Commercial Real Estate Financing
2017

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Issues Facing the Mortgage Loan Opinion Giver

Gregory P. Pressman

Schulte Roth & Zabel LLP
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“THE (BAKER’S) DIRTY DOZEN” – QUESTIONS AND ISSUES

1. Why am I giving this opinion? Custom and usage in the opinion process; the rationale for a borrower’s counsel opinion in a mortgage loan transaction vs. a sale.

2. Am I “special counsel” or just counsel? Avoiding arguments over trivial distinctions.

3. What documents am I giving an opinion on? Defining the universe of loan documents; describing the scope of counsel’s due diligence.

4. Why all of these assumptions? Are they all necessary? Does the list ever get shorter? Creating a set of generally acceptable assumptions.

5. How can I, borrower’s counsel, a New York lawyer, give an opinion on Delaware law? (And how can I, as lender’s counsel, accept certain limitations on the law covered by the opinion?) Examining the rationale for the “applicable law” paragraph.

6. The “due formation, power and authority” opinion: is it enough to say only that the borrower is a “validly existing” entity? What about the “good standing” opinion? (Note: New York does not issue “good standing” certificates, only certificates of subsistence.)

7. Do I really have to opine as to the borrower’s managing member? How far up the chain is far enough? Avoiding complexity; acknowledging complexity; understanding the scope of due diligence.

8. The “no conflicts” opinion: why am I being asked to opine as to factual matters? The “knowledge” qualifier; choosing between “actual knowledge” and an identified list of documents (accepted customs vs. the NYSBA model opinion formulation).

9. Why is the lender’s counsel insisting on a separate usury opinion? Why is lender’s counsel also asking for opinions on the form of mortgage, place of recordation, and lack of requirement for governmental consents? Usury and other annoying details.

10. If the property is not in New York but loan documents are governed by New York law, what choice-of-law opinion can I (or should I) give? Avoiding the inadvertent non-New York opinion, using the right qualifiers.

11. I’m a real estate lawyer. How can I give a creation and perfection opinion under the UCC (and the Delaware UCC to boot)?
ining the rationale, issues and qualifications; giving opinions as to fixture filings.

12. Qualifications to the remedies opinion: “Practical Realization” vs. “Material Default”. Does it really make a difference?

13. The reliance paragraph: why should agents, trustees and rating agencies in a securitization be entitled to rely on my opinion? Should the lender’s counsel also be entitled to rely on my opinion? I always wanted to be a published author, but this is ridiculous!

     And – as an extra question

14. Whatever happened to the “Accord” opinion (which is like asking whatever happened to the Leisure Suit)?
“ANATOMY OF AN OPINION”

Real Estate Department CLE Program
Part I

Gregory P. Pressman

I. Addressee and Subject.
   a. Usually lender.
   b. Avoid definitions.

II. Introduction.
   a. Who we represent.
   b. Why we're giving the opinion.
   c. Defined terms.

III. Predicates to the opinion – setting the stage.
   a. Documents reviewed.
      i. Loan documents.
      ii. Use of schedule instead – pros & cons.
   b. Other documents examined; reliance documents.
      i. Organizational documents.
      ii. Reliance on certificates and written statements as to certain facts.
      iii. Importance of due diligence – see below.
   c. Certain assumptions.
      i. Legal capacity of persons.
      ii. Genuineness of signatures.
      iii. Authority of signatories on behalf of non client parties.
      iv. Authenticity of originals and accuracy of copies.
   d. Other assumptions – the “dirty dozen”, (a) through (l).
   e. What we're expressly not opining on.
      i. Title.
      ii. Adequacy of description of collateral.
iii. Creation, attachment, perfection, priority (except as specifically set forth).

iv. Reliance by addressee on title insurance as to:
   1. title to realty;
   2. creation and priority of mortgage lien.

f. Governing law.
   i. Federal, NY State, Delaware LLC Act, Delaware UCC.
   ii. Other limitations – UCC opinions.
   iii. No opinion on county or municipal law.

g. Reliance on other opinions.

h. Definition of “our knowledge”.

Part II

IV. The Opinion – “Core” Opinions Plus Certain Additions.

a. Due formation, valid existence, good standing.
   i. NY entity – “subsisting”.
   ii. Qualification in New York.
   iii. “Duly organized” vs. “duly incorporated” or “duly formed”?
   iv. Note: a Del llc is “formed” when certificate filed (or later stated date).
   v. Separate opinion as to lower tier entities.
   vi. NYSBA Model Opinion – only opines as to “valid existence”.

b. Power under Organizational Documents and applicable llc law.
   i. Own its properties.
   ii. Carry on its business.
   iii. Execute and deliver the loan documents and perform its obligations.
iv. Same opinions as to sole member or managing member.
   1. “Power” opinion more limited – only as to carrying on its business.

v. “Power and authority” is also used.

C. Due authorization, execution and delivery of Loan Documents.
   i. As to individual guarantors, only due execution and delivery.
   ii. Due authorization, etc., by borrower subsumes all lower tier entities.

d. Important note: as to a, b & c opinions, adequate due diligence is critical.
   i. Duty to investigate – reliance on information must be “reasonable”.
   ii. See Whitney v. Citibank, N.A., 782 F. 2d 1106 (2d Cir. 1986).

e. Enforceability – legal, valid and binding obligation.
   i. Separate enforceability opinion for guarantors.

f. “No conflict” opinion.
   i. Execution, delivery and performance of loan documents will not violate:
      1. Organizational documents.
      2. Applicable federal or NY State statute, rule or regulation.
      3. Any agreement or court decision binding on Borrower.
         a. Made “to our knowledge”.
         b. NYSBA form – refers to schedules.
   ii. Separate opinion for guarantors.
   iii. NYSBA form – uses “payment of indebtedness” language.
      1. Not commonly accepted.
g. No pending proceeding that could adversely affect loan transaction.
   i. Also being given only “to our knowledge”.

h. UCC Article 9 security interest creation opinion.
   i. Perfection opinion under applicable UCC – place of filing (perhaps).
      i. State of organization of Borrower – usually Delaware.
      ii. Possible opinion as to location of filing offices.
      iii. Fixture filing opinion under NY UCC.

j. Usury opinion.

k. Form of mortgage; place of recordation – not always given.
   i. Sufficient to create a valid lien.
   ii. Satisfactory for recording.
   iii. Place of recordation – City Register’s Office.

l. No governmental consent, authorization or approval required – not always given.

V. Qualifications and Limitations.
   a. Bankruptcy, creditors rights.
      i. “Practical Realization” approach – preferred alternative.
      ii. NYSBA and ACREL use “Material Default” approach – not common.

   b. No opinion as to certain “boilerplate” clauses (waivers, set off rights, etc.).

   c. UCC qualifications.
      i. None in NYSBA opinion – no UCC opinion being given.
      ii. Typically contains 14 paragraphs, all blessed by SRZ.
      iii. Paragraph 15 – required if giving a “place of filing” opinion.

VI. Conclusion.
   a. Reliance limitations.

   b. Who may receive copies.
c. No obligation to update upon change of law.
d. No opinion on issues arising out of certain related transactions.
   i. Identity or status of transferee or participant.
   ii. Securitization of the loan.
   iii. Subsequent transaction or change of law.
Unconscionable Bank, National Association

[_______________]

[_______________]

Re: $[–],000,000.00 Mortgage Loan to LLC

Gentlemen:

We have acted as counsel to [______________] LLC, a Delaware limited liability company (“Borrower”), [______________] LLC, a Delaware limited liability company, the sole member of Borrower (“Sole Member”), and [______________], an individual (“Indemnitor”), in connection with that certain $[–],000,000.00 mortgage loan (the “Loan”) made by Unconscionable Bank, National Association, a national banking association (“Lender”), to Borrower, pursuant to [an Agreement of Consolidation and Modification of Fee Mortgage, Security Agreement, Assignment of Rents and Fixture Filing] of even date herewith between Borrower and Lender (the “Mortgage”). Except as otherwise indicated, all capitalized terms used herein and defined in the Mortgage shall have the meanings given such terms in the Mortgage.

For the purpose of rendering this opinion, we have reviewed originals or copies, certified or otherwise identified to our satisfaction, of the following documents, all dated as of the date hereof (the “Closing Date”), unless otherwise noted, as executed and delivered in connection with the Loan:

(a) The Mortgage secured by that certain real property located at __________ Avenue, New York, New York (the “Real Property”) and certain personal property (including fixtures and other rights) located thereon or used in connection therewith (the “Personal Property”);

(b) [Amended, Restated and Consolidated Promissory Note (the “Note”) made by Borrower to the order of Lender in the principal amount of $__________;]

(c) Guaranty made by Indemnitor in favor of Lender (the “Guaranty”);

(d) Assignment of Leases and Rents and Security Deposits made by Borrower in favor of Lender (the “Assignment of Leases”);

__________, 200_

(e) Central Account Agreement among Lender, Borrower and [_______] Bank, National Association ("Bank") (the "Central Account Agreement");

(f) [Add references to other documents, including Severance Agreement, Rate Cap Agreement, other notes etc.]; and

(g) Two (2) UCC financing statements, naming Borrower, as debtor, in favor of Lender, as secured party (the “Financing Statements”).

The Mortgage, the Note, the Guaranty, the Assignment of Leases, the Central Account Agreement, [other agreements referenced above] and the Financing Statements are referred to herein individually as a "Loan Document" and collectively as the “Loan Documents”. The Real Property and the Personal Property are collectively referred to herein as the “Collateral”.

In rendering our opinion, we have also examined the Certificate of Formation of Borrower and the Limited Liability Company Agreement of Borrower, dated __________, 200_, and __________, 200_, respectively, the Certificate of Formation of Sole Member and the Limited Liability Company Agreement of Sole Member, dated ___________, 200_, and ___________ , 200_, respectively (each of such sets of organizational documents being referred to below as the “Organizational Documents” of the applicable party), certificates of public officials, and such other records, certificates, documents and instruments as we have deemed necessary for the purposes of the opinions expressed herein. As to various questions of fact material to our opinion, we have relied upon certificates and written statements of officers, members and other representatives of Borrower and Indemnitor.

In addition, we have assumed the legal capacity of all natural persons (other than Indemnitor) executing the Loan Documents and the aforementioned certificates and written statements, the genuineness of all signatures thereon (other than Borrower), the authority of all persons signing the Loan Documents on behalf of all parties thereto (other than Borrower), the authenticity of all documents submitted to us as originals and the conformity to the original of all copies submitted to us as facsimiles, photocopies or conformed copies.

In rendering the opinions set forth below, we have also assumed the following: (a) each Person (other than Borrower) which is a party to any Loan Document is validly existing and in good standing under the laws

of the jurisdiction of its organization; (b) each Loan Document has been duly authorized by all parties thereto (other than Borrower); (c) each Loan Document has been duly executed and delivered by all parties thereto (other than Borrower and Indemnitor); (d) the parties to each Loan Document (other than Borrower) have the requisite power and authority (corporate, company, partnership or other) to execute, deliver and perform such Loan Document; (e) each Loan Document constitutes the legal, valid and binding agreement of the parties thereto (other than Borrower and Indemnitor) and is enforceable against each such party in accordance with its terms; (f) each Loan Document has been entered into by the parties thereto (other than Borrower and Indemnitor) in good faith, and the conduct of all such parties has conformed and will conform with all applicable express and implied covenants of good faith and fair dealing and the requirements of conscionability; (g) there has been no mutual mistake of fact; (h) there exists no fraud, duress or undue influence with respect to the Loan Agreement or any of the other Loan Documents or any of the obligations contained in the Loan Documents; (i) you have complied with all state and federal laws and regulations applicable to you arising out of the Loan or your status as Lender therein; (j) the Mortgage and the Assignment of Leases will be duly recorded and indexed in the Office of the City Register, County of New York, State of New York, and all applicable mortgage recording taxes and other recording fees and charges imposed thereon will be paid; (k) the Financing Statements will be filed in the appropriate filing offices and all applicable filing fees and charges imposed thereon will be paid; and (l) all of the proceeds of the Loan will be advanced on the date hereof.

We express no opinion with respect to (i) the title to or the rights or interests of Borrower in the Collateral, (ii) the adequacy of the description of the Collateral, or (iii) except as otherwise specifically set forth below, the creation, attachment, perfection or priority of any liens thereon or security interests therein. We understand that with respect to the title to the Real Property and the creation and priority of the lien of the Mortgage, you will be relying on the certificate and report of title issued to you by [______________] Title Insurance Company and redated as of the Closing Date.

The law covered by this opinion is limited to the federal law of the United States, the law of the State of New York, the Limited Liability Company Act of the State of Delaware, and the Uniform Commercial Code currently in effect in the State of Delaware (the “Delaware UCC”).
In addition, (i) the opinions expressed in paragraph 12 below are limited to Article 9 of the Uniform Commercial Code as currently in effect in the State of New York (the “New York UCC”), and (ii) the opinions expressed in paragraph 14 below are limited to the New York UCC and to Article 9 of the Delaware UCC and are based on our review of Sections 9-501 through 9-504 of the Delaware UCC as published in The Uniform Commercial Code Filing Guide, without regard to case law decided thereunder or any other provisions of the Uniform Commercial Code, or any other statutory provisions, in effect in the State of Delaware. We express no opinion with respect to the law of any other jurisdiction and no opinion with respect to administrative decisions, rules, regulations or requirements of any county, municipality, subdivision or local authority of any jurisdiction.

Any reference herein to “our knowledge” or any similar phrase means the actual knowledge of the attorneys of this Firm with primary responsibility for the preparation, review and negotiation of the Loan Documents on behalf of Borrower, Sole Member and Indemnitor.

Based on the foregoing, and subject to the qualifications, limitations and exceptions herein contained, we are of the opinion that:

1. Borrower is a duly formed limited liability company validly existing and in good standing under the laws of the State of Delaware [and qualified to do business and own and operate the Property under the laws of the State of New York].

2. Sole Member is a duly formed limited liability company validly existing and in good standing under the laws of the State of Delaware.

3. Borrower has the power under its Organizational Documents and applicable limited liability company law to own its properties, to carry on its business as now being conducted, to execute and deliver the Loan Documents to which it is a party and to perform its obligations thereunder.

4. Sole Member has the power under its Organizational Documents and applicable limited liability company law to carry on its business as now being conducted.

5. Borrower has taken all action necessary under its Organizational Documents and applicable limited liability company law to authorize the execution and delivery of each Loan Document to which it is a
party and the performance of its obligations thereunder and has duly executed and delivered such Loan Documents.

6. The Loan Documents to which Borrower is a party constitute the legal, valid and binding obligations of Borrower, enforceable against Borrower in accordance with their respective terms.

7. Indemnitor has duly executed and delivered the Guaranty.

8. The Guaranty constitutes the legal, valid and binding obligation of Indemnitor, enforceable against Indemnitor in accordance with its terms.

9. The execution and delivery by Borrower of the Loan Documents to which it is a party and the performance by Borrower of its obligations thereunder do not (a) conflict with or violate any provision of the Organizational Documents of Borrower; (b) conflict with or violate any applicable provision of any presently existing statute, rule or regulation of the United States of America or any governmental agency thereof, or of the State of New York; or (c) to our knowledge, (i) conflict with or violate or result in a breach of any of the provisions of any agreement or instrument to which Borrower is a party or (ii) conflict with or violate any judgment, order, writ, injunction or decree binding on Borrower.

10. The execution and delivery by Indemnitor of the Guaranty and the performance by Indemnitor of his obligations thereunder do not (a) conflict with or violate any applicable provision of any presently existing statute, rule or regulation of the United States of America or any governmental agency thereof, or of the State of New York, or (b) to our knowledge, (i) conflict with or violate or result in a breach of any of the provisions of any material agreement or instrument to which Indemnitor is a party, or (ii) conflict with or violate any judgment, order, writ, injunction or decree binding on the Indemnitor.

11. To our knowledge, there is no action or proceeding pending against either Borrower or Indemnitor (or either of them) before any New York court that may adversely affect the transactions contemplated by the Loan Documents.

12. The Mortgage creates in favor of Lender, as security for payment of the Debt (as defined in the Mortgage), a security interest in such
portion of the Collateral (as defined in the Mortgage) described in the Mortgage in which a security interest may be created under Article 9 of the New York UCC (the “Article 9 Collateral”).

13. The Mortgage is in a form sufficient to create a valid mortgage lien on the Real Property under New York law, and the Mortgage and the Assignment of Leases are in form satisfactory for recording in the Office of the City Register, New York County. The recording of the Mortgage in said City Register’s Office is the only filing or recording necessary to give constructive notice of the lien created by the Mortgage to subsequent purchasers and mortgagees of the Real Property. No other recordation, filing, re-recording or refiling is necessary in order to maintain the validity or priority of the lien created by the Mortgage.

14. Lender will have, upon the filing of the Financing Statements in the Office of the Delaware Secretary of State, a perfected security interest in that portion of the Article 9 Collateral in which a security interest is perfected by filing financing statements under Article 9 of the Delaware UCC. In addition, with respect to that portion of the Article 9 Collateral that constitutes goods that are or are to become fixtures, Lender will have a perfected security interest in such portion of the Article 9 Collateral upon the filing of the Financing Statements as a fixture filing in the Office of the City Register, New York County.

15. The Loan, as made pursuant to the terms of the Mortgage, complies with or is exempt from applicable New York laws pertaining to usury.

16. No consent, authorization, approval or other action by or filing with any state or federal court or governmental authority is required in connection with the execution and delivery by each of Borrower and Guarantor of the Loan Documents to which it is a party or for the performance by them of their respective obligations thereunder.

The opinions set forth above are subject to the following qualifications and limitations:

A. The opinions expressed in paragraphs 6 and 8 above are subject to:

(i) the effect of bankruptcy, insolvency, receivership, fraudulent transfer or conveyance, reorganization, moratorium, arrangement
or other similar laws affecting enforcement of creditors’ rights generally;

(ii) the application of general principles of equity, whether considered in a case or proceeding at law or in equity, including concepts of materiality, reasonableness, good faith and fair dealing;

(iii) the qualification that indemnification and contribution provisions in the Loan Documents may be unenforceable to the extent that such indemnification or contribution relates to claims made under any federal or state securities laws or is otherwise limited by public policy;

(iv) the qualification that the enforcement of the Assignment of Leases (and any similar provisions in the Mortgage) is limited to the enforcement of such assignment upon acceleration of the debt following a material default for purposes of collecting rents accruing after the appointment of a receiver by a court of competent jurisdiction in an action to foreclose the Mortgage;

(v) the limitations imposed under applicable law on the availability and extent of equitable remedies and relief, ex parte remedies and other self-help or non-judicial relief; and

(vi) the qualification that certain provisions contained in the Loan Documents (including waivers of certain rights and defenses) may be further limited or rendered unenforceable by applicable law, but in our opinion such law does not render any of the Loan Documents invalid as a whole or substantially interfere with realization of the principal benefits and security provided thereby.

B. We express no opinion as to the legality, validity, binding effect or enforceability (whether according to its terms or otherwise) of the following:

(i) any provision of any Loan Document that provides, in substance, that rights or remedies are not exclusive, that every right or remedy is cumulative and may be exercised in addition to any other right or remedy, that the election of some particular remedy does not preclude recourse to one or more other remedies or that a failure to exercise or a delay in exercising rights
or remedies will not operate as a waiver of any such right or remedy;

(ii) any waiver or consent relating to the rights of Borrower or Indemnitor under any Loan Document or applicable law or the duties owing to such party existing as a matter of law, to the extent such waivers or consents are found by a court to be against public policy or are ineffective pursuant to applicable law;

(iii) any provision in any Loan Document that provides, in substance, that oral or other modifications, amendments or waivers cannot effectively be agreed upon by the parties or that the doctrine of promissory estoppel may not apply;

(iv) any right of set off with respect to any obligations of a Person to any other Person against any obligations other than the obligations of such other Person to such Person; and

(v) any obligations of Borrower or Indemnitor as a guarantor or indemnitor under any of the Loan Documents where the obligations guaranteed are invalid or unenforceable as against the primary obligor or where the nature of the indemnity is against public policy or contrary to law.

C. The opinions expressed in paragraphs 6, 12 and 14 above are subject to the following qualifications:

(i) we express no opinion with respect to any Article 9 Collateral of a type described in Section 9-501(a)(1)(A), (B) or (C) of the New York UCC or represented by a certificate of title;

(ii) in the case of property of a type as to which the federal laws of the United States have preempted the Uniform Commercial Code in any applicable jurisdiction with respect to the validity or perfection of the security interest in such property, the security interest may not be perfected without compliance with applicable federal law;

(iii) we have assumed that none of the Article 9 Collateral in which a security interest is granted consists or will consist of any real property (including a lease or rents thereunder), any interest in or claim in or under any policy of insurance,
cooperative interests, commodity contracts, commodity accounts, uncertificated securities, consumer goods, farm products, crops, timber and as-extracted collateral (including oil, gas and other minerals) or accounts resulting from the sale thereof, beneficial interests in a trust or a decedent’s estate, letters of credit, or items that are subject to (A) a statute or treaty of the United States that provides for a national or international registration or international certificate of title for the perfection of a security interest therein or which specifies a place of filing different from that specified in the applicable Uniform Commercial Code for filing to perfect such security interest, or (B) a certificate of title statute of any jurisdiction;

(iv) we have assumed that Lender will not voluntarily waive, subordinate or modify the perfection or priority of the security interests referenced in such paragraphs or act in any way inconsistent with the maintenance or perfection of such security interests;

(v) we express no opinion with respect to proceeds except to the extent that the proceeds constitute Collateral in which a security interest may be perfected by the filing of a financing statement as described in paragraph 14 above;

(vi) we express no opinion as to (A) any security interest in any Collateral, or any transactions, excluded from Article 9 of the New York UCC by Section 9-109 (c) or (d) thereof; (B) any security interest in any commingled goods under Section 9-336 of the Uniform Commercial Code as in effect in the applicable jurisdiction, to the extent that such security interest is limited by such Section; (C) the perfection of any security interest in goods covered by a certificate of title statute; (D) the perfection of any security interest in goods that consist of timber to be cut or as-extracted collateral (as defined in Section 9-102 (a)(23) of the Delaware UCC); or (E) Collateral that constitutes commercial tort claims (as defined in Section 9-102 (a)(13) of the Uniform Commercial Code as in effect in the applicable jurisdiction;

(vii) we express no opinion regarding any security interest in any Collateral that is subject to a statute, regulation or treaty of the
United States of America whose requirements for a security interest’s obtaining priority over the rights of a lien creditor with respect to such Personal Property preempt Section 9-310(a) of the Uniform Commercial Code as in effect in the applicable jurisdiction;

(viii) in the case of Collateral in which the security interests of Lender have been perfected by the filing of UCC financing statements, (A) Article 9 of the Uniform Commercial Code in the applicable jurisdiction requires the filing of continuation statements within the period of six (6) months prior to the expiration of five (5) years from the date of the original filings, in order to maintain the effectiveness of the filings referred to in this paragraph, (B) if the debtor referred to in a financing statement changes its name, identity or organizational structure so as to make an original financing statement inaccurate, incomplete or misleading, new appropriate financing statements indicating the new name, identity or organizational structure of such party must be filed and (C) if the location (within the meaning of Section 9-307 of the Uniform Commercial Code) of the debtor changes, additional financing statements may need to be filed in other offices;

(ix) we express no opinion as to any security interest in any letter-of-credit rights or cash;

(x) we express no opinion as to the enforceability of any security interest created by the Mortgage insofar as such security interest purports to secure obligations other than for the payment of money;

(xi) Lender’s security interest in Collateral or proceeds of any Personal Property is limited to the extent set forth in Section 9-315 of the Uniform Commercial Code as in effect in the applicable jurisdiction;

(xii) insofar as the Mortgage purports to create a security interest in after-acquired property, such security interest will be subject to Section 547 and Section 552 of the Bankruptcy Code;

(xiii) the security interests created by the Mortgage will not be enforceable against (A) any party, and will not attach to
Collateral, until such party has rights therein or (B) the competing interests of those third parties who would, in accordance with the provisions of the New York UCC or the Uniform Commercial Code in any other applicable jurisdiction, take free of such security interests notwithstanding their perfection;

(xiv) enforcement of any security interest may be subject to the rights of account debtors and other Persons party to any agreement subject to such security interest and any claims or defenses of such account debtors or other Persons arising under or outside any such agreement between the parties thereto; and

(xv) we have assumed that Borrower is a “registered organization” under Delaware law, within the meaning of Section 9-307(e) of the Uniform Commercial Code in the applicable jurisdiction.

This opinion letter is rendered by us as counsel for Borrower, Sole Member and Indemnitor solely for the purposes contemplated by the Loan Documents. The opinions expressed herein may be relied upon only by you and by transferees of the Note or your interest in the Loan or any partial interest in either the Note or the Loan, including any Person acting as agent or trustee and rating agencies in connection with a securitization of the Loan, and only in connection with the Loan. Our opinion may not be used, quoted from, referred to or relied upon by you or any other Person for any other purpose, nor may copies be delivered to any other Person, without our prior written consent in each instance, except that you may deliver copies of this opinion to (a) your auditors, attorneys and other professional advisors acting on your behalf in connection with the Loan or the transactions contemplated thereby, (b) governmental authorities having jurisdiction over you to the extent that disclosure of this opinion is required by applicable law or regulation, (c) designated Persons pursuant to order or legal process of any court or governmental agency or authority of competent jurisdiction and (d) rating agencies in connection with a securitization of the Loan, prospective purchasers of the Note or any interests therein and participants in the Loan. We shall have no obligation to revise or reissue this opinion with respect to any change in law or any event, fact, circumstance or transaction that occurs after the date hereof. In addition, we express no opinion with respect to any issue arising out of or related to (i) the identity or status of any

___________, 200_

transferee of the Note or participant in the Loan, (ii) a securitization of the Loan or (iii) any transaction subsequent to the closing of the Loan.

Very truly yours,
[Institutional Lender] LOAN

ENFORCEABILITY OPINION REQUIREMENTS

The Opinion shall be in form and substance acceptable to Lender and shall be given in relation to Property Owner, Borrower, Principal, Property Manager and any other relevant party to the Loan (each, a “Loan Party”). Depending on the nature of the transaction, the Opinion shall address the applicable law of the State of New York, the State where the Property is located and each State where any Loan Party is organized (collectively, the “Relevant States”). To the extent that the Property is located in, and/or any Loan Party is organized under, a jurisdiction outside the States of New York or Delaware, the appropriate opinions below should be given by local counsel. The Opinion shall be given on the basis of an examination of an executed original of each completed Loan Document in addition to such other documents or instruments counsel deems relevant.

The Opinion shall contain the following opinions:

(a) Each Loan Party is a [describe legal form] duly organized, validly existing and in good standing under the laws of the State of [state of organization] and is authorized to do business and in good standing in each Relevant State.

(b) Each Loan Party has the requisite power to own its properties and to carry on its business as now being conducted and to enter into the transactions covered by the Loan Documents.

(c) The execution and delivery by each Loan Party of each Loan Document to which it is a party has been duly authorized by all necessary partnership, company and/or corporate action, as applicable. To the extent a party thereto, the Loan Documents have been duly executed and delivered by each Loan Party.

(d) The execution, delivery and performance by each Loan Party of the Loan Documents to which it is a party does not:

(i) conflict with or result in a breach of any of the terms, conditions or provisions of, or constitute a default under, the partnership agreement, partnership certificate, articles of incorporation, by-laws, trust agreement or trust certificate, as applicable, of such Loan Party;
(ii) contravene any law, statute or regulation of the United States of America or the Relevant States or any agency or political subdivision of either thereof;

(iii) violate any order, writ, injunction or decree of which, after due inquiry, counsel has actual knowledge, issued by any court or governmental authority of the United States of America or the Relevant States or any agency or political subdivision of either thereof to which such Loan Party is subject; or

(iv) conflict with or result in any breach of any of the terms or provisions of, or constitute a default under, or result in the creation or imposition of (or the obligation to create or impose) any lien other than the lien of the Loan Documents, upon any of the assets or properties of such Loan Party pursuant to the terms of any material indenture, mortgage, deed of trust, agreement, contract or instrument to which such Loan Party is a party or by which it or any of its assets or properties is bound.

(e) To the extent a party thereto, the Loan Documents are the legal, valid and binding obligations of each Loan Party, enforceable against such Loan Party in accordance with their terms.

(f) Under the NY UCC, the provisions of the Cash Management Agreement are effective to create, in favor of Lender to secure Borrower’s obligations under the Loan, a valid security interest in Borrower’s rights in the Accounts. Lender’s security interest in Borrower’s rights in the Accounts is a perfected security interest.

(g) Under the NY UCC, the provisions of the Pledge Agreement are effective to create, in favor of Lender to secure Borrower’s obligations under the Loan, a valid security interest under the NY UCC in Borrower’s rights in the Pledged Collateral (as defined in the Pledge Agreement).

(h) Upon delivery of the Pledged Collateral to Lender indorsed, by an effective indorsement, to Lender or in blank, in the State of New York, the security interest of Lender in the Pledged Collateral will be perfected, and Lender will acquire its security interest in the Pledged Collateral (and the shares represented thereby) free of any adverse claims under Section 8-303 of the NY UCC. As used herein, “notice of adverse claim” has the meaning set forth in Section 8-105 of the NY UCC.
(i) The Financing Statements are in proper form so as to comply with the filing requirements of the State of [_____________] and, upon filing in the office of the Secretary of State and [describe all other appropriate recording offices] (the “UCC Filing Offices”), the Financing Statements will perfect the lien in favor of Lender, created by the Pledge Agreement on the general intangibles described therein.

(j) The provisions of the Pledge Agreement are effective to create in favor of Lender, to secure the obligations purported to be secured thereby, a valid security interest in Borrower’s rights in that portion of the collateral which is subject to Article 9 of the UCC (the “UCC Collateral”).

(k) No order, consent, approval, license or authorization of, or filing, recording or registration with, any governmental or public body or authority of the United States of America or the Relevant States or any agency or political subdivision of either thereof is required in connection with the execution and delivery of any of the Loan Documents, the validity, binding effect or enforceability of any of the Loan Documents or the consummation of the transactions contemplated thereby.

(l) There are no actions, suits or proceedings by or before any court, governmental or regulatory authority or agency of which, after due inquiry, we have actual knowledge pending or threatened against or affecting any Loan Party or Borrower’s rights with respect to the Property wherein an adverse ruling or decision, individually or collectively with other such actions, suits or proceedings, is reasonably likely to (i) affect materially and adversely the ability of any Loan Party to consummate the transactions contemplated by the Loan Documents or to perform its obligations under any of the Loan Documents, or (ii) result in a challenge to the legality, validity, binding effect or enforceability of any of the Loan Documents.

(m) No approval, authorization or other action by, or filing with, any governmental authority of the United States of America or the Relevant States of is required for the valid execution, delivery and performance by any Loan Party of any of the Loan Documents.

(n) [not customarily in New York] Based upon facts of which counsel has actual knowledge, the transactions contemplated by the Loan Documents do not constitute a fraudulent conveyance, fraudulent transfer or a preferential transfer under the laws of

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the Relevant States, so long as the conveyances are made for adequate consideration and in good faith.

(o) The payment by Borrower and receipt by Lender of all principal and interest and other payments required to be paid pursuant to the terms of the Credit Tenant Note™ and the other Loan Documents (including, without limitation, the provisions for interest after default and late charges) will not violate the usury laws of the Relevant States or otherwise constitute unlawful interest.

(p) Lender is not required to register as a foreign entity or qualify to do business in the State of [location of property] solely by reason of the transactions contemplated by the Loan Documents.

(q) Lender will not become subject to any fees, charges or income, franchise or other tax imposed by the State of [location of property] or be required to obtain any license, approval or authorization in the State of [location of property] solely by reason of the transactions contemplated by the Loan Documents.

(r) A federal court sitting in the State [location of property] and applying the conflict of law rules of the State [location of property], and the state courts in the State [location of property], would give effect to the choice of law provisions contained in the Loan Documents. If counsel is not able to give this opinion as an unqualified opinion, an opinion that the Loan Agreement and the Credit Tenant Note™ would be enforceable under the laws of the State of [location of property] if such law were held to apply will be required.

(s) [not customarily in New York] The operation of any term of the Loan Documents, including, without limitation, the terms regarding late charges, default interest or prepayment premiums, or the lawful exercise of any right thereunder, shall not render the Loan Documents unenforceable, in whole or in part, or subject to any right of rescission, set-off, counterclaim or defense.

The Opinion shall be addressed to Lender and its successors and assigns and shall state that it may be relied upon by (a) any assignee of Lender’s interest in the Loan, (b) any participant of Lender’s interest in the Loan, (c) any servicer of the Loan, (d) any purchaser of the Loan or any portion thereof in any securitization backed by the Loan, (e) any rating agency involved in a securitization of the Loan, (f) the issuer of securities in a securitization of the Loan, and (g) any trustee or servicer appointed in connection with a securitization of the Loan.
DISAPPROVED OPINIONS

It is the Committee’s position that the Firm should not render, among others, the following opinions:

1. So-called “practical realization” language\(^1\) as a part of enforceability opinions.
2. Title opinions.
3. Priority opinions for liens or security interests.
4. Opinions on qualification of the company to do business as a foreign corporation in all jurisdictions in which the company’s property or activities require qualification (even if a material adverse effect qualification is added).
5. Opinions that the company has all necessary licenses and permits or has obtained all approvals and made all filings required for the conduct of the company’s business (even if a materiality standard is added).
6. Opinions that the company is in compliance with all laws and regulations applicable to it (even if a materiality standard is added).
7. Opinions that the company is not in default of any of its contractual obligations (even if a materiality standard is added).
8. Opinions on the expected outcome of pending or threatened litigation.
9. Opinions that the opinion documents contain the rights and remedies normally found in such documents in the applicable jurisdiction.

Further, the Committee recommends that RE attorneys should, in the first instance, attempt to avoid giving the following opinions:

1. Personal property security interest opinions in the context of mortgage transactions where the personal property does not constitute a significant part of the loan collateral.

\(^1\) However it would be permissible to offer, as a substitute, as a qualification to an exception that certain provisions of the loan documents may be unenforceable, that however such unenforceability will not render the transaction documents invalid as a whole or preclude judicial enforcement of repayment, acceleration of the note or foreclosure of collateral in the event of a material breach of a payment obligation or other material provisions of the transaction documents. These assurances should not extend to or cover the bankruptcy or equitable principles exceptions.
2. Zoning opinions in jurisdictions where title insurance endorsements are available to provide coverage for zoning matters.

3. Opinions that the company has the authority to own its properties and conduct its business.²

4. Opinions that the company’s outstanding equity securities are duly authorized, validly issued, fully paid, and non-assessable.

5. Opinions based solely upon certificates issued by other persons.

6. Opinions that the execution and delivery of the opinion documents do not violate any agreements or create any liens.³

7. Opinions that the documents do not violate any orders or judgments.⁴

8. Opinions on the existence of pending or threatened litigation.⁵

Opinion givers may find it helpful to cite Real Estate Opinion Guidelines, 38 Real Prop., Prob. and Tr. J. 241(2003) as support for reasons not to give many of these opinions.

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² This opinion may be given only if the description of the business conducted were limited to that contained in specifically identified materials, such as an SEC filing.

³ This opinion may be given only if the agreements in question are specifically identified in the opinion.

⁴ This opinion may be given only if it were qualified as to knowledge and backed up by a certificate.

⁵ This opinion may be given only if it were qualified as to knowledge, contained a disclaimer that we have not done a docket search, and were backed up by a certificate, or if the opinion were limited to the Firm’s retention to represent the company in such litigation, in each case if adequate due diligence were conducted within the firm.
MORTGAGE LOAN OPINIONS - A BRIEF LIST OF CURRENT USEFUL SOURCES


4. 29 Real Prop., Prob. and Tr. J. No. 3(Fall 1994) - contains a number of articles about opinions in real estate secured transactions as well as the full texts of both the Third-Party Legal Opinion Report Including the Legal Opinion Accord issued by the ABA Section of Business Law and the Report on Adaptation of the Legal Opinion Accord cited above.


7. Real Estate Finance Opinion Report of 2012, a comprehensive report prepared by the American Bar Association Section of Real Property, Trust and Estate Law, Committee on Legal Opinions in Real Estate Transactions, the American College of Real Estate Lawyers, Attorneys’ Opinions Committee, and the American
College of Mortgage Attorneys, Opinions Committee. The full text of the report is published at 47 Real Prop. Tr. & Est., J. 213 (2012).