

## AN OVERVIEW OF THE REAL ESTATE FINANCE OPINION REPORT OF 2012

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Many state bars and other professional groups have provided reports on opinion practices, both general and specific. Although the Delaware State Bar Association has not yet produced such a report, a recent report by three national lawyer associations should be of interest to lawyers in Delaware who issue opinions in Delaware real estate transactions.

The Real Estate Finance Opinion Report of 2012<sup>1</sup> is a joint project of the American Bar Association (ABA) Section of Real Property, Trust and Estate Law, Committee on Legal Opinions in Real Estate Transactions; the American College of Real Estate Lawyers Attorneys' Opinions Committee; and the American College of Mortgage Attorneys Opinions Committee. The 2012 Report intends to give guidance to lawyers serving as borrowers' lead counsel in mortgage loan transactions, but the extensive background material and guidance in the 2012 Report are useful to all lawyers involved in the opinion process.

### I. BACKGROUND

To fully understand the purpose of the 2012 Report, some background is necessary. The project started in 2009 to update the *Inclusive Real Estate Secured Transaction Opinion* (the "Inclusive Opinion"), which was published in 1998 as a joint project of the ABA RPTE Committee and ACREL.<sup>2</sup>

The Inclusive Opinion was based on the ABA Legal Opinion Accord (the "Accord").<sup>3</sup> The Accord included a short form opinion letter that incorporated the rest of the Accord report by reference. Although very important from a normative perspective, the Accord suffered from several problems. It was difficult to master because most of the content of an Accord-based opinion is in the report rather than in the body of the opinion letter itself. Also, the Accord omitted coverage of many substantive areas common to legal opinions in real estate transactions.

To make the Accord usable for real estate lawyers, the ABA and ACREL prepared the *2012 Report on Adaptation of the Legal Opinion Accord* (the "Adaptation").<sup>4</sup> But in fixing one problem, the Adaptation exacerbated another one. Now

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1. [http://meetings.abanet.org/webupload/commupload/RP213000/newsletterpubs/Real\\_Estate\\_Finance\\_Opinion\\_Report\\_of\\_2012\\_Final.PDF](http://meetings.abanet.org/webupload/commupload/RP213000/newsletterpubs/Real_Estate_Finance_Opinion_Report_of_2012_Final.PDF). See also, Edward J. Levin, *The Real Estate Finance Opinion Report of 2012* 27 PROB. & PROP., January/February 2013.

2. See <http://apps.americanbar.org/dch/committee.cfr?com=RP213000> and <http://www.acrel.org/Documents/Public-Documents/InclusiveRealEstateSecuredTransactionOpinion.htm>.

3. *Third-Party Legal Opinion Report, including the Legal Opinion Accord, of the Section of Business Law, American Bar Association*, 47 BUS. LAW. 167 (1991) (reprinted in 29 REAL PROP. PROB. & TR. J. 487 (1994)).

4. *Report on Adaptation of the Legal Opinion Accord of the Section of Business Law of the American Bar Association for Real Estate Secured Transactions of the Section of Real Property, Probate and Trust Law of the American Bar Association and the American College of Real Estate Lawyers*, 29 REAL PROP. PROB. & TR. J. 569 (1994).

practitioners who wanted to issue an Accord-based real estate opinion needed to master two reports, the Accord and the Adaptation, both of which were incorporated by reference in an opinion letter issued under the Accord model.

To make Accord-based real estate opinions user-friendly, the ABA and ACREL collaborated on the Inclusive Opinion, which provides a form of opinion letter that has all of its terms and provisions within the four corners of the opinion letter itself. The Inclusive Opinion does not include by reference any report or other source.

The 2012 Report was undertaken initially to develop a form opinion letter that reflects current national real estate financing practice and that is not limited to the Accord and its offspring. In this way, current customary practice in the giving and receiving of opinion letters is reflected in the work product. The project originally focused on the Illustrative Opinion Letter that is part of it, and the opinion was heavily footnoted to explain many of the terms and provisions included, or not included, in the opinion. Because of these footnotes, the project was called the Annotated Real Estate Finance Opinion. Over time, however, the drafting committee, with input from members of the three constituent organizations, changed the focus from an opinion form to an opinion report.

The 2012 Report contains three chapters. Chapter One is the introduction and general discussion of the scope and purpose of the 2012 Report. Chapter Two discusses in more detail key components and issues of an opinion for a real estate secured transaction. Chapter Three is an illustrative opinion, designed not to serve as model opinion but merely to illustrate in opinion language and format the components addressed in Chapter Two. As discussed below, the 2012 Report is written for the borrower's lead law firm in a mortgage loan transaction and not for local counsel. Like the Adaptation and the Inclusive Opinion, the 2012 Report is limited to financing transactions that are secured by real estate located in the United States.

The 2012 Report can serve as an educational tool and a starting point for discussion and consideration by those who are involved in the opinion process.

## II. SUMMARY OF ISSUES IN THE 2012 REPORT

Because the Guide (Chapter Two of the 2012 Report) is a discussion of the issues raised in the Illustrative Opinion Letter (Chapter Three), and the Illustrative Opinion Letter reflects the 2012 Report's analysis of the pertinent issues that are considered in the Guide, the section numbers of Chapters Two and Three of the 2012 Report are parallel. Unless otherwise noted, the section numbers below refer to Chapter Two, the Guide.

### A. General Opinion Matters

**1. Professional Responsibility.** The 2012 Report highlights some of the professional responsibility issues involved in the rendering of third-party opinion letters, but does not thoroughly examine each of these issues. Although the 2012 Report notes that “[r]ules in several jurisdictions require consent of the client ‘after consultation’ to any evaluation by a lawyer of a matter for someone other than the client,” the 2012 Report also observes that Rule 1.2(a) of the Model Rules of Professional Conduct also permits a lawyer to take such action “as is impliedly authorized to carry out the representation,” premised on the lawyer’s having consulted with the client about the means by which the client’s interest is to be pursued.<sup>5</sup> The 2012 Report also observes, however, that Model Rule 2.3(b) requires the lawyer to obtain the

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5. See also The Delaware Lawyers’ Rules of Professional Conduct, § 1.2(a).

client's informed consent if the lawyer "knows or reasonably should know" that providing the opinion would materially and adversely affect the client's interests.<sup>6</sup>

Also, the 2012 Report refers to but does not explore the issues that relate to representation of more than one party in a transaction, such as the borrower and a guarantor.<sup>7</sup>

**2. Customary Practice.** The 2012 Report recognizes the current role of "customary practice" in the giving and receiving of legal opinions. Customary practice considers the custom and practice of lawyers involved in this area of practice. This statement on customary practice was endorsed by the Section on Real and Personal Property of the Delaware State Bar Association in 2008.<sup>8</sup> The Guidelines are built around the Business Law Section Guidelines, which includes the Legal Opinion Principles by the Committee on Legal Opinions of the ABA's Section of Business Law.<sup>9</sup>

**3. Lead Counsel, Not Local Counsel.** The 2012 Report focuses on the borrower's only counsel in a mortgage loan transaction if the borrower has one counsel, or on the lead counsel for the borrower if the borrower has more than one counsel on a transaction. The 2012 Report addresses some issues that local counsel are not generally asked to opine on (such as entity organization and authorization), and it does not address a number of the issues about which local counsel are frequently asked to render opinions (such as certain state-specific matters).

**4. Parties.** The 2012 Report is based on a loan to a borrower that is guaranteed by a separate guarantor. The Illustrative Opinion Letter never refers to those parties collectively so that it is clear that the opinion giver and the opinion recipient should separately consider the opinions about them and limitations applicable to each of them.<sup>10</sup>

**5. Authority Documents.** The 2012 Report notes that it is a matter of personal preference as to whether the opinion giver refers to each document examined individually or in general terms. If direct or indirect owners of the borrower or guarantor are entities and are to be covered by the opinion letter, the opinion giver must review their organizational documents as well. Although the 2012 Report suggests that an opinion giver can deviate from the practices, it is best to say so explicitly.<sup>11</sup> See further discussion in Section B.3 below.

**6. Opinion Jurisdictions.** In the 2012 Report, the term "law" means the statutes, judicial and administrative decisions, and policies, rules, and regulations duly promulgated by applicable governmental agencies and instrumentalities. Covered law normally would include the law of the state that governs the transaction documents and the state or states of formation of each of the borrower and the guarantor. However, the 2012 Report notes that "Local Law" is generally excluded from the scope of opinion letters. The term "Local Law" is defined as the statutes and ordinances, administrative decisions, and rules and regulations of counties, towns, municipalities, and special political subdivisions, and judicial decisions to the extent that they deal with any of the foregoing matters.<sup>12</sup> The 2012 Report notes that federal laws are

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6. See also *id.* § 2.3(b).

7. 2012 Report at 2-3.

8. See *Statement on the Role of Customary Practice in the Preparation and Understanding of Third-Party Legal Opinions*, 63 BUS. LAW. 1277 (2008). The 2012 Report notes the importance of the Real Estate Opinion Letter Guidelines, 38 REAL PROP. PROB. & TR. J. 241 (2003).

9. See 53 BUS. LAW. 831 (1998).

10. 2012 Report, ¶ 0.4.

11. *Id.* ¶ 1.2.

12. See ¶ 4.6(g) of the *Illustrative Opinion Letter*.

typically not addressed in opinion letters except in situations where certain expressly identified federal law is relevant to the transaction parties. The 2012 Report provides that if any federal law is to be deemed covered by an opinion letter, that law should be specifically identified. Note that even though bankruptcy law is federal law, out of caution the 2012 Report does include a bankruptcy exception that refers to federal law.<sup>13</sup>

**7. Scope of Review.** A statement that the opinion giver has reviewed what is necessary in order to render the opinion is not necessary because it is implicit in opinion letters.<sup>14</sup>

**8. Reliance on Other Sources Without Investigation.** An opinion giver may rely on certificates and other information obtained from others unless the opinion giver has actual knowledge that the information is not accurate or the opinion giver does not reasonably believe that the source is appropriate. An opinion giver should not render an opinion that the opinion giver recognizes will be misleading about the subject matter of the opinion. It is preferable for an opinion giver to include as an assumption a legal conclusion or opinion that is rendered by other counsel involved in the transaction, instead of for the opinion giver to rely on the opinion of the other counsel or for the opinion giver to render a pass-through or “conduit” opinion.<sup>15</sup>

**9. Assumptions - Generally.** The 2012 Report notes that there is not a consistent practice about implicitly stating all assumptions that are part of an opinion letter or deeming certain assumptions to be implied as a matter of customary practice. The 2012 Report states that each of the assumptions that is set forth in the Illustrative Opinion Letter is deemed to be implicit as a matter of customary practice. Excluding the implicit assumptions makes the opinion letter more streamlined and enables the parties to focus on the opinions and specific limitations relevant to the particular transaction. On the other hand, many opinion givers feel more comfortable with opinion letters that specifically include the assumptions that they are making. They think that it is one thing to believe that counsel for the opinion recipient will understand that all of the assumptions that the opinion giver considers to be implicit are intended to be (and are) part of the opinion letter, but it is an altogether different matter to have confidence that a judge or jury will reach the same conclusion in a lawsuit about the opinion letter. The lawyers who advocate stating explicitly the assumptions that may be considered implicit find support for their position in *Fortress Credit Corp. v. Dechert LLP*,<sup>16</sup> in which the court in New York looked to particular language in the opinion letter regarding the authenticity of the signatures on the loan documents when it dismissed the plaintiff’s complaint.<sup>17</sup>

**10. Genuineness of Signatures.** One of the assumptions included in the Illustrative Opinion Letter is that the opinion giver assumes that all signatures are genuine. This is considered to be an implicit assumption that need not be expressed in an opinion letter. This assumption extends to the clients of the opinion giver, including the borrower and any guarantor. It is typical that opinion letters include an assumption that the signatures of parties are genuine notwithstanding that it is implicit, but opinion recipients sometimes request that this assumption be limited to the signatures of the parties that the opinion giver does not represent. If an opinion giver were to limit the extent of the assumption to nonclients, the opinion giver would essentially be giving an assurance that the signatures by the borrower and guarantors

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13. 2012 Report at ¶ 1.3.

14. *Id.* ¶ 1.4.

15. *Id.* ¶ 1.5.

16. *Fortress Credit Corp. v. Dechert LLP*, 89 A.D.3d 615, 934 N.Y.S.2d 119 (N.Y. 2011).

17. 2012 Report at ¶ 2.1(c).

are not forgeries and that the individuals who signed are actually the persons that they purport to be. These are factual, not legal, opinions and should be beyond the scope of third-party legal opinions. An example of the problems that might arise if the signatures on the loan documents are not those of the borrower, are the facts in *Fortress Credit Corp. v. Dechert, LLP*, discussed above.<sup>18</sup>

**11. Assumptions - Different Types.** The 2012 Report points out the distinction between those assumptions that actually apply to the particular transaction that is the subject of the opinion letter and those assumptions that are applicable to the way that the parties have dealt, and are expected to deal, with each other on the subject transaction or any other transaction. The 2012 Report notes that a number of opinion givers are concerned that inclusion of the latter assumptions may imply a greater breadth to the opinion letter than intended by the opinion giver.<sup>19</sup>

## B. Core Opinions

The first five opinions in the Illustrative Opinion Letter are considered to be the core opinions of the opinion letter. They are: status, power, authorization, execution and delivery, and enforceability.

**1. Status.** The Illustrative Opinion Letter includes opinions that the borrower is in good standing and is qualified to do business in the named state. Because these opinions are given solely in reliance on certificates of public officials, the Guide points out that many practitioners question the value of and the need for such opinions. Opinion recipients can read those certificates just as well as opinion givers can. The 2012 Report also questions the need for a formation opinion in most real estate secured transactions.<sup>20</sup>

**2. Power.** This opinion refers to the legal power of an entity under its organizational documents and applicable law to enter into the loan transaction or to guaranty the loan, as applicable. It does not relate to the entity's financial ability to fulfill its legal obligations.<sup>21</sup>

**3. Authorization.** The Illustrative Opinion Letter includes the opinion that all actions or approvals that are necessary by the borrower to be taken or obtained have been taken or obtained in order to bind the borrower under the transaction documents. When there are tiers of ownership of the borrower entity before the ultimate individual owners are reached, it is necessary that the entity at each level properly have the power to enter into the transaction and authorize the transaction in order for the documents to be enforceable against the borrower. However, it is not always clear after reviewing an opinion letter whether the opinion giver is providing a power opinion or an authorization opinion that extends through all of the levels of ownership, or if the opinion is limited to the borrower (or guarantor) entity itself. Unless an opinion giver intends to render power and authorization opinions that extend through all levels, the 2012 Report advises opinion givers to expressly limited the scope of these opinions. The 2012 Report does note that the TriBar Opinion Committee has taken the position that opinion givers need only focus at the level of the entity about which they are specifically opining and that they may assume that the member or manager of the borrower is authorized to approve the transaction.<sup>22</sup>

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18. 89 A.D.3d 615, 934 N.Y.S.2d 119 (N.Y. 2011). *See also* the discussion on the execution and delivery opinion at ¶¶ 2.1 and 3.4(a).

19. 2012 Report at ¶ 2.1.

20. *Id.* ¶ 3.1.

21. *Id.* ¶ 3.2.

22. *Id.* ¶¶ 1.2(b) and 3.3.

**4. Execution and Delivery.** In order to render an execution and delivery opinion, the opinion giver must be satisfied that an authorized person has both executed and delivered the loan documents, as permitted under applicable law. This may include use of electronic means. As noted in paragraph 2.1 of the 2012 Report, the opinion giver is entitled to assume that all signatures are genuine.<sup>23</sup>

**5. Enforceability.** Although the Guidelines suggest that in purely intrastate transactions, enforceability opinions should not be requested or given, enforceability opinions are often given in connection with such transactions, and they are normally given in interstate or multi-state transactions. Because an opinion recipient may believe that an enforceability opinion means that not just material remedies provisions but each and every provision of the transaction documents is enforceable, the 2012 Report suggests that a prudent opinion giver will prepare an enforceability opinion as if it means that each and every provision of the documents addressed in the letter is enforceable.<sup>24</sup>

**6. Enforceability - No Implicit Assurance.** Although enforceability opinions give assurance that the transaction documents are sufficient to meet their basic purposes, including that the form of the mortgage complies with the applicable legal requirements to be a mortgage on the subject real property, the enforceability opinion does not provide that the mortgage actually encumbers the property, creates a lien, or has any particular priority.<sup>25</sup>

### C. Other Opinions

The following opinions, which are frequently also requested, are not endorsed by the 2012 Report even though the Illustrative Opinion Letter contains forms of them: form of security documents, status, no breach or violation, no violation of law, choice of law, usury, and legal proceedings confirmation.<sup>26</sup>

**1. Form of Security Documents.** Instead of providing an opinion that the mortgage creates a lien on real property, which is generally covered by title insurance, opinion givers typically opine that the security instrument is in form to create an encumbrance and is in form to be recorded in the applicable records. The 2012 Report mentions that opinions may be given that the filing of a mortgage may create a lien on fixtures, but the Illustrative Opinion Letter does not refer to fixtures. The 2012 Report notes that it does not address UCC perfection requirements or security interests in personal property.<sup>27</sup>

**2. No Breach or Violation.** A no breach or violation opinion relates to internal organizational documents or certain obligations that the borrower has to other persons. It should be read to apply to the date of the closing of the transaction and not relate to future performance of any party. Consistent with the Adaptation, the 2012 Report limits the no breach or violation opinion to the payment obligation of the borrower, as the opinion does not extend to the future performance obligations of the borrower.<sup>28</sup>

**3. No Violation of Law.** The 2012 Report limits the no violation of law opinion to statutes and regulations in the relevant state and to judicial interpretations of those statutes and regulations, but common law generally is not

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23. *Id.* ¶ 3.4.

24. *Id.* ¶ 3.5.

25. *Id.* ¶ 3.5(b).

26. *Id.* at . 24-33.

27. *Id.* ¶ 3.6.

28. *Id.* ¶ 3.7.

included in the scope of the opinion. Further, the law of counties, towns, municipalities, and special political subdivisions or other local laws are not included in a no violation of law opinion. Also, the reach of the opinion should be limited to the borrower's payment obligations and should not include its other agreements about future performance. The 2012 Report observes that the violation of law opinion may include usury by implication.<sup>29</sup>

**4. Choice of Law.** A choice of law opinion may seem to be part of an enforceability opinion unless the choice of law opinion is specifically excluded. The 2012 Report takes the position that a choice of law opinion should not be implied as part of an enforceability opinion, but it advocates adding specific language to an opinion letter to deal with choice of law issues. This is a complex area, and when choice-of-law opinions are given they are reasoned opinions that are accompanied by a number of assumptions. Although the Guide includes a discussion of choice of law issues, the Illustrative Opinion Letter excludes a choice of law opinion.<sup>30</sup>

**5. Usury.** The 2012 Report takes the position that usury opinions are implied in both the enforceability opinion and the no violation of law opinion. If an opinion giver does not want to give an implied usury opinion when giving either of these two typical opinions, the opinion letter should expressly exclude such an opinion. Usury issues are state-specific, so the relevant issues and assumptions that are important will differ from state to state.<sup>31</sup>

**6. Legal Proceedings Confirmation.** A statement that the borrower is not involved in litigation is not a legal opinion, but instead it is a factual confirmation. In light of cases such as *Dean Foods Company v. Pappathanasi*,<sup>32</sup> and the vagaries related to the knowledge of the opinion giver and its lawyers, many counsel are reluctant to give such a statement. The Illustrative Opinion Letter includes only a confirmation relating to cases on which the opinion giver has worked.<sup>33</sup>

## D. Limitations

The 2012 Report addresses the standard limitations on the opinions express in an opinion letter. Some of these limitations apply only to the core opinions,<sup>34</sup> some apply to specific transactional considerations,<sup>35</sup> and some apply generally to all opinions.<sup>36</sup> Note that the definition of "limitations" in the 2012 Report is broad and includes assumptions, qualifications, and exclusions.<sup>37</sup>

**1. Bankruptcy.** All opinion letters exclude bankruptcy and similar laws. This is an implicit exception if not stated. The bankruptcy exception applies to all opinions, not just the enforceability opinion. Any reference to bankruptcy

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29. *Id.* ¶ 3.8.

30. *Id.* ¶ 3.9.

31. *Id.* ¶ 3.10.

32. *Dean Food Co. v. Pappathanasi*, 18 Mass. L. Rep. 598 (Mass. Super. Ct. 2004),

33. *Id.* ¶ 3.11.

34. *Id.* ¶¶ 4.1--4.3.

35. *Id.* ¶ 4.4.

36. *Id.* ¶ 4.5.

37. *Id.* at 5 and 33.

law or other federal law in connection with this exception should not be deemed to limit the exclusion of federal law stated elsewhere in the opinion letter.<sup>38</sup>

**2. Equitable Principles.** All opinions, not just the enforceability opinion, exclude “equitable principles.” This is an implicit exception even if not stated explicitly. The 2012 Report includes an expansive definition of equitable principles.<sup>39</sup>

**3. Generic Enforceability Qualification with Assurance.** This limitation is often referred to as the “generic qualification,” but the 2012 Report refers to it as the “generic enforceability qualification.” The limitation is in two parts. The first is a statement that not all provisions in the loan documents may be enforceable. Because this could be read broadly to render the enforceability meaningless, it is followed with the second statement, an assurance that certain specified remedies will be available. The assurance is made specifically subject to all of the other limitations in the opinion letter. Moreover, the assurance in the generic enforceability qualification about the ability of the lender to foreclose under certain circumstances does not implicitly furnish any other opinions.<sup>40</sup>

The Illustrative Opinion Letter provides the lender assurance that it will have its remedies when there is a material default in a payment provision, and the Illustrative Opinion Letter includes optional language that provides the assurance upon a material default in any other material provision in the documents. The vagueness of the term “material” in this context could require the opinion giver to give careful consideration to what defaults might or might not cause acceleration of the indebtedness and invocation of the lender’s remedies, and, if appropriate, to include state-specific exceptions to the assurance.<sup>41</sup>

The language in the generic enforceability qualification should be amended for application in states that have particular laws limiting the enforceability of certain provisions of the documents, such as single form of action rules, limitations on deficiency judgments, and limitations on late fees.

The 2012 Report identifies particular problems with respect to giving assurances about the enforceability of guaranties, because a failure of the loan documents to include an effective waiver of rights of guarantors, such as the defense of material modification of a guaranty, can release a guarantor from all liability. The Illustrative Opinion Letter, therefore, provides that the assurance relating to guaranties is limited “to the extent not deemed a penalty and subject to the defenses of a surety that have not been or cannot be waived.”<sup>42</sup>

The 2012 Report notes that the assurance provides that upon material default, the lender will be able to foreclose, but it does not indicate the method of foreclosure. The assurance so given is not an opinion that the loan documents include “all customary provisions and remedies,” an opinion that is discouraged by the 2012 Report.<sup>43</sup>

The 2012 Report disapproves of the use of the traditional practical realization assurance in real estate secured transactions because of its “apparent ambiguity and subjectivity.”<sup>44</sup>

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38. *Id.* ¶ 4.1.

39. *Id.* ¶ 4.2.

40. *Id.* ¶ 4.3(b).

41. *Id.* ¶ 4.3(e).

42. *Id.* ¶ 4.3.

43. *Id.* ¶ 4.3(f).

44. *Id.* ¶ 4.3(g).



**Other Transaction-Related Qualifications.** This is a placeholder for matters that may be relevant under state law, such as issues relating to usury, prepayments, indemnification, and assignment of rents.<sup>45</sup>

**4. Other General Qualifications.** The Illustrative Opinion Letter includes seventeen “other general qualifications” (many of which relate to the method or means of pursuing remedies), but there is no clear consensus as to how many, if any, of the specific other general qualifications are necessary in light of the bankruptcy, equitable principles, and generic enforceability qualifications.<sup>46</sup>

**5. Exclusions.** The exclusions are a listing of types of law that are not included in the Illustrative Opinion Letter. The exclusions include local law (*i.e.*, laws of counties, cities, towns, and other subdivisions), zoning law, land use law, and environmental matters. Federal law is not listed as an exclusion in this section because the law covered by the opinion letter is only the law of the jurisdiction or jurisdictions listed in Section 3.1 of the Illustrative Opinion Letter. All of the exclusions that are specified in the Illustrative Opinion Letter may be implied as exclusions as a matter of customary practice.<sup>47</sup>

**6. Knowledge.** Even though the term “knowledge” of the opinion giver is not used in the Illustrative Opinion Letter, the Guide contains a formulation of “knowledge” that can be used if the concept of the knowledge of the opinion giver is applicable to an opinion letter. The term is limited to the conscious awareness of facts by a person included within the “primary lawyer group,” which includes the lawyers involved in the transaction or in preparing the opinion letter.<sup>48</sup>

## E. Scope and Use of the Opinion Letter

The 2012 Report addresses certain specific limitations and understandings on the scope and use of an opinion letter.

**1. Use.** The Illustrative Opinion Letter contains two alternatives about use of the opinion letter. In the first, only the original lender may rely on the opinion letter without the opinion giver’s consent. In the second, an assignee of all of the interest of the lender in the loan may also rely on the opinion letter. The Illustrative Opinion Letter makes it clear that no subsequent beneficiary of the opinion letter may have any greater rights under it than the original addressee. The 2012 Report states that it is not appropriate for an opinion letter to provide that counsel to the opinion recipient may rely on it. The 2012 Report does not discuss the possible reliance on opinions letters by other parties, such as rating agencies.<sup>49</sup>

**2. Effective Date; No Obligation to Update.** An opinion letter is effective as of its date only, and the opinion giver has no obligation to update the letter. This is implicit even if not stated.<sup>50</sup>

**3. Governing Law.** The opinion letter itself should be governed by the law of the state where the opinion giver practices. Opinion letters typically do not include a governing law provision that applies to them.<sup>51</sup>

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45. *Id.* ¶ 4.4.

46. *Id.* ¶ 4.5.

47. *Id.* ¶ 4.6.

48. *Id.* ¶ 4.7.

49. *Id.* ¶ 5.1.

50. *Id.* ¶ 5.2.

51. *Id.* ¶ 5.3.

**4. Disclaimer of Implied Opinions.** As a matter of customary practice, opinion letters relate only to the issues specifically mentioned in them. It is not necessary to state this in an opinion letter.<sup>52</sup>

**5. Expression of Professional Judgment.** As a matter of customary practice, legal opinions are expressions of the opinion givers' professional judgment and are not guaranties of particular results as a matter of customary practice. This is considered to be the case whether or not the opinion letter states this. The Illustrative Opinion Letter does not include such a statement.<sup>53</sup>

**6. Signatures.** The opinion may be signed in any of several different ways, including by the firm or by an individual lawyer, and it may be signed manually or electronically. A recipient typically expects that the opinion letter is from the firm as a whole rather than only from an individual lawyer.<sup>54</sup>

**7. No Incorporation by Reference.** Some state bar reports provide that an opinion delivered in that jurisdiction is deemed to incorporate that report by reference.<sup>55</sup> The *Illustrative Opinion Letter* does not include a statement that the 2012 Report is included in the opinion by reference.

### III. CONCLUSION

The 2012 Report is intended to be a resource for lawyers practicing in the area of secured real estate finance transactions by synthesizing the current state of opinion practices. It can guide both opinion givers and opinion recipients in how best to address important opinion issues and therefore should make the opinion process more efficient for all. There is presently no comparable report exclusively describing best practices for opinions in secured real estate finance transactions specific to Delaware. Moreover, opinion practice varies greatly among the law firms involved in such transactions in Delaware. As Delaware has no independent opinion reports of its own, lawyers can look to the 2012 Report, including the Illustrative Opinion Letter, for helpful guidance in navigating opinion drafting and negotiation.

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52. *Id.* ¶ 5.4.

53. *Id.* ¶ 5.5.

54. *Id.* ¶ 5.6.

55. See, e.g., 2007 Report On Lawyers' Opinions in Business Transactions by the Special Joint Committee of the Section of Business Law and the Section of Real Property, Planning and Zoning of the Maryland State Bar Association, Inc. dated June 14, 2007, revised as of October 6, 2009, posted at <http://msba.org/docs/opinionmatters.asp>. Also, the Accord opinion incorporates the entire Accord by reference.