DELAWARE THIRD-PARTY LEGAL OPINIONS ON REMEDIES IN REAL ESTATE FINANCING TRANSACTIONS: A PRIMER

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I. INTRODUCTION

A. Purpose Of This Article

This article is intended as a primer for Delaware lawyers who render third-party legal opinions in real estate finance transactions and for use by lawyers who represent clients receiving third-party legal opinions from Delaware counsel in a financing transaction secured by real estate located in the State of Delaware. This article was informed by various reports on opinion practices that have been issued over the years by state bar associations, national bar groups and specialty associations, and, in particular, reflects the topical organization and treatment of certain opinion issues as found in the so-called Florida Report.[1] The Florida Report presents a very clear, detailed and useful approach to opinion practice and therefore can serve as a model for other states to follow should they wish to issue their own report, though of course the law of each jurisdiction may differ on specific opinion topics. This article is not intended to be a treatise on the subject of third-party legal opinions, but only to provide practical guidance. Accordingly, while the authors state certain preferences on how to address opinion topics and express opinions on how opinion practice should be, the reader should understand that some issues are open to debate among opinion practitioners across the country.

What follows in this section of the article are some of the more important basic principles and guidelines that govern opinion practice nationally and in Delaware.

B. What Is An Opinion?

For purposes of this article, a third-party legal opinion, referred to in this article as an "opinion" or an "opinion letter," is generally understood to be a written legal opinion letter delivered in connection with a real estate financing transaction (a "Real Estate Financing Transaction") and given by counsel representing one party (the "Opinion Giver") on behalf of that party (the "Client") to another party (the recipient of the opinion or a permitted assignee of the opinion recipient) that is not the client of the Opinion Giver (the "Opinion Recipient").[2] The specific opinions discussed in this article are usually given with respect to the documentation exchanged in connection with the closing of a Real Estate

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1. Legal Opinion Standards Comm., Bus. Law Section of the Fla. Bar & Legal Opinion Comm., Real Property, Probate and Trust Law Section of the Fla. Bar, Third-Party Legal Opinion Customary Practice in Florida, December 3, 2011 [hereinafter Florida Report].

2. *Id.* at 8. For purposes of this article, counsel to the Opinion Recipient is referred to as the "Recipient Counsel." Note that in certain transactional practices (e.g., cross-border) the Opinion Giver may be issuing the opinion letter to the Client.

Financing Transaction (the "Transaction Documents"). In most cases, delivery of the opinion letter is a condition to the completion of the Real Estate Financing Transaction.

C. Background On Opinion Practice[3]

Over the years, several opinion projects have sought to improve and provide uniformity and guidance in third-party closing opinion practice. In 1998, the Committee on Legal Opinions of the Business Law Section of the American Bar Association issued its *Legal Opinion Principles*[4] providing suggestions for customary practice in closing opinions. Also in 1998, the TriBar Opinion Committee issued its Third-Party Closing Opinions report,[5] and a committee composed of members of the Real Property Law Committee of the Association of the Bar of the City of New York and the Real Property Law Section of the New York State Bar Association published their *Mortgage Loan Opinion Report*.[6] In 2002, the Business Law Committee issued *Guidelines for the Preparation of Closing Opinions*[7] providing further guidance on the preparation of closing opinions.

While the Legal Opinion Principles and Business Law Guidelines are invaluable resources for real estate practitioners, closing opinions in real estate secured loan transactions present opinion issues not addressed in either document. For that reason, a joint subcommittee of the Attorneys Opinion Committee of the American College of Real Estate Lawyers (the "ACREL Committee") and the Committee on Legal Opinions of the Real Property, Probate and Trust Section (now the Real Property, Trust and Estate Law Section) (the "RPTE Committee") of the American Bar Association undertook a number of years ago to adapt and expand the Business Law Guidelines to provide guidance with respect to closing opinions in real estate secured loan transactions, resulting in the issuance of the Real Estate Opinion Letter Guidelines.[8]

In 2008 and thereafter, a number of major national and state bar associations (including the Delaware State Bar Association), committees and groups adopted the *Statement on the Role of Customary Practice in the Preparation and Understanding of Third-Party Opinions*.[9]

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3. For a general treatment of opinions in real estate transactions, *see* R. Thompson, Real Estate Opinion Letter Practice (ABA Book Publishing, 2d ed. 2009).

4. Comm. on Legal Opinions, Section of Bus. Law of the American Bar Ass'n, *Legal Opinion Principles*, 53 Bus. Law. 831 (1998) [hereinafter "*Legal Opinion Principles*"]. Of course, opinion literature predated these Legal Opinion Principles. S*ee, e.g.*, Special Committee on Legal Opinion in Commercial Transactions, New York County Lawyers' Ass'n, *Legal Opinions to Third Parties: An Easier Path*, 34 Bus. Law. 1891 (1979).

5. Tribar Opinion Comm. (Special Comm. on Legal Opinions in Commercial Transactions, New York County Lawyers' Ass'n; Corp. Law Comm., the Ass'n of the Bar of the City of New York; and Special Comm. on Legal Opinions of the Bus. Law Section, New York State Bar Ass'n), *Third Party Closing Opinions*, 53 Bus. Law. 591 (1998) [hereinafter "*Tribar 1998 Report*"].

6. Subcommittee on Mortgage Loan Opinions, Comm. on Real Property Law, the Ass'n of the Bar of the City of New York & Attorney Opinion Letters Comm., Real Property Law Section, New York State Bar Ass'n, *1998 Mortgage Loan Opinion Report*, 33 Real Prop. Prob. & Tr. J. 552 (1998) [hereinafter "*1998 Mortgage Loan Opinion Report*"].

7. Section of Bus. Law of the American Bar Ass'n Comm. on Legal Opinions, *Guidelines for the Preparation of Closing Opinions*, 57 Bus. Law. 875 (2002) [hereinafter "*Business Law Guidelines*"].

8. Attorneys' Opinion Comm., American College of Real Estate Lawyers & Comm. on Legal Opinions in Real Estate Transactions, Section of Real Property Probate & Trust Law, American Bar Association, *Real Estate Opinion Letter Guidelines,* 38 Real Prop. Prob. & Tr. J. 241 (2003) [hereinafter "*RE Guidelines*"].

9. *See generally* 63 Bus. Law. 1277 (Aug. 2008) [hereinafter "*Statement on the Role of Customary Practice*"]. The Commercial Law Section and the Real & Personal Property Law Section of the Delaware State Bar Association have endorsed the *Statement on the Role of Customary Practice in the Preparation and Understanding of Third-Party Legal Opinions*.

In 2012, the ACREL Committee, the RPTE Committee and the Opinion Committee of the American College of Mortgage Attorneys published the first national report on real estate opinions.[10] Following that, the same groups published a supplement on local counsel opinions in real estate financing transactions.[11]

D. Purpose Of Third-Party Legal Opinions

The type of opinion letter discussed in this article is a written letter stating the Opinion Giver's reasoned conclusions on the application to certain stated, agreed or assumed facts of certain Delaware laws and legal principles applicable to the Client, the Transaction Documents or the Real Estate Financing Transaction, and subject to the exceptions, qualifications and other limitations expressed in the opinion letter or otherwise implied based on customary practice.[12] An opinion is a reasoned professional judgment of how a Delaware court "should" decide the legal issue considered in the opinion if the court were properly presented with that issue as of the date of the opinion.[13] Importantly, an opinion is a professional judgment, but not a guarantee, that the Delaware Supreme Court would make this decision.[14]

E. Customary Practice In Opinions

Inherent in the giving and receiving of opinions is the customary practice of Delaware lawyers regarding the way certain words and phrases commonly used in opinions are understood and the diligence the Opinion Giver is expected to perform to give those opinions.[15] This customary practice is based on the understanding of lawyers who regularly give

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10. Committee on Legal Opinions in Real Estate Transactions, the American Bar Association Section of Real Property, Trust and Estate Law, Attorneys' Opinions Committee, the American College of Real Estate Lawyers & Opinions Committee, the American College of Mortgage Attorneys (the "Real Estate Opinion Committees"), *Real Estate Finance Opinion Report of 2012*, 47 Real Prop. Tr. & Est. L. J. 213 (2012) [hereinafter the "*2012 Report*"]. *See also* R. Krapf and E. Levin, *An Overview of the Real Estate Finance Opinion Report of 2012*, 14 Del. L. Rev. 153 (2014).

11. The Real Estate Opinion Committees, *Local Counsel Opinion Letters in Real Estate Finance Transactions: A Supplement to the Real Estate Finance Opinion Report of 2012*, 51 Real Prop Tr. & Est. L. J. 167 (2016) [hereinafter the "*LoCo Report*"].

12. *TriBar 1998 Report*, *supra* note 5, § 2.1.1 at 608.

13. Restatement of the Law (Third) of the Law Governing Lawyers § 95 cmt. c (2000) [hereinafter the "Restatement on Lawyers"] ("Unless effectively stated or agreed otherwise, a legal opinion or similar evaluation constitutes an assurance that it is based on legal research and analysis customary and reasonably appropriate in the circumstances and that it states the lawyer's professional opinion as to how any legal question addressed in the opinion would be decided by the courts in the applicable jurisdiction on the date of the evaluation."). It is generally viewed that notwithstanding the wording of the Restatement on Lawyers, an opinion does not provide "assurance" that a particular legal issue "will be decided" in a certain way by the Delaware Supreme Court, but rather reflects how the Delaware Supreme Court "should" decide the legal issue based on the facts, law, assumptions and other matters relevant to the opinion as interpreted under customary practice in Delaware. Note, however that the Restatement on Lawyers has not been adopted or cited by any Delaware court relating to third-party opinion practices in Delaware.

14. *Legal Opinion Principles*, *supra* note 4, § I.D at 832.

15. *Statement on the Role of Customary Practice*, *supra* note 9, at 1277. *See also Legal Opinion Principles*, *supra* note 4, § I.B at 832; Restatement on Lawyers, *supra* note 13, at §§ 51 cmt. e & 95(2) cmt. b. The Business Law Guidelines state, "An opinion giver is entitled to assume, without so stating, that in relying on a closing opinion the opinion recipient (alone or with its counsel) is familiar with customary practice concerning the preparation and interpretation of closing opinions." Business Law Guidelines, *supra* note 7 at 876.

these opinions and lawyers who regularly review them for clients. Customary practice can be described as both a sword and shield for the practitioner – a sword in that the opinion will be read to incorporate what is meant by the opinion among practitioners in the applicable legal community for similar third-party legal opinions under similar circumstances, and a shield in that, whether or not expressly incorporated into the opinion, the assumptions, exceptions, qualifications and limitations inherent in Delaware customary practice will be part of the opinion. Unless the Opinion Giver states otherwise in the opinion letter, Delaware customary practice should be understood to govern every opinion letter delivered by a Delaware lawyer even if the phrase "customary practice" is not mentioned in the opinion letter.

F. The "Golden Rule"

The so-called "golden rule" applies to opinion practices.[16] Simply put, do not request an opinion you would not be prepared to give if you were the Opinion Giver and possessed the requisite expertise to give the opinion.[17] Similarly, do not refuse to give an opinion that lawyers with requisite expertise would give, assuming you have the requisite expertise.[18]

G. Standard Of Care

The standard of care for the Opinion Giver in rendering an opinion in a Real Estate Financing Transaction is generally explained by reference to the Restatement on Lawyers. The Restatement states that a lawyer who provides an opinion to a party other than the client "must exercise care with respect to the nonclient to the extent stated in §51(2) and not make false statements prohibited under §98."[19] The Opinion Giver has a duty of care to the Opinion Recipient comparable to the duty the lawyer owes to his or her client.[20] Reasonable care or competence depends upon the circumstances and the character of the information.[21] For instance, Section 98 of the Restatement on Lawyers provides, in part, that a lawyer communicating on behalf of a client with a non-client may not "knowingly make a false statement of material fact or law to the non-client." If the Opinion Giver does not know the information is false, the Opinion Giver is entitled to rely on the information; but if the Opinion Giver knows the information is outside the informant's expertise, the Opinion

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16. *See RE Guidelines*, *supra* note 8, at 248.

17. *Id*.

18. *Id*.

19. Restatement on Lawyers, *supra* note 13, at § 95. For a discussion of the professional liability and ethical issues for the Recipient's Counsel, *see* R. Ryan, *Recipient Counsel Responsibilities and Concerns*, 62 Bus. Law. 401 (2007).

20. Restatement on Lawyers, *supra* note 13, at § 51(2). *See also* Restatement (Second) of the Law of Torts § 552 (1977); Guardian Constr. Co. v. Tetra Tech Richardson, Inc., 583 A. 2d. 1378 (Del. Super. 1990).

21. *See* Restatement on Lawyers, *supra* note 13, at § 51(2) cmt. e. Juries are often given an instruction similar to the following: "In providing services relating to plaintiff a lawyer must possess and apply knowledge and use the skill and care ordinarily used by a reasonably well-qualified lawyer under the circumstances similar to those shown by the evidence. A failure to do so is professional negligence." Illinois Pattern Jury Instructions, Instruction 105.01, *quoted in* William Freivogel, *The Ethics and Lawyer Liability Issues Raised by Closing Opinions*, Loss Prevention J. 7 (1998).

Giver might not reasonably rely on it.[22] If the Opinion Giver is not initially aware but later learns the information is untrue, the Opinion Giver should include the new information in any subsequent opinions or documents to avoid liability.[23]

In the absence of any Delaware cases, and although the Restatement on Lawyers has not been adopted by any Delaware court relating to Delaware opinion practices, a cautious lawyer might assume that a Delaware court could hold that the Restatement on Lawyers articulates the standard of care to which Delaware lawyers who render opinions would be held.

H. No Implied Opinions

Customary practice provides that no implied opinion should be read into an express opinion.[24]

I. Ethical And Professional Issues[25]

Rule 2.3 of the Delaware Rules of Professional Conduct (the "RPC") applies to giving legal opinions as stated in Rule 2.3:

> a. A lawyer may undertake an evaluation of a matter affecting a client for the use of someone other than the client if the lawyer reasonably believes that making the evaluation is compatible with other aspects of the lawyer's relationship with the client.
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> b. When the lawyer knows or reasonably should know that the evaluation is likely to affect the client's interests materially and adversely, the lawyer shall not provide the evaluation unless the client gives informed consent; and
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> c. Except as disclosure is authorized in connection with a report of an evaluation, information relating to the evaluation is otherwise protected by Rule 1.6.

A full review of the ethical issues involved in giving opinions is beyond the scope of this article; however, it is obvious there is an inherent, ethical tension between the duty of the Opinion Giver to the Client and the giving of an opinion to the Opinion Recipient on which it may rely. The duty of loyalty, client confidentiality, conflicts, client consent, good faith, and candor are all implicated in opinion practice. At a minimum, the Opinion Giver should issue an opinion only with the Client's consent, however that consent may be given. It is generally understood that if the Client is

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22. *Id.*; *see also* Model Rules of Professional Conduct § 4.1, Cmt. (attorney may not "knowingly make a false statement of material fact or law to a third person" while representing a client, including "incorporat[ing] or affirm[ing] a statement of another person that the lawyer knows is false"); *id.* (if attorney knows certificate is false or unreliable or that the facts under the circumstances make reliance unreasonable, attorney may not reasonably rely on the information without further investigation).

23. Freivogel, *The Ethics and Lawyer Liability Issues Raised by Closing Opinions*, Loss Prevention J. 7. *See, e.g.*, Klein v. Boyd, C.A. No. 97-1143, 1998 WL 55245 (3d Cir. Feb. 12, 1998).

24. *RE Guidelines*, *supra* note 8, § 1.5a at 246.

25. For a more detailed discussion, see C. McCallum and B. Young, *Ethics Issues in Opinion Practice*, 62 Bus. Law. 417 (2007). *See also* Florida Report, *supra* note 1, § M at 15; *2012 Report*, *supra* note 10, § II at 218-220.

proceeding with a Real Estate Financing Transaction for which an opinion is required, the Client's consent is implied and may be relied on by the Opinion Giver.[26]

An interesting ethical issue peculiar to Delaware law practice is whether a lawyer who is not licensed in Delaware may ethically issue an opinion on Delaware law. The best example is if such a lawyer issues an opinion on the status of a Delaware corporation or limited liability company. Historically, it is not unusual for lawyers in corporate transactions to issue opinions on Delaware corporations, expressly limiting those opinions exclusively to the Delaware General Corporation Law and without regard to case law on Delaware corporations. This practice has been accepted by Delaware lawyers as customary in the world of opinion practice and has been accepted by various opinion authorities.[27] With the advent of the limited liability company, many lawyers around the country became uncomfortable with giving similar opinions on Delaware limited liability companies, especially given the importance of contract law principles, and not statutes, in how limited liability companies are formed, governed and empowered. This unease was compounded by cases that extended Delaware long-arm jurisdiction over out-of-state lawyers representing Delaware clients in Delaware law matters.[28] Some authorities in Delaware responsible for supervision of lawyers have expressed the belief that because issuing opinions constitutes the practice of law, the issuance of an opinion on a Delaware entity (i.e., a Delaware "person") by a lawyer not licensed in Delaware constitutes the unauthorized practice of law if not within the permissive bounds of RPC Rule 5.5. Accordingly, that lawyer may be subject to the jurisdiction of the Delaware Supreme Court and its Board on Unauthorized Practice and subject to disciplinary sanctions by the court, either in Delaware or, by way of comity, in the lawyer's licensing jurisdiction, and those lawyers may be subject to the long-arm jurisdiction of Delaware courts.[29]

J. Law Governing The Opinion Letter

Although this subject has not been well explored in the reports and other authorities, it is arguable that the law governing the interpretation and enforcement of an opinion letter given by Delaware counsel in a Real Estate Financing Transaction involving Delaware real property is, and should always be, the laws of the State of Delaware without regard to conflicts of law principles. However, there is no apparent consensus on this point, especially with respect to possible claims against an Opinion Giver, which are likely to be tort rather than contract claims.

II. BASIC ELEMENTS OF OPINIONS

What follows is a summary of the various basic elements of an opinion letter for a Real Estate Financing Transaction.

A. Date

The date of an opinion letter is generally the date on which it is delivered, usually the closing date of the Real Estate Financing Transaction for which the opinion letter is given. Except if expressly stated otherwise in an opinion letter,

26. *RE Guidelines*, *supra* note 8, § 2.4 at 247.

27. *TriBar 1998 Report*, *supra* note 5, § 4.1 at 631 n.85; *1998 Mortgage Loan Opinion Report*, *supra* note 6, at 574 n.31.

28. Michael McGinniss, *Five Years Later: The Delaware Experience with Multi-Jurisdictional Practice*, 10 Del. L. Rev. 125 (2008). *See also Beverage v. Pullman & Comley, LLC*, 306 P.3d 71 (Az. Ct. App. 2013), aff'd. § 316 P. 3d 590 (2014).

29. McGinniss, *supra* note 28, at 139-43; *See also* M. Johnson, *Multi-Jurisdictional Practice: Emerging Issues from a Delaware Perspective*, 5 Del. L. Rev. 67 (2002) for an analysis of the more rigorous standards for admission to the Delaware Bar, which,

continued on page 41

the opinions included in the opinion letter are statements made as of the date of the opinion letter. As the practice of real estate finance has transitioned to where face-to-face closings occur with declining frequency, opinion letters sometimes are dated with the closing date and submitted in advance with an appropriate transmittal letter or e-mail authorizing release upon satisfaction of certain conditions. Some Opinion Givers prefer to deliver their opinion letters only upon closing. Regardless of when it is delivered or released, the opinion letter speaks only to matters as of its date.[30] Accordingly, for example, the Opinion Giver has no duty to update an opinion based on subsequent changes in the law upon which the opinion was based or if the Opinion Giver subsequently discovers facts unknown to the Opinion Giver at the time of issuance of the opinion that would modify the conclusions set forth in the opinion.[31] This limitation need not be stated in the opinion letter, as the limitation is implicit in all Delaware opinions.[32]

B. Addressee And Reliance

The opinion letter will generally be addressed to the Opinion Recipient, usually one or more lenders in the Real Estate Financing Transaction. Except if expressly stated otherwise in the opinion letter, the only person entitled to rely on the opinions is the Opinion Recipient identified in the opinion letter, usually as the addressee.[33] There is no need to state this limitation in the opinion letter, as the limitation is implicit in all Delaware opinions.

Requests are sometimes made to include credit rating agencies (each more formally identified as a "nationally recognized statistical rating organization" or an "NRSRO") as addressees or persons expressly entitled to rely on the opinion letter. Rating agencies have confirmed[34] they should be included as persons to whom the opinion letter may be furnished and by whom the opinion letter may be reviewed, but should not be included as addressees or reliance parties. Requests for inclusion of rating agencies formally as reliance parties (addressees or otherwise) are inappropriate and appear to be based on a misunderstanding of the NRSRO's requirements. Because reliance may indicate legal recourse against the Opinion Giver, reliance could imply that rating agencies are parties to the transaction, which is inconsistent with their role and function.

Access to the opinion letter, however, is important, and rating agencies should be added to the list of those to whom an opinion letter may be delivered and reviewed when the transaction is one in which a rating agency will be relevant. As the non-reliance/disclosure-only discussion has evolved recently, one solution in particular emerged to address this. Many

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continued from page 40

the article argues, may limit the competence of out-of-state lawyers on matters of Delaware law.

30. *Legal Opinion Principles*, *supra* note 4, at 833-34; *TriBar 1998 Report*, *supra* note 5, at 597; *2012 Report*, *supra* note 10, §§ 0.2 [seems incorrect] at 227 and 5.2 at 259.

31. *Tribar 1998 Report*, *supra* note 5, at 596 n.11.

32. *Legal Opinion Principles*, *supra* note 4, at 833-34.

33. *2012 Report*, *supra* note 10, § 0.3 [is this correct?] at 227.

34. *See* Dunn, William B. & Forte, Joseph Phillip, *Loan Closing Opinions and Rating Agencies: Disclosure Not Reliance*, CRE Finance World, Winter 2016, p. 58. https://crefc.wordpress.com/2016/01/10/loan-closing-legal-opinions-and-rating-agencies-disclosure-not-reliance/ (last visited March 16, 2017); *see also LoCo Report*, *supra* note 11, § 0.3 at 181.

legal opinions now refer to allowing the posting of the opinion on a website maintained to fulfill certain of the requirements under SEC Rule 17g-5.[35] The Commercial Real Estate Finance Council has published a best practice proposing that all CMBS pooling and servicing agreements allow for the delivery of documents and materials such as legal opinions directly to the credit rating agencies so long as such documentation is also posted on the 17g-5 website within a set timeframe.[36]

The Opinion Recipient also often requests that the Opinion Giver permit future lenders and assignees to rely upon the opinion letter. Many Opinion Givers are reluctant to agree to this request because of various concerns including that (i) successors and assigns may not understand Delaware customary practice and therefore may not appreciate the assumptions and qualifications that limit the scope of the opinion letter, (ii) the opinion may be deemed reissued as of the date a future lender or assignee acquires its interest in the loan, (iii) claims may arise in multiple jurisdictions or under the laws of multiple jurisdictions, or (iv) claims may be brought by "rogue" or "vulture" lenders or assignees that buy loans with a view to suing the opinion giver, among others.[37]

Opinion practice varies considerably among Opinion Givers – some refuse to allow any future parties to rely on the opinion letter, some allow reliance but qualify it in different ways and some permit reliance. When reliance is permitted but with limitations, those limitations generally make clear that the new lender or assignee has no greater rights than the original addressee and has those rights only as of the original date of the opinion letter. An example of such a provision is:

> Without our prior written consent, this Opinion Letter may not be used or relied upon by the Lender for any other purposes whatsoever or relied on by any other person, except that this Opinion Letter may from time to time be delivered by the Lender to an assignee for value of all right, title, and interest in and to the Transaction Documents, and such assignee may rely on this Opinion Letter as if it were addressed and had been delivered to it on the date hereof. Nothing in the preceding sentences, however, shall give any person entitled to rely upon this Opinion Letter any greater rights with respect to this Opinion Letter than those of the Lender as of the date hereof, or shall provide or imply any opinion being given with respect to an assignee that depends on the identity or characteristics of the named assignee or other circumstances than those of the original Opinion Letter.[38]

Finally, an Opinion Recipient might also request that Recipient Counsel or purchasers of loan participation interests be permitted to rely upon the opinion letter. Most commentators believe that such requests are inappropriate under customary practice and should be refused.[39]

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35. 17 C.F.R. § 240.17g-5. This is a rule on conflicts of interest promulgated under the Securities Exchange Act of 1934, adopted in November 2009 by the Securities and Exchange Commission (the SEC) under the Credit Rating Agency Reform Act of 2006.

36. Accessed at http://www.crefc.org/CREFC/Industry_Standards/CREFC_IRP/CREFC_IRP_7.1.aspx?WebsiteKey=148a29c3-4a5a-4a0d-98a7-70be1a37d5a7 (last visited March 16, 2017).

37. Florida Report, *supra* note 1, § B at 19.

38. This sample reliance language along with the sample opinions in this article are provided only as examples to illustrate the nature of the particular opinion. In practice, the specific language that Opinion Givers use can vary greatly.

39. *See 2012 Report*, *supra* note 10, § 5.1(c) at 258; *LoCo Report*, *supra* note 11, § 0.3 at 181; *see also* Florida Report, *supra* note 1, § B at 19.

C. Role Of Counsel As Opinion Giver

Typically, the opinion letter will identify the Opinion Giver as the Client's counsel. At a minimum, the statement makes clear to the Opinion Recipient that the Opinion Giver is not representing the Opinion Recipient, who should look to its own counsel for advice on the adequacy and meaning of the opinion.[40]

At times, such as when acting as local counsel, the Opinion Giver will characterize its role in some way, such as "special" or "local" counsel. While probably harmless to include, these terms have no settled meaning and are not an appropriate substitute for properly describing the Opinion Giver's relationship to the Client and the Real Estate Financing Transaction. Certainly, the use of these terms does not qualify the diligence required of the Opinion Giver to give the opinions nor the duty of the Opinion Giver to the Opinion Recipient. If the Opinion Giver's limited involvement with the Client warrants a limitation on the Opinion Giver's responsibilities or level of care, such limitations should be expressly stated in the opinion letter through appropriate qualifications or assumptions relating to the facts upon which the opinions are based. Moreover, the absence of words like "special" modifying the word "counsel" should not be construed to imply a broader role, or greater expertise or knowledge, than that stated in the opinion letter. In addition, any such statement of the Opinion Giver's relationship to the Client should be consistent with the lawyer's engagement by that person.[41] Other than in instances where specialized limited legal issues are being considered in the opinion letter, there is no apparent reason, other than psychological comfort for the Opinion Giver, to use labels such as "special counsel" or "local counsel." As one commentator has suggested, the facts defining the Opinion Giver's role are more important than the label.[42] Indeed, current practice seems to be toward the unqualified label of "counsel" or "counsel in Delaware" for the Opinion Giver.

At times, the Opinion Giver may give opinions with respect to persons other than its Client involved in the same Real Estate Financing Transaction. For example, when the Opinion Giver is representing the borrower in a loan transaction, the lender may also request opinions regarding the guarantors, the guaranty and other guarantor-related documents signed by the guarantors, and the Opinion Giver may agree to render such opinions even though the Opinion Giver is not otherwise representing the guarantors. In that situation, the opinion letter should state the Opinion Giver is not representing those persons; alternatively, the Opinion Giver might agree to represent those persons for the limited purpose of rendering the opinions on behalf of such persons, but not for any other purpose, in which case this should be stated in the opinion letter. Of course, if the latter arrangement is made, the Opinion Giver should also address the potential conflicts of interest inherent in performing even this limited representation on behalf of persons who are not clients of the Opinion Giver.[43]

The opinion letter often will contain a statement that the Client has consented to issuance of the opinion letter.[44]

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40. Donald W. Glazer, Scott T. FitzGibbon & Steven O. Weise, Glazer and FitzGibbon on Legal Opinions: Drafting, Interpreting, and Supporting Closing Opinions in Business Transactions 73 (3d ed. 2008) [hereinafter "Glazer"].

41. *2012 Report*, *supra* note 10, § 1.0 at 227.

42. M. John Sterba, Jr., Drafting Legal Opinion Letters 22 (2d ed. 1988).

43. *See 2012 Report*, *supra* note 10, at 219 & §0.4 at 227.

44. *See* Section I.I *supra* for a discussion regarding the Client consent.

D. Transaction Documents

An opinion letter typically includes a list of the Transaction Documents about which the opinions are given.[45] For example, the opinion letter might identify a loan agreement, a security agreement, a mortgage, or a promissory note. The important point in most opinions is that the key Transaction Documents are contracts made by the parties to the Real Estate Financing Transaction. Sometimes other Transaction Documents are reviewed for the opinions even though not contractual in nature – for example, UCC financing statements, organizational documents, resolutions, incumbency certificates, and the like. If these differing types of documents (contracts and non-contracts) are to be identified, the Opinion Giver should delineate between the documents about which legal opinions, such as an enforceability opinion, are being given and other documents that are necessary for giving the legal opinions but are not documents about which legal opinions are being given.[46]

On occasion, the Opinion Recipient might request that the Opinion Giver list in the opinion letter, as reviewed, Transaction Documents as to which the Opinion Giver is not providing any opinions and that are not otherwise necessary to support the express opinions given. Such a request is inappropriate.[47] The Opinion Giver should not be expected to identify as reviewed any documents that are not intended to be the subject of the express opinions in the opinion letter or that are not necessary to support such opinions. However, if any such documents are so identified and reviewed, whether at the request of the Opinion Recipient or at the election of the Opinion Giver, and whether or not identified in the opinion letter as reviewed, the Opinion Recipient should not infer from such review or identification that any opinions on those documents are implied by the opinion letter.[48]

The opinion letter generally will state the meaning of terms used in the opinions, either by defining those terms in the opinions or by referring to definitions found in one or more of the Transaction Documents (e.g., the mortgage). If incorporated definitions are included in Transaction Documents that are not governed by Delaware law, which is increasingly common in Real Estate Financing Transactions, the Opinion Giver should determine that incorporated definitions are used in a manner consistent with Delaware law, take any differences into account, or assume such consistency of meaning. In other words, if the term used in the opinion is defined in the loan agreement, and the loan agreement is governed by New York law, how does the Delaware lawyer know for sure the meaning of that term, in that New York law may affect its meaning?

E. Reliance On Certificates And Other Statements Of Fact Or Laws

The Opinion Giver often obtains from appropriate persons certificates covering factual matters and upon which the Opinion Giver bases its legal conclusions. For example, the Opinion Giver might ask the Client to provide a certificate

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45. *2012 Report*, *supra* note 10, §1.1 at 228.

46. *Id.* § 1.1(c) at 228.

47. *Id.* § 1.4 (c) at 232.

48. In particular, the limitation to the identified documents is appropriate where the Opinion Giver is local counsel without a long-standing client relationship with the borrower or first-hand involvement in the negotiation of transactional documents. Committee on Legal Opinions, *Third-Party Legal Opinion Report, Including the Legal Opinion Accord, of the Section of Business Law, American Bar Association*, 47 Bus. Law. 167, 183 (1991) [hereinafter the "*Accord*"]; *see also 2012 Report*, *supra* note 10, §1.4 at 231.

identifying any overtly threatened litigation. The Opinion Giver may rely, without further investigation, on information provided in such certificates unless the Opinion Giver has actual knowledge the information is false or the Opinion Giver does not reasonably believe the source is appropriate.[49]

Opinion letters often include statements to the effect that, in addition to identified Transaction Documents, the Opinion Giver has reviewed such matters as are necessary in the professional judgment of the Opinion Giver to render the opinion. Customary practice requires that the Opinion Giver has undertaken a review of what is necessary to render the opinion letter;[50] therefore, such a statement need not be included in the opinion letter. The Opinion Giver may limit the scope of inquiry to specific documents or other specific items, but such a limitation is effective only if it is explicit. For example, the opinion letter might state, "we have reviewed only the following documents and made no other investigation or inquiry." Recitation of a list of documents without an express limitation as to the scope of review should not be relied upon by the Opinion Giver as being effective to limit the scope of review. However, limitation of the scope of review as to a given issue – such as "relying solely on our review of the good standing certificate of the Client issued by the Office of the Secretary of State of Delaware, the borrower is in good standing under the Delaware General Corporation Law" – is effective as a limitation of the Opinion Giver's duty as to the stated issue.

A certificate used for opinion purposes should usually be signed by an individual who is an officer or other representative of the entity as to which the certificate is being given, but not signed by or on behalf of the entity. This is because a certificate signed by or on behalf of the entity would merely be a reiteration of representations made by that entity in the relevant documents.[51]

Although the Opinion Giver should not usually rely on certificates that are statements of legal conclusions, rather than facts,[52] the Opinion Giver may rely on certificates of public officials that are legal conclusions – for example, a good standing certificate issued by the Delaware Secretary of State.

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49. *2012 Report*, *supra* note 10, § 1.5(a) at 232. Sources vary in their descriptions of what information should not be relied upon, and some appear to expand the field of unjustified reliance to information the user should deduce to be unreliable even when furnished by an otherwise reliable source. *Accord* §3 states that an Opinion Giver may rely without investigation on information provided by others only if (among other things) the provider of the information "is reasonably believed by Opinion Giver to be an appropriate source for the information" *Accord* §5 states: "As a general and overarching principle, the Opinion Giver may not rely on information (including certificates or other documentation) or assumptions, otherwise appropriate in the circumstances, if Opinion Giver has Actual Knowledge that the information or assumptions are false or Opinion Giver has Actual Knowledge of facts that under the circumstances would make the reliance unreasonable." *Legal Opinion Principles*, *supra*, provides: "Customary practice permits such reliance [on factual information obtained from others] unless the factual information on which the lawyers preparing the opinion letter are relying appears to be irregular on its face or has been provided by an inappropriate source." *Legal Opinion Principles*, *supra* note 4, § III.A at 833. The difference between having knowledge that would make reliance unreasonable and the facial appearance of irregularity may be significant.

50. *See RE Guidelines*, *supra* note 8, § 3.3a at 249 ("Absent qualification, the opinion giver may be presumed to have undertaken such legal research, reviewed such documentation, and investigated such matters as is professionally appropriate to render the opinions given (*see* BLS Accord § 2). However, any expressly stated limitations as to documents reviewed or the scope of legal and factual inquiry will be given effect."). *Accord*, Section 2 says, "[t]he Opinion Recipient may assume that the Opinion Giver has reviewed such documents and given consideration to such matters of law and fact (in accordance with the principles set forth in this Accord) as the Opinion Giver has deemed appropriate, in its professional judgment, to render the Opinion." *Accord*, *supra* note 48, at 183.

51. *2012 Report*, *supra* note 10, § 1.5(e) at 233; Glazer, *supra* note 40, § 4.2.3.8 at 618; *Tribar 1998 Report*, *supra* note 5, at 618.

52. Florida Report, *supra* note 1, § G at 23.

Certificates generally should be dated contemporaneously with the closing and, therefore, the date of the opinion letter. At times, however, certificates may have been obtained prior to the issuance of the opinion letter, and the Opinion Giver needs to consider if those certificates should be updated or assumptions added to the opinion letter. Although not every certificate needs to be updated for purposes of issuing the opinion letter, most of the steps to update are easy to take and provide greater comfort to the Opinion Giver that material facts have not changed during the course of preparation, but prior to issuance, of the opinion letter.[53]

F. Opinions Under Delaware Or Federal Law

An opinion letter in Delaware typically will state it is limited to Delaware law and includes this limitation in the text of the opinion. There is a trend in real estate secured financing opinion letter practice to exclude coverage of federal law except where expressly identified federal law is relevant to the Real Estate Financing Transaction or the parties.[54] In particular, a request from the Opinion Recipient to include federal law when the Opinion Giver's role is limited to serving as local Delaware counsel is inappropriate.[55] Federal law sometimes is stated in opinion letters to be included even though, after taking account of the broad exclusions of the kind set forth in most opinion letters, it is difficult to identify any federal law that would be relevant in opinion letters given in most Real Estate Financing Transactions. For these reasons, a request to include federal law in a standard opinion for a Real Estate Financing Transaction is inappropriate.[56] If any federal law is to be considered, it should be identified and covered expressly; otherwise no coverage of federal law should be implied or generally referred to.

The laws of multiple jurisdictions may need to be considered in the opinion letter, as appropriate. Opinions with respect to entity, transactional or other issues governed by the law of jurisdictions in which the Opinion Giver does not practice may need to be covered by an appropriate assumption as to such law or, if necessary, by engaging other counsel to opine as to such law.

Under customary practice, an opinion letter covers only law that a lawyer in the jurisdiction whose law is being covered by the opinion letter, exercising customary professional diligence, would reasonably be expected to recognize as being applicable to the entity, transaction or agreements to which the opinion letter relates.[57]

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

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53. *See* Committee on Corporations, *1989 Report of the Committee on Corporations of the Business Law Section of the State Bar of California Regarding Legal Opinions on Business Transactions*, 45 Bus. Law. 2169, 2189 (1990) ("[R]easonable prudence does not require that every certificate be updated for purposes of rendering an opinion.").

54. *See RE Guidelines*, *supra* note 8, § 1.2a at 245.

55. *LoCo Report*, *supra* note 11, § 1.3 at 183; *RE Guidelines*, *supra* note 8, § 1.2a at 295.

56. *2012 Report*, *supra* note 10, § 1.3(b) at 229.

57. This statement of what law is covered follows the formulation set forth in *Legal Opinion Principles*, *supra* note 4, at Section II.B.

G. Assumptions[58]

An Opinion Giver will generally derive the facts that go into a particular opinion from one or more of the following sources: facts identified by the Client or other person in a certificate, facts derived from representations and other statements in the Transaction Documents, and facts assumed by the Opinion Giver. Assumptions are often used because efforts of the Opinion Giver to elicit those facts would not be cost-effective given the relative unimportance of those facts, or the facts would be beyond the professional competence of counsel to know (e.g., the legal capacity of an individual).

Assumptions are made "without investigation," whether or not the opinion letter so states.[59] The same principles governing justifiable reliance discussed above with respect to certificates apply as well to assumptions, which form additional factual bases for the opinions expressed in the opinion letter. That is, the Opinion Giver may rely, without additional investigation, on assumptions unless the Opinion Giver has actual knowledge the assumed information is false or will materially mislead the Opinion Recipient. The Opinion Giver may rely on assumptions or statements that are known by the Opinion Giver to be incorrect, but only where the reliance is with the express consent of the Opinion Recipient. For example, for an enforceability opinion on Transaction Documents governed by the laws of a jurisdiction other than Delaware, at times the Opinion Recipient may request that the Opinion Giver assume Delaware law governs notwithstanding the express choice of another governing law in the Transaction Documents.

A related concept addresses misleading opinions.[60] Section 1.5 of the Real Estate Opinion Guidelines[61] states:

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

There are several assumptions that appear to be generally accepted in customary practice and therefore do not need to be stated in the opinion letter.[62] Customary practice views these assumptions as implicitly included in opinions rendered by Delaware counsel. However, as with other aspects of opinion practice, many Delaware counsel will expressly state these implicit assumptions in the opinion letter, viewing this as the more cautious approach given that a court outside Delaware might disregard customary practice and look only to the express language of the opinion letter.[63]

Here are a few (but not all) of what are generally viewed to be implicit assumptions included in all Delaware opinion letters applicable to Real Estate Financing Transactions:

a. all signatures on documents examined by the Opinion Giver are genuine;

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58. For a good discussion of the cost-benefit analysis in opinion practice, see generally, Jonathan C. Lipson, *Cost-Benefit Analysis and Third-Party Opinion Practice*, 63 Bus. Law. 1187 (2008).

59. *2012 Report*, *supra* note 10, §2.3(b) at 234.

60. *Id.* §1.5(b) at 233.

61. *RE Guidelines*, *supra*, note 8, § 1.5 at 245.

62. *See infra* note 120.

63. *2012 Report*, *supra* note 10, §2.1(c) at 234.

b. all documents submitted to the Opinion Giver as originals are authentic;

c. all documents submitted to the Opinion Giver as copies conform with the original copies of the documents;

d. each document reviewed by the Opinion Giver has not been amended or modified in any respect;

e. any remedy set forth in the Transaction Documents will be availed of in accordance with applicable procedures of law (including sales procedures), in a commercially reasonable manner, and without a breach of the peace;

f. the legal capacity of all natural persons who are parties to the Transaction Documents; and

g. any assumptions that are within the scope of customary practice.

Some Delaware Opinion Givers may include some but not all of the implicitly included assumptions in their opinion letters; even so, all implied assumptions should nevertheless be deemed included in the opinion letter.

One assumption attracting increased attention is the assumption of the genuineness of signatures. Most opinion letters assume all signatures are genuine. Opinion Recipients occasionally request that an assumption that signatures are genuine not apply to signatures on behalf of the Client or certain other parties to Transaction Documents. In effect, such a request might be construed to require the Opinion Giver to assure that the signatures of the Opinion Giver's client are not forgeries and that the persons signing are in fact the persons they purport to be. Such an assurance is not an opinion of law but, rather, is a factual matter generally outside of the knowledge and professional competence of the Opinion Giver; and most opinion authorities view such request to be inappropriate.[64] Even familiarity with the signatory over years of representation may not necessarily support a factual determination that, as a legal certainty, the person is who the person purports to be. As noted above concerning assumptions generally, assuming that the signatures are genuine would be inappropriate if the Opinion Giver knows otherwise, and this should be sufficient comfort to the Opinion Recipient. As a practical matter, however, in Delaware intrastate transactions, some Opinion Givers are willing to exclude the Client from this assumption based on having taken reasonable steps to assure themselves that the signer is the person he or she is represented to be.

Note, too, that assumptions are made "without investigation," meaning those matters within the knowledge of the Opinion Giver without any inquiry or investigation.[65] This limitation is implicit in all assumptions.

H. Limitations On Delaware Laws And Exceptions To Those Laws

An opinion issued by Delaware counsel addresses only those laws, rules and regulations a Delaware lawyer exercising customary professional diligence would reasonably be expected to recognize as being applicable to the Client, the Transaction Documents or the Real Estate Financing Transaction to which the opinion relates (referred to in this article as the "Applicable Laws").[66] As discussed elsewhere in this article, if the Client's business is regulated (e.g., a public utility), the Applicable Laws may include laws, rules and regulations related to the regulated business.

64. *Id.* § 2.1(d) at 234; GLAZER, *supra* note 40, at 29.

65. *2012 Report*, *supra* note 10, § 2.1 (b) at 234.

66. *Id.* § 1.3(e) at 231.

Under customary practice, a Delaware opinion is generally held not to cover any federal law[67] or any laws or ordinances of a subordinate jurisdiction, such as a county or municipality. Moreover, the scope of Applicable Laws will not cover certain specified areas of law, such as securities, bankruptcy, insolvency, tax, admiralty and the like.[68]

At times, the Opinion Recipient will request an opinion that assumes Delaware law will apply to a Transaction Document even though that document expressly elects the governing law of another jurisdiction. Such an opinion should only be requested, and given, when there is reason to believe application of Delaware law is possible or when Delaware counsel is the only counsel for the Client in the transaction and the Opinion Recipient is willing to accept such an opinion rather than requiring the Client to engage counsel in that other jurisdiction. In this case, the assumption is a hypothesis that Delaware law will apply as if the parties had elected substantive Delaware law to govern. This is a so-called "as if" opinion. If providing such an opinion, the Opinion Giver should make clear that no opinion is being given that Delaware law actually could or would apply.

Sometimes the Opinion Recipient will ask the Opinion Giver to hypothesize that the law of another jurisdiction is identical to Delaware law. Such an opinion is essentially meaningless and is not favored in opinion practice.[69]

I. Knowledge

It is appropriate for an Opinion Giver to qualify certain factual components of the opinion analysis by the extent of the Opinion Giver's knowledge. Typical phrases include "to our knowledge," "to our current actual knowledge," "to the best of our knowledge," "known to us," "we are not aware of" or "nothing has come to our attention that."

Current opinion practice recommends that the Opinion Giver define in the opinion letter what is meant by "knowledge"; otherwise, the definition may be left to the imagination of the Opinion Recipient.[70] In addition, current practice for such a definition focuses on the concepts of "conscious awareness" and on an identified set of persons, often referred to as the "primary lawyer group," who may have that conscious awareness – for example, the lawyer who signs the opinion letter, together with the lawyers actually working on the transaction. Some Opinion Givers provide for a narrower group and some a larger group. By limiting the scope of the knowledge qualification to the "primary lawyer group," no additional inquiry should be required beyond the members of that group unless the Opinion Giver is requested, and undertakes, to conduct an inquiry of other lawyers in the Opinion Giver's firm.[71] By incorporating the knowledge qualification into an opinion, it will not be necessary for the Opinion Giver to undertake an investigation of all other lawyers in the firm or to review all of the firm's files, nor will it be necessary for the Opinion Giver to undertake an investigation with the Client or with any third parties (e.g., searches of governmental databases).[72] Generally, the literature suggests that

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67. *RE Guidelines*, *supra* note 8, § 1.2a at 245.

68. *2012 Report*, *supra* note 10, § 4.6 at 256.

69. Florida Report, *supra* note 1, § M at 32.

70. *RE Guidelines*, *supra* note 8, § 3.4 at 249.

71. *2012 Report*, *supra* note 10, § 1.5(c) at 233 & § 4.7 at 257.

72. Keep in mind that generally the knowledge of the partnership is that of the partner acting in a particular matter or other partners who could or should have communicated with that partner. Uniform Partnership Act § 12. *See also Legal Opinion Principles*, *supra* note 4, § III.B at 833.

"knowledge" is understood by both Opinion Givers and Opinion Recipients not to mean everyone in the firm.[73] However, given possible uncertainty, best practice is to define "knowledge" in the opinion letter itself.[74]

Further, as a matter of prudent practice, the Opinion Giver should consider inquiring with the lawyers within the Opinion Giver's firm who serve as the principal relationship managers for the Client (regardless of whether or not such lawyer otherwise falls within the purview of the "primary lawyer group") in order to avoid any claims in the future regarding the diligence undertaken in rendering the subject opinion.[75]

J. Signatures

Opinion Recipients anticipate that an opinion is the expression of the professional judgment of the firm issuing the opinion letter, not of the individual lawyer or lawyers who prepared the opinion letter. Accordingly, the opinion letter is signed in the name of the Opinion Giver firm or on its behalf. Of course, if the Opinion Giver is a sole practitioner, the Opinion Giver signs an opinion letter in the Opinion Giver's own name.

III. DELAWARE ENTITY OPINIONS

In an opinion letter for a typical Real Estate Financing Transaction, the Opinion Giver is usually asked to opine with respect to the Client's creation, existence and current status as a business entity under the laws of the jurisdiction where the Client is organized. In deference to our colleagues in the Delaware corporate bar, it is beyond the scope of this article to address such opinions in any detail; however, the following observations are offered for some general guidance, particularly as to the opinions or assumptions that are the necessary building blocks for issuing a remedies opinion.[76]

A. Status

In most Real Estate Financing Transactions where the Opinion Giver is acting as local counsel with respect to the Transaction Documents (as opposed to lead counsel with respect to the Client itself or as local counsel giving entity opinions where the Client is a Delaware entity), it is unnecessary to opine about initial filings of documents with public authorities to create the Client entity (a duly formed opinion) or the initial organizational matters relating to events and circumstances at the time the entity was formed (a duly organized opinion), as opposed to its current existence.[77]

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73. GLAZER, *supra* note 40, at 530 n.31.

74. The *Dean Foods* case in Massachusetts underscores the need to take certain actions and not simply to rely on definitions but to make a reasonable and prudent inquiry of lawyers in the firm who are actually undertaking litigation for the company. Dean Foods Co. v. Pappathanasi, 2004 WL 3019442 at *17-18 (Mass. Super. Dec. 3, 2004); *see also Legal Opinion Principles*, *supra* note 4, § III.B at 833; *Tribar 1998 Report*, *supra* note 5, at 664; Georgia Report Section 15.04B cited at GLAZER, *supra* note 40, app. 13 at 13:167.

75. *Legal Opinion Principles*, *supra* note 4, § III.B at 833.

76. *See infra* Section V ("Remedies Opinion").

77. *See RE Guidelines*, *supra* note 8, § 1.5.b.

However, when the Delaware lawyer is acting as lead counsel for the Client, the lawyer is usually requested to give an opinion as to the Client's status where the Client is an entity created under Delaware law. This opinion typically includes three components: the Client has been formed, incorporated or otherwise created *de jure*; the Client validly exists on the date of the opinion; and the Client is in good standing under the applicable requirements of the Delaware Secretary of State. An example of a due formation opinion is:

> Borrower has been duly formed and is validly existing and in good standing as a limited liability company under the Delaware Uniform Limited Liability Company Act, 6 Del. C. §18-101, *et seq*.

The first component is the initial creation of the Client under Delaware law. For example, a corporation will have been incorporated by the filing of a certificate of incorporation.[78] A limited liability company will have been formed by the filing of a certificate of formation. A limited partnership will have been formed by the filing of a certificate of limited partnership. In each case, the Opinion Giver needs to check with the Delaware Secretary of State for the initial filing document in order to determine that the document and the filing comply with the requirements of Delaware law.

The "validly existing" opinion also goes beyond that initial creation filing to opine that as of the date of the opinion the Client still exists in a "valid" way. In other words, the Opinion Giver opines that the Client has not dissolved, consolidated or merged with or into another entity. Accordingly, the Opinion Giver must check with the Delaware Secretary of State for all other filings relating to the Client to make sure no such event has occurred in the life of the Client. The Constituent Documents[79] of the Client also must be examined to determine whether the Client has a limited duration (often the case for limited partnerships). The Constituent Documents may also identify circumstances under which the Client can be dissolved by the action of its Owners,[80] (often the case for limited partnerships). To support its opinion, the Opinion Giver may obtain from the Client a certificate stating that the Client has not dissolved, its Owners have not taken any action to dissolve the Client, and no proceeding for involuntary dissolution has been initiated.[81]

In addition, certain events can occur during the life of the Client that result in the dissolution of the Client by operation of law. In a partnership, limited partnership, or limited liability company being treated as a partnership for income tax purposes, assignment of more than 50 percent of the interests of the Owners can effect a dissolution for federal income tax purposes.[82] Of course, the dissolution of a general partnership, limited partnership or limited liability company does not terminate the Client, absent a provision to the contrary in its Constituent Documents. Rather, the Client continues to exist during a winding up of its affairs.[83] The Client may therefore continue to validly exist even after dissolution

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78. This article does not cover the more involved "due organization" opinion for entities. *See* Scott FitzGibbon and Donald W. Glazer, *Legal Opinions on Incorporation, Good Standing, and Qualification to do Business*, 41 Bus. Law. 461 (1986) for a discussion of that opinion.

79. Throughout this article, the term "Constituent Documents" is used to identify the certificate of incorporation, bylaws, partnership agreement, limited liability company agreement or similar governing documents of the Client.

80. Throughout this article, the term "Owners" is used to identify the shareholders, partners, members, beneficiaries or other owners of the beneficial interests in the Client.

81. Some commentators argue that these non-public activities go beyond the scope required for a validly existing opinion, which should be able to be based on public filings alone. *See* Glazer, *supra* note 40, at 162-63.

82. Internal Revenue Code § 708.

83. *See, e.g.*, 6 Del. C. §§ 17-803(b) & 18-803(b); 8 Del. C. § 278.

but before its affairs have been wound up. On the other hand, the occurrence of dissolution frequently limits the ability of the Client to continue certain undertakings, as its activities are then limited to winding up its affairs. Moreover, the Constituent Documents or Applicable Laws may direct one of the Owners or some other person to be responsible for the winding up, thereby limiting the scope of the authority of the Owners.[84]

For purposes of most of the opinions discussed in this section, the Opinion Giver may confine the opinion to those Constituent Documents known to and reviewed by the Opinion Giver. Otherwise, the Opinion Giver will want a certificate from the Client specifically identifying the Constituent Documents being reviewed for purposes of the opinions and certifying they have not been amended.

Although the "good standing" of the Client will have different meanings in different jurisdictions, in Delaware, good standing relates to the status of the Client's payment of applicable taxes or other fees and does not relate in any way to the validity of its existence or its due organization.[85] The Opinion Giver should obtain from the Secretary of State a certificate of good standing, which will be issued as of a particular date. Because of the nature of the good standing certificate and its source, this only applies to those types of business entities that have made a filing or registration with the Secretary of State. Typically, general partnerships, joint ventures, sole proprietorships and grantor trusts do not require such a filing, and a good standing opinion is irrelevant. Note, however, that limited liability partnerships will generally have a filing.[86] In addition, in states like Delaware where a general partnership can merge with another business entity, a filing is necessary for the general partnership for that purpose.[87]

Because the good standing certificate generally relates to the tax status of the Client, it is important to know on what basis a business entity can lose its good standing status. In Delaware, the entity pays a tax or fee and files an annual report. Accordingly, the Opinion Giver needs to keep in mind that the failure to carry out these actions will cause the entity to lose its good standing status. In that instance, knowing the date by which payments are due is a material concern to the Opinion Giver. For example, if the good standing certificate of the Secretary of State is issued prior to the date by which such performance is due and the opinion is issued after that date, the Client might lose its good standing in the interim. It is for this reason that best practices for Opinion Givers include obtaining the good standing certificate dated as close as possible to the date of the opinion letter. In Delaware, the Opinion Giver can have direct access to the office of the Secretary of State and obtain a good standing certificate dated the same day as the closing of that transaction and the issuance of the opinion. If there is any concern by the Opinion Giver about a possible change of status of the Client, the Opinion Giver should state in the opinion that the good standing opinion is given as of the date of the good standing certificate or include an assumption that there has been no change to the Client's status since the date of the good standing certificate.

An opinion regarding good standing should be given only in reliance on a public authority document confirming good standing. Such an opinion often is given solely in reliance on public authority documents. Such phrasing limits the duty of the Opinion Giver to make further inquiry. For that reason, many question the value of, and need for, such an opinion.

An opinion that the Client is qualified to do business in Delaware is often requested if the Client is not formed in Delaware.[88] If the issue of existence is to be addressed in the opinion letter and the Client is not formed in Delaware, it

84. *See, e.g.*, 6 DEL. C. *§§ 17-803(a) & 18-803(a); 8* DEL. C. *§ 279.*

85. In some states, *e.g.*, Pennsylvania, the Good Standing Opinion does not go to the tax status of the Client. GLAZER, *supra* note 40, at 168.

86. *See, e.g.*, 6 DEL. C. § 15-1001.

87. *Id.* § 15-902(c).

88. Some of the authorities oppose the request for a qualification to do business opinion as it is not a legal opinion but a factual determination. *See* GLAZER, *supra* note 40, at 184-85.

may be appropriate to include a statement in the opinion letter as to qualification to do business in Delaware. As a matter of customary practice, the Opinion Giver may rely solely on a certificate of qualification provided by the Delaware Secretary of State, again raising the question of the value of, and need for, such a legal opinion.

B. Power

Opinion letters often include opinions as to the corporate (or other type of entity) power of the Client. An example of a power opinion is:

> The Borrower has the limited liability company power to execute and deliver the Transaction Documents.

Such an opinion on corporate (or other type of entity) power supplements, or may even be implicit in, other opinions, such as the authorization opinion. However, it is useful to state the power opinion expressly as a reminder to the Opinion Giver to check applicable organizational documents and law (particularly in the case of certain regulated entities) and as comfort to the Opinion Recipient that the Opinion Giver has considered these issues. This opinion addresses only the legal power of the Client under its Constituent Documents and Applicable Laws and not the financial or other ability to perform. Some commentators have interpreted this as meaning the specified actions are not *ultra vires*.[89] However, the power opinion does not assure there is no impediment to performance under law.[90]

Some Opinion Recipients request the power opinion include, more broadly, the power of the Client to carry on its business wherever conducted. This is not an appropriate opinion request in a Real Estate Financing Transaction.[91] If such an opinion is given, the Opinion Giver will need to identify the "business" of the Client, usually by reference to a description of the "business" in the Constituent Documents or in a certificate obtained from the Client.

Because commercial real estate secured financings most often involve entities other than corporations, some Opinion Givers refer to "limited liability company power," for instance. Some practitioners use the phrase "power and authority" instead of just "power." These phrases generally are interpreted to have the same meaning.[92]

The power opinion does not mean the transaction or execution of applicable documents has been authorized by the board of directors or other appropriate persons. It does not mean that entering into the transaction by the Client does not violate some law. It simply means the Client has the inherent ability to take the specified actions. Because the power opinion should be viewed in this manner, it is important for the Opinion Giver to draft the opinion appropriately so that the Opinion Giver is limiting this opinion to the Constituent Documents and the Applicable Law giving the Client existence.

Some Opinion Recipients request a statement that the Client has "full power." This statement should not be given, as "full" may need a review of every conceivable statutory basis for the Client to take the particular action.[93]

Corporations often have broad powers, making the power opinion relatively easy to give.[94] However, there may be situations in which an entity's Constituent Documents limit the entity's power to a particular project or business. Further,

89. GLAZER, *supra* note 40, at 192.

90. *2012 Report*, *supra* note 10, §3.2(a) at 238.

91. *Id.* §§ 3.2(b) at 238, 3.7(b) at 244; *LoCo Report*, *supra* note 11, § 3.2 at 194.

92. *2012 Report*, *supra* note 10, § 3.2(c) at 238.

93. *Id*.

94. *See, e.g.*, 8 DEL. C. § 121.

if the entity has been organized as a "special purpose entity" (an "SPE"), there may be further limitations on the power of the entity to act in certain circumstances.

SPE provisions are often encountered in financing transactions where the lender desires to isolate the assets that serve as collateral for the financing from the assets and liabilities of an affiliated parent entity. SPE provisions are also encountered where a pool of loans is being sold to investors as part of a "securitized" financing (whether the pool contains residential or commercial mortgages or other types of financial assets).

In connection with the formation of an SPE, the lender or investors often will require that the entity's Constituent Documents include SPE provisions. These provisions generally purport, among other things, to deprive the SPE of the capacity to take certain actions (such as engaging in activities other than those specifically authorized) without consent of some third party, such as a lender or an independent director.

If the entity's Constituent Documents limit its power to a particular project or business, or if the Constituent Documents contain SPE provisions, the Opinion Giver must carefully review the Constituent Documents to determine whether such provisions affect the power of the entity to undertake the Real Estate Financing Transaction. If such provisions disable the entity's ability to engage in the Real Estate Financing Transaction and such disability cannot be resolved (for example, by elimination of the limitations from the Constituent Documents in accordance with the entity's Constituent Documents), an opinion regarding the power of the entity to complete the Real Estate Financing Transaction should not be given.

Another instance where power may be constrained is when the Client is governed by some specialized statute applicable to a particular class of business, such as a bank, a utility or an insurance company. Those statutory schemes may circumscribe the power to enter into particular kinds of transactions. Another instance may be where the transaction is of the type that can be *ultra vires*, such as where the Client is guaranteeing another entity's obligations. In those cases, the Applicable Laws must be analyzed carefully to determine whether applicable tests have been met such that the Client has the corporate power to enter into that guarantee transaction.

C. Authorization

Opinion letters usually include opinions that the necessary corporate (or other entity) actions have been taken and approvals have been received. An example of an authorization opinion is:

> All limited liability company actions or approvals by the Borrower necessary to bind the Borrower under the Transaction Documents have been taken or obtained.

Such actions or approvals include any necessary actions taken by the Client's governing body, such as the board of directors of a corporation.

Two aspects of due diligence are necessary as a threshold matter for giving an authorization opinion: first, identifying the persons who authorize the Client to undertake the transaction; and second, identifying what steps are necessary to carry out the authorization. In both cases, a review of the Client's Constituent Documents is necessary in order to address these issues.

Once the Opinion Giver has identified the persons who carry out the authorization and the steps for the authorization, the Opinion Giver must examine what actions have been taken to authorize the Client to undertake the transaction in question. In other words, was there a meeting of the board of directors? If so, was it duly noticed and held? Was there a quorum? Were the other formalities in adopting a resolution carried out? Is the resolution part of the minutes of the

corporation? Was the resolution of the directors instead adopted by consent of the directors? Did that process satisfy the requirements under the Constituent Documents and Applicable Laws for adoption by consent? Similar investigation would be undertaken for the authorization activities of a limited liability company, limited partnership or other business entity.

Often, the Client may be owned by one or more other business entities and each of them perhaps owned by one or more business entities, and so on until individuals, whether members, partners, shareholders, or the like, are the owners. Where there are tiers of ownership, the Opinion Giver should make clear the extent to which it has or has not reviewed and verified any necessary consents throughout the tiers of ownership or at specified levels of the organizational hierarchy. In the absence of clarifying language in the opinion letter,[95] it may not be clear to the Opinion Recipient whether the Opinion Giver is opining only on the authorizing actions taken by the direct Owner of the Client, having assumed the requisite authorizations by all indirect Owners, or has reviewed the authorizations by all indirect Owners. The same issue arises concerning the power opinion discussed above. Unless the opinion is expressly limited, the Opinion Giver must review what is necessary to render the authorization opinion.[96]

In those instances where there are multiple tiers of ownership of the Client, the due diligence discussed in this article with respect to the Client applies equally to direct or indirect Owners that are business entities.

Finally, the Opinion Giver needs to review the authorizing resolution or other action taken to authorize the transaction in question and needs to determine such authorizing action has not been rescinded or revoked in any way. In most instances, the Opinion Giver will obtain from the Client an appropriate certificate certifying the occurrence of the authorizing action in question, such as a certified resolution, and certifying that the authorizing action has not been modified or rescinded and there are no other resolutions relating to the transaction.

The authorization opinion does not apply to third-party or governmental approvals, but only to internal company or other entity approvals regarding the Client.[97]

Some jurisdictions may also have criminal laws that affect the ability of the business entity to undertake actions on its own behalf. In Delaware, for example, the state law version of the RICO Act requires a foreign corporation (meaning a corporation not incorporated in Delaware) to register in Delaware.[98] Filing under the Delaware General Corporation Law as a foreign corporation is sufficient as a filing under this act.[99] A foreign corporation that does not file as required by this act may be legally prohibited from owning property in the State of Delaware.[100]

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95. For example, the opinion letter might list the entity documents for the Client as the only entity documents reviewed for giving the opinions.

96. *2012 Report*, *supra* note 10, § 3.3(b) at 239; *LoCo Report*, *supra* note 11, § 3.3 at 195. The view of the level of required diligence of remote tiers of owners is not uniform. For a statement that authorization at remote tiers may be assumed, see TriBar Opinion Committee, *Third-Party Closing Opinions: Limited Liability Companies*, 61 Bus. Law. 679, 689 n. 52 (2006):

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

97. *2012 Report*, *supra* note 10, § 3.3(c) at 239.

98. 11 Del. C. § 1501 *et seq*.

99. 11 Del. C. § 1510.

100. *Id*.

IV. EXECUTION AND DELIVERY

As discussed in Section V below, the remedies opinion is inherently an opinion that a Transaction Document is enforceable as a contract between the Client and, usually, the Opinion Recipient. Accordingly, all of the requirements necessary for contract formation must be determined to exist or be assumed. One of the essential elements of contract formation is that the Transaction Document has been executed and delivered by the parties. Therefore, the Opinion Recipient will often want an opinion that the Client has executed and delivered the Transaction Documents. An example of an execution and delivery opinion is: "The Borrower has duly executed and delivered the Transaction Documents."[101] Because execution and delivery are formal requirements of contract formation, the "execution and delivery" opinion along with opinions on entity status and organization, entity power, authorization of the transaction, no violation of laws and no required government consents are the building block opinions for the remedies opinion.[102]

For purposes of a Delaware execution and delivery opinion, "execution" means that, to the extent Delaware law governs the execution of the Transaction Documents, the proper Client party, whether an individual or the officer or manager or other person who has signed the Transaction Documents on behalf of a Client entity, has signed the Transaction Documents and, if the Client is an entity, that such person was authorized to execute the Transaction Documents on behalf of the Client.[103]

For purposes of a Delaware execution and delivery opinion, "delivery" means that, to the extent Delaware law governs the delivery of the Transaction Documents, the Client has in some manner given the executed Transaction Documents to the Opinion Recipient with the intent to create a contract. The use of the phrase "execution and delivery" is likely redundant as delivery is a component of execution, but use of the phrase continues.

The execution opinion must be analyzed to assure, as a matter of contract law, that the Transaction Documents have been signed by the party to be bound by the documents. This is a matter for the substantive laws governing the documents and not the law governing the Client.[104] However, given the components of "execution," such as authorization, the laws governing the Client may also apply, and those laws may differ from the laws governing contract formation. For example, the Transaction Documents might be governed by Delaware law, but the Client is a Pennsylvania entity and the documents might be physically executed in New York. In that case the Opinion Giver must determine the extent to which Delaware law governs the execution component of contract formation.

If the Opinion Giver is present when the Transaction Documents are executed and delivered, giving these opinions is easier, but that often is not the case in Real Estate Financing Transactions. Increasingly, documents are signed and transmitted by electronic mail or other methods, typically outside the presence of the Opinion Giver. Accordingly, the Opinion Giver must use other means to confirm execution and delivery have taken place – for example, the Client could

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101. The opinion regarding execution and delivery covers only the execution and delivery of the Transaction Documents by the Client and not by any other parties to the Transaction Documents. In Delaware, it is customary practice for the Opinion Giver to assume execution and delivery with respect to all parties signing the Transaction Documents other than the Client.

102. *See infra* Section V ("The Remedies Opinion").

103. Execution implicitly incorporates authorization when the signer is an entity. *2012 Report*, *supra* note 10, § 3.4 at 240; *LoCo Report*, *supra* note 11, § 3.4 at 196. Note that the implicit assumption of the genuineness of signatures applies to execution by the Client.

104. GLAZER, *supra* note 40, at 227. Section 10.4(i) of the Accord Commentary states that the Opinion Giver should also establish that the applicable state's laws for the formation of a contract have been met.

deliver a certificate stating the actions taken by the Client to sign and transmit the Transaction Documents to the other party or its agent.

Recording of the Transaction Documents, alone, may not be sufficient to evidence delivery. With respect to execution and delivery in the context of a Delaware Real Estate Financing Transaction, Delaware cases hold that the recordation of an instrument merely creates the "presumption" of delivery.[105]

Although the Opinion Giver must review copies of the Client's signature pages for each of the Transaction Documents opined upon to confirm the Transaction Documents reflect what purports to be a signature by the Client, the Opinion Giver does not need to compare the Client's signatures on the Transaction Documents to the Client's signatures contained in a certificate of incumbency or other such certificate provided as part of the closing of the Real Estate Financing Transaction. Rather, the Opinion Giver may assume the genuineness of the signature of the individual who signed the Transaction Documents as the Client or on behalf of an entity Client unless the Opinion Giver has factual knowledge to the contrary. Under customary practice, an assumption to this effect is implicitly included in the "execution and delivery" opinion rendered by Delaware counsel whether or not such assumption is expressly stated in the opinion letter.[106]

V. THE REMEDIES OPINION

A. Overview Of The Remedies Opinion

The "remedies opinion," often referred to as the enforceability opinion, is the key opinion for most Real Estate Financing Transactions. An example of the remedies opinion is: "The Transaction Documents are enforceable against the Borrower in accordance with their respective terms."[107] This opinion tells the Opinion Recipient that the Transaction Documents are enforceable against the Client.[108] But what does "enforceability" mean in the context of opinions? When

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105. *See* Smith v. May, 50 A.2d 59, 60 (Del. Super. 1901).

> The mere fact that a deed has been recorded is not conclusive evidence of its delivery. Pennel v. Weyant, 2 Har. 508; Guest v. Beeson, 2 Houst. 267. But generally, in the absence of evidence to the contrary the fact that a deed has been recorded is prima facie evidence of delivery. This, however, may be rebutted by satisfactory evidence that it was not delivered. 9 Am. & Eng. Enc. Law, 159, 160. It was held in Jamison v. Craven, 4 Del. Ch. 327, that a different degree of proof of delivery is required in case of a voluntary conveyance from that required in case of a conveyance upon a valuable consideration; that in the former case greater strictness of proof of delivery is required, and that in such case, the recording of a deed is not alone sufficient proof of delivery.

Id. In Pennel's Lessee v. Weyant, 2 Harr. 501 (Del. Super. 1838), the court considered the adoption of such a standard, where a grantor who records a deed is estopped from denying its delivery, absent fraud. *See generally* 2 Harr. 501 (Del. Super. 1838). However, the court ultimately rejected such standard. *Id.* at 508 (". . . nor is the fact of recording a deed *conclusive* evidence of the delivery"). Several other 19th century cases also expressly rejected such a standard. *See, e.g.*, Guest v. Beeson, 2 Houst. 246, (Del. Super. 1860) ("The mere recording of a deed in the office of the Recorder of Deeds for the county, even by the authority of the grantor, is not of itself, evidence of its delivery.")

106. *2012 Report*, *supra* note 10, § 2.1 (d) at 234; *LoCo Report*, *supra* note 11, § 3.4 at 197.

107. Note that if the Transaction Documents are not governed solely by Delaware law (e.g., New York law governs all aspects, other than the creation, perfection and enforcement of the mortgage lien), the opinion should take into account that it is only being given to the extent Delaware law applies.

108. It is implicit that the enforceability of the subject documents refers to enforceability against the borrower and not against any other party to the documents.

applied to the Transaction Documents, "enforceability" provides certain assurances that, under the terms of the document and the law of the jurisdiction stated in the opinion, a remedy is available for a breach by the Client of an undertaking in that document.[109]

Some hold the view that the remedies opinion need not be given, and should not be requested, in purely intra-state transactions.[110] This view is not uniform, however, and while a request for a remedies opinion in an intra-state Real Estate Financing Transaction should not be necessary and is disfavored, it is not an unreasonable request.

The remedies opinion may often state that the Transaction Documents are "legal," "valid," "binding" and "enforceable" against the Client. Opinion practice varies in respect of these word choices, but customary practice is that no words other than "enforceable" are necessary for the remedies opinion.[111] Some commentators have observed that the "valid" or "binding" opinion is actually a separate opinion that is, for the most part, governed by the laws of the jurisdiction governing the Client, while the "enforceable" opinion is governed by the laws of the jurisdiction chosen by the parties in the Transaction Documents.[112] While that view may not be shared by most Opinion Givers, it is true the concepts of "valid" and "binding" support the assurance that a contract has been formed.

It is important for the Opinion Giver to keep in mind that while the remedies opinion will almost never[113] be implied in an opinion letter merely because of the inclusion of the so-called "building block" opinions,[114] a remedies opinion implies the issuance of the "building block" opinions. If the Opinion Giver is not intending to give each of these opinions, the Opinion Giver should expressly assume the particular opinions not given.

Opinion authorities disagree over the scope of a remedies opinion. At the risk of oversimplification, there are two broad views of the scope of a remedies opinion. One view, held by those subscribing to the so-called "Tribar" approach, believe the remedies opinion means that "each and every" provision of a Transaction Document is enforceable as written.[115] The other view, held by those subscribing to the so-called "California" approach, believe the remedies opinion means that the "essential provisions" of a Transaction Document are enforceable.[116] In the authors' estimation, the prevailing view taken in Delaware is the Tribar "each and every" provision approach recommended in the 2012 Real Estate Report.

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109. *See* Arthur Norman Field & Jeffrey M. Smith, 1 Legal Opinions in Business Transactions §6.7 at 127 (3d ed. 2014) [hereafter "Field"].

110. *See, e.g.*, *RE Guidelines*, *supra* note 8, § 1.2 ("In particular, opinions from borrower's counsel in intrastate transactions (or in a multistate transaction for which the lender has retained its own local counsel for the purposes of advising it) with respect to the enforceability of loan documents prepared by the lender normally should not be necessary and may not be cost justified.").

111. *2012 Report*, *supra* note 10, § 3.5(a) at 241 n.28.

112. *See* Laurence G. Preble, *The Remedies Opinion Revisited: A Primer for Real Estate Lawyers*, 33 Real Prop. Prob. & Tr. J. 63 (1998).

113. However, *see infra* Section VIII ("Mortgage Lien Creation"), a creation opinion may be viewed as including an implied, though limited, remedies opinion.

114. The "building block" opinions are generally understood to include the entity opinions discussed in Section III above, the execution and delivery opinions discussed in Section IV above, and the no violation of laws opinion discussed in Section VI below.

115. *Tribar 1998 Report*, *supra* note 5, at 619-621; *1998 Mortgage Loan Opinion Report*, *supra* note 6, at 153.

116. State Bar of Cal., Real Prop. Law Section & L.A. Cnty. Bar Ass'n, Real Prop. Section, *Legal Opinions in California Real Estate Transactions*, 22 Real Prop. Prob. & Tr. J. 373, 393; *see also Toward a National Legal Opinion Practice: The California Remedies Opinion Report*, 60 Bus. L. 907 (2005).

That said, the authors believe it would be preferable for the scope of a remedies opinion, at least with respect to opinions in Real Estate Financing Transactions, to cover the "essential provisions" in the Transaction Documents, and not each and every right and remedy. Certainly this represents the correct approach in the cost-to-benefit analysis described in the Guidelines.[117] However, in the absence of clear guidance either nationally or for Delaware, an Opinion Giver should cautiously approach this issue of the scope of a remedies opinion.

Although the remedies opinion provides assurance the contractual provisions are enforceable under Applicable Laws, thereby affording the legal right to pursue a given remedy, the remedies opinion does not address procedural actions necessary to enforce a remedy.[118] For example, the remedies opinion does not address the need of the Opinion Recipient to take certain actions to comply with applicable court rules or law at the time of exercising a remedy.

B. The Elements Of The Remedies Opinion

The remedies opinion implicitly includes three elements: (i) a contract has been formed, (ii) a court will give effect to the stated remedies in the event of a breach by the Client of at least "essential" undertakings, and (iii) certain laws will qualify the extent to which a court will enforce those remedies.[119]

First, the Opinion Giver must be satisfied the contracts represented by the Transaction Documents have been formed.[120] Of course, this means the remedies opinion should only be given with respect to Transaction Documents that are in the nature of contracts. As discussed in Section II.D above, some documents – UCC financing statements, certificates, affidavits and the like – are not contracts and therefore not the proper subject of certain opinions.[121] Accordingly, the Opinion Giver will analyze the relevant laws governing whether a contract has been formed under Delaware law and whether, based on the facts expressed or assumed, those legal requirements have been satisfied.

Second, the Opinion Giver must be satisfied a court will give effect to the remedies stated in the Transaction Documents if the Client breaches at least the "essential" undertakings in those Transaction Documents. Accordingly, the Opinion Giver will review the stated remedies and make a legal determination of whether those remedies will be available against the Client.

Third, as discussed further below, the remedies opinion addresses the scope to which remedies will be enforceable. The remedies opinion will be limited by certain qualifications, both expressed and implied, that may render as unenforceable by a court an undertaking or a remedy contained in the Transaction Documents.

The remedies opinion for the Delaware opinion letter discussed in this article is given on the basis of Delaware law; but that does not mean the Opinion Giver must consider every law in effect in Delaware on the date the opinion is given. Keep in mind the laws in question are those that lawyers who render legal opinions with respect to the type of transaction involved would reasonably recognize as being applicable to transactions of the nature covered by the Transaction Documents and the role of the Client in the Real Estate Financing Transaction (for example, a borrower). As discussed

117. *RE Guidelines*, *supra* note 8, § 1.2 at 244.

118. *2012 Report*, *supra* note 10, § 3.5(a) at 241.

119. Field, *supra* note 109 at 125.

120. Note that the Opinion Giver will have already determined or assumed the "building block" opinions. *See supra* notes 102, 114 and accompanying text.

121. *See supra* Section II.D ("Transaction Documents").

elsewhere in this article, certain types of laws are generally excluded in this analysis, and others will be included only under certain circumstances (e.g., the borrower is a regulated entity such as a public utility).

Some laws, however, are implicitly excluded from the scope of an opinion of Delaware counsel unless such laws are specifically addressed in the opinion letter.[122] Opinion Recipients should consider whether under their particular circumstances they want to require coverage in an opinion as to the impact of any excluded law. However, the Opinion Recipients should only request comfort regarding implicitly excluded laws that is reasonable under the circumstances. The Opinion Giver should exercise diligence and do what is reasonably necessary to provide coverage of requested excluded laws, including consultation with lawyers with relevant experience or expertise, as appropriate, in cases where the Opinion Giver does not otherwise have the expertise to render such opinions. The Opinion Giver should not generally be required to seek guidance from experts in every specialized field of law that might be implicated by the undertakings in a Transaction Document-- such an effort would never be cost-justified (even in very large transactions). Furthermore, the Opinion Giver may wish to exclude other areas of law from the opinion by expressly excluding them in the opinion letter. For example, the Opinion Giver may wish to specifically exclude from the scope of the opinion certain laws that may affect the Client's business, such as (for example) laws, rules and regulations overseen by the Delaware Bank Commissioner.[123]

Although, as discussed earlier in this article, implied opinions should not be read into an express opinion, the opinion authorities generally agree that some opinions will be implied as part of the remedies opinion. The two most important opinions potentially implied in a remedies opinion are usury and choice of law. Most authorities agree the remedies opinion always covers usury except (i) when usury is expressly excluded from the scope of the remedies opinion, (ii) where usury is expressly addressed in a separate opinion, or (iii) if compliance with usury laws is assumed. If there is a separate usury opinion, the remedies opinion will be read as having excluded any opinion on usury.[124] On the other hand, an opinion on the effectiveness of the choice of the law governing the Transaction Documents being opined on is generally not implied in a remedies opinion unless otherwise expressly stated.[125]

Note that the remedies opinion addresses "undertakings" in the Transaction Documents. These can mean many things, but fundamentally the undertakings to which the remedies opinion refers are those affirmative actions the Client is required to take and those prohibited actions the Client is not to take. Because undertakings are affirmative (or negative) acts or omissions, provisions in a Transaction Document that are not "undertakings" (e.g., representations or warranties) are not the subject of the remedies opinion.

C. Qualifications For Narrowing The Scope Of The Remedies Opinion

All remedies opinions are qualified by certain limitations and exclusions ("Qualifications"), whether implied or expressly stated in the opinion letter. An entire article could be written on the topic of Qualifications and the competing authorities on the "proper" way to approach these in the opinion letter. Such a discussion is beyond the scope of this article, which addresses the basics.

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122. *See supra* Section II.H ("Limitations on Delaware Laws and Exceptions to Those Laws") for a list of laws that are not covered under customary practice by an opinion issued by Delaware counsel unless such laws are expressly addressed in the opinion letter.

123. *See infra* Section V.F ("Additional Qualifications").

124. *2012 Report*, *supra* note 10, §§ 3.5(d) at 242, 3.10(a) at 248.

125. *Id.* §§ 3.5(c) at 241, 3.9(c) at 246; *cf. RE Guidelines*, *supra*, note 8, § 4.9 at 257.

The Opinion Giver should, as a general rule, expressly state the Qualifications in the opinion letter. However, customary practice implicitly includes certain Qualifications in all opinion letters, whether stated or not.[126] The two most important of these implicit Qualifications are the bankruptcy exception[127] and the equitable principles limitation.[128] Nevertheless, most Opinion Givers follow customary practice and expressly include the bankruptcy and equitable principles Qualifications when giving a remedies opinion. [129]

Also, the Opinion Giver can follow a few different approaches with respect to inclusion of qualifications. Until fairly recently, most opinion practitioners would list each Qualification to be included – the so-called "laundry list" approach. More recently, opinion practice has incorporated the so-called "generic" Qualification, which attempts to subsume all potentially listed qualifications into one general Qualification. Not surprisingly, many Opinion Givers include both the "generic" Qualification and a "laundry list" of Qualifications in the same opinion letter.

D. The Bankruptcy Exception And The Equitable Principles Limitation

1. The Bankruptcy Exception

The bankruptcy exception excludes from the scope of the remedies opinion the effects of bankruptcy and similar creditor's rights laws. The Qualification therefore is less about the enforceability of particular Transaction Documents than about the effect on the Transaction Documents if these laws apply, even if the laws are applied to persons other than the Client. For example, the bankruptcy of another person could affect the Client. Whether or not expressly stated, and whether or not the wording of the exception includes reference to any or all of these issues, this exception includes (to the extent these issues otherwise might be covered in the opinion letter): (i) the federal Bankruptcy Code, including, among others, matters of turnover, automatic stay, avoiding powers, fraudulent transfer, preference, discharge, conversion of a non-recourse obligation into a recourse claim, limitations on *ipso facto* and anti-assignment clauses, and the coverage of prepetition security agreements applicable to property acquired after a petition is filed; (ii) all other federal and state bankruptcy, insolvency, reorganization, receivership, moratorium, arrangement and assignment for the benefit of creditors laws affecting the rights and remedies of creditors generally (not just creditors of specific types of debtors); (iii) all other federal and state bankruptcy, insolvency, reorganization, receivership, moratorium, arrangement and assignment for the benefit of creditors; (iv) state fraudulent transfer and conveyance law; (v) state insolvency law; and (vi) judicially developed doctrines relevant to any of the foregoing law, such as substantive consolidation of entities.

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126. For a general discussion of including exceptions, see TriBar Opinion Committee, *Special Report of the TriBar Opinion Committee: The Remedies Opinion - Deciding When to Include Exceptions and Assumptions*, 59 Bus. L. 1483 (2004); *see also*, G. Merel, et al., *Common Qualifications to a Remedies Opinion in U.S. Commercial Loan Transactions*, 70 Bus. L. 121 (2014/2015).

127. An example of the bankruptcy exception is: "The effect of bankruptcy, insolvency, fraudulent transfer, reorganization, receivership, moratorium, and other similar law affecting the rights and remedies of creditors generally."

128. An example of the equitable remedies exception is: "The effect of general principles of equity, whether applied by a court of law or equity."

129. *2012 Report*, *supra* note 10, §§ 4.1(b) at 251, 4.2(a) at 252.

Although Delaware customary practice does not generally include federal laws within the scope of an opinion, the bankruptcy exception is included as a matter of customary practice and because the bankruptcy exception also applies to state insolvency laws. In referring to federal law concerning bankruptcy and related matters, an opinion letter should not be read to limit the exclusion of federal law stated elsewhere in the opinion letter.[130]

2. The Equitable Principles Limitation

The equitable principles limitation addresses the fact that while particular provisions of a Transaction Document may be enforceable under Delaware law, a court may not give effect to those provisions in certain factual circumstances where the interests of equity dictate otherwise. For example, a court may determine, in certain circumstances, equity dictates that the withholding of consent is unreasonable, even though the Transaction Documents provide that consent may be given or withheld in a party's sole and absolute discretion. As another example, a court may decline to give effect to a contractual provision, such as when the alleged breach is not material and has not resulted in sufficient damage to the party seeking enforcement.

Whether or not expressly stated, and whether or not the wording of the exception includes reference to any or all of the listed items, this limitation includes principles: (i) governing the availability of specific performance, injunctive relief or other equitable remedies that generally place the award of such remedies in the discretion of the presiding court; (ii) affording equitable defenses (e.g., waiver, laches and estoppel) against a party seeking enforcement; (iii) requiring reasonableness, diligence, good faith and fair dealing in the entering into, performance and enforcement of a contract by the party seeking its enforcement; (iv) requiring consideration of the materiality of (*a*) the Client's breach and (*b*) the consequences of the breach to the enforcing party; (v) requiring consideration of the impracticability or impossibility of performance at the time of attempted enforcement; (vi) affording defenses based upon the unconscionability of the documents or the enforcing party's conduct; and (vii) limiting the effectiveness, validity or enforceability of waivers of any of the foregoing. This exception states an expansive concept, not limited to the Transaction Documents themselves or to acts and omissions occurring at any particular time, whether at, before or after formation of the contract.

E. The "Generic" Qualification

1. What Is The "Generic" Qualification

The so-called "generic" Qualification is better understood if called a "general" Qualification. An example of the generic Qualification is:

> Certain provisions of the Transaction Documents may not be enforceable; nevertheless, subject to the other limitations set forth in this opinion letter, any such unenforceability will not render the Transaction Documents invalid as a whole or preclude (i) the judicial enforcement in accordance with the applicable law of the obligation of the Borrower to repay as provided in the Note the principal, together with interest thereon (to the extent not deemed a penalty); (ii) the acceleration of the obligation of the Borrower to repay such principal, together with such interest, upon a material default by the Borrower in the payment of such principal or interest; and (iii) the foreclosure in accordance with applicable law

130. *Id.* § 4.1(b) at 252.

> of the lien on and security interest in the collateral created by the Security Documents upon maturity or upon acceleration pursuant to clause (ii) above.

This Qualification generally covers laws that may prevent one or more (or even all) of the remedies in the Transaction Documents from being enforceable as written. The obvious concern of the Opinion Recipient would be there is no meaningful remedies opinion remaining after applying this Qualification. Therefore, the generic Qualification goes one step further and gives assurance to the Opinion Recipient that certain remedies remain available despite this Qualification. In the context of a Real Estate Financing Transaction, the generic Qualification assures the Opinion Recipient of the ability (i) to obtain judicial enforcement of the Client's obligations under the Transaction Documents to repay the principal and interest of the loan; (ii) to accelerate principal and interest in the event of a material default under the Transaction Documents; and (iii) to foreclose on the real property security under those circumstances.[131]

Importantly, however, even these assurances remain subject to other Qualifications, such as the bankruptcy exception and the equitable principles limitation, as well as other Qualifications the Opinion Giver may specify. Implicit in the generic Qualification is that it is subject to the bankruptcy exception and equitable principles limitation, whether expressly stated or not. This understanding of the Generic Qualification has been adopted generally by the national real estate bar.[132]

The principal rationale for the generic Qualification is that most Opinion Recipients and Recipient Counsel already understand that not every contractual remedy will be enforced as written and that these remedies have been drafted by them for their own benefit. It is therefore not cost-effective to require the Opinion Giver to parse through each and every stated remedy for specific enforceability as written, so long as certain essential remedies are available.

The statement that foreclosure is an available remedy provides assurance that some type of foreclosure will be available, but not assurance that any particular type of foreclosure (such as through a scire facias proceeding) will be possible. In addition, assurance that the security instrument may be foreclosed relates to the content of the security instrument. It does not assure that any particular holder of the instrument, whether the addressee or a person permitted to rely on the opinion letter as an assignee or successor of the addressee, satisfies requirements of applicable law to pursue the remedy. Thus, for example, if the Opinion Recipient is not a proper assignee of the mortgage, the assurance that the instrument can be foreclosed should not be read as meaning that the purported holder of the mortgage is qualified to foreclose it. The Opinion Giver also should be aware of the ethical issues attendant to disclosing remedies not covered properly in Transaction Documents as initially drafted by counsel for the Opinion Recipient.[133] For example, if a mortgage does not have requisite language to permit it to be foreclosed, which could be a material advantage to the mortgagor Client, the Opinion Giver's ethical duties to the Client may not allow the Opinion Giver to raise this deficiency in the opinion without the Client's consent.

The Opinion Giver should consider separate treatment in the generic Qualification of any guaranty. The language of the generic Qualification intends to give comfort to the Opinion Recipient with respect to certain basic

131. The "generic" Qualification is sometimes confused with the "practical" realization Qualification. But the latter is out of favor among opinion practitioners largely because it is too broad and without settled meaning. *2012 Report*, *supra* note 10, § 4.3 (g) at 254-55. For a broader discussion, see Kenneth P. Ezell, Jr., et al., *The Remedies Opinion and Customary Diligence - The Real Estate Secured Transaction Approach: Is It Consistent with Customary Non-Real Estate Legal Opinion Practice?* 43 Real Prop. Trust & Estate L.J., 1 (Spring 2008).

132. *2012 Report*, *supra* note 10, § 4.3 at 252-255.

133. *See RE Guidelines*, *supra* note 8, § 1.1.b.

remedies available in the event of a "material breach" by the Client. However, a "material breach" standard does not adequately address exceptions to enforcement of a guaranty (e.g., an unenforceable waiver of the defense of material modification of the underlying debt), which can result in the complete exoneration of the guarantor, leaving nothing to enforce. As a result, such exceptions, where they exist, should be separately stated to the extent not otherwise covered by the bankruptcy exception and equitable principles limitation.

2. Inappropriate Modifications Of The "Material Default" Language

Sometimes an Opinion Recipient, faced with numerous opinion exceptions that significantly diminish the strength of the remedies opinion, will respond with a request that the "material default" language discussed above be modified to include the following: "Notwithstanding the exceptions noted above, the Opinion Recipient will achieve the practical realization of the benefits intended to be conferred by the Transaction Documents." This broad "practical realization" language is wholly different from the more limited version described above. Unlike the more limited version, which is subject to the bankruptcy exception and the equitable principles limitation, this version of the "practical realization" Qualification seeks to override *all* Qualifications, requiring the Opinion Giver to conclude there are no Qualifications preventing the Opinion Recipient from enjoying the "benefits" of the Transaction Documents. This form of opinion request is inappropriate and should not be requested or given.[134]

F. Additional Qualifications

As mentioned, when the remedies opinion includes the "generic" Qualification, an Opinion Giver also might include specific exceptions and qualifications. Often these are included either to bring some peculiarity of Delaware law to the attention of the Opinion Recipient (e.g., the limitation of attorneys' fees to reasonable fees not to exceed 20 percent) or simply out of caution. As discussed earlier, a court outside Delaware might interpret the opinion letter differently from Delaware customary practice, notwithstanding the implicit election of Delaware law as governing interpretation of an opinion letter applicable to a Delaware Real Estate Financing Transaction. Accordingly, most practitioners will list these additional Qualifications in the opinion letter rather than rely on customary practice.

Other Qualifications one might see in the opinion letter relate to any provision of the Transaction Documents that:

a. is unenforceable as a result of public policy;[135]

b. purports to treat as conclusive those certificates, determinations and other matters which the Transaction Documents state are to be so treated;

c. purports to affect persons who are not parties thereto;

d. purports to entitle lender to apply payments to liabilities as lender may determine;

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134. *2012 Report*, *supra* note 10, § 2.3(b) at 253.

135. Most Opinion Givers include among the Qualifications an exception to the remedies opinion for matters that violate public policy. Under customary practice, such a Qualification is implicit in the opinion letter and, whether or not stated expressly, will be read into the Qualifications.

e. purports to appoint attorneys-in-fact;

f. purports to apply any lien or other security interest to after-acquired property;

g. purports to require prepayment prohibitions, prepayment fees, prepayment penalties, exit fees or similar fees or penalties ;

h. purports to grant powers of sale or rights to partial foreclosures or non-judicial foreclosures;

i. purports to make the terms and conditions of the Transaction Documents covenants running with the land;

j. purports to establish a definite time period as reasonable notice to the Client in connection with the notice of sale, disposition or other intended action by any secured party under the Delaware UCC; or

k. purports to create an absolute assignment of rents and leases, rather than a collateral or conditional assignment.

Obviously, each Opinion Giver will analyze what additional specific Qualifications should be included in a particular opinion letter.

VI. NO VIOLATION

Other opinions given in the world of corporate finance could be requested by Opinion Recipients in Real Estate Financing Transactions, although most of these are practically valueless given both the other opinions already included in the typical opinion letter and the nature of borrowers in Real Estate Financing Transactions. One example is the "no violation" opinion to the effect that execution, delivery and performance of the Transaction Documents by the Client does not violate other agreements of the Client, the Constituent Documents of the Client, or Applicable Laws. An example of the no violation opinion is:

> The execution and delivery by the Borrower of, and performance of its payment obligations in, the Transaction Documents, do not: (i) breach any existing obligation of the Borrower under any of the agreements and documents [specified in Attachment [__] hereto] [known to us] or (ii) violate the Borrower Organizational Documents. The execution and delivery by the Borrower of, and performance by the Borrower of its payment obligations in, the Transaction Documents, neither are prohibited by applicable provisions of law comprising statutes or regulations duly enacted or promulgated by the State ("Statutes or Regulations") nor subject the Borrower to a fine, penalty, or other similar sanctions, under any Statutes or Regulations.

In the past, such opinions were designed for large corporate financings and were rarely requested in Real Estate Financing Transactions. As with other opinions that seem inappropriate or inapplicable for most Real Estate Financing Transactions, these opinions now are requested routinely in Real Estate Financing Transactions, notwithstanding that they originated in transactions involving public companies and frequently seem like odd requests in the Real Estate Financing Transaction context.

A. No Violation Of Other Agreements

If given, a no violation opinion as to other agreements of the Client should be limited to written agreements and amendments or modifications that are reflected in written documents, as the Opinion Giver is unable to review oral contracts and unwritten amendments.[136] Various authorities give some guidance on what aspects of the specified other agreements are material to this particular opinion. For example, the Accord provides that a no violation opinion "does not extend to any action or conduct of the Client that a Transaction Document may permit but does not require, except to the extent that such action or conduct takes place simultaneously with, and the Opinion Giver has actual knowledge that it constitutes part of, the consummation of the Transaction."[137] Similarly, while a no violation opinion as to other agreements of the Client might make sense in a corporate setting (e.g., the borrower has agreed to a negative pledge in another agreement), where the borrower in a Real Estate Financing Transaction is likely to be a newly formed SPE, one is hard pressed to determine what "other agreements" would be relevant.

B. No Violation Of Constituent Documents

A no violation opinion with reference to the Client's Constituent Documents is unnecessary and therefore inappropriate to request if the opinion letter also includes opinions on power and authorization. In other words, if the Opinion Giver is already opining that the Client has the necessary power to enter into and perform the Transaction Documents and has authorized such execution, delivery and performance, there is no independent purpose served by an opinion that these actions do not violate the Client's Constituent Documents. Although this position is sound and defensible, the no violation opinion with respect to Constituent Documents has, unfortunately, become customary in Real Estate Financing Transactions and is generally not objected to by most Opinion Givers.

C. No Violation Of Laws

Although requested less frequently than opinions on no violation of other agreements or Constituent Documents, Opinion Recipients occasionally request an opinion to the effect that the execution and delivery of the Transaction Documents do not violate laws. Such an opinion seems on the one hand duplication of the remedies opinion (could a Transaction Document be enforceable if it violates Delaware law) and on the other hand overly broad. It is therefore appropriate to limit any no violation opinion to violation of laws with respect to "performance" of payment obligations under the applicable documents. In a typical Real Estate Financing Transaction, it is not at all obvious which laws are, in practice, relevant to overall performance of each and every covenant in a loan document. Limiting the opinion analysis to the payment obligations therefore is consistent with both practice and expectations.[138]

Opinions stating the Client is in compliance with laws are infrequently requested or given in Real Estate Financing Transactions. The Business Law Guidelines provide that the Opinion Giver should not be asked for a comprehensive opinion that the Client is not in violation of any applicable laws or regulations.[139] The Real Estate Opinion Guidelines

136. *Accord*, *supra* note 48, Commentary § 15.3.

137. *Id.* § 15(d).

138. *2012 Report*, *supra* note 10, § 3.7(b) at 244; *LoCo Report*, *supra* note 11, § 3.13 at 222.

139. *Business Law Guidelines*, *supra* note 7, § 4.3 at 880 (2002).

take the concept further and provide that "any legal compliance opinion should be expressly and specifically limited to specific laws."[140] If requested, these opinions should be limited in scope to specific statutes, such as healthcare licensing requirements or specific permitting laws.

D. "No Conflicts" Opinion Contrasted

Sometimes an Opinion Recipient, in addition to a no violation opinion, also requests a "no conflict" opinion. A "no conflict" opinion states that the execution, delivery and performance by the Client of the Transaction Documents do not conflict with other agreements, Constituent Documents or laws. Under customary practice, it is unreasonable for the Opinion Recipient to insist that a no violation opinion be expanded to include a "no conflict" opinion. This is because the concept of "no conflict" is unreasonably broad; it arguably extends to implicit or indirect conflicts, which are essentially unknowable by the Opinion Giver. Under customary practice, use of the term no conflicts should be read as meaning "no violation" or "no breach or default."[141]

VII. NO GOVERNMENTAL APPROVALS REQUIRED

Another accretion onto opinion practice for Real Estate Financing Transactions has been the "no governmental approvals required" opinion. This opinion addresses whether there are governmental consents, approvals, authorizations, actions, filings or registrations that must be obtained or made in order to make effective the Client's execution and delivery of the Transaction Documents.

The "no governmental approvals required" opinion is fundamentally an opinion concerning contract formation and should be limited to those governmental approvals necessary for the execution and delivery of the Transaction Documents by the Client. In this context, "execution and delivery" means the signing and delivery of the Transaction Documents sufficient to meet the applicable law for the formation of a contract. Although occasionally the Opinion Giver is asked to include in this opinion a reference to "performance of the Client's obligations under the Transaction Documents," this request is not favored as it is tantamount to a "compliance with laws" opinion. Such a request should be avoided except in circumstances where the Opinion Recipient has reason to believe the subject entity is a regulated entity, in which case the request should be limited to certain specified laws likely to have a material effect on the entity's ability to perform its obligations under the Transaction Documents.[142]

Some Opinion Givers seek to limit the "no governmental approvals required" opinion to the Opinion Giver's knowledge. However, because this opinion is solely a conclusion as to an issue of law, a knowledge qualifier, if included, will not have the effect of limiting this opinion in any manner. As a result, under customary practice, if this opinion is limited to the knowledge of the Opinion Giver, it has the same meaning and requires the same diligence as if it were not limited to the knowledge of the Opinion Giver. This does not mean, however, that the Opinion Giver should not, when appropriate, rely on assumptions and certificates, or even its own knowledge, regarding facts necessary to give the opinion.

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140. *RE Guidelines*, *supra* note 8, § 4.3 at 254.

141. Glazer, *supra* note 40, at 493-96 (including discussion of TriBar view that "no conflict" should be deemed to mean "no breach or default").

142. *RE Guidelines*, *supra* note 8, § 4.3 at 254.

Finally, as with the "no violation of law" opinion (see discussion in Section VI), when the particular Client is governed by some unique set of laws, an analysis of the Client itself may be necessary to determine whether any such governmental approvals are needed. For example, the Client may be a bank, an insurance company, or a utility subject to regulations that could affect its right to enter into a specific transaction.

VIII. MORTGAGE LIEN CREATION

With increasing frequency, Opinion Recipients request opinions in Real Estate Financing Transactions with respect to the creation of the mortgage lien by the mortgage included in the Transaction Documents. It is generally understood that opinions on title, creation, perfection and priority of liens are not appropriate opinion requests, and of course those aspects of the mortgage are adequately covered by title insurance in Delaware. On the other hand, even though title insurance addresses the issue, it is not necessarily unreasonable (at least when the Opinion Giver is acting as local Delaware counsel and the lender does not have Delaware counsel) to request an opinion on the legal sufficiency of the security document, as a form, to create a lien and that the security document is in proper form to be recorded in the Recorder of Deeds office.[143]

The mortgage lien creation opinion includes more or less three components: (i) the mortgage is in proper form for recordation in the land records; (ii) the particular mortgage satisfies requirements to create a mortgage lien on the real property collateral; and (iii) proper recording of that mortgage is sufficient to establish notice to third parties of the lien on the real property collateral and that other recordings are not necessary for that purpose.

A. Proper Form Of Mortgage Instruments For Recordation

The mortgage lien creation opinion states that the mortgage is in proper recordable form under Applicable Laws. In other words, strictly speaking, does the mortgage comply with the applicable legal requirements of the Recorder of Deeds in the applicable county of the State of Delaware where the Opinion Giver understands or is advised by the Opinion Recipient the document will be recorded? The difficulty with such an opinion is that many of the requirements for recordable form are set forth in local, uncodified rules and often depend on variable facts. For example, if a Recorder of Deeds in Delaware requires a certain font size or certain margins in documents to be recorded, the font or margin size of the document the Opinion Giver reviews for the opinion may change when the same document is reproduced for execution and recording. However, for purposes of a Delaware opinion letter, local laws are excluded from the applicable Delaware laws on which the Opinion Giver is opining.[144] Accordingly, the review for purposes of issuing the opinion should be limited to the requirements of state law; the particular requirements of a Recorder of Deeds, if not part of state law, may be disregarded. For this reason, title insurance is the more appropriate method of giving comfort to the Opinion Recipient on the issue of proper form for recording.

B. Creation Of A Mortgage Lien

The second component of the mortgage lien creation opinion addresses the creation of the mortgage lien on the real property collateral. Many authorities on national opinion practice for Real Estate Financing Transactions believe it is

143. *2012 Report*, *supra* note 10, § 3.6(a) at 242.

144. *LoCo Report*, *supra* note 11, § 3.6(b) at 211.

inappropriate to request an opinion that the mortgage actually creates a valid lien.[145] In part, this is because of the belief that, as noted above, matters concerning the creation, perfection and priority of a lien on real property interests are covered by title insurance in most states, including Delaware. These authorities believe the more appropriate request is for an opinion focusing on the legal sufficiency of the form of the mortgage to "create" a lien. While these authorities are correct in stating what should be the better practice, it is possible to give an opinion on the actual creation of the lien provided that appropriate assumptions are made by the Opinion Giver and the mortgage in question satisfies all of the necessary requirements. For example, if the mortgage is governed solely by Delaware law and the Opinion Giver assumes that the mortgagor has a sufficient interest in the real property collateral for a security interest to attach and therefore be created, the Opinion Giver could proceed to opine that, upon proper execution and delivery, the mortgage in question creates a mortgage lien on that real property collateral. In addition, it would not be controversial for the Opinion Giver to opine further that the proper recording of that mortgage in the applicable Recorder of Deeds office provides notice to third parties of the existence of that lien. On occasion Opinion Recipients (particularly those who are not real estate lawyers but live in the world of commercial finance) will request an opinion that the recordation "perfects" the lien. Because there is no statutory basis in Delaware (or in most jurisdictions) to "perfect" the lien of a mortgage, this opinion is generally phrased with respect to "notice" of that lien. Of course, even if the term "perfect" is used, it will be read to mean that "notice" has been given by recordation.[146]

C. Sufficiency Of Recording

A third component of a mortgage lien creation opinion may address the sufficiency of recording the document. In other words, recording the mortgage in the applicable Recorder of Deeds office is the only recording necessary to publish notice of the lien, and no additional recordings, including future recordings, would be necessary to "perfect" and maintain that lien. If the Opinion Giver includes this third element in the opinion, the Opinion Giver should keep in mind some aspects of the applicable collateral. If the subject real property collateral includes fixtures under Delaware law, the opinion given applies equally to the mortgage as a lien on those fixtures. Accordingly, any applicable aspects of Article 9 of the Delaware Uniform Commercial Code should be examined by the Opinion Giver. In addition, the Opinion Giver should consider that while no further recording may be necessary to maintain the lien on the identified real property, the mortgage may contain provisions to spread its lien to after-acquired property, as to which additional recordings might be necessary under Delaware law. Likewise, applicable statutes of limitations may inhibit what otherwise appears to be the perpetual nature of this particular opinion.

IX. NO LITIGATION

The "no litigation" opinion is a statement to the effect there is no outstanding litigation involving the borrower, the collateral or both.[147] It is a controversial opinion for many reasons, not least of which is that it is not actually a legal

145. *2012 Report*, *supra* note 10, § 3.6(a) at 242.

146. Florida Report, *supra* note 1, § C at 156.

147. For a general discussion, *see* Donald W. Glazer and Arthur Norman Field, *No-Litigation Opinions can be Risky Business*, 14 Bus L. Today 37 (July/August 2005). *See also* R. Thompson, Real Estate Opinion Letter Practice § 4.17 at 141 (ABA Book Publishing, 2d ed. 2009).

opinion. Rather, it is a statement of fact intended to give assurance to the Opinion Recipient of the absence of certain events. As with any other negative assurance statement contained in an opinion letter, opinion authorities view such a request as inappropriate.[148] The request is especially inappropriate where the Opinion Giver serves as local counsel in Delaware and is opining on certain security documents involving Delaware property. [149] Notwithstanding its inappropriateness and essential meaninglessness, Opinion Recipients often request it. In essence, this opinion makes the Opinion Giver a party to the transaction by providing factual representations to the lender, even though the borrower will be making the same representations in the loan Transaction Documents.

In any event, opinion practice has evolved over more recent years such that the "no litigation opinion" is usually stated as a confirmation of the results of a search performed by the Opinion Giver of applicable court records. This makes the opinion no more than a statement of search results that the Opinion Recipient or Recipient Counsel could undertake themselves or that could be given to the Opinion Recipient by the Client and therefore seems meaningless.

Finally, opinion practice has developed to the point where this "no litigation" statement is expressly phrased as a factual confirmation and often placed in a separate section of the opinion letter rather than included among the opinion paragraphs. However, it is not clear whether such phrasing or placement changes the liability of the Opinion Giver should the confirmation be incorrect.

X. CONCLUSION

As detailed at the beginning, this article serves as an introduction to opinion practice for Real Estate Financing Transactions in Delaware and to give guidance on how to determine which opinions are appropriate to give (or request) and the diligence necessary to give them. In addition, this introduction serves to guide recipients of such opinions from Delaware counsel in how to read and interpret the opinions under Delaware customary practice. Although not the purpose of this article, perhaps it may initiate further discussions among Delaware opinion counsel and result in the Delaware State Bar Association taking action to memorialize what is customary practice in Delaware, thereby providing a persuasive Delaware-centric statement of policy counsel may rely upon in giving and interpreting Delaware opinions.

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148. *See* FIELD , *supra* note 109, at 231 ("The initial position of many opinion preparers is that the subject should be covered by company representations and not by an opinion . . . . There is sensible concern that an opinion that merely repeats a client's representation may appear to a court to provide more information than is intended and thereby unfairly increase the opinion giver's exposure to claims."). *See also* The Corp. Comm. of the Bus. Law Section of the State Bar of Cal., *1989 Report of the Comm. on Corp. of the Bus. Law Section of the State Bar of Cal. Regarding Legal Ops. in Bus. Transactions*, §§ IV.B at 2177-78, IV.D.4 at 2196 (1990); *TriBar 1998 Report*, *supra* note 5, at 665.

149. *LoCo Report*, *supra* note 11, § 3.11 at 217.