislation. The Texas Remote Online Notary Act was adopted in 2018 and is codified at §121.006 of the Texas Civil Remedies and Practice Code. It provides that the requirement that a person personally appear before the notary may be satisfied by "appearing by an interactive two-way audio and video communication that meets the online notarization requirements under Subchapter C, Chapter 406, Government Code and rules adopted under that subchapter." Tex. Civ. Prac. & Rem. Code §121.006(c)(2). Thus, at least under Texas law, it would be possible for a Texas notary that has duly qualified as a remote online notary to take the acknowledgment of an individual by electronic means. *See*, G. Roland Love, *Updates: TREC, Title Examination Standards, Texas Survey Standards, and Online* Notarization, State Bar of Texas 42nd Annual Advanced Real Estate Law (2020); Dawn Lewallen, *eSignature Documents and Notarization: Drafting Considerations for eClosing Real Estate Transactions,* State Bar of Texas 29th Annual Advanced Real Estate Drafting (2018); Nicole Hadaway, *Online Notarizations and State Laws – When Can You Close Remotely?*, State Bar of Texas 40th Annual Advanced Real Estate Law (2018).

C. Governor Abbott's Suspension.

In the early days of the pandemic, the New York Governor issued an executive order suspending the requirement that a party physically appear before a notary for an effective acknowledgment. This

Governor's order was followed in many other states that did not have remote online notarization litigation in place at the beginning of the pandemic. These orders have been referred to as "RIN" or remote ink notary. Even though Texas had legislative authority for remote online notarization, the Office of the Attorney General of Texas requested Governor Abbott to suspend the requirement of Section 121.006(C)(1) of the Civil Practice and Remedies Code requiring physical appearance before a notary. Governor Abbott issued an initial suspension on April 10 that related only to documents such as medical powers of attorney and other medical documents. This was expanded on April 27, 2020 to include "real estate instruments" and remains in effect until the emergency declaration is terminated (the "***Suspension***"). Thus, even in the absence of an authorized online notary, it may be possible to execute certain real estate documents under the terms of the Suspension. The Governor's Suspension is attached as Schedule 3.

D. Electronic Recordation

Finally, even if electronic signatures and notarization are permitted, if the instrument is one that must be recorded under Chapter 11 of the Texas Property Code but the clerk of court of the particular county has not implemented electronic filings under Chapter 15 of the Property Code, this necessary step in the closing process may be unavailable. First American Title Company maintains a list of counties that accept electronic filings; at last count, less than half of the counties are able to accept electronic filings. The Suspension mandates that all Texas clerks of court accept documents for filing that are notarized as provided in the suspension.

E. Caveats

Even if a transaction is entirely within the State of Texas, an opinion giver should consider whether other parties to the transaction, such as a mortgage banker, Fannie Mae, Freddie Mac, or a title company, would accept this method of execution and notarization. In addition, the opinion giver may wish to make assumptions in the opinion (such as the consent of all parties to utilize TUETA, assume the validity of the remote online notarization or notarization pursuant to the Governor's waiver, or assume that the clerk of court of the applicable county will accept the document for filing) and these assumptions may not be acceptable to the opinion recipient. If the transaction and all of the parties are not entirely located in Texas, the opinion giver should consider whether other applicable states would recognize the Texas procedures.

IX. CONCLUSION

Each opinion giver and opinion recipient will have to make its own determination of whether it is comfortable giving or receiving an opinion with a specific exception or limitation arising from the COVID crisis. There does not appear to be a consensus that specific exceptions are necessary or whether opinion recipients will accept particular exceptions or limitations.

Schedule 1
2012 Illustrative Form
Attached

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.][1]

(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

[1] 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.

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.]

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

KEN PAXTON
ATTORNEY GENERAL OF TEXAS

August 1, 2020

Honorable Bryan Hughes
Texas Senate
P.O. Box 12068
Capitol Station
Austin, TX 78711

Dear Senator Hughes,

You ask whether local governmental bodies have authority to limit in-person attendance at a judicial or non-judicial foreclosure sale to 10 persons or fewer. Your question concerns local emergency orders restricting or delaying such sales during the current COVID-19 pandemic. We conclude that a foreclosure sale of residential or commercial real property that is conducted outdoors is subject to the limitation on outdoor gatherings in excess of 10 persons imposed by Executive Order GA-28. Accordingly, an outdoor foreclosure sale may not proceed with more than 10 persons in attendance unless approved by the mayor in whose jurisdiction the sale occurs, or if in an unincorporated area, the county judge. However, to the extent a sale is so limited, and willing bidders who wish to attend are not allowed to do so as a result, the sale should not proceed as it may not constitute a "public sale" as required by the Texas Property Code.

When a mortgage loan is in default, a mortgagee may elect to institute either a judicial foreclosure or, when permitted by the deed of trust, a non-judicial foreclosure.[1] A judicial foreclosure begins with a lawsuit to establish the debt and fix the lien.[2] The judgment in a foreclosure lawsuit generally provides that an order of sale issue to any sheriff or constable directing them to seize the property and sell it under execution in satisfaction of the judgment.[3] After the sale is completed, the sheriff or other officer must provide to the new buyer possession of the property within 30 days.[4]

---

[1] *Bonilla v. Roberson*, 918 S.W.2d 17, 21 (Tex. App.—Corpus Christi 1996, no writ).
[2] *Id.* at 21.
[3] TEX. R. CIV. P. 309; *but see id.* (excepting judgments against executors, administrators, and guardians from orders of sale). The procedures for the sale under judicial foreclosure generally follow the same procedures as sales under non-judicial foreclosures. *Compare id.* 646a–648 *with* TEX. PROP. CODE § 51.002.
[4] TEX. R. CIV. P. 310.

A non-judicial foreclosure, in turn, must be expressly authorized in a deed of trust.[5] The Property Code prescribes the minimum requirements for a non-judicial sale of real property under a power of sale conferred by a deed of trust or other contract lien.[6] The Code requires that a sale under a non-judicial foreclosure be "a public sale at auction held between 10 a.m. and 4 p.m. of the first Tuesday of a month," unless that day is January 1 or July 4, in which cases the sale must be held on the first Wednesday of the month.[7] The deed of trust or other loan document can establish additional requirements, and if such requirements are established, those requirements must likewise be satisfied in order for there to be a valid foreclosure sale.[8]

We understand that many foreclosure sales in Texas, both judicial and non-judicial, are held outdoors. Frequently, such sales occur on the steps of a courthouse.

With this background in mind, we address your question concerning attendance limitations. Governor Abbott ordered in Executive Order GA-28 that "every business in Texas shall operate at no more than 50 percent of the total listed occupancy of the establishment."[9] This general limitation, however, is subject to several exceptions. One such exception is found in paragraph five of the order, which limits outdoor gatherings to 10 persons or fewer without approval by the mayor or, in the case of unincorporated territory, the county judge in whose jurisdiction the gathering occurs.[10] Accordingly, to the extent a foreclosure sale occurs outdoors, attendance at the sale is limited to 10 persons or fewer unless greater attendance is approved by the relevant mayor or county judge.

While certain services are exempt from the outdoor gathering limitation in Executive Order GA-28, we do not conclude that foreclosure sales are included within them. Executive Order GA-28 exempts from its limitations on outdoor gatherings services described in paragraphs 1, 2, and 4 of the order. Relevant here, paragraph 1 exempts from capacity limitations, *inter alia*, "any services listed by the U.S. Department of Homeland Security's Cybersecurity and Infrastructure Workforce, Version 3.1 or any subsequent version."[11] (CISA Guidance). Among the services listed in version 3.1 of

[5] *See* TEX. PROP. CODE § 51.002.
[6] *See id.* § 51.002.
[7] *Id.* §§ 51.002(a), (a-1); *see also id.* § 51.002(h) (requiring a sale to be held on or after the 90th day after the date the commissioners court records a designation of a sale at an area other than an area at the county courthouse).
[8] *See Bonilla*, 918 S.W.2d at 21.
[9] Gov. Greg Abbott Exec. Order GA-28.
[10] *Id.* at 3 (as amended by Gov. Greg Abbott Proc. of July 2, 2020).
[11] *Id.* at 2.

the CISA Guidance are "[r]esidential and commercial real estate services, including settlement services."[12]

A court's main objective in construing the law is to give effect to the intent of its provisions.[13] And there is no better indication of that intent than the words that are chosen.[14] One dictionary defines a "service" as "[w]ork that is done for others as an occupation or business."[15] A periodic foreclosure auction conducted at a courthouse—whether by an officer of the court, an attorney, an auction professional, or another person serving as trustee[16]—does not constitute the type of dedicated real estate service work contemplated by the CISA Guidance. Accordingly, we conclude that outdoor foreclosure sales are not exempted from the 10-person attendance limitation imposed by paragraph 5 of Executive Order GA-28.

If a foreclosure sale is subject to, and not exempted from, the 10-person attendance limit imposed in Executive Order GA-28, it should not proceed if one or more willing bidders are unable to participate because of the attendance limit. "[A] sale of real property under a power of sale conferred by a deed of trust or other contract lien must be a *public sale* at auction held between 10 a.m. and 4 p.m. of the first Tuesday of a month."[17] The purpose of the public sale requirement is to "secure the attendance of purchasers and obtain a fair price for the property."[18] Strict compliance with the Property Code is required for a trustee to properly make a foreclosure sale.[19] If an attendance limit precludes the conduct of a public sale for the purpose of securing sufficient bidders to obtain a fair price, the propriety of a foreclosure auction may be called into question. Accordingly, to the extent attendance at a foreclosure sale is limited to ten or fewer persons, and that limit precludes the attendance of one or more willing bidders who otherwise would have appeared in person, the sale should not go forward as it likely would not comport with the Property Code requirement that the sale be a "public sale."

---

[12] *See* Guidance on the Essential Critical Infrastructure Workforce: Ensuring Community and National Resilience in COVID-19 Response, at 16, available at https://www.cisa.gov/sites/default/files/publications/Version_3.1_CISA_Guidance_on_Essential_Critical_Infrastructure_Workers.pdf.

[13] *See Summers*, 282 S.W.3d at 437.

[14] *See id.* ("Where text is clear, text is determinative of that intent.").

15 Am. Heritage Dictionary (5th ed. 2020), available at https://www.ahdictionary.com/word/search.html?q=service; *see also Greater Houston P'ship v. Paxton*, 468 S.W.3d 51, 58 (Tex. 2015) (applying an undefined term's ordinary meaning, unless the context of the law in which the term appears suggests a different or more precise definition).

[16] The Texas Property Code does not set forth specific professional requirements for a foreclosure trustee, providing only that "[o]ne or more persons may be authorized to exercise the power of sale under a security instrument." TEX. PROP. CODE § 51.007(a).

[17] TEX. PROP. CODE § 51.002(a) (emphasis added).

[18] *Reisenberg v. Hankins*, 258 S.W. 904, 910 (Tex. Civ. App.–Amarillo 1924, writ dismissed w.o.j.).

[19] *Myrad Props. v. LaSalle Bank Nat'l Assoc.*, 252 S.W.3d 605, 615 (Tex. App.–Austin 2008), *rev'd on other grounds*, 300 S.W.3d 746 (Tex. 2009).

We trust this letter provides you with the advice you were seeking. Please note this letter is not a formal Attorney General opinion under section 402.042 of the Texas Government Code; rather, it is intended only to convey informal legal guidance.

Sincerely,

Ryan Bangert
Deputy First Assistant Attorney General

Office of the Attorney General (OAG):

The Office of the Governor is in receipt of OAG's request to temporarily suspend section 121.006(c)(1) of the Texas Civil Practice & Remedies Code. OAG asserts that strict compliance with this law could prevent, hinder, or delay efforts to cope with the COVID-19 disaster. Minimizing in-person contact with people who are not members of the same household is necessary to slow the spread of COVID-19. OAG explains that section 121.006(c)(1) could frustrate this public-health goal by requiring in-person appearance before a notary public to acknowledge certain real-estate instruments. OAG's request would temporarily relax the in-person requirement to allow for appearance before a notary public via videoconference, avoiding the need for face-to-face contact during a pandemic.

In accordance with section 418.016 of the Texas Government Code, and subject to the conditions set forth below, the Office of the Governor suspends section 121.006(c)(1) of the Texas Civil Practice & Remedies Code to the extent necessary to allow for appearance before a notary public, for the purpose of acknowledging real-estate instruments, via videoconference. Nothing in this suspension shall prevent a traditional notarization or an online notarization under chapter 406 of the Texas Government Code.

The following conditions shall apply whenever this suspension is invoked:

- A notary public shall use two-way audio-video communication technology that allows for direct and contemporaneous interaction between a person signing a document and the notary public by sight and sound.
- A notary public shall verify the identity of a signatory at the time the signature is taken by using two-way audio-video communication technology. A notary public may verify identity by:
    - personal knowledge of the signatory;
    - analysis based on the signatory's remote presentation of a government-issued identification credential, including a passport or driver's license, that contains the signature and a photograph of the signatory, and is of sufficient quality to allow for identification; or
    - an introduction of the signatory by oath of a credible witness who personally knows the signatory, and who is personally known to the notary public.
- During the two-way audio-video communication:
    - the notary public shall attest to being physically located in Texas;
    - the signatory shall attest to being physically located in Texas;
    - the signatory shall affirmatively state what documents are being signed; and
    - the signatory's act of signing shall be close enough to the camera for the notary public to observe it clearly.
- A recording of the two-way audio-video communication of the notarial act shall be kept by the notary public for two years from the date of the notarial act.
- The signatory shall send the original signed documents by courier, U.S. Mail, or overnight carrier directly to the notary public for the notary public to sign and to affix the official stamp or seal.
- The official date and time of the notarization shall be the date and time when the notary public witnessed the signatory signing the documents during the two-way audio-video communication.
- The documents shall include, whether in a notarial certificate, a jurat, or an acknowledgement, language substantially similar to the following: "This notarization involved the use of two-way audio-video communication pursuant to the suspension granted by the Office of the Governor on April 27, 2020, under section 418.016 of the Texas Government Code."

This suspension, granted by the Office of the Governor on April 27, 2020, is in effect until the earlier of May 30, 2020, or the termination of the March 13, 2020 disaster declaration. Any document acknowledged while this suspension is in effect, and in accordance with its terms, shall be considered duly acknowledged and fully compliant with Texas law after the termination of this suspension. All county clerks in Texas shall accept for recording in the public records all documents signed and notarized by means of the two-way audio-video communication described in this suspension.