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# Third Party Real Estate Legal Opinion Practice: A Deeper Dive Into Selected Third-Party Opinion Letter Practice Issues

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This paper presents, in outline format, a discussion of selected third-party legal opinion issues. Many commercial real estate mortgage loan transactions include, as a condition to closing, the delivery by borrower's counsel, of a legal opinion letter addressed to the lender, providing such counsel's professional evaluation of various topics identified by the lender as subjects to be covered by the opinion letter. Most of the literature on opinion practice in commercial real estate transactions focuses on opinions provided in real estate financing transactions. This paper will follow that focus.

This paper will introduce some of the key concepts of third-party legal opinion practice and will then discuss some issues that arise in connection with third-party legal opinions following, for the sake of convenience, the order in which those issues might appear in a typical third-party legal opinion. This paper revisits the subject matter of a paper presented in 2016 and provides expanded coverage of selected topics addressed in the 2016 paper as well as selected illustrative examples.

An opinion letter may be provided at the closing of some real estate transactions and is viewed as an element of the recipient's diligence. This paper addresses closing opinion letters and the opinions that they might include addressing various aspects of the transaction and the parties (for purposes of this paper, such an opinion letter is sometimes referred to as a "closing opinion"). More than one closing opinion might be provided in connection with the closing of a commercial real estate financing transaction. This might be the situation where more than one counsel is involved with differing relationships to the transaction, the parties and the collateral. For example, primary transaction counsel to the borrower may provide opinions on a number of topics and other counsel might provide opinions on others. A not uncommon circumstance might arise where the primary transaction counsel is not regularly engaged as "corporate" counsel to the parent company guarantor of a borrower and the real estate collateral is located in jurisdiction other than the jurisdiction of primary transaction counsel. Under those circumstances, in addition to the primary transaction counsel's closing opinion, additional closing opinions as to entity predicates (e.g., entity existence, entity powers and entity authorization) might be provided by regular corporate counsel to the parent company guarantor and local counsel regarding the enforceability of the real estate mortgage under the law in which the real estate collateral is located. With multiple closing opinions, borrower's primary transaction counsel is often tasked with organizing the collection of closing opinions, while the recipient's counsel will need to confirm that the multiple closing opinions adequately address the closing opinion requirements of the recipient.

Since the paper provided in connection with the 2016 program, the Legal Opinions Committee of the Business Law Section of the American Bar Association and the board of directors of the Working Group on Legal Opinions Foundation authorized distribution to various bar and other groups of an exposure draft of a "Statement of Opinion Practices" (the "Statement") that updates the Legal Opinion Principles (described below) in its entirety and selected provisions of the Legal Opinion Guidelines (described below) and the Legal Opinions in Real Estate Transactions Committee of the Section of Real Property, Trust and Estate Law of the American Bar Association, the Opinions Committee of the American College of Mortgage Attorneys and the Attorneys' Opinions Committee of the American College of Real Estate Lawyers approved a report on local counsel opinion letters, "Local Counsel Real Estate Opinion Letters in Real Estate Finance Transactions: A Supplement Real Estate Finance Opinion Report of 2012."

This paper does not address all opinions that might be provided in a commercial real estate financing closing. For example, for certain transactions, an opinion recipient might request separate opinions as to the potential for substantive consolidation of the borrower in the bankruptcy of another entity (i.e., a so-called non-consolidation opinion) and another set of closing opinions from counsel which may address whether under US bankruptcy law, the law of given state (often Delaware) will govern the authority of the borrower to file for bankruptcy, whether under the law of a given state, the approval of one or more specified persons (such as an independent director, manager or member) will be required for the borrower to file for bankruptcy and whether the bankruptcy or resignation of the sole member of a limited liability company borrower will cause a dissolution of a limited liability company borrower under applicable state law. This paper also does not address opinions that might be provided in connection with mortgage loan assumptions or modifications. A discussion of when the types of opinions described in this paragraph are appropriate and considerations regarding the substantive issues involved is beyond the scope of this paper.

## I. CONCEPTS AND TERMS

A. In the context of this paper, an opinion letter is delivered by a law firm to a non-client third-party. This differs from what lawyers often do, which is to provide advice to clients. Thus, an opinion letter is an "evaluation" prepared by the borrower's counsel (the "opinion giver") addressed to the lender (the "opinion recipient").

The third-party opinion letter may be viewed as an element of the opinion recipient's diligence in concluding that the conditions to be satisfied for the extension of credit have been satisfied. The opinion is typically one of many conditions to be satisfied at the closing of the loan. Certain areas covered by an opinion letter may also be the subject of other closing deliveries and diligence by the opinion recipient and its counsel such as the delivery of evidence of the borrower's existence, good standing and authorization to enter into the transaction.

B. Professional Responsibility Issues.

1. Client Confidences. Lawyers have a responsibility to maintain client confidences. An opinion might be viewed as disclosure of client confidences. Many commercial real estate borrowers understand that delivery of an opinion is a condition to receipt of an extension of credit and it may often be expressly required or contemplated in a loan application, commitment, term sheet or loan or credit agreement.

2. Client Consent. Client consent is often a requirement under professional responsibility rules for delivery of a closing opinion. (of course, there may be jurisdiction-by-jurisdiction variations in the applicable rules.) Rule 1.6 of the Model Rules of Professional Conduct provides that a lawyer is not to reveal information, regarding representation of a client without the client's informed consent Rule 2.3 of the Model Rules of Professional Conduct permits a lawyer to provide an evaluation of a matter, if the lawyer reasonably believes that making the evaluation is compatible with other aspects of the lawyer's relationship with the client. Opinion givers should consult applicable professional rules of conduct to determine whether client consent is required for delivery of an opinion letter and how such consent may be obtained. Client consent may be inferred, as a general proposition, by provisions in loan commitments, loan applications or loan documents requiring delivery of a closing opinion or conditioning closing on delivery of a closing opinion.

C. Customary Practice. Customary practice is a framework among practitioners who regularly participate in the giving and receipt of closing opinions. Customary practice provides participants in the opinion process with a common understanding of the opinions expressed in an opinion letter and the opinion process. An important

consideration regarding customary practice is that opinion recipients are expected to understand customary practice. Often, such understanding occurs through a recipient's counsel. Lawyers are permitted to vary the meaning of an opinion and the nature of the work required to provide an opinion, but such deviations should be stated in the opinion letter or by reaching an express understanding with the opinion recipient or its counsel (though some opinion givers prefer to express such deviations within the opinion letter itself).

1. What the Words Mean. Customary practice provides meaning for the words utilized in an opinion letter.

2. What Diligence is Required to Say Those Words. Customary practice provides a framework for the diligence required to provide the opinions provided in the opinion letter.

D. Firm Practices. Often opinion givers provide opinions in the context of law firm generated procedures that are to be followed in connection with the opinion-giving process. Opinion practice may be facilitated through early discussions of opinion requirements and dialogue in order for the law firm's procedural requirements to be followed. A survey of law firm opinion practices is provided in *Report on the 2010 Survey of Law Firm Opinion Practices*, 68 Bus. Law. 785 (2013) issued by the Legal Opinions Committee of the Business Law Section of the American Bar Association.

1. Two Partner Review. Typically, opinions are signed by firm partners (often in the firm name). Some firms require an "additional set of eyes" to pass on opinions. For example, some firms require second partner approval and other firms may require opinion committee approval.

2. In-Firm Consultation With Attorneys With Requisite Practical Area or Governing Law Expertise. To the extent the lawyer primarily responsible for preparation of an opinion recognizes that he or she lacks the competence to provide an opinion, they should consult with other lawyers that have such competence.

    a. Examples include circumstances where the governing law selected by the documents may vary from the law that the deal counsel is familiar with (e.g., New York law).

    b. Other examples include personal property security interests.

3. Opinion Committee. Some firms have opinion committees that generate policies, provide for review of opinion letters and provide guidance as to how opinion-related issues are to be addressed in particular matters.

4. Third-Party Opinion Manual. Some firms have formal third party opinion manuals for use in connection with third-party opinions rendered to non-clients.

E. Introduction to Terminology.

1. Opinion Giver: The law firm providing the opinion letter. Of course, an opinion letter may also be given by a solo conditioner or inside counsel. While this paper primarily addresses opinions given by law firms, closing opinions may be given by inside counsel. Inside counsel that provide opinion letters owe a duty of care, like other opinion givers, to the recipient to, as a general proposition, exercise the competence and diligence normally exercised by lawyers in similar circumstances. See, Committee on Legal Opinions, ABA Section of Business Law, "Closing Opinions of Inside Counsel," 58 The Business Lawyer 1127 (2003).

2. Opinion Recipient: The addressee to whom the opinion letter is addressed that is to receive the opinion letter. The concept of reliance by non-addressees is discussed below.

3. Opinion Letter: A letter from an opinion giver addressed to a non-client, third party addressing certain legal issues.

4. Opinion: The professional judgment expressed by an attorney in an opinion letter on the legal issues addressed in an opinion letter.

5. Assumption: A factual assumption that permits an opinion giver to render an opinion without establishing the facts being assumed. The concepts related to establishing facts to support an opinion and assumptions generally are discussed below.

6. Exception: Qualifications, limitations or other exclusions which narrow an opinion.

7. Enforceability Opinion: An opinion addressing, in relation to the documents covered by the opinion, whether a contract exists and whether the remedies and other provisions of the covered documents are effective against the opinion giver's client.

8. Confirmation: A statement expressed as a confirmation of a factual matter, rather than an opinion.

9. Local Counsel: Counsel that are engaged solely to address discrete legal issues relevant to a transaction that are not addressed in any other opinion to be provided by primary or other counsel to the client in connection with the related transaction. In the context of real estate transactions, this may arise where the primary transaction counsel are located in a state other than the state where the real estate collateral is located, but might also arise in the context of an entity in a jurisdiction outside the jurisdiction addressed in the opinion letter provided by deal counsel. A "Local Counsel Opinion" is an opinion letter provided by local counsel.

10. Choice of Law Opinion: An opinion that a particular jurisdiction will enforce the parties' choice of the law governing the documents addressed in the closing opinion.

11. Entity Opinions. A group of opinions addressing (i) formation, existence and good standing of an entity, (ii) the due authorization through all necessary entity action of the execution and delivery by such entity of each relevant document to which it is a party, and the performance of its obligations thereunder, and (iii) the due execution and delivery by an entity of documents covered by an opinion.

12. Noncontravention Opinion: A group of opinions addressing whether the execution, delivery and performance of documents covered by an opinion violate laws or breach organizational documents of a client, agreements to which a client is a party or court orders binding on a client.

13. Legal Opinion Principles: This is a reference to the "Legal Opinion Principles" issued by the Committee on Legal Opinions of the Business Law Section of the American Bar Association. A copy may be found attached to the Guidelines for Preparation of Closing Opinions referenced in XII.D.1, below. Some opinion givers attach a copy of the Legal Opinion Principles to their opinions or incorporate the Legal Opinion Principles by reference. Other opinion givers do not. Either way, it is generally understood that the customary practice concepts addressed in the Legal Opinion Principles apply to third-party opinions.

14. Opinion Report: A report discussing selected non-client, third party opinion issues issued by one or more bar-related groups or committees of such bar-related groups. Some opinion reports are identified in XII.D, below.

F. Some Selected General Principles and Comments

1. Opinion letter practice is designed to facilitate the diligence of the opinion recipient and leads to delivery of an opinion letter in satisfaction of a condition to closing imposed by the opinion recipient.

2. The time and expense of providing the opinion should be justified by the benefit to be obtained by providing the opinion.

3. An opinion giver should not provide an opinion that it recognizes will be misleading with respect to the opinions given in the closing opinion.

4. An opinion is an expression of professional judgment regarding the legal matters addressed and not a guarantee of a particular result.

5. Golden Rule.

   a. An opinion giver should not be expected to give an opinion that counsel for the opinion recipient would not give if it were the opinion giver and had the requisite competence.

   b. An opinion giver should consider whether declining to give a requested opinion is justified if the opinion giver is competent to give the opinion and a lawyer in similar circumstances would commonly give that opinion.

6. Opinions should address distinct legal issues and should not address matters that are not within a lawyer's competence. For example, financial statement analysis is not something that lawyers are expected to undertake when providing opinions. Consider how this works under circumstances where the opinion giver is requested to provide a non-contravention opinion with respect to other documents to which a borrower or a guarantor is a party. To the extent that those documents include financial covenants (e.g., net worth maintenance, fixed charge coverage, etc.), the opinion giver is not expected to analyze financial statements and information in order to determine whether or not such an opinion may be given. An opinion giver might

address these issues in an opinion letter by assuming relevant facts, expressly disclaiming an opinion or obtaining a client certificate.

7. See the Legal Opinion Principles for other general principles related to third-party opinion practice.

8. There are not many reported judicial decisions on opinions.

9. The real estate opinion reports primarily focus on real estate secured transactions (that is, on loans secured by mortgages or deeds of trust on real estate).

10. In addition to some of the items described above, the Statement addresses some other aspects of customary practice. The Statement indicates that the bankruptcy and equitable principles qualifications, discussed below, apply to opinions whether or not stated. Furthermore, it indicates an opinion recipient ordinarily need not take action to verify the opinions, but, is not entitled to rely on an opinion if it knows the opinion is not correct or reliance is otherwise unreasonable.

## II. PARTIES (AND ROLE OF THE OPINION GIVER)

A. The opinion letter typically identifies the parties involved in the relevant transaction and identifies the client(s) represented by the opinion giver.

B. The opinion giver may be primary transaction counsel for the borrower in the transaction, but might not be the only opinion giver in the transaction.

C. Local Counsel.

1. Some lenders may prefer retaining their own local counsel to provide the opinion. In some circumstances, where cost considerations may be relevant or otherwise, absent a pre-existing relationship between the borrower and counsel, it may be more cost-efficient for only one lawyer to be retained as local counsel and for that lawyer to represent the lender.

2. Because the scope of the engagement is limited, local counsel might consider incorporating concepts in engagement letters that provide for termination of the representation upon closing of the transaction. Client consent to provide an opinion letter may be required under applicable rules of professional

responsibility. Local counsel are subject to these rules, but many never interact directly with the client, but deal only with the primary deal counsel retained by the client. Many practitioners believe that, as agent for the client, primary deal counsel may provide required client consents.

3. For local counsel to the borrower, the opinions given, the assumptions made and qualifications taken will differ from opinions provided by primary transaction counsel. For example, if local counsel has been engaged to provide an enforceability opinion pertaining to the enforceability of loan documents under jurisdiction addressed by local counsel, the opinion letter should, unless the local counsel has also been engaged to address such matters, assume, among other assumptions, the "corporate opinions" (existence, good standing, entity power and authority and entity authorization) as well as execution and delivery of the loan documents.

4. Because local counsel may be addressing only a subset of loan documents in a financing transaction, local counsel might consider assuming that the remaining loan documents are enforceable and contain no provisions that are inconsistent with the provisions of the loan documents addressed in the local counsel opinion letter.

5. Good practice would be to engage local counsel early in the transaction.

E. Opinion Bundling. The trend is that an opinion giver assumes matters that are the subject of opinions of other counsel rather than relying on such opinions.

1. An example would be an opinion given by local counsel in a transaction, where other counsel is addressing the "entity predicate" opinions such as existence and authorization. In that situation, the local counsel opinion giver might, for example, assume the existence of the entity in the context of an enforceability opinion as to documents executed and delivered by that entity. Another approach, less common today, is to specifically state in the opinion letter that the opinion giver is relying on the opinion of the other counsel.

2. Another example might arise where there is a guaranty with respect to which an opinion is being provided by guarantor's counsel.

3. Yet another example might arise in circumstances where deal counsel provides some opinions, but regular parent company counsel provides other opinions relative to entity organizational and authorization matters. In that situation, deal counsel might assume the substance of the opinions addressed by regular counsel to the parent company.

F. Illustration:

> "We have acted as [If applicable: LOCAL COUNSEL JURISDICTION} counsel to (A) _____, a _____ limited liability company ("Borrower"), and (B) _____ _____, a _____ limited partnership ("Guarantor"), in connection with a mortgage loan in the amount of $_____ (the "Loan") being made by you ("Lender") to Borrower to finance the [Project]. This opinion letter is required under Section _____ of the Loan Agreement dated [as of] _____, ____ between Borrower and Lender ("Loan Agreement"). Except as otherwise indicated, capitalized terms used in this opinion letter are defined as set forth in the Loan Agreement."

## III. DATE

A. An opinion letter speaks only as of its date.

B. An opinion giver does not have a responsibility to update the opinion to address changes in fact or law occurring after its date.

C. Delivery of the opinion in advance of a closing. Logistics must be worked out to provide for delivery of an opinion dated as of a particular date when physical delivery on that date is impractical. Sometimes escrow arrangements are utilized.

## IV. REVIEWED DOCUMENTS AND DILIGENCE

A. Documents Covered by the Opinion v. Other Documents (do you list other documents if not covered by the opinion). Many opinion givers limit the list of reviewed documents to only those documents addressed by the opinion letter.

B. Listing organizational and authorization documents

1. Unless the closing opinion expressly limits the scope of diligence to the listed organizational and authorizing documents, customary practice implies and opinion recipients often expect that the opinion giver has conducted all requisite diligence,

including, diligence that might extend beyond the listed organizational and authorization documents.

2. Reliance on client certificates and certificates of public officials. Typically, opinions will recite reliance on client certificates and public authority documents (e.g., certificates of good standing issued by a Secretary of State). However, customary practice implies that an opinion giver should not rely on matters certified in certificates known by the opinion giver to be incorrect.

C. Gathering Facts

1. Going Up the Organizational Chain To Establish Authority

   a. With multi-tiered organizational structures with layers of entities, the opinion recipient may need to diligence the existence and authorization of entities at different layers of the organizational structure of the entity.

   b. The Real Estate Finance Opinion Report of 2012 suggests that if the opinion giver is not going to proceed with the diligence of all the requisite upper-tier entities, it should consider calling that limitation on diligence out to the attention of the opinion recipient in the opinion itself.

2. Client Certificates

   a. Conclusions of Law Not Acceptable. Certifications in a client certificate should not be tantamount to the opinions expressed.

      i. An example of a conclusory certification is: “the execution and delivery of Loan Documents does not violate any agreements to which the Borrower is a party”. The opinion recipient might expect that the opinion giver will have applied legal analysis to facts and the statement in the preceding sentence does not do that.

      ii. An example of a non-conclusory certification is: “The Borrower is a party to documents x and y, true and complete copies of which have been delivered to the opinion giver…”.

iii. Conclusory statements may, however, be relied upon if included in a public authority document (e.g., certificate issued by a governmental authority).

b. Reliability of the Certificate. The certificate should not recite facts known by the opinion giver to be incorrect.

c. Attach or Not Attach. Many opinion givers attach the certificate as a way of identifying potential limitations on the diligence conducted by the opinion giver.

e. Appropriate Source of Facts. The certifying party should be someone likely to know something about the subject matter of the certificate. The certificate should not be provided by someone known to the opinion giver as an inappropriate source.

f. Financial calculations. The opinion giver is ordinarily not responsible for financial calculations. An example of financial calculations that might be relevant would be a determination of a debt to equity ratio or other financial covenants of ratios in connection with financial covenants or in connection with leverage or concentration (e.g. limitations on asset-type or investment location) limits that might appear in organizational documents.

g. A client certificate should be used to establish relevant facts that will allow the requisite diligence to proceed. For example, the certificate might include a certification that an attached limited liability company agreement is the limited liability company agreement of a limited liability company covered by the opinion or that a particular consent or resolution has been adopted and has not been amended or revoked.

h. Client certificates are often used by the opinion giver to confirm that the opinion giver is reviewing correct and complete copies of relevant organizational and authorization documents such as limited liability company agreements, partnership agreements, bylaws, resolutions and consents. For example, for an opinion to the effect that an action by a limited liability company is authorized, the client certificate might attach a copy of the limited liability company agreement of the limited liability company and a copy of any consent of the limited liability

company's members and managers, as applicable, with a certification to the effect that the attached copy is true and complete. Based on the certification and the review of the document itself, the opinion giver would review the limited liability company agreement to determine if the term of the limited liability company has not, by the terms of the limited liability company, ended, if the action to be addressed by an opinion was within the entity powers of the limited liability company and determine what internal approvals might be required, (which would then inform the opinion giver as to what diligence is required to address whether such approvals have been obtained). Sometimes this information may be obtained from a review of public authority documents. The relevant statute must also be considered to confirm that the action taken is an action that a limited liability company is permitted to take and whether the approvals required by the limited liability agreement are sufficient under the statute to provide the requisite entity approval.

i. An illustrative certificate is attached as Appendix A. This is attached for illustrative purposes only. As with many illustrative items, one size does not fit all. The opinion giver may need to work with the client and certifying party on the form and content of the certificate to fit the particular circumstances in question. Note that the illustrative certificate does not contemplate actual attachment of copies of organizational and authorization documents, but could be adapted to incorporate such attachments (and related certifications as to the accuracy of the attachments) or a separate certificate might be used for purposes of attachment of organizational and authorization documents.

D. Review of Covered Documents

1. The opinion letter should identify the documents that the opinion addresses

2. The opinion letter should ordinarily not identify or reference documents that are not addressed by the opinion.

3. Financing Statements

a. Review protocol

b. Are they documents for purposes of the enforceability opinion?

E. Illustration (paradigm: opinion giver is primary transaction counsel):

> "In connection with this opinion letter, we have examined [an executed copy of] [an unexecuted copy of] the following documents (collectively, the "Loan Documents"), each dated [as of] _____, ____, unless otherwise stated:
>
> 1. Promissory Note (the "Note") made by Borrower in the amount of the Loan payable to the order of Lender;
> 2. Loan Agreement between Borrower and Lender;
> 3. Mortgage, Assignment of Leases and Rents, Security Agreement and Fixture Filing (the "Mortgage") executed by Borrower in favor of Lender, purporting to encumber, inter alia, the Project;
> 4. Assignment of Leases and Rents executed by Borrower in favor of Lender (the "Assignment");
> 5. Cash Management Agreement (the "Cash Management Agreement") executed by Borrower and Lender;
> 6. Deposit Account Control Agreement (the "DACA") executed by Borrower, _____ ("Bank") and Lender;
> 7. Environmental Indemnity Agreement executed by Borrower and Guarantor in favor of Lender;
> 8. Guaranty (the "Guaranty") executed by Guarantor in favor of Lender;
> 9. Undated Uniform Commercial Code Financing Statement (the "Fixture Filing") identifying Borrower, as debtor, and Lender, as secured party designated to be filed with the Recorder of Deeds, _____ County, Illinois; and
> 10. Undated Uniform Commercial Code Financing Statement (the "Financing Statements") identifying Borrower, as debtor, and Lender, as secured party designated to be filed with the Secretary of State of the State of _____ ("__SOS").
>
> We have examined such other documents and records pertaining to the Borrower and Guarantor and have made such examinations of law as in our judgment are necessary or appropriate to enable us to render the opinions expressed below.

In rendering this opinion, as to questions of fact material to this opinion we have relied to the extent we have deemed such reliance appropriate, without investigation, on certificates and other communications from public officials, the certificate ("Certificate") of _____ (a copy of which is attached hereto as Exhibit A) and from officers or other representatives of the Borrower and

Guarantor and on representations and warranties of the Borrower and Guarantor set forth in the Loan Documents as to factual matters and not as to legal conclusions."

F. Review of Law

1. What laws are covered? It is generally understood that the laws covered are those laws that a lawyer experienced in the jurisdiction would reasonably recognize as applicable to the opinions expressed in the closing opinion.

2. Excluded Law. As a matter of customary practice, it is generally understood that the third-party closing opinion does not address all laws, but, rather, certain laws are understood as excluded from coverage. Some opinion givers rely on customary practice for this exclusion, but other opinion givers reference them in the closing opinion. Some examples of customarily excluded laws in real estate transactions are:

   a. Project-Related Laws (e.g, zoning)

   b. Local Law

   c. Antitrust, Banking and Securities Laws

   d. The Investment Company Act of 1940 is generally assumed to be an excluded "securities" law, but, when the opinion giver recognizes that it is dealing with an investment company, it will, as a general proposition, need to address such law.

   e. Some opinion reports indicate that many opinion givers will not address federal law when providing closing opinions in commercial real estate mortgage loan transactions.

3. Illustration (paradigm: opinion giver that is primary transaction counsel):

> "Our opinions in this opinion letter are limited to those laws of the State of _____ (such laws, "Generally Applicable Laws") that we, in the exercise of customary professional diligence would reasonably recognize as being directly applicable to the Borrower, the Guarantor or the Transaction or generally applicable to transactions similar to the Transaction. However, we have not reviewed and do not opine with respect to: (1) compliance by the Project with applicable zoning, health, safety, antidiscrimination, building, environmental, landmark, archaeological preservation, mobile home, land use or subdivision laws, rules or regulations,

(2) pension and employee benefit laws, rules or regulations, (3) taxation, trust, banking, financial institution, insurance, anti-trust and unfair competition, bulk sales, securities or "blue sky" laws, rules or regulations, (4) margin regulations, (5) racketeering laws, rules or regulations, (6) criminal laws, rules or regulations, (7) civil forfeiture laws, rules and regulations and other laws, rules or regulations of general applicability to the extent they provide for criminal prosecution (e.g., mail fraud and wire fraud statutes), (8) anti-terrorism or money-laundering laws, rules or regulations, and (9) any laws, rules or regulations of any county, town, municipality or special political subdivision (whether created or enabled through legislative action at the federal, state or regional level)."

## V. ASSUMPTIONS

A. Implicit v. Explicit Assumptions. Some assumptions are implicit (e.g., all signatures are genuine) and customary opinion practice indicates that they may be assumed for purposes of the opinion letter without the necessity of an express inclusion of those assumptions in the text of the opinion. Nevertheless, many opinion givers include, as express assumptions, assumptions that customary practice would imply are implicit. Other assumptions must be expressly stated in the opinion letter itself. An example of an express assumption is an assumption, often found in local counsel closing opinions, to the effect that the mortgagor has duly authorized, executed and delivered the documents addressed in the closing opinion.

B. Unwarranted Reliance. An opinion giver should not rely on an implicit assumption known to be incorrect. An opinion giver should not rely on an express assumption if it knows that such assumption, if incorrect, would render the opinion misleading. However, certain assumptions, while expressly stated, might be incorrect and would vitiate the opinion.

C. Genuineness of Signatures. This is viewed as an implicit assumption. Whether a signature is genuine or not is a question of fact. Does it matter if the signature is that of the opinion giver's client? Some recipients request that the opinion giver not be permitted to assume that the signatures of its client are genuine. Because such a conclusion is not a legal conclusion, the trend in the opinion reports is that an assumption as to the genuineness of all signatures is an appropriate assumption.

D. Relevant Assumptions Only. There are some variations in practice areas as to the appropriateness of utilizing irrelevant assumptions, qualifications and exceptions in their opinions. The Statement suggests that the value of an opinion may be furthered by including only relevant assumptions, qualifications and exceptions, but, also suggests that there may be circumstances where inclusion of such items would not be objectionable.

E. Illustration (paradigm: opinion giver is primary transaction counsel):

> "In connection with this opinion letter, we have assumed the accuracy and completeness of all documents and records that we have reviewed, the genuineness of all signatures, the authenticity of the documents submitted to us as originals and the conformity to authentic original documents of all documents submitted to us as certified, conformed or reproduced copies and that:
>
> (i) All natural persons involved in the transaction contemplated by the Loan Documents (the "Transaction") have sufficient legal capacity to enter into and perform their respective obligations under the Loan Documents or to carry out their roles in the Transaction.
>
> (ii) All material terms and conditions of the relationship between Borrower and Guarantor, on the one hand, and Lender, on the other hand, are correctly and completely reflected in the Loan Documents.
>
> (iii) Each party (other than Borrower and Guarantor) to the Transaction has satisfied all legal requirements that are applicable to it to the extent necessary to make the Loan Documents enforceable against it.
>
> (iv) Each party to the Transaction (other than Borrower and Guarantor) has complied with all legal requirements pertaining to its status as such status relates to its rights to enforce the Loan Documents (except the Financing Statements) against the Borrower and Guarantor.
>
> (v) The conduct of the parties to the Transaction complies with any requirement of good faith, fair dealing and conscionability.
>
> (vi) There has not been any mutual mistake of fact or fraud, duress or undue influence.
>
> (vii) Borrower holds the requisite title and rights to any property involved in the Transaction.
>
> (viii) Any description set forth in, or appended to, any of the Loan Documents with regard to the property involved in the Transaction that is intended to provide notice to third parties of the liens and security interests provided by the Loan Documents is complete and accurate.

(ix) Lender will exercise its rights and remedies under the Loan Documents in good faith and in circumstances and a manner which are commercially reasonable.

(x) The Mortgage, the Financing Statements, the Fixture Filing and the Assignment have been, or will be, duly and timely recorded or filed (or both) and properly indexed, in all places necessary to create and perfect the lien or security interest provided therein.

(xi) The initial disbursement to, or at the direction of, the Borrower of the proceeds of the Loan is occurring simultaneously with the delivery of this opinion letter and "value" (as defined in the Uniform Commercial Code as in effect in the State of ___) has been given to the Borrower.

(xii) Guarantor is the owner of a direct or indirect interest in the Borrower or has otherwise received legally adequate consideration for its execution and delivery of the Loan Documents to which it is a party."

## VI. SPECIFIC OPINIONS

This portion of this paper covers the enforceability opinion first. Many opinion letters address the entity opinions first as they are "building blocks" toward reaching a legal conclusion as to enforceability.

A. Enforceability. The enforceability opinion is sometimes referred to as a "remedies" opinion. It provides comfort to the opinion recipient that an agreement exists and that remedies exist if there is a breach of the agreement in question. Many believe that the terms "valid" and "binding" are subsumed with an opinion that a document is "enforceable."

1. Contract Exists. An enforceability opinion provides assurance that there is a contract. Thus, the opinion giver must satisfy itself through assumptions and diligence that the conditions required to create a contract have been satisfied and conclude that there is an agreement between the relevant parties.

a. Requires an existing person or entity with the capacity (individuals) and entity power to do what it is agreeing to.

b. Requires the entity to take all steps required to bind itself to the transaction. This includes execution by a person with the authority to bind the entity and manifestation of the intent to be bound by delivery of the relevant agreements.

c. Requires legally sufficient consideration to the party that is agreeing to be bound.

2. The enforceability opinion provides comfort to the opinion recipient that there is a remedy for a breach of the agreements of the party covered by the opinion with regard to the documents addressed by the opinion. If, for example, applicable law exists to the effect that a remedy is not available for a breach of a particular agreement in a document, such an opinion should not be given (and, an exception should be taken in the closing opinion for such matter).

3. The enforceability opinion provides comfort that the remedies specified in the documents will be given. Thus, if, for example, the mortgage provides for foreclosure following a default, an enforceability opinion would mean that such remedy will be given effect.

4. Each provision will be given effect. Thus, for example, an enforceability opinion would mean that waivers of various rights are effective. If applicable law exists that would not recognize a waiver (e.g., waiver of a right to a jury trial), the opinion giver should consider whether to include an exception in the opinion letter with respect to such matter (though, as will be discussed below, the generic qualification is generally considered to include such types of exceptions).

5. The enforceability opinion is provided based upon assumptions (implicit and explicit) and subject to exceptions. Accordingly, an opinion that a document is enforceable does not, given the totality of the opinion letter, mean that everything necessarily works, as opinion letters should be analyzed in their entirety.

6. Opinion reports differ as to whether an enforceability opinion addresses the enforceability of each and every provision of the documents covered by the enforceability opinion. That is, unless otherwise specified in the opinion, each waiver, agreement and other provision of the documents addressed in the opinion will be given effect as written. Other reports indicate that the enforceability opinion addresses only material provisions. However, many opinion givers proceed, without regard to what the reports might say, within a paradigm that assumes that the recipient will view the enforceability opinion as addressing the enforceability of each and every provision.

6. Guarantees. There are issues to consider when providing opinions with respect to the enforceability of a guarantor's obligations. Some opinion givers will address the enforceability of a guarantor's obligations in a paragraph separate from an enforceability opinion with respect to the borrower's obligations.

    a. Consideration. What consideration supports the guaranty? In many instances, the guarantor holds a direct or indirect interest in the borrower and consideration would include receipt of the benefit conferred by the lending of a loan. In other instances, the guarantor might receive a fee and consideration would include receipt of the fee.

    b. Conflict of Interest. A guarantor's interests are not necessarily aligned with the borrower.

    c. Downstream Guarantees. There are issues related to consideration and fraudulent conveyance that may need to be considered in connection with guarantees provided by subsidiaries or affiliates of a borrower.

7. While there is some disagreement, it is often understood that coverage of usury is subsumed in an enforceability opinion. To avoid ambiguity, usury is often addressed in a separate opinion. If the opinion giver declines to provide a usury opinion, it should do so expressly. In some jurisdictions, the status of a loan as usurious or not may depend on the ability to utilize an exemption (such as the status of the lender) and assumptions may be required to permit the opinion giver to provide the opinion.

8. Some practitioners believe that an enforceability opinion does not subsume an opinion as to the creation of a lien. Many practitioners believe that the enforceability opinion subsumes an opinion that the documents are in form sufficient to create a lien. To avoid ambiguity, opinions as to lien creation, if given at all, are often stated separately. If such a lien creation opinion cannot, or is not to, be given, it should be expressly disclaimed.

9. Choice of Law. While some practitioners may disagree, an enforceability opinion is generally thought to subsume an opinion as to choice of law. Many opinion givers prefer, due to the difficulties in providing a choice of law opinion, to state

such opinion separately. If that approach is taken, the opinion letter should indicate the choice of law opinion is given only with respect to the express choice of law opinion stated in the opinion letter.

10. Illustration (paradigm is the opinion giver as primary transaction counsel):

> "__. The Loan Documents (except the Financing Statements and Guaranty) constitute the legal, valid and binding obligations of Borrower and are enforceable against Borrower in accordance with their respective terms.
>
> __. The Guaranty and Environmental Indemnity constitute the legal, valid and binding obligations of Guarantor and are enforceable against Guarantor in accordance with their terms."

B. Due Formation v. Existence; Good Standing. A due formation or due organization provides comfort that the statutory and organizational formalities have been complied with. For entities recently organized by the opinion giver, that may not be difficult to give inasmuch as the opinion giver will, in the context of its representation of the borrower, have taken steps to assure such compliance. For older entities or entities not organized by the opinion giver, such an opinion might be more difficult to give. For many mortgage loan transactions, it is sufficient for the borrower (mortgagor) to exist, which can be ascertained through public authority documents and client-based certifications.

1. Due Organization v. Due Formation. The correct term ("organized" versus "formed") may depend on the type of entity and the jurisdiction of its formation.

2. Existence. This may often be ascertained through public authority documents and a certification from the client.

3. Good Standing. This usually means that the entity has not dissolved, has made all required filings with the applicable governmental authorities and paid the requisite taxes and fees to remain in good standing. This may be established by a certificate of a public authority and is typically based solely on a certificate of good standing (or analogous certificate) issued by a public authority. Some opinion givers state that they are giving a good standing opinion based solely on the good standing certificate of a public authority.

4. Foreign qualification. This means that an entity organized or formed in another jurisdiction has taken the requisite steps to qualify to do business in the relevant jurisdiction. The diligence to provide such an opinion is typically conducted by obtaining a public authority document and is often given solely in reliance on a public authority document. Some opinion givers believe that, inasmuch as such sole reliance reduces the foreign qualification opinion to a conduit opinion, such an opinion does not add value and should not be given as the public authority document that the opinion giver is relying on may be furnished directly to the opinion recipient (and, indeed, often is an item incorporated into the recipient's checklist of closing requirements).

5. Illustration (paradigm: opinion giver is primary transaction counsel):

> "__. Borrower is an existing [limited liability company] in good standing under the laws of the State of ____.
>
> __. Guarantor is an existing [limited partnership] in good standing under the laws of the State of ___."

C. Entity Power

1. This opinion confirms whether or not an action is within the power for the entity was formed. For example, an entity power opinion provides comfort that the action taken by the entity is not outside the purpose for which the entity was formed as stated in the organizational documents of the entity or forbidden by the legislation governing the type of entity in question. An opinion giver would review the relevant statutes and relevant organizational documents to provide the support for this particular opinion. For example, the relevant limited liability company might provide that the limited liability company cannot engage in certain types of businesses or activities or the "purpose" provisions of a limited liability company's limited liability company agreement might limit the purpose of the limited liability company in ways that would place the relevant transaction outside of the permitted purposes of the limited liability company.

2. Borrow, Execute and Deliver and Perform. The entity power opinion often provides that an entity has the entity power to borrow the loan (if the transaction is a loan), to execute and deliver the documents covered by the opinion and to perform

the obligations of the entity under the documents covered by the opinion.

3. Business. Some opinion givers are requested to provide an opinion that the entity has the entity power to conduct its business as presently conducted. However, such an opinion requires diligence as to what business is currently being conducted and would require diligence that is difficult or expensive to conduct.

4. Illustration (paradigm: opinion giver is primary transaction counsel):

> "__. Borrower has the limited liability company power and authority to borrow the Loan and to execute and deliver the Loan Documents to which it is a party and to perform its obligations under the Loan Documents to which it is a party.
>
> __. Guarantor has the limited partnership power and authority to execute and deliver the Loan Documents to which it is a party and to perform its obligations under the Loan Documents to which it is a party."

D. Due Authorization, Execution and Delivery

1. This opinion provides assurance that the transaction was approved pursuant to applicable entity procedures, the documents were executed by the properly authorized individuals and the documents were delivered pursuant to applicable law.

2. An implicit assumption is that the fiduciary duties were complied with.

3. "Informal" Escrow Delivery. Delivery of documents can occur in a variety of contexts including physical delivery around a closing table or authorization to release signature pages. The opinion such must ascertain that the relevant parties have figuratively taken "its fingers off the documents." As indicated above, where local counsel are not physically present at the closing, they will often assume due execution and delivery.

4. Illustration (paradigm: opinion giver is primary transaction counsel):

> __. The borrowing of the Loan, the execution and delivery of the Loan Documents and the performance by the Borrower of its obligations under the Loan Documents have been duly authorized by all required limited liability company action of the Borrower.

__ The execution and delivery of the Loan Documents and the performance by the Borrower of its obligations under the Loan Documents have been duly authorized by all required limited partnership action of the Guarantor.

__. The Loan Documents have been duly authorized, executed and delivered by the Borrower and the Guarantor."

E. Choice of Law

1. A choice of law opinion is an opinion to the effect that under the laws of the jurisdiction covered by the opinion, the parties' choice of governing law as set forth in the documents covered by the opinion will be enforced. There are a range of circumstances to consider in this content. Sometimes the law chosen in the documents is the law addressed by the opinion giver and is also the jurisdiction where the real estate is located. Other times, some documents are governed by the law of a jurisdiction that is not the opinion giver's jurisdiction and other documents. Sometimes a document will choose the law of the opinion's giver jurisdiction for some purposes, but not for others. These variations will affect the choice of law (and enforceability) opinions that may be considered.

2. An inbound choice of law opinion addresses circumstances where the law covered by the opinion giver and the law chosen as the governing law in the loan documents are the same and will be given effect (e.g., where the opinion giver is covering Illinois law, an inbound choice of law opinion would indicate the choice of Illinois law as the governing law in the documents covered by such counsel in its opinion is enforceable). An outbound choice of law opinion addresses circumstances where the law covered by the opinion giver and the law chosen as the governing law in the loan documents are not the same and will be given effect (e.g., where the opinion giver is covering Illinois law, an outbound choice of law opinion would indicate the choice of New York law as the governing law in the documents covered by such counsel in its opinion is enforceable).

3. Some states have enacted legislation that provides that in specified categories of transactions (often based on the size of the transaction), the governing law set forth in a contract will be given effect where the chosen law is the law of the state with such legislation.

4. Unless disclaimed, although the reports do not universally accept such position, an enforceability opinion means that the choice of law provisions in the loan documents will work under the laws covered by the opinion giver's opinion.

5. An approach, where the law covered by the opinion differs from that chosen in the documents is expressed as "To the extent the laws of State X apply, excluding choice of law rules…"

6. Another approach is an assumption that the law of state x is the same as the law covered by the opinion giver's opinion. This assumption is often disfavored because it is likely not to be correct and does not provide the information that the opinion recipient seeks. If the recipient is willing to accept this opinion, why is an opinion necessary at all?

7. Without a statute addressing the choice of law, a choice of law opinion is often given as a reasoned opinion with appropriate assumptions and qualifications as well as, depending on applicable law, a discussion of applicable law.

8. Inbound choice of law opinion illustration (paradigm: opinion giver is primary transaction counsel):

> _"_. The [XYZ Choice of Law and Forum Act, [citation] ("Choice of Law and Forum Act")], provides that parties to any contract, agreement or undertaking covering in the aggregate not less than $____ may agree that the laws of the State of XYZ shall govern their rights and duties in whole or in part, whether or not the contract, agreement or undertaking bears a reasonable relationship to the State of XYZ, subject to certain specified exceptions for labor, personal, family or household services. Thus, under a properly presented question regarding the selection of XYZ law to govern, in part, the Loan Documents, an XYZ court or federal court applying XZY law should uphold such choice in accordance with the dictates of such Choice of Law and Forum Act."

9. Outbound choice of law opinion illustration (paradigm: opinion giver is primary transaction counsel):

> __. Under choice of law principles applicable under XYZ law, in a properly presented and argued case, an XYZ court or federal court sitting in XYZ, applying XYZ choice of law principles, should conclude that the provisions of the Loan Documents stating that the laws of the State of ____ (the "Chosen State") shall govern the enforcement of such Loan Documents are enforceable so long as (i) the Chosen State bears a reasonable relationship to the Transaction, (ii) the enforcement of the Loan Documents with the laws of the Chosen State is not is not dangerous, inconvenient,

immoral or against public policy, (iii) the Loan Documents are enforceable in accordance with their terms under the laws of the Chosen State, and (iv) the selection of the application of the laws of the Chosen State will be honored by courts in the Chosen State. We note, however, that choice-of-law issues are decided on a case-by-case basis, depending on the facts of a particular transaction, and we are thus unable to conclude with certainty that the courts of the state of XYZ or a federal court sitting in XYZ applying XYZ law, would give effect to such provisions. We also note and do not express an opinion regarding whether the courts of the State of XYZ or a federal court sitting in XYZ applying XYZ law might conclude that enforcement of a particular non-payment covenant or non-payment agreement set forth in the Loan Documents should be governed by the laws of the State of XYZ as opposed to the law of another state (by way of example, and not in any manner intended to limit the scope of this sentence, an XYZ court might apply XYZ law to the application or enforceability of any representation, warranty or covenant or any right that the Lender may have in any way directly or indirectly related to or affecting any real or personal property located in XYZ (for example in the determination of what constitutes "waste" with respect to a covenant or agreement, if any, precluding "waste")).

F. Lien Creation. In a typical commercial real estate transaction, the loan documents grant liens on real estate collateral, including, fixtures, and non-real estate collateral. The rules governing the creation of those liens typically differ (e.g., Uniform Commercial Code). Where required, opinions may address lien creation separately for real estate collateral fixtures and UCC collateral. Some opinion givers, when they do provide lien creation opinions, disclaim opinions regarding the characterization of collateral as real estate, fixtures or personal property. Such disclaimer arises, in part, because the collateral described in a mortgage as real estate might, under applicable law, not be considered real estate under the law covered by the closing opinion.

1. As indicated earlier, an enforceability opinion may subsume an opinion that the documents are in form sufficient to create the lien.

2. Lien Creation v. Form Sufficient to Create

    a. Lien Creation. Necessary assumptions include the debtor having title or sufficient rights in the collateral, recordation (in same states require recordation for creation of mortgage liens), adequate consideration (or legal conclusion that it is adequate) (e.g., "value" has been given) and an accurate and sufficient collateral description.

b. Form Sufficient to Create a Lien. This opinion advises the opinion recipient that the documents covered by the opinion are in form sufficient to create the lien that they are intended to create.

c. Is a real estate lien creation (or form of documents as sufficient to create a lien) opinion necessary if a title policy is obtained? The loan policy insures, among other things, the validity of the mortgage lien insured by the policy. Many opinion givers expressly disclaim opinions as to title, lien creation and attachment, perfection and priority. Indeed, matters of title and priority are rarely covered. Where creation and perfection are addressed, any such disclaimer will need to be tweaked.

3. Necessity of Recording. Some jurisdictions require recording in order to create a lien on real estate.

4. Personal Property Security Interests. The Uniform Commercial Code covers the creation, attachment, perfection, priority and enforcement of security interests in most types of non-real estate property and also addresses security interests involving minerals (before extraction) and standing timber.

5. Some real estate lawyers assert that an opinion regarding Article 9 UCC security interests in property other than fixtures is not an appropriate opinion to request given the uniformity of the Uniform Commercial Code and the fact that in many real estate transactions, the personal property collateral is not a significant component of the collateral. This may be the case with many commercial real estate types, but there are exceptions such as hotels where personal property can be a significant element of the value of the collateral. The imposition of cash management regimes (e.g. lockboxes and reserve accounts) in real estate financings may also result in a desire by the opinion recipient to obtain opinions as to the creation and perfection of security interests in that form of collateral.

6. Leases and Rents. An assignment of leases is an assignment of an interest in real estate. States vary as to how such liens and assignments are created and perfected. Rents are personal property under the laws of many states. Some mortgage lenders utilize an absolute assignment of leases and rents (with a license back to the assignor). Many opinion givers will decline to

express an opinion as to the effectiveness of such absolute assignment other than for collateral purposes.

7. Mezzanine Loans. Security interests in ownership interests in entities that own direct or indirect interests in owners of real estate are governed by the Uniform Commercial Code. Title insurance policy-like insurance products are available in the market-place and are widely used in connection with mezzanine lending. Some opinion recipients will not require security interest opinions with respect to mezzanine loans where a UCC policy is obtained.

8. Illustration (paradigm: primary transaction counsel is the opinion giver giving an opinion where the real estate collateral is located in the jurisdictions covered by such counsel's opinion with a mortgagor organized in a jurisdiction covered by that counsel's opinion):

> "The Mortgage is in form sufficient to create a lien on the real estate collateral described in the Mortgage. The Mortgage is in form sufficient to create a lien on the fixtures and personal property collateral described in the Mortgage to the extent that a security interest may be created in such fixtures and personal property under Article 9 of the Uniform Commercial Code as in effect in the state of _____, [citation]."

G. Lien Perfection

1. Fixtures. One often records a financing statement intended to perfect a security interest in fixtures in the real estate recording office in the county where the fixtures are located. However, a recorded mortgage on the real estate can be serve as a fixture filing, but must meet UCC requirements.

2. Real Estate. One records a mortgage or a deed of trust in the real estate recording office in county where the real estate is located.

3. Personal Property. Perfection depends on type of collateral.

   a. Filing Collateral

      i. Filing Collateral. Need to determine where to file. Most filing collateral is perfected by filing in the central filing office of the state where the debtor is located. For debtors that are registered organizations, that state is the state of organization of the debtor. There are rules for determining the location

of a debtor that is not a registered organization. Where to file within a jurisdiction is governed by the laws of that jurisdiction. The UCC is specific about the requirements for a financing statement and those requirements must be adhered to. This includes identification of the debtor correctly and sufficient identification in the financing statement of the collateral. Where the opinion giver is not addressing the law of the jurisdiction that governs the perfection of filing collateral, the opinion recipient may require a local counsel addressing the laws of that jurisdiction to provide such an opinion. The financing statement must be reviewed by the opinion giver to confirm that the information furnished meets the requirements to perfect the relevant collateral by filing.

b. Possessory and Control Collateral. Perfection of security interests in deposit accounts and security accounts may be important in transactions where reserve, lockbox and cash management requirements are imposed. Some opinion recipients request that creation and perfection of security interests in these types of collateral be addressed in the opinion.

4. Illustration (paradigm: primary transaction counsel is the opinion giver giving an opinion where the real estate collateral is located in the jurisdictions covered by such counsel's opinion with a mortgagor organized in a jurisdiction covered by that counsel's opinion):

> "__. The [Office of the Recorder of Deeds] of the county in the state where the real estate collateral described in the Mortgage is located is the only office, which, under the laws of the [State], where the Mortgage is to be recorded in order to provide constructive notice of the liens purported to be created under the Mortgage.
>
> __. Upon the filing of the [Fixture Filing] in the form attached to this opinion letter as Exhibit __ in the office of the ____ ("Filing Office"), the security interest created under the Mortgage will be perfected to the extent that a security interest in the fixtures described in the Mortgage may be created and perfected under Article 9 of the Uniform Commercial Code as in effect in the State of ____, [citation] (the "UCC"), by filing with the Filing Office.

> ___. Upon the filing of the [Financing Statement] in the form attached to this opinion letter as Exhibit __ in the office of the Secretary of State of the State of ____ ("Filing Office"), the security interest created under the Mortgage will be perfected to the extent that a security interest may be created and perfected under the UCC by filing a financing statement with the Filing Office."

H. Lien Priority. This is an opinion that is rarely requested or provided. Most opinion recipients will address their desire to confirm the priority of the liens securing their loans through title insurance and financing statement searches.

I. Noncontravention Opinions/No Violation Opinions. Unlike the enforceability opinion, the non-contravention and no-violation opinions provide comfort to the opinion recipient that the borrowing of the loan and the execution and delivery and performance of obligations of the borrower and guarantor under the loan documents do not breach other documents (organizational documents and third-party agreements), court orders and laws. The opinion recipient may require these because of a concern that the violation or breach in question might threaten the ability of the borrower or guarantor to satisfactorily proceed toward timely repayment of the loan. Thus, a "noncontravention opinion" is an opinion to the effect that the borrowing of the loan, the execution and delivery of the loan documents and the performance of the client's obligations under the loan documents do not breach the applicable organizational documents, agreements to which the specified person is a party or court orders by which the specified person is bound. A "no violation opinion" is an opinion to the effect that the borrowing of the loan, the execution and delivery of the loan documents and the performance of the obligations of the specified person does not violate applicable laws covered by the opinion.

   1. Borrow. This component of a noncontravention opinion assures the opinion recipient that the actual borrowing of the loan is not a breach or violation.

   2. Execute and Deliver. This component of a noncontravention opinion assures the opinion recipient that the execution and delivery of the covered documents is not a breach or violation.

   3. Perform. This component of a noncontravention opinion assures the opinion recipient that the performance by the opinion giver's client of the covered documents is not a breach or violation. Because a party's obligations are usually not fully

performed at the time of the delivery of the opinion, this opinion addresses future activities. However, notwithstanding the use of future tense, it is understood that such opinion speaks only as of the date of the opinion. Because of the myriad of covenants and other obligations in covered documents, this opinion may present challenges for the opinion giver.

a. Non-Payment Obligations. Because loan documents incorporate numerous non-payment obligations, opinion givers may be concerned that the diligence required to support an opinion as to all non-payment obligations does not add sufficient value to justify the opinion as to non-payment obligations.

b. Payment obligations under the loan documents.

4. Illustrative (paradigm: primary transaction counsel is opinion giver):

> "The borrowing of the Loan by the Borrower, the execution and delivery of the Loan Documents by the Borrower and the performance of the payment obligations of the Borrower under the Loan Documents does not (a) violate those laws of the [State] that we, in the exercise of customary professional diligence, would reasonable recognize as being applicable to the Borrower, the [Transaction] or transactions similar to the [Transaction], (b) constitute a breach of, or default under, the [Organizational Documents] of the Borrower or (c) constitute a breach of, or default under, the agreements for borrowed money to which the Borrower is a party identified in the [Certificate] attached to this opinion letter as Exhibit __, which agreements have, in such [Certificate], been identified as the only agreements for borrowed money to which the Borrower is a party."

Note that the above illustration also addresses opinions considered in J, K and L, below.

J. Non-contravention with Organizational Documents. To use an example, if the organizational documents of a borrower preclude investment in real estate in a given jurisdiction, a mortgage given by the borrower secured by real estate in the forbidden jurisdiction would be problematic.

K. No Violation of Law

1. Specified Laws. Some opinion givers limit the opinion to specific laws identified in the opinion rather than a broader set of laws.

2. Reasonably recognize as applicable.

3. Knowledge qualifier is often inappropriate.

L. No Breach of Agreements

1. All Agreements v. Identified Agreements. Some opinion givers are concerned that the diligence that may required to identify and review all agreements to which are person or entity is a party is onerous and not cost-justified. Some opinion givers will address the issue by limiting the opinion to documents identified in a client-certificate. Under those circumstances, the opinion giver and the opinion recipient will need to agree upon the scope of the identified documents.

   a. SPE borrowers are often not a party to many agreements (other than leases).

   b. Agreements for Borrowed Money

   c. Often limited to documents identified in a client certificate.

2. Does a "knowledge" or "materiality" qualifier help? Some believe that the use of a "knowledge" qualifier limits the diligence required. Others believe it does not as, among other things, it may be difficult to determine what is known. It may be difficult for an opinion giver to independently determine what is "material" for purposes of the opinion.

3. Financial Covenants. Financial covenant compliance will often involve financial calculations. Some opinion givers will include a qualification to the effect that their opinion does not address compliance with financial covenants. An example of such a qualification might be:

   "We express no opinion as to compliance with financial covenants."

   Where relevant, the opinion giver may rely on a certificate from an appropriate source. This may require knowledge of the financial covenants and might require the opinion giver to work with the client to craft the relevant certifications.

4. Material Adverse Effect. How might an opinion giver address a noncontravention opinion in the context of an agreement that provides for a default if an action has a material adverse effect. Some opinion givers will include a qualification to the effect that their opinion does not address defaults by virtue of

a material adverse effect or material adverse change. An example of such a qualification might be the following:

> "We express no opinion regarding whether the execution, delivery and/or performance of the Loan Documents is a default or breach under any "material adverse change" clause, "general insecurity" clause or any words of similar import or meaning contained in any instrument, contract or agreement to which the Borrower or Guarantor is a party or by which Borrower or Guarantor are bound."

M. Recordable Form. This opinion provides comfort to the recipient that the mortgage and other applicable loan documents satisfy applicable recording formalities. Recording formalities usually specified by statute.

1. Acknowledgments. A recordable form opinion subsumes an opinion that the form of acknowledgement is suitable in a jurisdiction covered by the opinion giver in question.
2. No opinion is given that the collateral description is correct.
3. A recordable form opinion does not address whether the signed document is properly signed (e.g., blue ink is required by state law) or whether acknowledged before a notary public.
4. Correct filing or recording office. The opinion informs the opinion recipient as to the proper office in which to record or file the mortgage and financing statement in which to create the lien (if recording is required to create the lien), perfect a security interest under the UCC or to provide constructive notice to third parties.

## VII. EXCLUSIONS/QUALIFICATIONS/EXCEPTIONS

Exclusions, qualifications and exceptions limit the scope of an opinion.

A. Bankruptcy. The bankruptcy qualification is a uniformly accepted qualification to the enforceability opinion that excludes from coverage of the opinion (whether stated or unstated) the body of state and federal insolvency laws of general application. Concepts related to insolvency and bankruptcy laws such as avoiding powers by virtue of fraudulent conveyances and preferential transfers are included as are matters such as the automatic stay in bankruptcy.

Illustrative bankruptcy qualification:

> "The enforceability of the Loan Documents is subject to the effects of bankruptcy, insolvency, reorganization, receivership, moratorium,

fraudulent conveyance or transfer and other similar laws affecting the rights and remedies of creditors generally."

B. Equitable Principles. The equitable principles qualification is a uniformly accepted qualification to the enforceability opinion that excludes from coverage of the opinion (whether stated or unstated) the availability of traditional equitable remedies. This includes such matters as waiver, materiality of breach and other equitable defenses and concepts.

Illustrative equitable principles qualification:

> "The enforceability of the Loan Documents is subject to the effects of general principles of equity (regardless of whether considered in a proceeding in equity or at law, including, without limitation, specific performance)."

C. Generic Qualification and Comfort/Practical Realization v. ACREL-Style

1. Generic Qualification. The generic qualification with some form of "comfort" is, in the context of commercial real estate mortgage loan transactions, a uniformly accepted qualification to a commercial real estate mortgage loan opinion. Many real estate practitioners do not believe that the bankruptcy and equitable principles qualifications express all of the potential impediments to the enforcement of mortgage loan documents and do not believe that the so-called laundry list approach adequately protects the opinion giver or conveys adequate information to the opinion recipient. Thus, the generic qualification implies that certain unspecified provisions of the covered documents may not be enforceable. Standing alone, such limitation would not be acceptable to most opinion recipients and, accordingly, is accompanied by some form of comfort.

   a. What does practical realization mean? In an increasingly disfavored approach, the comfort provided utilizes a so-called practical realization comfort, sometimes expressed as verbiage to the effect that notwithstanding the lack of enforceability of the unspecified provisions that may not be enforceable, there exist in the loan documents or pursuant to applicable law, adequate remedies for the practical realization of the principal benefits and security of the loan documents. The practical realization approach is disfavored because of its lack of precision (neither the

opinion recipient nor the opinion giver may be certain as to what it means).

2. ACREL-Style. To address the lack of precision and clarity and to reduce the potential for miscommunication, the ACREL-style formulation of the comfort is increasingly favored in place of the practical realization formulation of the comfort. ACREL-Style comfort has two elements.

    a. Notwithstanding the potential unenforceability of certain provisions, the covered loan documents are not invalid as a whole.

    b. Notwithstanding the potential unenforceability of certain provisions, the opinion recipient receives the following additional comfort:

        i. The lender can obtain a judgment for principal and interest (to the extent not deemed a penalty) following a maturity default or acceleration (described below).

        ii. The lender can accelerate the loan if a material default occurs under the loan documents.

            1. Material payment default.

            2. Material non-payment defaults. Covering non-payment defaults might require identification of material non-payment defaults where the lender's right to accelerate or exercise remedies may be limited by applicable law (other than limitations imposed by laws covered by the bankruptcy and equitable principles qualifications).

            3. If a provision in a document is of questionable enforceability there may be need to separately qualify the opinion by identifying the issue.

        iii. Foreclosure following maturity default or acceleration as a result of a material default.

        iv. Other remedies. Typically, specific identification of permitted remedies is limited by i, ii and iii.

c. Comfort Qualified by all other Exclusions/Qualifications. It is generally understood that the comfort is subject to all other exceptions without the necessity of so stating. Some opinion givers prefer to make that statement explicit.

d. Illustrative (paradigm: opinion giver is primary transaction counsel) ACREL-style generic qualification with "comfort":

> "Certain rights, remedies, waivers and other provisions of the Loan Documents may not be enforceable; nevertheless, subject to the assumptions and other qualifications in this opinion letter and to the last paragraph of this opinion letter, such unenforceability will not render the Loan Documents invalid as a whole or preclude (1) the judicial enforcement of the obligation of the Borrower to repay the principal, together with interest thereon (to the extent not deemed a penalty), as provided in the Loan Documents, (2) the acceleration of the obligation of Borrower to repay such principal, together with such interest, upon a material default by Borrower in the payment of such principal or interest [or upon a material default in any other material provision of Loan Documents] and (3) the foreclosure of the Mortgage upon maturity or upon acceleration pursuant to (2) above, subject in each case under parts (1), (2) and (3) of this paragraph to the economic consequences of delay and increased costs which may be occasioned by the unenforceability of such rights, remedies, waivers and other provisions. [Without limiting the foregoing, we bring to your attention that 735 ILCS 5/15-1602 grants a mortgagor the right, which in certain circumstances is exercisable not more than once in any five year period, to cure the default of a loan secured by real estate within certain time periods specified in such statute.]"

D. Other Common Exceptions. Many opinion recipients and opinion givers give and accept opinion letters containing only relevant exceptions. Some possible exceptions to an enforceability opinion are noted below. The Real Estate Finance Opinion Letter Report of 2012 provides, in part III of that report, an extensive list of other common qualifications. Some or all of these exceptions will be relevant. Where the generic qualification's comfort covers material payment or non-payment defaults, the opinion giver may need to include additional qualifications to address actual or potential issues regarding agreements and provisions in the loan documents covered by the opinion to avoid circumstances where the comfort provided might not be appropriate because of these issues.

1. Late Charges
2. Interest on Interest
3. Prepayment Premium
4. Exculpation/Indemnification as To One's Own Negligence
5. Suretyship Waivers
6. Compliance with Fiduciary Duties
7. Choice of Forum
8. Jury Trial Waiver

E. Knowledge. Often defined in the opinion itself.

1. Does not require search of files (absent a statement to that effect in the closing opinion).
2. Limitation to defined group or named individuals.

## X. LITIGATION CONFIRMATIONS

A. Scope of Confirmation

i. All Litigation

ii. Only Litigation that affects the transaction

iii. Only litigation to which the opinion giver has devoted substantive attention.

B. 2012 Real Estate Finance Opinion Letter Report approach limits the litigation confirmation to devotion of substantive attention to matters that affect the transaction.

C. Knowledge

## IX. NON-STANDARD OPINION REQUESTS

Non-standard opinion requests are viewed as inappropriate opinion requests for borrower's counsel to address.

A. Representations and Warranties Are Accurate. A request for confirmation in a closing opinion that the representations and warranties of a party are accurate or not known to be inaccurate is generally viewed as inappropriate. Where an opinion giver incorporates language to the effect that it is relying on representations and warranties of the client (e.g., borrower) in the loan documents, the

recipient might request that the opinion giver indicate that it is not aware that such representations and warranties are incorrect. Opinion givers might then take care, if they choose to accommodate that request, that any such assurance is tied to the representations and warranties as to which to they have relied to avoid implying that they are covering the entirety of a party's representations and warranties. It should be noted that some opinion givers and opinion recipients believe that the assurance is not necessary under customary practice.

B. Title/Lien Priority. As discussed above, commercial real estate opinion practice does not typically provide opinions as to title or lien priority. This is likely due to the prevalence of title insurance.

C. Practical Realization Notwithstanding Qualifications. Opinion requests to the effect that the lender is entitled to the practical realization of the principal benefits and security provided by the loan documents notwithstanding the qualifications appearing in the opinion letter are considered inappropriate.

D. Lender Status. These are opinion requests related to the status of the lender that are made of the borrower's counsel. Often, these requests might be more efficiently handled by the lender's own counsel.

   a. Need to qualify

   b. Not subject to tax

E. Loan Documents include all customary remedies. This is generally viewed as an inappropriate opinion request because it does not require the application of professional judgment to the subject and is often considered to be a matter that is more efficiently handled by the lender's own counsel.

F. Comprehensive Legal Compliance. An opinion that the borrower (or collateral) is in compliance with applicable law is generally viewed as an inappropriate opinion request. These issues can often be handled through a combination of third-party reports (e.g., zoning reports), design professional opinions in construction projects, title insurance (where available) by zoning and subdivision endorsements and representations and warranties by the relevant parties.

G. Qualified in All Jurisdictions. This is generally viewed as an inappropriate opinion request.

H. Licenses and Permits. This is generally viewed as an inappropriate opinion request.

## X. ASSIGNABILITY-WHO MAY RELY

A. Addressee

B. Successors and Assigns/Participants

1. Potential unknown reliance parties. The opinion giver may be concerned that remote assignees of the loan will not be familiar with customary practice or may not have relied on the opinion to the extent that the initial opinion recipient did. The opinion recipient prefers to minimize limitations on reliance in order to maintain its ability to pledge, sell or grant participations in the loan addressed in the opinion letter. Many opinion givers prefer not to permit loan participants to rely on the opinion due to, among other things, lack of privity.

2. "Wachovia"-style formulation. This formulation permits successors and assigns permitted under the loan documents to rely on the opinion, but provides limitations tied to the opinion being dated as of its date and being based on the facts, law, parties and circumstances in effect at the time the opinion is given.

C. Rating Agencies. Occasionally, opinion givers receive requests in commercial real estate mortgage loan transactions to allow rating agencies rating securities issued in connection with securitizations of the loan to rely on the opinions. However, many rating agencies have indicated that they do not need to rely on opinions from mortgagor's counsel in commercial real estate mortgage loan transactions where the opinion letter allows a copy of the opinion letter to be disclosed to the rating agency.

D. What about Counsel to the Recipient? The trend in the reports is that the recipient's counsel should not be permitted to rely on the opinion letter.

E. The Real Estate Finance Opinion Report of 2012 includes illustrative language in the illustrative opinion included in part III of that report.

## XI. PROCESS

A. Appropriate-Level of Review

B. Negotiation-Style

C. Timeliness

1. Engaging in-firm Resources
2. Selection of Local or Special Counsel
3. Prompt Submission of Opinion Requests
4. Attention to Potential Opinion Issues Early in the Transaction
5. Prompt Delivery and Response to Opinion Drafts

D. Opinion Coordination. This may involve coordination with local or special counsel and with other lawyers in the opinion giving law firm. It may also involve coordination with in-house counsel if in-house counsel is providing an opinion letter and coordination with the client relative to diligence. On the recipient-side, this coordination may involve review of more than one opinion letter.

E. Delivery of Opinion.

## XII. SOME RESOURCES [MANY RESOURCES ARE AVAILABLE THROUGH THE LEGAL OPINIONS RESOURCES CENTER-SEE BELOW FOR LINK]

1. Real Estate Opinion Letter Guidelines (2003) [ACREL Attorneys' Opinions Committee & ABA Section of Real Prop. Prob. and Tr. Law Comm. on Legal Opinions in Real Estate Transactions, "Real Estate Opinion Letter Guidelines", 38 REAL PROP. PROB & TR J. 241 (2003)]. The Real Estate Opinion Letter Guidelines adopted the Guidelines for the Preparation of Closing Opinions issued by the ABA's Business Law Section (including the Legal Opinion Principles) and added an overlay of topics relevant to commercial real estate opinion practice. The Business Law Section's Guidelines may be found at: http://apps.americanbar.org/buslaw/tribar/materials/20050120000001.pdf (last visited December 10, 2016).
2. Real Estate Finance Opinion Report of 2012. [ACREL Attorneys' Opinions Committee, ACMA Opinions Committee & ABA Section of Real Prop. Tr. and Es. Law Comm. on Legal Opinions in Real Estate Transactions, 47 REAL PROP. TR & ES J. 213 (2012)].
3. ACREL Attorneys' Opinions Committee, ACMA Opinions Committee & ABA Section of Real Prop. Tr. and Es. Law Comm. on Legal Opinions in Real Estate Transactions "Local Counsel Opinion Letters in Real Estate Finance Transactions:

A Supplement to the Real Estate Finance Opinion Reports of 2012" [ 51 REAL PROP. TR. & ES. J. 167 (2016)].

4. TriBar Reports. These may be found through the "Legal Opinion Resources Center" referenced in D.7, below.

5. Thompson [Robert A. Thompson. REAL ESTATE OPINION LETTER PRACTICE (2009)].

6. Customary Practice Statement. Statement on the Role of Customary Practice in the Preparation and Understanding of Third-Party Legal Opinions, 63 Bus. Law 1277 (2008), Multiple Bar Groups.

7. Glazer [Donald W. Glazer, Scott FitzGibbon and Steven O. Weise. GLAZER AND FITZGIBBON ON LEGAL OPINIONS (2008)].

8. State and Local Bar Association Reports. The American Bar Association Business Law Section website includes the "Legal Opinion Resources Center" which includes links to a number of national, state and local bar association reports [http://apps.americanbar.org/buslaw/tribar/home.shtml] (last visited December 10, 2016)].

## XII. NOT ADDRESSED IN THIS PAPER

A. Nonconsolidation Opinions

B. Opinions in connection with loan modifications, loan assumptions and defeasances

C. Delaware Single-Member LLC Opinions

D. Opinion Practice for Government-Insured Loans or Loans Lent to, or by, Governmental Entities (e.g., HUD)

E. Land Use Opinions

F. Cross-Border opinions.

## APPENDIX A

**The following is included for illustrative purposes only. Actual circumstances may require different certifications and formulations. For purposes of illustration, this illustration uses, as a paradigm, a single-member, member-managed limited liability company as the borrower, with the sole member being a limited partnership and a guarantor, and, with the general partner of such limited partnership being another limited liability company, managed through a board of managers consisting of various individuals.**

### CERTIFICATE OF _____

The undersigned, _____, does hereby certify, as of the date set forth below, that [he/she] is the duly appointed and serving _____ of Wonderful Investment Strategies GP LLC, a _____ limited liability company ("General Partner"), that General Partner is the sole general partner of Wonderful Investment Strategies I L.P., a ___ limited partnership ("Fund"), and the Fund is the sole member of WIS Office Campus I LLC, a ___ limited liability company ("Borrower" and, together with General Partner and Fund, the "WIS Entities"). The undersigned has been advised that Opinion Giver LLP ("Counsel") has been requested to furnish Counsel's legal opinions on certain matters (the "Legal Opinion") related to a $___ mortgage loan to the Borrower by _____. In connection with the Legal Opinion, Counsel has requested that this Certificate be furnished to Counsel with respect to the factual matters set forth below. The undersigned understands that Counsel will be relying on the representations contained herein in connection with the Legal Opinion. The term "Loan Documents" shall have the meaning given in such Legal Opinion.

The undersigned does hereby certify and represent to Counsel that:

1. General Partner is an existing limited liability company under the laws of the State of ___. Fund is an existing limited partnership under the laws of the State of ___. Borrower is an existing limited liability company under the laws of the State of ____.

2. Attached as Section A through C of Exhibit A to this Certificate is a true, correct and complete list of all documents creating the WIS Entities, relating to the existence of the WIS Entities or pertaining to authorization of the Loan Documents (collectively, the "WIS Documents"). A true, correct and complete copy of each of the

WIS Documents has been furnished to Counsel. [ALTERNATE TO THE PRECEEDING SENTENCE. A true, correct and complete copy of each if the WIS Documents is attached to this Certificate as Exhibit B.] Except as disclosed in this Certificate, the WIS Documents have not been amended, modified, rescinded or terminated, and no amendment, modification, rescission or termination of any of the WIS Documents has been authorized. None of the WIS Entities has received notice from the State of ___ that its status as a ___ limited liability company or _____ limited partnership has been suspended or forfeited. None of the WIS Entities has received any notice of the commencement of any proceeding for dissolution, or the filing of a certificate of dissolution or a certificate of cancellation of any of the WIS Documents, and, to the undersigned's knowledge, no procedure or proceeding to effect a dissolution, liquidation, reorganization or bankruptcy of any of the WIS Entities has been initiated. To my knowledge, no circumstances have occurred or exist which has effected or will effect a dissolution of any of the WIS Entities under the WIS Documents, and to my knowledge, each of the WIS Entities continues to exist as a limited liability company in the case of the Borrower and General Partner or limited partnership in the care of Fund.

3. The signatures of all persons signing the Loan Documents on behalf of one or more WIS Entities appearing on such documents are their genuine signatures. The person whose name, title and signature appears in paragraph 12 of the Certificate attached hereto is a duly elected, qualified and acting officer of the General Partner and is authorized to execute and deliver in such capacity on behalf of the General Partner, in its own or in its capacity as general partner of the Fund, in its own or in its capacity as the sole member of the Borrower, the [Loan Documents], and the signatures herein appearing opposite [his][her] name are [his][her] genuine signatures.

4. Any and all representations and warranties (to the extent they relate to factual matters concerning any one or more of the WIS Entities, made by Borrower or the Fund in the Loan Documents) are true and correct as of the date hereof, and are hereby made to, and may be relied upon by, Counsel.

5. Natural persons who are involved on behalf of the WIS Entities have sufficient legal capacity to enter into and perform the transaction evidenced by the Loan Documents or to carry out their roles in it.

6. Each Loan Document is accurate and complete and will be executed by Borrower and the Fund in exactly the form and content submitted.

7. There has not been any mutual mistake of fact or misunderstanding, fraud, duress or undue influence in connection with the Loan Documents.

8. 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 Loan Documents.

9. There are no material pending or threatened lawsuits, claims or criminal proceedings against WIS Entities or specifically applicable to the collateral described in the Loan Documents.

10. None of the WIS Parties is bound by any judgment, order, writ, injunction or decree other than _____(collectively, "Judgments"). WIS Parties have provided Counsel with true and complete copies of the Judgments, none of which have modified or amended.

11. Neither the Borrower nor the General Partner is a party to any agreement for money borrowed. The Fund is not a party to any agreements for money borrowed except for that certain [Credit Agreement] ("Credit Agreement"). The Credit Agreement has not been amended or modified and a true and complete copy of the Credit Agreement has been provided to Counsel.

12. To the knowledge of the undersigned, none of the WIS Parties are subject to any investigation by any Governmental Authority.

13. The following persons are officers of General Partner, serving in the office set forth opposite his name:[1]

| Name | Title | Signature |
|---|---|---|
| _____ | _____ | _____ |
| _____ | _____ | _____ |

[*Signature Page Follows*]

1. See Revisions.

The undersigned has made or caused to be made such factual investigations as are necessary in order to permit the undersigned to verify the accuracy of the information set forth in this Certificate.

Dated as of _____.

Name: _____

## EXHIBIT A

### Schedule of Organizational and Authorization Documents

**A. Borrower.**

**[**List applicable documents**]**.

**B. General Partner.**

**[**List applicable documents**]**.

**C. Fund.**

**[**List Applicable Documents**]**.

## NOTES