

**LOCAL COUNSEL OPINION LETTERS
IN REAL ESTATE FINANCE TRANSACTIONS
A SUPPLEMENT TO THE
REAL ESTATE FINANCE OPINION REPORT OF 2012**

A Report of:

the American Bar Association Section of Real Property, Trust and Estate Law, Committee on Legal Opinions in Real Estate Transactions;

the American College of Mortgage Attorneys, Opinions Committee;
and

the American College of Real Estate Lawyers, Attorneys' Opinions Committee*

Editors' Synopsis: The Report on Local Counsel Opinion Letters in Real Estate Finance Transactions supplements the Real Estate Finance Opinion Report of 2012 (the 2012 Report), which provided an update on the practice of opinion givers and recipients in a real estate finance transaction from the perspective of sole transaction counsel. Local counsel typically are involved in discrete and often disconnected pieces of these transactions. However, the opinions expressed in a local counsel's opinion letter cover many of the same topics addressed by lead counsel as well as other topics. The Report builds on the foundation of the 2012 Report to explore the role of local counsel, specific

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language of opinions local counsel may render, modification of assumptions on which opinions are based, and appropriate limitations of opinions. The Report discusses and illustrates assumptions, opinion statements, and limitations that are included in an Illustrative Opinion Letter Addendum. The Report is the first that focuses exclusively on opinion letters of local counsel. The Report provides many citations for further reference. The Report represents the collaborative effort of bar members of many jurisdictions, as members of three national bar organizations.

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INTRODUCTION

This Supplement to the Real Estate Finance Opinion Report of 2012¹ is prepared to assist lawyers who do not have overall transaction responsibility but who express legal opinions² in real estate financing transactions on subjects governed by the law of a specific jurisdiction,

¹ See Joint Drafting Committee, *Real Estate Finance Opinion Report of 2012*, 47 REAL PROP. TR. & EST. L. J. 213 (2012) [hereinafter *2012 Report*].

² The term “legal opinion” in this Supplement refers to a legal evaluation provided in writing (an “opinion letter”) by a lawyer or law firm (the “opinion giver”) to a party (the “opinion recipient”) who is not a client of the opinion giver (referred to as a “third-party”) with respect to the subject matter of the evaluation in a financing transaction secured by real estate in the United States.

often with limited knowledge of the transaction. These lawyers are referred to as “local” counsel.³

The 2012 Report presents a discussion about legal opinions expressed in third-party opinion letters provided in real estate finance transactions by a lawyer or law firm on behalf of a transaction party, usually a Borrower or a guarantor, to a nonclient transaction party, typically a lender. The legal opinions, along with customary assumptions and limitations⁴ pertaining to them, were compiled in the setting of such an opinion letter as illustrated in Illustrative Language of a Real Estate Finance Opinion Letter provided with the 2012 Report (the 2012 Illustrative Language).⁵ The discussion of topics that may be commonly the subject of such an opinion letter in the 2012 Report is in the context of a single opinion letter from one opinion giver, referred to in the 2012 Report as “lead” counsel, for an obligor party.⁶ The 2012 Report expressly did not address opining situations and conventions for “local” counsel.

For ease of reference, the subject matter considered in this Supplement generally follows the organization of the 2012 Report. This Supplement does not repeat what is contained in the 2012 Report. It incorporates much of the 2012 Report by reference and presents content within the context of the 2012 Report. The reader should have access to the 2012 Report and have familiarity with it. This Supplement presents certain additional subject matter when applicable to opinion letters provided by local counsel. This Supplement also discusses certain common issues that will be addressed in preparing a local counsel opinion letter

³ The 2012 Report and this Supplement focus on opinions about applicable law of a jurisdiction. Counsel may also be needed to provide opinions about specific legal issues in a transaction, such as substantive non-consolidation, specialized tax, or regulatory matters. These counsel are more properly referred to as “special” counsel rather than local counsel. *See 2012 Report, supra* note 1, at 228.

⁴ The term “limitations” encompasses exceptions, exclusions, qualifications, and other limitations. *See 2012 Report, supra* note 1, at 251. That same convention is used in this Supplement.

⁵ *See 2012 Report, supra* note 1, at 261–73. The 2012 Report notes, on pages 223–24, that the 2012 Illustrative Language is not a recommended or preferred form of all or any part of an opinion letter, but a collection of sample opinion statements, and assumptions and limitations relevant to them. The text of the 2012 Illustrative Language is to provide context for the 2012 Report, and there are many other expressions possible and in some cases desirable.

⁶ Lead counsel typically have overall transaction or client responsibility beyond providing an opinion letter.

that differ from preparation of a single comprehensive opinion letter as described in the 2012 Report. All opinion practitioners in commercial real estate finance transactions, regardless of their role, will find subject matter of general applicability in this Supplement.

EARLIER REPORTS AND REFERENCES

The 2012 Report updated and expanded upon earlier work focused on opinions given in finance transactions secured by real estate in the United States, much of which has been strongly influenced by the Third-Party Legal Opinion Report of the ABA Business Law Section, which included a Legal Opinion Accord (the Accord),⁷ published in 1991. The Accord did not address opinion matters relating to secured transactions and was not wholly consonant with third-party opinion practice in real estate transactions. However, it appeared to represent a great step forward in a consensus for opinion practice in general, and especially in multijurisdictional transactions where common understanding was desirable. From that premise, the ABA Section of Real Property, Probate and Trust Law (the ABA Section, now known as the Section of Real Property, Trust and Estate Law) and the American College of Real Estate Lawyers (ACREL) appointed a Joint Drafting Committee to adapt the Accord to real estate secured transactions. A Report on Adaptation of the Legal Opinion Accord was published in 1994 (the Accord Adaptation Report).⁸

In 1999, the ABA Section and ACREL prepared an Inclusive Real Estate Secured Transaction Opinion (the Inclusive Opinion).⁹ This product was intended to demonstrate what an opinion letter in a real estate secured transaction would look like if the principles and content of the Accord as modified by the Accord Adaptation Report were fully expressed within the four corners of an opinion letter rather than in a separate set of rules and protocols.

The Accord itself did not achieve widespread endorsement or acceptance among members of the business bar, and the focus of that bar

⁷ See Committee on Legal Opinions, *Third-Party Legal Opinion Report including the Legal Opinion Accord, of the Section of the Business Law, American Bar Association*, 47 BUS. LAW. 167 (1991) [hereinafter *ABA Business Law Accord Report*].

⁸ See Joint Drafting Committee, *Report on Adaptation of the Legal Opinion Accord*, 29 REAL PROP. PROB. & TR. J. 569 (1994).

⁹ See *Inclusive Real Estate Secured Transaction Opinion* (Feb. 2, 1999), http://apps.americanbar.org/dch/thedl.cfm?filename=/RP213000/newsletterpubs/incl_article.doc.

shifted to stating Guidelines¹⁰ and Principles¹¹ for opinion practice, and to relying on concepts of customary practice¹² recognized among experienced practitioners rather than on express conventions of meaning and verbiage. The business bar also placed increasing reliance on the work of the TriBar Opinion Committee, which published its first report on third-party opinion practice in 1979¹³ and has published numerous reports on the subject since then.¹⁴ In 2003, the real estate bar published Guidelines¹⁵ built on and incorporating the Business Opinion Guidelines and Business Opinion Principles.

CONTEXT

In themselves, the labels “lead” and “local” have insufficient inherent meaning to determine without more information what opinions each counsel would provide. The labels more appropriately describe a hierarchy of relationship in the transaction than determine the scope of each such counsel’s opinion letter. The legal matters to be addressed in an opinion letter of local counsel often are not as comprehensive as those matters on which lead counsel opines. The menu of opinions is substantially the same, however, and which opinions will be given by lead or by local counsel will depend on the facts and circumstances of each transaction.

¹⁰ See Committee on Legal Opinions, Section of Bus. Law of the ABA, *Guidelines for the Preparation of Closing Opinions*, 57 BUS. LAW. 875 (2002) [hereinafter *Business Opinion Guidelines*].

¹¹ See Committee on Legal Opinions, Section of Bus. Law of the ABA, *Legal Opinion Principles*, 53 BUS. LAW. 831 (1998) [hereinafter *Business Opinion Principles*].

¹² See *Statement on the Role of Customary Practice in Preparation and Understanding of Third-Party Legal Opinions*, 63 BUS. LAW. 1277 (2008) [hereinafter *Customary Practice Statement*].

¹³ See Special Committee on Legal Opinions in Commercial Transactions et al., *Legal Opinions to Third Parties: An Easier Path*, 34 BUS. LAW. 1891 (1979).

¹⁴ The ABA Business Law Section and the TriBar Committee provide a Legal Opinions Resource Center that contains reasonably comprehensive reference to many reports and other resources on opinion letter practice, accessible at <http://apps.americanbar.org/buslaw/tribar/>.

¹⁵ See ACREL Attorneys’ Opinion Comm. and ABA Section of Real Prop., Prob. and Tr. Law Comm. on Legal Opinions in Real Estate Transactions, *Real Estate Opinion Letter Guidelines*, 38 REAL PROP. PROB. & TR. J. 241 (2003) [hereinafter *Real Estate Opinion Guidelines*].

The lawyer described as “lead counsel” in the 2012 Report typically is retained directly by the Borrower¹⁶ to negotiate the transaction terms and contents of the documents, and lead counsel establishes the primary lawyer-client relationship with the Borrower. In transactions involving matters governed by the law of more than one jurisdiction,¹⁷ lead counsel or a transaction party may arrange for one or more local counsel opinion letters that, together with lead counsel’s opinion letter, provide a comprehensive evaluation to the opinion recipient concerning the parties to the transaction, agreements of those parties, and security for a loan. Local counsel is customarily engaged by lead counsel on behalf of the obligor transaction party (the Borrower) to provide opinions that lead counsel cannot, does not, or should not provide. In many instances, local counsel has no direct contact with the Borrower, but only with lead counsel as the Borrower’s agent or representative.

Most commonly, a local counsel opinion letter is provided in a transaction that involves multiple jurisdictions at least one of which is outside the competence of lead counsel. Such examples include (i) when real property interests securing a loan are located in the jurisdiction where local counsel, but not lead counsel, is admitted to practice, and the lien or security interest in those real property interests provided in a transaction document¹⁸ is governed by the law of that jurisdiction (referred to in this

¹⁶ This Supplement chooses the single term “Borrower” solely for convenience to refer to the obligor party or parties about which the opinion letter is provided. This Supplement does not provide multiple opinion statements about multiple parties. The 2012 Report referred to both a Borrower and a guarantor as the parties about whom the opinion letter may be provided, noting that an opinion letter for both could be problematic in terms of conflicting interests, *see 2012 Report, supra* note 1, at 219, and it provided separate opinion statements for each when applicable. Collectively, these parties were referred to as “Credit Parties.” *See id.* at 227. Other reports refer to the party for or about whom the opinion is provided as the “Client.” In an opinion letter, the role of the obligor party in the transaction (e.g., “borrower,” “guarantor,” or “mortgagor”) would be substituted as appropriate, as in the Illustrative Opinion Letter. *See, e.g., id.* When the opinion letter opines about multiple parties, it is recommended that each be identified by role and made the focus of separate opinion statements in the opinion letter, as in the Illustrative Opinion Letter.

¹⁷ These matters are referred to as “multijurisdictional” in this Supplement. *See supra*, Part I.A. This broad term is used to denote transactions involving a recipient party in one state and a Borrower or collateral in another, as well as those involving parties in more than two states. *See id.*

¹⁸ The transaction document by which the security interest is to be created will be referred to in this Supplement generically as a “Mortgage,” as it was in the 2012 Report. *See 2012 Report, supra* note 1, at 242. The term encompasses deeds of trust, deeds to secure debt, mortgages, and other real estate security instruments. *See id.*

Supplement as the “Local Opinion Jurisdiction” and in the Illustrative Opinion Letter as the “State”);¹⁹ or (ii) when a party²⁰ to the transaction is organized under the laws of, or is acting in, the Local Opinion Jurisdiction. In the first setting, the local counsel opinions pertain to transaction documents. In the second setting, the local counsel opinions focus on one or more legal entities or natural persons. It is not unusual for local counsel opinions to be given as to both the transaction documents and a party, as, for example, where a party organized or acting in the Local Opinion Jurisdiction has interests in the real property in that jurisdiction in which a security interest is sought. An example of this is a guarantor organized in the local counsel’s Local Opinion Jurisdiction guarantying the debt of an affiliate that is not organized in the Local Opinion Jurisdiction, and the guarantor is encumbering real estate in the Local Opinion Jurisdiction as security for the guaranty. In such cases, an opinion letter from local counsel would address both subject matters unless lead counsel has undertaken to provide the formative opinions described in the 2012 Report.²¹

A prototypical example of a local counsel’s engagement would be to prepare an opinion letter about a Mortgage of real estate in the Local Opinion Jurisdiction (for example, Kansas), entered into by an entity organized in Delaware, with New York law applicable to the loan documents other than discrete issues in or involving the Mortgage. Real estate lawyers are often requested to provide legal opinions as local counsel not only in transactions the principal purpose of which is to

¹⁹ The 2012 Illustrative Language uses “State” when referring to one jurisdiction and “Opinion Jurisdictions” when more than one State is involved. *See id.* In the text, the 2012 Report uses the word “State” to refer to a jurisdiction. The term Local Opinion Jurisdiction in this Supplement is used to identify that jurisdiction where the law is relevant to the opinions being provided in the opinion letter of local counsel. In the texts of the 2012 Report and this Supplement, the words “State” and “Local Opinion Jurisdiction” are synonymous. In the opinion letter itself, the Local Opinion Jurisdiction would be defined as the State, as it appears in the Illustrative Opinion Letter.

²⁰ The term “Party” would most commonly refer to a transaction party, a signatory to transaction documents. It may be appropriate for local counsel to provide opinions as to affiliates or principals of a transaction party. In this Supplement, the term party when not otherwise defined or modified means any person about which an opinion is provided; and the term “third-party” refers to the recipient. For further discussion of opinions concerning affiliates and principals of a transaction party, see *2012 Report, supra* note 1, at 239.

²¹ *See id.* at 237–40. Although opinions on these subjects may in some ways seem more appropriately the province of corporate lawyers, it is not unusual for a real estate lawyer’s opinion letter to include them where relevant.

finance the acquisition or development of real estate assets, but also in a wide variety of other financing transactions. These other transactions may not be real estate-centric but will have a real estate collateral component. Situations in which a real estate lawyer may be asked to provide legal opinions include:

- A loan to finance a specific real estate project located in the Local Opinion Jurisdiction, where some or all of the loan documents are governed by, and the Borrower is organized under, the laws of the Local Opinion Jurisdiction, but the Borrower is represented in the transaction by lead counsel elsewhere.
- A loan to finance a specific real estate project located in the Local Opinion Jurisdiction, where some or all of the loan documents are governed by the laws of the Local Opinion Jurisdiction, but the Borrower is organized under the laws of a jurisdiction other than the Local Opinion Jurisdiction.
- A loan to finance one or more specific real estate projects located in the Local Opinion Jurisdiction (and perhaps other jurisdictions), where the core financing documents—the loan agreement, the note, and any guaranty—are governed by the laws of another jurisdiction (often, New York), but the Mortgage, any assignment of leases and rents, and perhaps other documents specifically related to the real estate located in the Local Opinion Jurisdiction will be governed in whole or in part by the laws of the Local Opinion Jurisdiction, and the Borrower may or may not be organized under the laws of the Local Opinion Jurisdiction.
- A credit facility consisting of loans principally for the purpose of financing the corporate activities of a Borrower, in which, as a part of the financing, the Borrower agrees to secure the credit facility by encumbering all of its assets, including real property that it or its subsidiaries own in the Local Opinion Jurisdiction (and perhaps other jurisdictions). In such a case the core financing documents—the credit agreement, the notes, a security agreement, and any guaranties of subsidiaries—are governed by the laws of another jurisdiction (typically, New York), but the Mortgage will be governed in whole or in part by the laws of the Local Opinion Jurisdiction. The entity owning the real property to be encumbered by the Mortgage may or may not be organized under the laws of the Local Opinion Jurisdiction.

- An issuance of debt securities in the form of notes or bonds, either in a private placement that is exempt from registration under federal securities laws pursuant to Securities and Exchange Commission (SEC) Rule 144A, or in a registered securities offering, to provide funding for operations of a company, to finance the acquisition of a company, to provide capital for other investments, to refinance existing debt and/or for other purposes not specifically related to any real property owned by the company, and which is secured by all assets of the company and its subsidiaries including real property. The securities are usually issued pursuant to an indenture between the company and a trustee. The core financing documents—the indenture, the notes or bonds, guaranties of subsidiaries, security agreement, etc.—are governed by the laws of another state (typically New York), but the Mortgage or Mortgages encumbering the real property located in the Local Opinion Jurisdiction will be governed in whole or in part by the laws of the Local Opinion Jurisdiction. The entity owning the real property to be encumbered by the Mortgage may or may not be organized under the laws of the Local Opinion Jurisdiction.
- One or more loans secured by real property located outside of the Local Opinion Jurisdiction, but with a Borrower that is organized under the laws of the Local Opinion Jurisdiction. In this situation, local counsel is not rendering opinions relating to real estate, but to an entity discussed in the 2012 Report.

There are many variations on these themes. In a number of these situations, opinion requests are generated by corporate finance lawyers, rating agency expectations, securities issuers, and underwriters without appreciation for the customary practice in real estate finance opinions. Despite the adaptability of the content of much of this Supplement to these variables, this Supplement does not attempt to address specifically either transactions that are customarily corporate financings in which real estate collateral is incidental, or opinion letter content for them, which may be expressed in different terms and provide narrower opinions than discussed in this Supplement.

The opinion giver, whether lead or local counsel, may be presented with a list of subjects the recipient would like the opinion giver to address in an opinion letter or with a form of opinion letter, often with a comprehensive set of opinion statements that the recipient would like to receive, and often with few or no assumptions or limitations. Although

opinion requests in many instances reflect legitimate interests of a recipient, not all requests are germane to the role of local counsel or appropriate for a local counsel's opinion or for the type of transaction the opinions are to address.

The degree of knowledge by local counsel of the Borrower and the amount of information provided to local counsel may vary dramatically from one transaction to another. When opining about a lien or security interest, local counsel may be provided only with a single Mortgage, or it may be provided with numerous loan documents and Uniform Commercial Code (U.C.C.) financing statements, some of which have no, or only tangential relevance, to the local counsel opinions, while others are appropriately addressed by the local counsel opinion letter. When opining about a party, local counsel may not know the Borrower or its principals, may have had no prior experience representing them, and may not have any direct communications with the Borrower during the pendency of the transaction; instead, the local counsel may communicate only through lead counsel. In other instances, local counsel may have extensive knowledge about, and communications with, the Borrower. The appropriate scope of the opinions and the appropriate content of the opinion letter are shaped by all of the circumstances. In this Supplement, the effect of variables such as these will be recognized in the discussion, but local counsel is advised to consider in each engagement exactly what the scope of its opinions and diligence should be, based on actual circumstances.

The specific purpose for which the opinion letter is being given is mentioned frequently in this Supplement because formulation of the local counsel's opinion letter will be directed by that purpose. For example, an opinion letter dealing only with the enforceability of a Mortgage affecting property in the Local Opinion Jurisdiction executed by a party not organized under the law of that jurisdiction would not also need to include opinions about entity status, power, authority, authorization, execution, and delivery, but it would assume those matters. An opinion letter dealing only with a party in the Local Opinion Jurisdiction executing a Mortgage encumbering real estate located in another jurisdiction, however, would not need to address enforceability or recordability of the Mortgage, but would address subjects such as entity status, power, authority, authorization, and in some cases, execution and delivery.

Local counsel should prepare an opinion letter that addresses the matters that are appropriate in the circumstances under customary

practice.²² If this response is considered inadequate by the recipient, further content should be discussed and agreed upon, again within the bounds of customary practice, respecting the legitimate interests of the parties, including cost effectiveness and the necessity of the opinions and assumptions and limitations under consideration. Some subjects of the request may be answered more appropriately and customarily by service providers other than local counsel or by reliance on commonly accepted alternatives. Examples of such subjects are ownership of collateral (provided by title insurance), litigation (provided by search services, unless the request is limited to matters in which the opinion giver is representing the client), and U.C.C., tax lien, or similar searches (provided by search services).²³

This Supplement provides example opinions, assumptions, and limitations that under appropriate circumstances may be included in local counsel opinion letters. Because of the range of issues about which some recipients may seek assurances, the opinion request may ask for subject matter to be addressed that is not within the scope of this Supplement. This Supplement may be helpful in providing indirect guidance in such cases. Alternatively, the opinion request may ask for an opinion on a subject treated in this Supplement in a different formulation or with a different scope. There may be no uniformity in opinion requests, but the subject matter is generally and commonly known. Thoughtful review and consideration of a request for a local counsel opinion letter is essential, and, within the bounds of customary practice and sound legal judgment, a response should be provided promptly to allow time for the gaps between the request and the response to be considered by the opinion recipient.

Assembling a local counsel opinion letter is a menu process. Examples of local counsel opinion statements and the commentary in this Supplement provide guidance in this process. In this Supplement, assumptions, opinion statements, and limitations are discussed in the text as they relate to the purpose of the opinion letter and the circumstances

²² See *id.* at 220–21, 223–25; see *infra* Part I.C (explaining what is regarded as customary practice). Customary practice may vary from state to state and within the profession. Although the 2012 Report and this Supplement may assist in identifying potentially agreeable, nationally applicable standards, which may thereby bridge the particularities among local and state practices in multistate transactions, the fact that certain opinions or opinion subjects are discussed in the 2012 Report and this Supplement does not prescribe a single solution for, or content of, an opinion letter.

²³ For a discussion of reliance on public authority documents and on representations of the Borrower, see 2012 Report, *supra* note 1, at 227–32.

of the local counsel providing the opinions. For purposes of context, however, modifications of the 2012 Illustrative Language contained in Chapter Three of the 2012 Report have been made, incorporating specific assumptions, opinions, and limitations that are discussed in the text of this Supplement. A complete Illustrative Opinion Letter, incorporating the text of the 2012 Illustrative Language and the modifications derived from this Supplement, is provided as an Addendum to this Supplement. It is referred to in this Supplement as the Illustrative Opinion Letter. The 2012 Report in Chapter One Part VII ILLUSTRATIVE LANGUAGE OF AN OPINION LETTER, at 223, provides extensive discussion about the purpose of such a demonstrative presentation that is equally applicable to this Supplement's Addendum. To underscore, the purpose of the Illustrative Opinion Letter is to present sample language of assumptions, opinions, and limitations compiled in the usual order of an opinion letter. It is not intended to create a prescriptive form or dictate content.

PROFESSIONAL RESPONSIBILITY

Many professional responsibility considerations apply to opinion letter practice—legal ethics are a starting point, but the entirety of the law governing lawyers is relevant. Two subjects deserve mention here.

First, the typical opinion letter declares that it is provided “as counsel to the Borrower.”²⁴ This declaration indicates the existence of a lawyer-client relationship. When the Borrower engages lead counsel to provide services in connection with the loan, that client relationship is reasonably clear. When local counsel is engaged to provide an opinion letter, the relationship may be remote—the engagement may come through lead counsel as the client's agent or representative, and local counsel may have no contact with the Borrower. In some cases, local counsel may be asked by the opinion recipient to provide an opinion about a local document or entity status as if on behalf of the Borrower. Regardless of how local counsel for a Borrower is brought into a matter to provide an opinion letter, local counsel should consider the Borrower as a client unless the transaction parties agree otherwise and observe the rules applicable to the representation of a client.²⁵ The formalities of establishing

²⁴ See *id.* at 261.

²⁵ See *Real Estate Opinion Guidelines*, *supra* note 15, at 243 (suggesting that the practical problem of forming a lawyer-client relationship with a party with whom local counsel has had little or no previous contact may suggest that the local counsel should serve as counsel to the lender in providing an opinion letter).

that relationship cannot be overlooked even in the face of a request for an opinion letter to be delivered in a very short time.²⁶

The duties of professional responsibility flow from the lawyer-client relationship, including ethical obligations to a client. Among them is the need to clarify (limit) the scope of the representation to the essential work required to provide the opinion letter appropriate to the circumstances of the engagement. This clarity will also define the degree of diligence required in the representation. Local counsel are asked sometimes by the opinion recipient to provide information on formatting and recording requirements, and even on content requirements needed to satisfy applicable law. This Supplement refers to possible responses to some such inquiries. A client's request to provide an opinion might or might not authorize the lawyer to provide substantive drafting suggestions to the recipient, even those necessary to render an opinion letter satisfactory to the recipient. While such permission could be implicit in the engagement, the lawyer should consider whether it is necessary in the circumstances to confirm with the client or lead counsel whether responding to the recipient's requests is authorized, observing the need to explain the request and the result of responding to it as required in the applicable rule of professional conduct.²⁷

Second, the standard of care expected of a lawyer is generally determined by practice standards of a lawyer in that jurisdiction. Comment b to § 52 of the RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS, notes that the "professional community whose practices and standards are relevant in applying this duty of competence is ordinarily that of lawyers undertaking similar matters in the relevant jurisdiction."²⁸ In many formulations, this means the jurisdiction in

²⁶ In some jurisdictions, a written fee agreement is required. In most instances, an engagement process should be followed that is consistent with the requirements of the Local Opinion Jurisdiction and of local counsel's law firm.

²⁷ The applicable rule of professional conduct governing the local counsel opinion letter would typically be that of the Local Opinion Jurisdiction. The lawyer should consider the choice of law rules of the jurisdiction where the lawyer is licensed pertaining to professional conduct provided in a rule based on ABA Model Rule of Professional Conduct 8.5(b)(2). See MODEL RULES OF PROF'L CONDUCT r.8.5(b)(2) (AM. BAR ASS'N 2015).

²⁸ The RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 52 cmt. b (AM. LAW INST. 2000). The RESTATEMENT comment also suggests that national standards may be recognized when there is a national practice. *Id.* Although the 2012 Report and this Supplement promote common understanding, they do not establish a national practice as contemplated by the RESTATEMENT.

which the lawyer is admitted to practice. It is possible, however, that providing an opinion about the law of another jurisdiction could impose duties of the profession of that jurisdiction, as well as implicate the rules pertaining to unauthorized practice of law and multijurisdictional practice.²⁹ There can be no better justification for a local counsel's opinion letter.

I. INTRODUCTION AND BACKGROUND OF THE OPINION LETTER

A. Introductory Matters. This subject is discussed at the start of Chapter Two of the 2012 Report.³⁰

0.3 Addressee. Nationally recognized statistical rating organizations (known as rating agencies) should not be named as addressees. See also this Supplement, Part V, Paragraph 5.1.³¹ It is not common practice to name recipient's counsel as an addressee for the reason that recipient's counsel should have no need to rely on the opinion expressed but rather should form independent judgment about the legal matters addressed.

B. Background of the Opinion Letter. This subject is discussed in Chapter Two Part I of the 2012 Report.³²

1.0 Role of Opinion Giver as Local Counsel. A common expression describing the role of local counsel would be:

We have acted as counsel to [name of party], as “[Mortgagor,] [Borrower,][Guarantor][etc.]” in the State of [Local Opinion Jurisdiction] (the “State”) for the purpose³³ of providing this Opinion Letter in connection with the Loan.

1.1 List and Definition of Transaction Documents;³⁴ Defined Terms.

(a) Paragraph 1.1 of the 2012 Illustrative Language contains a list of documents commonly used in real estate secured transactions,

²⁹ See applicable rules in the jurisdiction based on ABA Model Rule of Professional Conduct 5.5. See MODEL RULES OF PROF'L CONDUCT r.5.5 (AM. BAR ASS'N 2015).

³⁰ See 2012 Report, *supra* note 1, at 227.

³¹ See *infra* Part V.5.1.

³² See 2012 Report, *supra* note 1, at 227.

³³ Some local counsel prefer to insert the word “solely” in describing the purpose of the engagement. The described limitation of scope is sufficient, regardless.

³⁴ See 2012 Report, *supra* note 1, at 228.

collectively defined as “Transaction Documents,” that lead counsel has acted as counsel in preparing or negotiating.³⁵ As local counsel would not ordinarily prepare, but would ordinarily review or consider in providing its opinions only some of the transaction documents, the local counsel opinion letter would typically present the list of documents in a manner such as:

In preparing this Opinion Letter, we have [been furnished with] [reviewed] unexecuted copies of the following documents relating to the Transaction:

In most transactions for which a local counsel opinion letter is required, some of the Transaction Documents listed will not be governed by the law of the Local Opinion Jurisdiction. Those documents that are not the subject of opinions in the opinion letter should be excluded when listing and defining Transaction Documents about which an opinion is provided. This topic is discussed in subparagraph (b) below. In addition, the enforceability of such excluded documents should be assumed, as discussed in this Supplement Part II Paragraph (1)(i). Such an assumption may be implicit but it is best stated in the opinion letter.

The source and status of these documents is relevant to local counsel. Some opinion givers prefer to state that the documents have been furnished by an identified source (usually the Borrower’s lead counsel or recipient’s counsel or recipient itself) when providing the opinion letter, but this statement is not necessary. It is the responsibility of the recipient to provide the documents for review, often to local counsel through lead counsel for the Borrower. If the local counsel opinion giver has commented on issues in the documents that prevent its providing opinions as requested, it would need to review revised documents that include the changes enabling issuance of the opinion letter or explicitly assume that the required changes have been made before providing the opinions as requested.

Some opinion requests ask that the opinion letter refer to documents reviewed “as executed.” Assumption (e) in the Illustrative Opinion Letter allows the opinion giver to assume that the documents examined are the same as those executed and delivered. Unless the local counsel has supervised or verified the execution of transaction documents, the expectation that local counsel is to review executed documents for its opinion is unnecessary, burdensome, and not cost effective.

³⁵ See *id.* at 261.

(b) The extent to which Transaction Documents apply to the opinions to be provided determines the extent to which local counsel needs to review them.³⁶ For example, terms of the Note or a Loan Agreement, governed by law of another jurisdiction, may be incorporated in a Mortgage that will be opined about as to enforceability under the law of the Local Opinion Jurisdiction. These documents will need to be reviewed, or their enforceability expressly assumed, if their terms are necessary to support express opinions being given.³⁷ Because these documents are not themselves opined about, the local counsel opinion giver should consider limiting the effect of review by omitting them from the list of Transaction Documents about which opinions are rendered, and by providing a separate paragraph about them such as the following example:

We have been furnished with a Loan Agreement for execution by Borrower and Lender (the “Loan Agreement”) and a Promissory Note for execution by Borrower in favor of Lender (the “Note”). We have not reviewed the Loan Agreement, the Note, or (except for the Mortgage) any other documents identified therein (collectively, the “Other Transaction Documents”) except to the extent the Other Transaction Documents contain specific definitions that are expressly incorporated in the [Mortgage] [Opinion Transaction Documents] and are necessary to our opinions. Our opinions are given (a) assuming that nothing in any of such Other Transaction Documents materially changes any of the terms of the [Mortgage] [Opinion Transaction Documents (referring to those Transaction Documents about which an opinion is being provided and defined as such in the Opinion Letter)], (b) assuming that such Other Transaction Documents will be enforced consistently with the opinions expressed in this Opinion Letter, (c) assuming that definitions incorporated in the [Mortgage] [Opinion Transaction Documents] will be construed in accordance with the Law of the State if applicable, and (d) without regard to the effect of incorporation, by reference or otherwise.

If the scope of the opinion letter is limited to authority or execution of Transaction Documents and does not opine as to enforceability, such a limitation is unnecessary. When documents have no application to the

³⁶ The scope of review by counsel is discussed in Chapter Two Paragraph 1.4 of the 2012 Report. *See 2012 Report, supra* note 1, at 231.

³⁷ *See id.* at 232.

opinions being provided, the opinion letter should state that those documents are excluded from review.

As noted in subparagraph (c) below, the opinion giver should determine that incorporated definitions are used in a manner consistent with the law of the Local Opinion Jurisdiction or take such differences into account.

Local counsel are sometimes asked to render an enforceability opinion about identified documents that on their face state that they are governed by the law of a jurisdiction other than the Local Opinion Jurisdiction “as if” the Local Opinion Jurisdiction law governed the documents. In such a case, the local counsel would need to review all of the identified documents rather than only those that are governed by the Local Opinion Jurisdiction or that affect opinions concerning them. This opinion and the reason that it may be requested are discussed in Part III Paragraph 3.5(b), of this Supplement. If it is intended that an opinion cover usury as if the law of the Local Opinion Jurisdiction applied although the evidence of indebtedness is governed by the law of another jurisdiction, the words “**and rendering the opinion expressed in opinion Paragraph __ [usury]**” would be added to the purpose statement in the example above. Implicit and express usury opinions are discussed in Part III Paragraphs 3.5(c) and 3.10 of this Supplement.

(c) At some place early in the opinion letter, a reference to defined terms used in the opinion letter may be made. Often, definitions in a transaction document are incorporated in the opinion letter. An example is:

Terms used in this Opinion Letter with initial capital letters and not otherwise defined in this Opinion Letter shall have the meanings ascribed to them in the Mortgage.³⁸

Note that this example refers to an external source of terms used as defined terms in the opinion letter. Local counsel should have access to any document that creates incorporated definitions. The Illustrative Opinion Letter Paragraph 1.1 defines certain terms, including “Real Property.”

Adopting definitions in transaction documents should not be considered simply a matter of convenience, as certain definitions may differ

³⁸ See *supra* note 16. The reference, “defined in this Opinion Letter,” relates to the definition provided in Paragraph 1.1 of the Illustrative Opinion Letter that contains the definition of the Mortgage. See *Illustrative Opinion Letter, infra* para. 1.1.

from those legally recognized in the Local Opinion Jurisdiction. For example, if the Mortgage includes in its definition of “real property” certain property that under the applicable Local Opinion Jurisdiction law is not treated as real property, an opinion letter adopting the document definition of real property may provide inadvertently an opinion contrary to law. The opinion giver should be careful to use the term in a manner that is consistent with applicable law. An alternative, limiting the definition to that recognized in the Local Opinion Jurisdiction, is provided in Part III Paragraph 3.6(a) of this Supplement.

1.2 Authority Documents.

This subject is discussed in Chapter Two Paragraph 1.2 of the 2012 Report at 229.

If the Borrower is an entity organized under the law of the Local Opinion Jurisdiction, the local counsel opinion giver may be asked to render opinions as to entity existence, status, power, authorization, and, when appropriate,³⁹ execution and delivery of transaction documents with respect to such domestic entity or entities.

If the Borrower is an entity that is not organized under the law of the Local Opinion Jurisdiction, the local counsel opinion giver will need to assume those matters relating to entity existence, status, power, authorization, and, if appropriate, execution and delivery of transaction documents. If the Borrower is an entity that is not organized under the law of the Local Opinion Jurisdiction, the local counsel is often asked to opine that the Borrower is qualified to transact business in the Local Opinion Jurisdiction. To support such an opinion, local counsel should obtain and rely on a status certificate from the appropriate public official of the Local Opinion Jurisdiction so stating.

These same concepts are applicable to any direct or indirect constituent members of the Borrower, the status of which is necessary for the opinion letter.

1.3 Opinion Jurisdiction; Definition of Law Applicable.

This subject is discussed in Chapter Two Paragraph 1.3 of the 2012 Report at 229.

The trend noted there to exclude coverage of federal law is even more pertinent to local counsel opinion letters. Lead counsel or special counsel would deal more appropriately with federal law issues

³⁹ See *infra* Part III.3.4.

concerning an obligor party that are relevant in the transaction. It is nevertheless usual, albeit unnecessary, to recite a limitation as to federal creditors' rights laws, as in Illustrative Opinion Letter Paragraph 4.2.

1.4 Scope of Review.

This subject is discussed in Chapter Two Paragraph 1.4 of the 2012 Report at 231.

The 2012 Report discusses limiting the scope of inquiry to specific documents, which local counsel often would.⁴⁰ As noted there, a specific limitation is needed for this purpose.⁴¹ An example is provided in Illustrative Opinion Letter Paragraph 1.4.

1.5 Reliance on Other Sources Without Investigation.

This subject is discussed in Chapter Two Paragraph 1.5 of the 2012 Report at 232.

II. ASSUMPTIONS

This subject is discussed in Chapter Two Paragraph 2.1 of the 2012 Report at 223–37. Assumptions relate to factual matters, including those based on legal conclusions, such as the legal status of a party, that are not the subject of the opinions given, but which may be necessary predicates for one or more opinions.

Not all of the assumptions listed in the Illustrative Opinion Letter would apply to all opinion letters, and not all assumptions that will underlie all opinions are listed.⁴² Opinion letters often include customary assumptions that do not pertain to the opinions expressed.⁴³ Recipients sometimes request that assumptions not relevant to opinions being provided be deleted, and the request can often be accommodated. The 2012 Illustrative Language lists assumptions generally recognized in real estate finance opinion letters of lead counsel. Additional assumptions and certain modifications of the listed assumptions that relate to local counsel opinions particularly are discussed in this Supplement and shown in the Illustrative Opinion Letter. Because the organization of an opinion letter usually places assumptions in a separate section, they will be so

⁴⁰ See 2012 Report, *supra* note 1, at 231–32.

⁴¹ See *id.*

⁴² See *id.* at 234.

⁴³ See *id.* at 233–34.

presented in this Supplement, but assumptions discussed in this Part II will be referenced to the opinions in Part III to which they relate.

(1) The intent of Assumption (c) of the 2012 Illustrative Language⁴⁴ is two-fold. It first assumes that those parties identified have legal existence (that is, each is organized as the entity described); that the transaction documents have been duly authorized by all necessary corporate or other governance action of the party; that the transaction documents have been duly executed and delivered; and that persons acting on behalf of those parties were duly authorized to act in that capacity. Secondly, it also assumes that the transaction documents are valid as to, binding upon, and enforceable against all the parties included in the assumption. Assumption (c) of the 2012 Report assumes that the opinion giver will opine about the Borrower (and a Guarantor) as an entity and about enforceability of documents, as that assumption excludes the Borrower (and a Guarantor) from its scope.⁴⁵

Modifications of the dual functions of Assumption (c) may be required for local counsel opinion letters:

(i) When the opinion giver is not opining about the Borrower itself, as will sometimes be the case in a local counsel opinion letter, the assumption should not state language excluding the Borrower. In Assumption (c), the phrase “(other than the Borrower)” either would be deleted or would be modified by substituting for the words “other than” the word “including.” In these situations, local counsel will assume that the Borrower also satisfies the requirements listed in the first clause of the sentence.⁴⁶ Deleting or modifying the phrase “(other than the

⁴⁴ *Id.* at 264:

(c) Each party to the Transaction (other than the Borrower and the Guarantor) has satisfied those legal requirements that are applicable to it to the extent necessary to make the Transaction Documents enforceable against it, and each such party’s obligations set forth therein are enforceable against it in accordance with all stated terms.

⁴⁵ *See id.* at 263–64.

⁴⁶ A possibly clearer approach to modifying Assumption (c) of the 2012 Report, more explicitly relating to the Borrower, might appear as follows:

We have assumed that the Borrower (a) if organized or formed under the laws of a jurisdiction other than the Local Opinion Jurisdiction is a [nature of entity] duly organized or formed, validly existing and in good standing under the law of the jurisdiction of its organization or formation; (b) has the power under its organizational documents and applicable [nature of entity] law to

Borrower)” in Assumption (c)—broadening the assumption—would result in assuming also that the transaction documents are enforceable against the Borrower. If an enforceability opinion relating to transaction documents entered into by the Borrower is to be given, however, the revision to this Assumption described in subparagraph (ii) following should be made.

(ii) If a purpose of the local counsel opinion letter is to provide an opinion as to enforceability of certain transaction documents against the Borrower but not an opinion about the Borrower itself, as is often the case, the breadth of the assumption resulting from deletion or modification of the phrase (“other than the Borrower”) should be limited. Otherwise, the value of the enforceability opinion would be negated, as the assumption would assume away the enforceability opinion. An example of such a limitation is the addition of a phrase such as **“except as is expressly provided as to the Borrower in this opinion letter”** preceding the second part of Assumption (c) of the 2012 Report.⁴⁷ Addition of this phrase allows omission or modification of the phrase “(other than the Borrower)” in Assumption (c), thereby enlarging the assumption as to all underlying legal requirements to enforceability to the Borrower, without thereby disclaiming an enforceability opinion as to the Borrower. The enforceability opinion can be given otherwise based on assumptions as to the Borrower’s existence, status, power, authorization, execution, and delivery. Therefore, if the opinion giver removes or modifies the first phrase of Assumption (c), the opinion giver should add the phrase appearing in boldface above in this paragraph when providing an enforceability opinion.⁴⁸

execute, deliver, and perform its obligations under the Transaction Documents to which it is a party; (c) has taken all action necessary under its organizational documents and applicable [nature of entity] law to authorize the execution and delivery of the Transaction Documents to which it is a party and the performance of its obligations thereunder; and (d) has duly executed and delivered the Transaction Documents to which it is a party.

This modification does not substitute for Assumption (c) of the 2012 Report, which is needed to state the assumption as to all parties other than the Borrower, but it more clearly explains the effect of deleting the parenthetical “(other than the Borrower)” or substituting the word “including” for “other than.”

⁴⁷ See 2012 Report, *supra* note 1, at 240–42.

⁴⁸ The bolded, additional phrase can be added to Assumption (c) of the 2012 Report, as a matter of form in every case as it is self-operative, meaning that the content of the opinion controls what is assumed. Its omission may be preferred so as not to suggest that such an opinion may be provided.

The limiting phrase provided in the example above should be considered in conjunction with two common situations. First, if there are documents in the transaction that are not addressed by the enforceability opinion given, such as those reviewed but not opined about, the sample language is intended to preserve the assumption about enforceability of those documents even as to the Borrower if the phrase “(other than the Borrower)” is deleted or modified. Second, if a choice of law opinion is not given expressly but an enforceability opinion is given, the sample limitation may not be sufficient to disclaim a choice of law opinion if it is inferred from an enforceability opinion. As noted in the 2012 Report⁴⁹ and in this Supplement Part III Paragraphs 3.5(b) and 3.9, enforceability of choice of law provisions should be addressed specifically by separate assumptions or exclusions. An example of an additional assumption for this purpose is:

To the extent governed by the Law of any jurisdiction other than the State, including conflicts of law principles thereof, we have assumed that the Transaction Documents are enforceable against the parties thereto in accordance with their respective terms.

Certain other assumptions or modifications of assumptions presented in the 2012 Report are discussed in Part III of this Supplement as they relate to opinion texts. Some deserve specific mention, as they are more often applicable to local counsel opinion letters than to lead counsel opinion letters.

(2) Unless local counsel is supervising or can verify the execution and delivery of the Borrower’s transaction documents,⁵⁰ which is not usual practice, an assumption about execution and delivery is appropriate. Although modification of Assumption (c) as discussed in Paragraph (1) above will subsume an assumption that the Borrower has duly executed and delivered transaction documents, a more specific assumption to this effect would read:

The Transaction Documents have been duly executed and delivered by the respective parties thereto by their duly authorized officers or other representatives in accordance with the laws of the jurisdiction where executed and with the laws of any jurisdiction governing actions of the parties executing and delivering such documents.

⁴⁹ See 2012 Report, *supra* note 1, at 245–48.

⁵⁰ See *infra* Part III.3.4.

(3) When the subject of acknowledgment is relevant to validity of a transaction document or to the recording of the document in the Local Opinion Jurisdiction,⁵¹ additional assumptions may be appropriate. By way of example, when the Local Opinion Jurisdiction accepts instruments acknowledged in accordance with the law of another jurisdiction where executed, the foregoing assumption would be expanded by adding:

... and the form of acknowledgment and action taken with respect to acknowledgment each complies with requirements of the jurisdiction where acknowledged.

Such an assumption can be added independently, as shown in the Illustrative Opinion Letter.

(4) If a choice of law opinion is given,⁵² an assumption such as that provided in the 2012 Report at 248, where state law is based on Restatement principles, should be added. Assumptions consistent with other Local Opinion Jurisdiction law on conflicts of law should be adapted as appropriate.

(5) To avoid any possible implicit opinion that all upper tiers of ownership or control of the Borrower have acted to authorize the Borrower to enter into and perform the transaction documents, as discussed in the 2012 Report at 239, an assumption may be added, as follows:

Each of the persons whose consent is required to authorize the Borrower to execute and deliver the Transaction Documents and perform its agreements thereunder, (i) if an entity, is validly existing and in good standing under the law of the jurisdiction of its formation; and (ii) has taken all action necessary or received all necessary authorizations under any applicable organizational documents and applicable law to authorize the execution and delivery of the Transaction Documents to which the Borrower is a party and the performance of the Borrower's obligations thereunder.

This subject is discussed further in this Supplement Part III Paragraph 3.3.

⁵¹ See *infra* Part III.3.6(b).

⁵² See *infra* Part III.3.5(b) and 3.9 (noting that a choice of law opinion may be inferred from an enforceability opinion).

(6) In addition to Assumptions (b) and (h) of the Illustrative Opinion Letter, opinions provided with respect to U.C.C. filings, including an opinion that the Mortgage or a U.C.C. financing statement is in form sufficient to perfect a security interest in fixtures, should be based on an assumption that the correct legal name of the debtor is stated in all relevant places when local counsel is not otherwise engaged to determine this fact. For example:

The Mortgage and the U.C.C. financing statement sufficiently provide the name of the Borrower as debtor.⁵³

(7) Local law and specific opinion statements not considered in the 2012 Report or this Supplement may require or merit assumptions in addition to those discussed in the 2012 Report⁵⁴ or this Supplement.

III. OPINIONS

This subject is discussed in Chapter Two Part III of the 2012 Report at 237–50.

This Part III provides a discussion about the opinions that local counsel may be asked to give in a real estate secured loan, with elaboration on how local counsel may need to adapt the language of comparable opinions that a lead counsel would be asked to give. This Part III refers to certain assumptions and limitations that are appropriate to support opinions by local counsel that differ from or add to the assumptions and limitations that are discussed in the 2012 Report. Inclusion of opinions or opinion topics in this Supplement does not establish that the request for or the giving of such an opinion is either customary practice or in some cases appropriate. The purpose of including the opinion topics that follow is that many of them appear in requests to local counsel, and it is the intention of this Supplement to provide some guidance in response when requests are appropriate. The Paragraph numbering used in this Supplement Part III corresponds to Paragraphs in both Chapter Two and Chapter Three of the 2012 Report.

Five opinions, discussed in Paragraphs 3.1 through 3.5 in this Part III, pertain to the formation and existence of an enforceable contract and are sometimes referred to as “core” opinions.⁵⁵ The subject matter of all these opinions would be appropriately addressed by counsel for the

⁵³ See U.C.C. §§ 9-502(a), 9-503 (revised 2000), 3 U.L.A. 143, 149 (2016).

⁵⁴ See 2012 Report, *supra* note 1, at 264–65.

⁵⁵ See *id.* at 242.

Borrower. When one opinion giver provides a single opinion letter, all five of these core opinions may (but will not necessarily) be provided in one opinion letter. When local counsel is involved, however, it would be more common that only some of the opinions are provided by local counsel, while the underlying legal and factual bases of others are assumed or otherwise relied upon.

The first four opinions, 3.1 through 3.4, relate to the Borrower as an actor in forming the contract. The substance of these opinions is prerequisite for an enforceability opinion, so the bases for them either should be determined or be assumed expressly or implicitly. Three of these opinions—status, power, and authority—are given only as to entities, not as to natural persons. Except as noted below, the issues related to these opinions in connection with a local counsel opinion letter are generally no different than the issues described in the 2012 Report⁵⁶ in relation to such opinions when rendered by lead counsel. The differences, discussed in this Supplement, lie in which of these opinions are to be given by local counsel, and the bases for giving them. Assumptions may be provided as substitutes for these opinions when appropriate.

3.1 Status – Existence and Good Standing.

This subject is discussed in Chapter Two Paragraph 3.1 of the 2012 Report at 237.

The formulation of an opinion about the status of the Borrower varies depending on whether or not the Borrower is an entity organized under the law of the Local Opinion Jurisdiction. The 2012 Report discusses this opinion in the context of a Borrower organized under the law of the Local Opinion Jurisdiction.

(a) The 2012 Illustrative Language Paragraph 3.1⁵⁷ includes several opinion formats. The first sentence is a statement indicating that the opinion giver has performed the legal due diligence necessary to form its opinion as to the Borrower's existence as a certain legal entity in the Local Opinion Jurisdiction. When counsel has formed the entity or otherwise has adequate information, such an opinion may be appropriate. The requisite diligence for this opinion when it is not based on a public authority document will vary from state to state. However, in most circumstances, local counsel will not be giving this opinion based on its

⁵⁶ See *id.* at 237–39.

⁵⁷ See *id.* at 266.

due diligence but in reliance on a public authority document, stating this opinion in language such as:

Based solely on the Public Authority Documents, the Borrower is a [nature of entity], validly existing [and in good standing] in the State.

The wording of the public authority document and the statutory basis for good standing (or qualification) in a given state will affect the scope and exact wording of this opinion. If the opinion is based solely on the public authority document, as in the example, the opinion should opine only to what the public authority document recites. A single public authority document may or may not include both assurances.

When the Borrower is an entity organized in the Local Opinion Jurisdiction, the opinion concerning existence and standing makes unnecessary a separate opinion that the Borrower is qualified to do business in the Local Opinion Jurisdiction.

(b) When the Borrower is not organized in the Local Opinion Jurisdiction, local counsel may be asked to opine that the Borrower is qualified to do business in that jurisdiction, or that it is not required to be so qualified to perform the transaction documents.

The opinion that the Borrower is qualified to conduct business in the Local Opinion Jurisdiction is based ordinarily on a public authority document. The opinion may include assurance that the Borrower is in good standing if the concept of “good standing” is recognized under the law of the Local Opinion Jurisdiction. As noted above, the assurance provided by the public authority document should be considered. A single public authority certificate may but may not include both assurances.

The opinion may be stated as follows:

Based solely on the Public Authority Documents, the Borrower is [qualified][registered] to do business [and is in good standing] in the State [as a foreign {nature of entity}].

(c) An opinion to the effect that the Borrower is not required to be qualified in the State in order to perform the Transaction Documents requires legal analysis that would exceed the scope of customary practice. Many consider such an opinion request to be unusual or inappropriate. Providing such an opinion would require consideration of the conduct of the Borrower that is permitted or required under the transaction documents in light of requirements of law of the Local

Opinion Jurisdiction.⁵⁸ Doing so would require specific discussion between the opinion giver and the recipient, and consideration of issues of cost-benefit of the opinion measured against the cost of qualifying or the risk of not qualifying.

3.2 Power.

This subject is discussed in Chapter Two Paragraph 3.2 of the 2012 Report at 238.

Local counsel opinion letters that cover a party organized as an entity under the law of the Local Opinion Jurisdiction often include opinions as to the corporate (or other entity) power of the Borrower to enter into the transaction or to execute and deliver the transaction documents. An opinion of local counsel regarding the power of the Borrower would be given only when the Borrower is organized under the laws of the Local Opinion Jurisdiction. When the Borrower is an entity not organized under the law of the Local Opinion Jurisdiction and an enforceability opinion is to be given, the Borrower's power is to be assumed. See Assumption (c) of the 2012 Report and discussion in this Supplement Part II Paragraph (1).

A lender may ask for an addition to this opinion that the Borrower has the power "to perform" its obligations under the transaction documents. After reviewing the organizational documents of the entity, and provided the conclusion is supported thereby, an opinion giver should be able to render such an opinion because this opinion covers only the power of the entity under its organizational and other governance documents and applicable entity law, and not the laws that may govern performance by the Borrower of the transaction documents.⁵⁹ In other

⁵⁸ Note that this opinion pertains to the Borrower. It does not address whether a managing member or general partner of the Borrower must qualify, which may be a requirement for certain activities in some jurisdictions. A request concerning this possible requirement may be appropriate in some circumstances. See also *infra* Part III.3.16 (regarding an opinion that pertains to regulation of the non-domestic recipient in the Local Opinion Jurisdiction).

⁵⁹ This power-to-perform opinion is limited to the legal capacity of the party to enter into and perform its contracts and should not be construed as applying to the lawfulness of the obligations to be performed or that any particular obligation in a transaction document is lawful or can be performed without further approvals or actions. This interpretation is discussed with analysis in DONALD W. GLAZER & SCOTT FITZGIBBON, *LEGAL OPINIONS* (3d ed. 2008), at 240–44. See *infra* Part III.3.17 for discussion of a request for an express opinion on performance of the Transaction Documents as not prohibited by law.

words, the scope of this opinion is limited to the legal capacity of the Borrower to form and perform its contract and not that any particular obligation in such a contract is lawful or can be performed unconditionally.

As is noted in more detail in Paragraph 3.3 (Authorization), below, exercise of the entity power of the Borrower to enter into and perform the transaction documents may be subject to consents or approvals of others, such as upper tier entities or managers.

3.3 Authorization.

This subject is discussed in Chapter Two Paragraph 3.3 of the 2012 Report at 238.

Local counsel opinion letters that cover a party organized as an entity under the law of the Local Opinion Jurisdiction often include an opinion that the necessary corporate (or other entity) actions and approvals have been taken or obtained.⁶⁰ The authorization opinion does not apply to third-party or governmental approvals, but only to internal company or other entity approvals regarding a Borrower. When the Borrower is not an entity organized under the law of the Local Opinion Jurisdiction, the matter of authorization is assumed.⁶¹

The 2012 Report⁶² advises that where there are tiers of ownership or control between the Borrower entity and its members, partners, shareholders, or other owners, an opinion giver should expressly state if counsel has reviewed and verified any necessary consents throughout the tiers of ownership or only those at specified levels of the organizational hierarchy. Unless the opinion is expressly limited, the opinion giver would need to review what is necessary to render the authorization opinion. Alternatively, the opinion giver should assume that such consents have been given.⁶³

Local counsel often will not have sufficient information to opine, implicitly or explicitly, through upper tiers, and in many cases, upper tier entities are not organized under the law of the Local Opinion Jurisdiction. If providing the opinion that upstream authorizations have been given, the opinion giver would need to rely on certificates of the constituents, or form an opinion based on review of the authority documents

⁶⁰ See 2012 Report, *supra* note 1, at 266.

⁶¹ See *id.* at 234; see also *supra* Part II.(1).

⁶² See 2012 Report, *supra* note 1, at 237.

⁶³ See *supra* Part II.(5).

and applicable law alone, but this endeavor is beyond the scope of the typical local counsel's diligence. Unless it is local counsel's intent to opine after such diligence, it should preclude such an implicit opinion. Although there is support for implicit limitation of such an opinion,⁶⁴ an express assumption, such as that provided in this Supplement, Part II Paragraph (5), would contravene such an implicit opinion.

3.4 Execution and Delivery.

This subject is discussed in Chapter Two Paragraph 3.4 of the 2012 Report at 240.⁶⁵

The execution and delivery opinion focuses on certain steps a party must take to bind itself to the contract. Although usually combined into one opinion statement,⁶⁶ there are two distinct aspects of it—execution and delivery. Whether local counsel is the appropriate opinion giver for either depends on a number of circumstances.

An opinion on execution means only that a person purporting to be the person authorized to execute on behalf of the party has executed the identified transaction documents.⁶⁷ It does not address enforceability of the contract or recordability requirements (for example, color of ink), although it may cover the laws on sufficiency of signatures (for example, an X or an electronic signature). When the law of the Local Opinion Jurisdiction governs the Borrower and execution of documents, local counsel in that jurisdiction could provide an opinion on execution in conformity with governing organizational documents and authorizations just as if it were lead counsel. When the law of the Local Opinion

⁶⁴ The TriBar Opinion Committee, in *Third-Party Closing Opinions: Limited Liability Companies*, 61 BUS. LAW. 679, 689 n.52 (2006) states that:

[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.

See *infra* Part II.(5) for such an assumption.

⁶⁵ Note: In Paragraph 3.4(a) of the 2012 Report, *supra* note 1, at 240, the reference to Paragraph 2.1(e) should read "2.1(d)."

⁶⁶ See *Illustrative Opinion Letter, infra* para. 3.4: "The Borrower has duly executed and delivered the Borrower Transaction Documents."

⁶⁷ See 2012 Report, *supra* note 1, at 240.

Jurisdiction does not govern execution, it is appropriate to assume execution by the Borrower. If the law of more than one jurisdiction could govern execution, such as, for example, when the Borrower is organized in the Local Opinion Jurisdiction but the execution of documents takes place elsewhere, it would be appropriate to limit the opinion statement as to execution by the preface “**to the extent the law of the State is applicable, . . .**” This limiting language would be called for even when a choice of law opinion is provided. Alternatively, the opinion giver can decline to address the subject entirely by adding a phrase such as “. . . , **as to which no opinion is given.**”

When appropriate to render the execution opinion, counsel not present at signing can give the opinion based on a certificate of the Borrower. This would be appropriate for counsel responsible for arranging for execution and delivery of transaction documents in a jurisdiction covered by its opinion letter, but it is pointless for local counsel to have such a responsibility otherwise. Such a certificate would be an additional Authority Document.⁶⁸ An execution opinion, based on a certificate or a sufficient corporate record, may be provided by a statement such as “**when the Transaction Documents have been signed by [person or officer authorized in such certificate or resolution], they will have been duly executed.**”

In giving an execution opinion, the opinion giver assumes, either implicitly or expressly, that the signature is genuine.⁶⁹ It is a commonly held view that a legal opinion as to genuineness of signatures is inappropriate because the assurance is a matter of fact.⁷⁰

Delivery, generally meaning voluntary transfer of possession or control,⁷¹ is usually not a matter for attention of local counsel. What law governs delivery is not always clear: it could be the law that governs the entity, the law of the place where executed, the law of the place where

⁶⁸ See *Illustrative Opinion Letter*, *infra* para. 1.2. Reliance on a certificate made by appropriate officials of the Borrower is permitted as customary practice. See, e.g., *ABA Business Law Accord Report*, *supra* note 7.

⁶⁹ See *2012 Report*, *supra* note 1, at 234.

⁷⁰ See *id.* at 235. Requests for assurance about genuineness have been related to the outcome in *Fortress Credit Corp. v. Dechert LLP*, 934 N.Y.S.2d 119 (N.Y. App. Div. 2011), discussed in the *2012 Report*, note 1, at 222. Local counsel having responsibility for arranging for document execution may be able to provide some assurance, short of an opinion, that certain described customary actions were taken to verify the identity of a signer, including an affidavit or certificate of the signer. A certificate of the actions taken may be provided to document and support the local counsel's conclusions.

⁷¹ See U.C.C. § 1-201(b)(15), 1 U.L.A. 184 (2012).

delivery is to be effected, or the law chosen to govern the transaction document.⁷² Delivery is most often effected by authorization of the delivering party when certain conditions are met. Unless the act of delivery is in control of local counsel and is governed by the law of the Local Opinion Jurisdiction, it is rarely an appropriate subject for local counsel to opine about.⁷³ Usually, local counsel will assume delivery as well as execution.

3.5 Enforceability.

This subject is discussed in Chapter Two Paragraph 3.5 of the 2012 Report at 240.

When local counsel is requested to review transaction documents governed by the law of the Local Opinion Jurisdiction, the opinion letter ordinarily includes an opinion that the specified transaction documents are enforceable against the Borrower.

This opinion subsumes the foregoing formative opinions, 3.1 through 3.4, which if not intended to be opined about are assumed, as noted in this Supplement Part II Paragraph (1). Although an opinion letter providing an enforceability opinion could omit the separate precursor formative opinions, it is customary practice in real estate financing third-party opinion letters to recite them or expressly assume them.

The language of an enforceability opinion could be read as covering a broad range of legal issues and opining about them implicitly. The following subsections review some of these issues, several of which present concerns unique to local counsel primarily for the reason that documents often are governed in whole or in part by the law of a jurisdiction other than the Local Opinion Jurisdiction. The use of the generic enforceability qualification (this Supplement Paragraph 4.3 and corresponding paragraph in the Illustrative Opinion Letter) may serve to exclude an enforceability opinion on most of these subjects to the extent limited by applicable law unless the assurances provided with that qualification indicate otherwise.

(a) Effect of the Document. An enforceability opinion assures that the transaction documents opined about are sufficient to serve their

⁷² See M. JOHN STERBA, JR., LEGAL OPINION LETTERS: A COMPREHENSIVE GUIDE TO OPINION LETTER PRACTICE, 11-81-11-82 (Supp. 2013).

⁷³ A statement such as “**the Mortgage will be delivered when transfer of possession of it to the Lender is authorized by the Borrower**” sometimes satisfies a request for an opinion about delivery.

fundamental contractual purpose.⁷⁴ This means that an enforceability opinion about a mortgage would indicate that at least as a matter of form the legal elements of a mortgage contract in the Local Opinion Jurisdiction are present. The enforceability opinion should not be read as assuring that a lien is created, but rather that the Mortgage is a contract that can function for that purpose, based on the assumptions expressed or implied and subject to the limitations expressed in the opinion letter. Critical legal foundations for mortgaging are assumed implicitly or explicitly, including that the Borrower has an interest in correctly described property that may be encumbered.⁷⁵

(b) Choice of Law. Transaction documents that are addressed in an opinion letter may contain provisions choosing the law of a jurisdiction other than the Local Opinion Jurisdiction to govern certain contractual aspects of the documents. Many counsel do not consider choice of law issues unless an express opinion about the effectiveness of choice of law provisions is specifically requested⁷⁶ and given in addition to the enforceability opinion. The literal language of an enforceability opinion could be read to include implicitly an opinion as to the effectiveness of choice of law provisions in the transaction documents.

(1) Unless only one jurisdiction's law is intended to govern all of the transaction documents, enforceability of the choice of law provisions in the documents is in question. It is common in a transaction involving local counsel that a Mortgage, which may be governed by local law, secures a debt instrument governed by the law of another jurisdiction. There are many variables, including bifurcated choice of law selecting the law of the Local Opinion Jurisdiction to govern creation of a Mortgage and remedial aspects as to the security property, but selecting the law of another jurisdiction as to covenants and agreements contained in it or secured by it.

There is a division of view as to whether and to what extent choice of law is addressed as an implied component of an enforceability

⁷⁴ See 2012 Report, *supra* note 1, at 241.

⁷⁵ See *Illustrative Opinion Letter*, *infra* para. 2.1.

⁷⁶ Specific choice of law issues pertaining to express choice of law opinions are discussed in Paragraph 3.9 of both the 2012 Report and in this Supplement. See 2012 Report, *supra* note 1, at 245–48. A limitation excluding a choice of law opinion is provided in *Illustrative Opinion Letter* Paragraph 4.6(v). See *Illustrative Opinion Letter*, *infra* para. 4.6(v).

opinion.⁷⁷ There is greater accord that if an implicit choice of law opinion is not intended, the opinion giver should provide an express limitation to the enforceability opinion such as that suggested in the 2012 Report at 247. If an implicit opinion is not precluded by such a limitation, an assumption such as that stated in the 2012 Report at 248 would be included where applicable law supports it.

(2) When the law of the Local Opinion Jurisdiction is chosen to govern certain but not all aspects of the transaction documents, and the opinion giver is satisfied that selection of the law of the Local Opinion Jurisdiction will be honored by the courts of the Local Opinion Jurisdiction, a more explicitly limited form of the enforceability opinion would be:

To the extent the law of the State applies, giving effect to the choice of law provisions in the Transaction Documents choosing the law of the State but excluding choice of law rules, the Opinion Transaction Documents . . . are enforceable

Such a statement would be appropriate also when an express choice of law opinion will be provided.

(3) When transaction documents provide that they are to be governed by the law of a jurisdiction other than the Local Opinion Jurisdiction and a choice of law opinion is disclaimed, requests are sometimes made that an enforceability opinion be given **as if the law of the law of the State [Local Opinion Jurisdiction] is the same as that of [chosen jurisdiction]**, or to state **that if a court of competent jurisdiction would rule that the law of the State [Local Opinion Jurisdiction] should**

⁷⁷ The 2012 Report expressed the view that a choice of law opinion should not be implicit in the enforceability opinion, but cautioned the opinion giver to address the subject either by express exclusion or by an assumption or limitation. *See id.* at 241, 246. The Accord (*see supra* note 7, § 10(d) and Commentary ¶ 10.5.) posited that an enforceability opinion inherently included an opinion that a governing law provision choosing the law of the Local Opinion Jurisdiction will be given effect under the choice of law rules of that jurisdiction, but did not include an opinion as to what law governs if the transaction document chooses the law of another jurisdiction to apply, or makes no choice at all. The Real Estate Opinion Guidelines, *see supra* note 15 at 257, say that a “general enforceability” opinion includes choice of law but that choice of law coverage often is disclaimed and should be separately requested and stated. The 1998 TriBar Opinion Committee, in *Third-Party “Closing” Opinions*, 53 BUS. LAW. 591, 634–36 (1998), takes a similar approach, that choice of law coverage is implicit in an enforceability opinion, and it notes specific limitations on the enforceability of a choice of law provision.

govern the Transaction Documents, notwithstanding the choice of law of [chosen jurisdiction], the Opinion Transaction Documents are enforceable.

Where either is appropriate, the latter formulation is the better of the two. In order to give an enforceability opinion based on such a hypothesis, the opinion giver would need to undertake a thorough review of the transaction documents as if governed exclusively by Local Opinion Jurisdiction law, expanding the scope of review beyond the matters otherwise stated in the transaction documents to be governed by that law. Thus, a request for an enforceability opinion based upon one of the foregoing hypotheses may significantly increase the amount of work needed to issue the opinion letter and, therefore, the cost. Opinion parties should balance the benefit of an enforceability opinion based on the foregoing hypotheses against the increased cost that may be required to provide such an opinion.

Requests sometimes are framed for the opinion giver to assume that the law of the chosen jurisdiction is the same as the law of the Local Opinion Jurisdiction for purposes of the enforceability opinion. This is an improper assumption. The purpose of it can be met by the language suggested above in this subparagraph (3).

(c) Usury. The 2012 Report, at Chapter Two Paragraph 3.5(d), observes that there may be implicit in the language of an enforceability opinion an opinion that interest provided for in the transaction documents addressed in the opinion letter is legal (that is, an enforceable obligation under applicable law). Accordingly, if coverage of usury is not intended, an express exception to the enforceability opinion statement should be made.⁷⁸

To the extent a usury opinion were to be given implicitly, it would be given under the Law of the Local Opinion Jurisdiction. When the transaction documents apply the law of a jurisdiction other than the Local Opinion Jurisdiction for such purpose, the implicitness principle breaks down. Clearly, the local counsel opinion giver would not implicitly opine about the law of another jurisdiction. In addition, in many instances, the local counsel opinion giver does not purport to opine about the instrument creating the indebtedness for purposes of providing its enforceability opinion. As noted in Chapter Two Paragraph 1.4(c) of the 2012 Report, even if the instrument was reviewed, if it were not to be the

⁷⁸ See *Illustrative Opinion Letter*, *infra* para. 4.6(w).

subject of an express opinion, the opinion recipient should not infer that any opinions on that instrument are implied by the opinion letter.

This Supplement questions whether any usury opinion should be implied when the law chosen to govern the instrument is not that of the Local Opinion Jurisdiction, and advances the proposition that none should be. Otherwise, the enforceability opinion could be read either (i) as effectively an implicit “backdoor” choice of law opinion (that the interest rate provisions will be given effect in the Local Opinion Jurisdiction) or (ii) as if the law of the Local Opinion Jurisdiction applied notwithstanding the choice of law. The former opinion is often excluded (see Paragraph 3.5(b) above), but neither opinion should be implicit as to usury in an enforceability opinion; each should be expressly addressed if at all. Although this view seems to be fully justifiable, no known reports or treatises discuss the point. The rule of thumb ought to be: The concept of an implicit usury opinion should be applicable, if at all, only if the law of the Local Opinion Jurisdiction is selected to apply to the interest obligation; otherwise, there is no opinion on usury implicit in an enforceability opinion.

The more certain practice is that usury issues should be dealt with expressly in the opinion letter to avoid doubt as to implicitness, and limited as necessary under the law of the Local Opinion Jurisdiction, as noted in Chapter Two Paragraph 3.10 of the 2012 Report and of this Part III. In this regard, assurances as to foreclosure of the mortgage and to repayment of the principal and interest under the evidence of indebtedness, both contained in Paragraph 4.3 of the Illustrative Opinion Letter, may be affected by the law of usury of the Local Opinion Jurisdiction. The assurances are, in effect, forms of an express opinion. When they are given, the effect of usury should be considered and appropriate limitations provided.

Note that an opinion on no-violation-of-law (see Paragraph 3.8 of this Part III) may also be read as including an implicit usury opinion, as well as on the other aspects of economic and remedial rights discussed in subparagraph (d) following.

(d) Economic Rights and Obligations. The enforceability opinion may also cover economic and remedial rights in addition to interest and usury, including interest on interest (compounding), capitalization of unpaid interest, late charges, default interest, prepayment restriction, prepayment fees, springing recourse, lock box and cash management provisions, and assignment of leases and rents. Many of these would require a limitation to the enforceability opinion unless the document is

drafted to comply with applicable law. When the transaction documents apply the law of a jurisdiction other than the Local Opinion Jurisdiction to these rights and obligations, implicit opinions on those subjects nevertheless could be understood to apply the law of the Local Opinion Jurisdiction. Whether or not this is intended, the implied opinions should be limited as necessary under the law of the Local Opinion Jurisdiction, as noted in this Supplement Part IV Limitations, or disclaimed expressly.

Express opinions on any of these subjects are sometimes requested. One example of this is an opinion as to the enforceability of provisions for assignment of leases and rents. Such assignments are specific to the law of the Local Opinion Jurisdiction, and when drafted without knowledge as to the law of the Local Opinion Jurisdiction may not be enforceable. This subject is further discussed in this Supplement Paragraph 3.6(a), Form of Documents. If an express opinion on assignment of leases and rents is provided, the limitation excluding such an opinion appearing in Paragraph 4.5(e) of the Illustrative Opinion Letter should be modified.

(e) Title. Customary practice is well established that no opinion that the obligor has title or interest in collateral is implied in an enforceability opinion, and an assumption as to title is implied. It remains customary, albeit unnecessary, however, for an assumption to be stated that the grantor of a lien or security interest has title or rights to the collateral, as in Illustrative Opinion Letter Paragraph 2.1(b).

(f) Legal Compliance; Governmental Approvals, Orders. The enforceability opinion should not be read as providing assurance that the Borrower or the collateral is in compliance with laws, court orders, or other external matters although such an assurance could be implied in the language of an over-broadly drafted “no-violation-of-law” opinion (see Paragraph 3.8 of this Part III). The enforceability opinion may imply, however, that approvals of governmental units or agencies or orders of courts, the absence of which would negate the enforceability of the loan documents that are the subject of the opinion, are not required or have been obtained.⁷⁹ The extent and applicability of such an implicit opinion for local counsel opinion letters should be further considered.

In many transactions, the Borrower is an entity about which there is no reason to question whether governmental approval is required.

⁷⁹ See ROBERT A. THOMPSON, REAL ESTATE OPINION LETTER PRACTICE § 4.16 at 143 (3d ed. 2014).

Matters of status, power, and authorization often are assumed, and the opinions expressed often are limited to the content of the transaction documents themselves. However, Borrowers involved in certain business activities that are comprehensively regulated by a state or the federal government may be required to obtain approvals or orders to incur debt and/or encumber their assets. Local counsel opinion letters nevertheless are provided in many instances without specific regard to the Borrower's business activities, which may not be evident to local counsel, or without specific regard to external regulation of the Borrower.

This Supplement questions whether any opinion as to governmental approvals, beyond the most fundamental proposition that as a general matter an owner of an interest in real property may borrow money and agree to encumber its asset in the Local Opinion Jurisdiction without obtaining approvals from governmental authorities, courts, or other third persons, should be implied by an enforceability opinion given by local counsel, and it advances the proposition that none should be. The subject of whether the Borrower about which the enforceability opinion is provided needs such approvals should be specifically addressed, if at all, based on a specific request. Paragraph 3.13 of this Part III discusses such an express opinion.

Although this view seems to be justifiable, no known reports or treatises have addressed the point. Some would suggest that it is reasonable to imply (or express) an assumption for local counsel opinions, such as: **“the Borrower is a general business entity of a type that is not regulated by governmental authority in a manner that restricts its ability to alienate or encumber its property to secure indebtedness [or to enter into the Transaction Documents].”** When there is a specific purpose to a request for the assurance such an opinion would provide, it should be specified in a request with the reason for it. Until this view is recognized practice, however, the more certain practice will be either to express an assumption such as that suggested in this paragraph or to state the express limitation provided below in boldface to avoid doubt as to implicitness.

When the opinion giver has not undertaken due diligence required to ascertain the presence or absence of potential unenforceability because of the absence of governmental approvals or court orders, the opinion giver will avoid any unintended implicit opinion by providing an express limitation of inquiry either in that portion of the opinion letter defining the scope of review or the scope of the enforceability opinion itself, or as

a limitation (as set forth in this Supplement, Part IV and Illustrative Opinion Letter Paragraph 4.4(b)), such as:

We express no opinion as to any consent, approval, authorization, or other action by, or filing with, any governmental agency or court required as a condition to the Borrower's entering into and delivering the Transaction Documents or performing its obligations thereunder.

(g) Remedies. Remedial rights provided in the transaction documents may be inherently opined about by the enforceability opinion, although the level of comfort intended is sometimes debated. Customary practice in real estate finance opinions is to provide a broad qualification about the extent of remedies available (see the generic enforceability qualification, Illustrative Opinion Letter Paragraph 4.3) that limits the effect of the enforceability opinion. The assurances provided to the generic enforceability qualification in Illustrative Opinion Letter Paragraph 4.3 should be given attention so as not to assure inadvertently the availability of remedies in a manner not available under applicable law. Additional limitations on the available remedies dictated by specific state law should be considered, as discussed in the 2012 Report, Chapter Two Paragraph 4.4(a) at 255. This subject is further discussed in Paragraph 3.14 below.

3.6 Form of Documents.

This subject is discussed in Chapter Two Paragraph 3.6 of the 2012 Report at 242.

Local counsel is often asked to opine on matters in addition to the contractual enforceability of the Mortgage and other transaction documents. One such request relates to creation of a lien by means of the Mortgage. By customary practice in real estate security interest opinion letters, a responsive opinion addresses only the sufficiency of the form of the Mortgage to grant a lien or security interest. See Illustrative Opinion Letter Paragraph 3.6. As a corollary, it is not customary practice to provide an opinion that the Mortgage creates a lien or security interest, as that conclusion is insured by title insurance in most commercial real estate financing transactions. The opinion recipient may also request assurance as to more technical matters, such as that the document is suitable under applicable law for recordation or filing. As this is equally insured by title insurance, the value of such opinions may not be worth their time and cost.

The form-of-documents opinion, standing alone, does not provide assurance regarding the contractual enforceability of the documents encompassed within it. This opinion may be suitable in situations when an enforceability opinion is not being given. It is not itself an enforceability opinion and is not dependent on assumptions as to matters such as contract formation and title to property, or further conditions such as recording requirements (e.g., recordation if a legal condition for creation of a lien) and enforceability (e.g., appointment of a receiver).

(a) Creation. The determination as to whether or not the form of a document is sufficient to create⁸⁰ a lien on real property is state specific and involves an analysis of requirements established under law of the Local Opinion Jurisdiction. When title insurance is issued in a loan transaction, an opinion on this subject is unnecessary.

In its basic form, a form-of-documents opinion⁸¹ addresses only whether, on its face, the form of the Mortgage reviewed by the opinion giver includes those provisions that are required under applicable law of the Local Opinion Jurisdiction for the creation of a security interest (lien or other security interest recognized under Local Opinion Jurisdiction law) in the real estate encumbered by the Mortgage. For purposes of the

⁸⁰ Requests are sometimes made for an opinion that the document “creates” a lien on real property. Such an opinion would be based entirely on (i) assumptions such as those shown in the Illustrative Opinion Letter that include title in the mortgagor (assumption (b)), sufficiency and accuracy of description of collateral (assumption (h)), and that the Mortgage is properly recorded (assumption (g)); (ii) matters of the mortgagor’s existence, power, authorization, and execution and delivery that are either assumed or opined about; and (iii) other specific assumptions and limitations relevant in the Local Opinion Jurisdiction. *See 2012 Report, supra* note 1, at 264. Because it is dependent on assumptions that effectively assume away the opinion, such an opinion would be of little value to the recipient even when title insurance is not obtained. In addition, it is effectively a title opinion, which real estate finance transaction opinions uniformly disclaim. Although a “creates” opinion is sometimes given as to personal property security interests to which the U.C.C., with its codified rules on creation, applies, it is regarded as highly irregular in real estate secured transactions and should not be requested. The form-of-documents language provided in the Illustrative Opinion Letter is widely accepted and is customary practice in such transactions.

⁸¹ *See Illustrative Opinion Letter, infra* para. 3.6. The term “Real Property” would have been defined in a transaction document or in the opinion letter to mean specifically identified property. *See supra* Part III. The opinion giver will need to determine whether a definition in a transaction document comports with the law of the Local Opinion Jurisdiction that defines real property. *See supra* Part III. If the definition is provided in the opinion letter, reference would be made to such property as is defined under the law of the Local Opinion Jurisdiction as “real property.” *See supra* Part III.

form-of-documents opinion, the document reviewed need not be executed or acknowledged, only complete in form.

When the Mortgage provides its own definition of Real Property or incorporates a definition from another transaction document, that term may include property that is not real property under applicable law. In order to avoid doubt and inadvertent opinions, definitional reference may be made to “... **property described in the Mortgage that is real property under Law of the State** [*Local Opinion Jurisdiction*] (**“Real Property”**) . . . ,”⁸² or wording to that effect.

Two specific opinion topics deserve mention: assignments of leases and rents and security agreements affecting both real estate and non-real estate collateral.

(i) Assignments of Leases and Rents.

If the form-of-documents opinion is to address expressly an assignment of leases and rents, the local counsel opinion giver should confirm that the applicable provisions of the Mortgage or, if applicable, a separate instrument, assigning leases and rents include provisions that satisfy applicable state law providing for assignment of leases and rents. The form-of-documents opinion given with respect to an assignment of leases and rents means that the relevant document incorporates those provisions that, pursuant to applicable law, are required to assign the leases and rents.

Often, assignment provisions appear in a Mortgage as well as a separate assignment document. One, either (both), or neither may be effective under applicable law. The form-of-documents opinion should address multiple instruments separately, and opinions addressing each may be required. Provisions in separate instruments often differ.

Determination whether a document is sufficient to “assign” leases and rents under applicable law is often more problematic than determining whether a Mortgage is sufficient to create a lien on real property. The precise formulation of an assignment of leases and rents to assign leases and rents may vary from state to state, and the following formulations of an opinion as to the effectiveness of such assignments are provided for illustrative purposes only. Two common state specific issues merit mention:

⁸² As the opinion requesting and giving process is itself a set of communications between giver and recipient, the opinion recipient (or lead counsel) may have further inquiry about what difference there is between a transaction document definition and the Local Opinion Jurisdiction’s law. The same may be true for other opinion statements that limit the scope of a request or modify terminology.

(y) Assignments of leases and rents may often be stated to be “absolute” assignments with a terminable license in favor of the assignor to collect the rents, rather than assignments for collateral purposes (as security), a more limited purpose for which an assignment of rents may be made in some jurisdictions. The language utilized in the opinion formulations addressing assignments of leases and rents does not distinguish between absolute and security assignments of the leases and rents. The local counsel opinion giver should confirm whether, under applicable state law, absolute assignments (even with a terminable license back to the assignor) are effective as absolute assignments, or only effective as security assignments,⁸³ or even whether they are effective at all (i.e., recognized or enforceable as security assignments). In many assignment provisions, assignment as security is expressly disclaimed, making effectiveness (and enforceability) of the absolute assignment even less likely when, as is often the case, the law of the Local Opinion Jurisdiction recognizes only security assignments.

(z) An assignment of leases independent of ownership of the fee is ineffective in some jurisdictions, even though an assignment of rents under leases may be effective. Even when an opinion that the assignment as to rents is enforceable or that the instrument is in form sufficient to create an assignment of rents can be given, an opinion that the form of the document is sufficient to assign the leases as provided in its terms may not be possible in those jurisdictions.

The Illustrative Opinion Letter in Paragraph 4.5(e) provides that opinions expressed in the opinion letter are subject to applicable law of the Local Opinion Jurisdiction that limit or affect the enforceability of provisions purporting to assign the rents, issues, and profits of the collateral. This qualification would apply to the enforceability opinion, but it would conflict with an express opinion on the assignment instrument. If this opinion is given, the limitation will require modification.

If the opinion letter addresses assignment of leases and rents expressly, the basic formulation of the form-of-documents opinion should be modified or supplemented. When the Mortgage includes an assignment of leases and rents, the text might read as follows:

⁸³ An opinion giver may add a qualification to the following effect: “**We express no opinion as to whether the language providing for any assignment of leases and rents contained in the Transaction Documents is in form to create an assignment other than for collateral purposes. Among other things, we express no opinion that any assignment of leases and rents included in the Loan Documents is in form to be enforceable or effective to assign the leases and rents absolutely.**”

The Mortgage is in form sufficient to create (i) a lien on all right, title, and interest of the Borrower in and to the Real Property [, including the Leases and Rents,] and (ii) an assignment of all right, title and interest of the Borrower in the [Leases and] Rents [for collateral purposes].⁸⁴

Inclusion of the bracketed phrase “including the Leases and Rents” indicates that defined leases and rents are real property under Local Opinion Jurisdiction law. This is state specific law, and although the law in most states will treat leases and rents of real estate as real property, this inclusion ought not to be pro forma. In addition, if the Mortgage purports to create a security interest in leases and rents that are not considered real property, such as in some jurisdictions, hotel room rate proceeds, the opinion giver should be careful to distinguish what leases and rents are covered in this opinion statement.

If there is a separate instrument for assignment of leases and rents (or analogous document), the local counsel opinion giver, depending on applicable state law, may modify the formulation to incorporate a reference to the separate assignment of leases and rents document as follows:

The Assignment of Leases and Rents is in form sufficient to assign [, as security,] all right, title, and interest of the Borrower in the [Leases and] Rents [for collateral purposes].

(ii) Security Agreement.

Similar to assignments of leases and rents, a security agreement relating to collateral other than real estate is often provided for in a Mortgage as well as in a separate security agreement or in a comprehensive loan agreement. Unless the law applicable to the creation or perfection of the security interest is the law of the Local Opinion Jurisdiction, an opinion on the separate security agreement should not be required of local counsel.

(b) Suitability for Recording/Filing. A form-of-documents opinion often includes language assuring that the document is in form suitable for recording or filing in the Local Opinion Jurisdiction. The opinion addresses only whether the documents are in form sufficient to satisfy the state law requirements for recordation or filing in the appropriate

⁸⁴ As with the term Real Property, this formulation presumes that the term Leases and Rents is defined in the transaction documents or the opinion letter, with due regard for possible disparities between a defined term and applicable law.

recording office designated under state law as the office to record or file the relevant document to provide record notice of such document, and in some jurisdictions, as a prerequisite for a valid mortgage. The opinion on suitability for recording is not intended to opine on the effect of recording, discussed in this Part III Paragraph 3.12, or on the act of acknowledgment itself.

When this opinion is given, it may read simply:

The Mortgage is in form sufficient to permit recordation under the Law of the State.

The need for this assurance in an opinion delivered at transaction closing is questionable because recordation is a usual closing requirement and is often managed by a title insurer. A request for this opinion is a request to approve the form of document in advance, which is a misuse of the opinion process to shift the burden of document preparation and compliance onto the Borrower's local counsel.

This formulation could be read to subsume an opinion that an appropriate form of acknowledgment if required under law of the Local Opinion Jurisdiction for recordation is provided in the Mortgage. If this assurance is not intended, the opinion statement would be framed in a more limited manner.

Although this is a simple statement, it presents several troublesome issues. First, when the transaction documents reviewed for purposes of the opinion letter are unexecuted, it is truly a "form" of documents opinion. This would necessitate evaluating the existence and sufficiency of all the elements that recordability may require under applicable State law, such as whether margins, font size, and length of paper are sufficient; whether provision is made for the proper number of witnesses; whether names are required to appear in typed or printed form under signatures; whether the form of acknowledgment provided is acceptable in the recording office where recording should be made; whether any required identification or certification of preparation is provided; whether a legal description of the property and information related to it is provided (without consideration of its correctness); and whether other formalities are met. Even so, the opinion does not assure that actions required to be taken outside of the "four corners" of the relevant documents have been taken.⁸⁵

⁸⁵ For example, if applicable law required documents to be signed utilizing a specified color of ink, the form suitable for a recordation opinion as to unexecuted documents would not address such a requirement.

When the opinion letter recites that executed documents have been reviewed for purposes of the opinions expressed, the opinion would require satisfaction not only as to matters of form but also as to how the documents have been executed. In this situation, the suitability for a recording opinion may be read as a different opinion entirely—that the documents as executed are in recordable form. Such an opinion could not be provided without examining the original executed documents to be recorded.⁸⁶ Unless local counsel has been engaged to supervise or verify execution of the documents or to record them, this review is undertaken more appropriately on the opinion recipient's behalf rather than in representing a Borrower client and ordinarily it is addressed by title insurance.

Second, the foregoing formulation addresses requirements for recording that are applicable on a statewide basis. There may be requirements imposed by local law or local custom and practice that are not applicable on a statewide basis and that may be difficult to ascertain in any reliable manner. It is customary to exclude local law generally from the law covered in an opinion letter.⁸⁷ This limitation would exclude an opinion that the documents are in recordable form to the extent that the form of such documents does not comport with local law.⁸⁸

If the opinion drafting process is used to create a dialogue between the opinion giver and the recipient about the possible effect of local law on recordability, even though local law is not implicitly addressed and is expressly excluded, the opinion giver might present a draft of the form-of-documents opinion that raises the issue in a manner such as:

We note the possibility that recording offices in this State may apply Local Law, and no opinion is provided in this Paragraph __ [form-of-documents opinion] that the Mortgage is in form suitable, or will be accepted, for, recording by reason of Local Law.

Use of the opinion drafting process to provide this information (accepting for the purpose of discussion only that the limitation of the opinion statement reflects an acceptable limitation of diligence in the first place) is not efficient, and the effect of such a disclosure may not indicate the true nature of a problem that is a matter of local practice

⁸⁶ See *supra* Part I.B. for comment about review of executed documents.

⁸⁷ See *Illustrative Opinion Letter*, *infra* para. 4.6(g).

⁸⁸ Local law is excluded from the opinion letter (see *Illustrative Opinion Letter*, *infra* para. 4.6(g)). No opinion is expressed about local customs and practices, and no limitation needs to be provided concerning them.

outside the definition of “local law” (Illustrative Opinion Letter Paragraph 4.6(g) noted above). The recipient would be better served by obtaining clear guidance on recordability from its own counsel, from public authorities, or from a title insurer on which in most real estate financing transactions it will rely for recordation. As an alternative to giving a form-of-documents opinion and to address possible local variations, the parties might consider pre-review of documents intended for recording by the title insurer or local recording office to confirm that such documentation will be accepted for recording by the applicable recording office.

Third, the opinion is rarely stated as simply as in the example first provided. It is sometimes expanded to provide assurance that recordation of the Mortgage is sufficient to perfect a security interest in fixtures and sometimes in personal property collateral. Illustrative Opinion Letter Paragraph 3.6 provides that the Mortgage is in form sufficient to create a lien on real property, which will include fixtures to the extent they are real property collateral under the law of the Local Opinion Jurisdiction. It also opines that the document serving as a security agreement is in a form sufficient to grant a security interest in certain personal property collateral. Neither the 2012 Report⁸⁹ nor this Supplement addresses opinions as to personal property security. Expanding the opinion beyond collateral that is “real estate” as that term is defined under the law of the Local Opinion Jurisdiction should be independently considered.⁹⁰ Nevertheless, a specific opinion to the effect that the Mortgage is in a form sufficient to be recorded as a U.C.C. fixture filing is sometimes requested. When the requirements of U.C.C. section 9-502 are met by the Mortgage, such an opinion statement might read:

Upon recordation in the Recording Office [a term defined elsewhere in the opinion letter], the Mortgage is in form sufficient to serve as a U.C.C. fixture financing statement with respect to that portion of the Collateral that consists of goods that are or are to become fixtures under the real property law of the State.

Fourth, where acknowledgment before a notary public is required for recordation, an opinion that the instrument is suitable for recordation can

⁸⁹ See *id.* at 243.

⁹⁰ A separate report on U.C.C. collateral will be published. For a general discussion of personal property issues in a real estate transaction, see Philip H. Ebling & Steven O. Weise, *What A Dirt Lawyer Needs to Know About New Article 9 of the U.C.C.*, 37 REAL PROP. PROB. & TR. J. 191 (2002).

be read to include an opinion that the form of acknowledgment that is used in the transaction document and that the actions of acknowledgment are sufficient under the law of the Local Opinion Jurisdiction.

Forms of acknowledgment differ from state to state, and acknowledgments are frequently taken outside of the state where the local counsel is located. In many states, the acknowledgment of recordable documents may be either in the form specified by the state where the document will be recorded or in the form specified by the state where the acknowledgment is taken. If the document uses the form where the instrument is to be recorded, which presumably will be the local counsel's state, local counsel can easily determine that the acknowledgment is in the correct form. However, if the document uses a different form, the local counsel is not expected to know whether it is in form required or permitted by the state where the acknowledgment is taken. If the form of acknowledgment used is not that of the state where the instrument is to be recorded (the Local Opinion Jurisdiction) but the law of the Local Opinion Jurisdiction accepts acknowledgments that are valid where taken, an assumption should be added to the opinion letter as suggested in this Supplement Part II Assumptions Paragraph (3). A standalone assumption would read:

We assume that the form of acknowledgment in the Mortgage and actions taken with respect to it comply with the requirements of the jurisdiction where acknowledged.⁹¹

3.7 No Breach or Violation of Organizational Documents or Other Obligations.

This subject is discussed in Chapter Two Paragraph 3.7 of the 2012 Report at 243.

Opinion letters often include opinions to the effect that, in entering into the loan transaction, the Borrower does not violate its internal organizational documents or certain obligations to others. The example provided in Illustrative Opinion Letter Paragraph 3.7 is appropriate for counsel for a party organized in the Local Opinion Jurisdiction. However, even when the Borrower is formed under the law of the Local Opinion Jurisdiction, unless local counsel is regularly counsel for the

⁹¹ This assumption may be unnecessary if the Local Opinion Jurisdiction has adopted, and the acknowledgment complies with, the Uniform Recognition of Acknowledgments Act or the Revised Uniform Law on Notarial Acts.

Borrower, lead counsel would more appropriately provide this opinion as it relates to obligations to others.

3.8 No Violation of Law.

This subject is discussed in Chapter Two Paragraph 3.8 of the 2012 Report at 245. See also this Supplement Paragraphs 3.5(c) and 3.10 regarding usury. Considerations discussed in Paragraph 3.13 relating to an opinion that no governmental approvals are required are relevant to the no violation of law opinion.

3.9 Choice of Law.

This subject is discussed in Chapter Two Paragraph 3.9 of the 2012 Report at 245.

The 2012 Report at 241 and 247 posits that an opinion on choice of law should not, but could, be implied in an enforceability opinion, and that it should be addressed specifically. The 2012 Report, Chapter Two Part III, Paragraph 3.9 and this Supplement, in this Part III, Paragraph 3.5(b), describe how the opinion giver might address choice of law in regard to the enforceability opinion.

To make clear that no choice of law opinion is intended, the opinion letter would state:

This Opinion Letter does not express any opinion on the enforceability of choice of law provisions in the Transaction Documents.⁹²

This statement should appear in the opinion letter's section on Limitations.

If an express opinion on the effectiveness of the choice of law provision is to be rendered, an express opinion might read, for example:

A federal court sitting in the State and the State courts in the State, applying the conflict of law rules of the State [would] [should]⁹³ give

⁹² See *Illustrative Opinion Letter*, *infra* para. 4.6(v). This limitation is found in the 2012 Illustrative Language Paragraph 3.9 for illustrative purposes, but is more appropriately stated as a limitation. See *2012 Report*, *supra* note 1, at 245–48. In this Supplement Part III Paragraph 3.5(b), a limitation accompanying the enforceability opinion language is also provided. See *supra* Part III.3.5(b).

⁹³ Some opinion givers prefer the use of “should” when referring to likely actions of a court; some opinion recipients prefer the use of “would.” Practitioners differ on whether the two words have different meanings in the context of such an opinion. Whichever word is used, the opinion almost always will be given in reliance on an assumption such as the assumption provided in *2012 Report*, *supra* note 1, at 247–48. Moreover, there is authority for the position that such an opinion has the same meaning whether stated as

effect to the choice of law provisions contained in Paragraph [] of the Mortgage.

Such an opinion, whether expressed or implied, needs to be accompanied by an assumption that reflects the Local Opinion Jurisdiction's choice of law principles supporting it.⁹⁴

The U.C.C. contains a choice of law rule⁹⁵ that permits parties to choose as the law governing their agreement the law of any state that "bears a reasonable relationship" to the transaction, subject to certain specified limitations as to subject matter. This U.C.C. provision provides an independent basis for choice of law. A single Mortgage may be governed in part by this provision and in other parts by other applicable law.

3.10 Usury.

This subject is discussed in Chapter Two Paragraph 3.10 of the 2012 Report at 248 and 242. See also this Supplement Part III Paragraph 3.5(c).

An opinion on usury may be implied by the language of an enforceability opinion and of a no-violation-of-law opinion, so if usury law is to be excluded from coverage in the opinion letter, as may be customary practice in certain states, that exclusion should be disclosed expressly in the opinion letter. An implied usury opinion covers all consequences of violating the applicable interest regulation law, including voidability of the obligation, loss of interest, or other penalties. Illustrative Opinion Letter Paragraph 3.10 is framed as an exclusion to the opinions expressed or implied (enforceability, no-violation-of-law), and would be more appropriately stated in that portion of an opinion letter that lists transaction-related qualifications, such as in Illustrative Opinion Letter Paragraph 4.4.

"would" or "should." See *Real Estate Opinion Guidelines*, *supra* note 15 § 3.5, at 250. Regardless of the choice of words, as discussed in the *2012 Report*, opinions letters are expressions of professional judgment and not guarantees of particular results. See *2012 Report*, *supra* note 1, at 259.

⁹⁴ See *Illustrative Opinion Letter*, *infra* para. 2.1(u). Choice of law opinions based on Restatement of Conflict of Laws, including assumptions such as this, are discussed in TriBar Opinion Committee, *Supplemental Report: Opinions on Chosen-Law Provisions under the Restatement of Conflict of Laws*, 68 BUS. LAW. 1161 (Aug. 2013).

⁹⁵ U.C.C. § 1-301 (formerly § 1-105) (amended 2008), 1 U.L.A. 57 (2008).

A separate usury opinion may be provided or requested, often identifying in detail some of the specific charges provided for in the transaction document. An example is:

The payment of any interest as provided in the Transaction Documents will not violate the usury laws or laws regulating the use or forbearance of money of the State.

The approach to usury in opinion letters, including the various assumptions and limitations and the diligence necessary to support a usury opinion in a specific situation, is state-specific. Where called for under the law in the Local Opinion Jurisdiction, the enforceability or express usury opinion may need to be qualified by reference to the effect of rate limitations, adjustments of rate, criminal maximums, compounding, the identity of the holder of the debt, and other issues uniquely involved in the transaction. The limitations provided in Illustrative Opinion Letter Paragraph 4.5(c) and Paragraph 4.6(w) address some but not all of these subjects.

The language of the sample opinion above, referring simply to “interest,” requires the opinion giver to evaluate what may be considered interest under the law of the Local Opinion Jurisdiction. In many jurisdictions, a wide variety of charges may be characterized as interest: a higher rate of interest in default, late charges, loan fees, closing costs, premiums for title insurance policies, appraisal fees, and other loan transaction fees and costs, even though they are not specifically so designated as interest. The limitation provided in Illustrative Opinion Letter Paragraph 4.5(c) would qualify the opinion as to certain of these components, but not all. For example, if default interest is a penalty, the opinion would be limited as to the penalty by Illustrative Opinion Letter 4.5(c). If default interest is not a penalty, this qualification would not apply to it. The opinion giver would want to sort through this in giving an express or an implied usury opinion, or seek to limit “interest” referred to in the opinion to the stated rate, or, preferably, provide an express limitation as to usury as suggested in the 2012 Report Chapter Two Paragraph 4.4(a).⁹⁶

3.11 Legal Proceedings Confirmation.

This subject is discussed in Chapter Two Paragraph 3.11 of the 2012 Report at 249.

⁹⁶ See 2012 Report, *supra* note 1, at 255.

This subject is discussed extensively in the 2012 Report. The role of the opinion giver determines whether this is an appropriate subject to be addressed at all. In local counsel engagements limited to the providing of a local counsel opinion, it is almost always unnecessary and overly burdensome. A confirmation that “**we do not represent Borrower in any litigation**” is a tempting quick solution, but as the 2012 Report notes, actually requires due diligence. A knowledge-based confirmation provides little benefit to a recipient and is increasingly of concern to opinion givers. There is no completely satisfactory rule of thumb, but local counsel whose role is to provide an opinion about real estate security and who otherwise has no lawyer-client relationship with the Borrower should not be expected to provide this confirmation. If there is a lawyer-client relationship beyond the opinion letter engagement, counsel should consider the guidance of the 2012 Report in responding to this request.

Additional Opinions

In the following paragraphs, this Supplement presents certain opinion subjects that may be encountered by local counsel in addition to those discussed in the 2012 Report. This discussion does not establish these opinion subjects as matters of customary practice or establish a norm that these should be requested or given. If some of these opinion subjects would be otherwise assumed, the opinion letter will require adjustment so that an opinion provided is not at the same time assumed away.

3.12 Recording and its Effect.

In addition to the opinion on recordability, discussed in Paragraph 3.6(b) above, an opinion as to the effect of the recording of the Mortgage or a financing statement may be requested. In transactions in which title insurance is provided, this opinion is unnecessary. It is discussed here because the universe of local counsel opinion letters in real estate security interests is not confined to transactions in which title insurance is provided. An example of such an opinion is:

The recording of the Mortgage in the Recording Office [*defined elsewhere in the opinion letter*] is the only action, recording, or filing necessary to publish record [or constructive] notice and to establish of record the rights of the parties under the Mortgage in real

property, including, without limitation, leases and rents, and the goods described therein that are or are to become fixtures.⁹⁷

Such an opinion would need, of course, to consider conditions of applicable law for establishing effective notice of record.

This opinion statement does not address more than notice of record as a purpose of recording or filing. It does not provide assurance that Local Opinion Jurisdiction requirements about recording to create the lien or real estate security interest or to fulfill requirements or functions other than providing notice of record have been addressed. See Paragraph 3.6(a) above as to the creation of the security interest in collateral that is real estate.

Variations on the opinion as formulated above are encountered. One example is:

The recording of the Mortgage in the Recording Office will perfect the lien and security interest of the [Lender] in that property described in the Mortgage that is real property under the Law of the State [, including fixtures and leases and rents].

The term “perfect” can be, but usually is not, applied to a real estate lien. The term is more customarily applied to U.C.C. personal property secured transactions and associated with bankruptcy principles than with consensual real estate liens. For this reason, the preferred form of opinion language is that first provided in this Paragraph 3.12.⁹⁸ An opinion about the effect of recording—providing constructive notice of record or perfection—should be unnecessary if title insurance is being

⁹⁷ In the *2012 Report*, *supra* note 1, at 243, discussion of this example opinion concluded that “Assumption . . . (g) . . . (which assumes that documents have been or will be recorded in the future) would be inappropriate as written if this opinion is given.” This Supplement notes that the opinion example is not intended to assure that the relevant document has been or will be recorded or filed, but only to provide an opinion about the effect of a recording or filing if and when made. Accordingly, Assumption (g) in the Illustrative Opinion Letter is appropriate if this opinion is given. See *Illustrative Opinion Letter*, *infra* para. 2.1(g).

⁹⁸ The legal (and opinion letter) underpinnings for perfection of a security interest in U.C.C. collateral that are ordinarily assumed can similarly apply to recordation and the effect of recordation of a real estate lien in many jurisdictions: title or rights in the collateral (assumed in Assumption (b)); a proper description of the collateral (assumed in Assumption (h) of the Illustrative Opinion Letter); a signature by the obligor (assumed in Assumption (e) of the Illustrative Opinion Letter); language of grant of the security interest or lien (essential for an enforceability opinion); and recording.

provided. The opinion may be provided, but with the assumptions made it provides little value other than implicit advice.

Requests are made sometimes for an opinion that a Mortgage when recorded will serve to perfect a Lender's security interest in goods that are or become fixtures. When Borrower's title or rights in Collateral and the giving of value are assumed, and the requirements of U.C.C. Section 9-502 are met by the Mortgage, the following opinion as to the effect of recording can be given:

When duly recorded, the record of the Mortgage is sufficient as a U.C.C. financing statement for the purpose of perfecting the security interest of the Lender as Secured Party in the interest of the Borrower as Debtor in that portion of the Collateral that consists of goods that are or are to become fixtures under the real property law of the State.

An opinion about the effect of recording as giving priority over other lien claimants is sometimes requested. It is well-accepted practice that nothing in the opinion letter addresses the actual priority of a lien. See Illustrative Opinion Letter Paragraph 4.6(i) for an express limitation, although such a limitation is implicit as a matter of customary practice. An opinion about relative priority of advances made after the initial advance at the time of recording of the Mortgage over intervening liens is sometimes requested. Such an opinion is highly dependent on State law governing loan advances. In some jurisdictions, the priority of future advances may vary depending on the purpose and circumstances of a given advance, whether a specified advance is within the stated principal amount of the loan, is an advance to protect the security of the lender, or is an advance that increases the amount of the loan or is made after actual or constructive notice of competing claims, with the latter being the most problematic. In other jurisdictions, such opinions are not feasible because they are dependent on future events or because of lack of clarity of the law. And in yet other jurisdictions, statutes or reliable case law may enable such an opinion to be given if the loan documents make provisions for such priority. Title insurance policies issued at closing, and further endorsements insuring the priority of the lien at the time of subsequent advances, are the recognized assurance for the subject of priority.

An opinion giver may be asked to address taxes and costs of recording the Mortgage.⁹⁹ This and other opinions in this category are easily resolved in most real estate finance transactions by recipient's reliance on a title insurer and are rarely an effective use of a Borrower's counsel. This opinion should not be confused with one that addresses requirements for qualification or taxation of the recipient, discussed in Paragraph 3.16 below.

3.13 No Governmental Approvals Required.

A companion to the no-violation-of-law opinion (see Paragraph 3.8, above), an express opinion to the effect that no governmental approvals [authorizations, orders, consents, etc.] are required as a condition precedent to the Borrower's execution and delivery of the transaction documents such as the following is sometimes requested:

No consent, approval, authorization, or other action by, or filing or registration with, any governmental authority or regulatory body of the State, or court order, is required by or on behalf of the Borrower as a condition precedent to execution and delivery by the Borrower of the Transaction Documents

The purpose of the opinion is to provide assurance that the Borrower does not need to obtain approvals of government entities or agencies or courts to enter into the transaction. The absence of the need for such consents, etc., as a matter of contract formation is a building block of the enforceability opinion to the extent of those approvals that affect validity or authorization of transaction documents.

⁹⁹ *The Real Estate Opinion Guidelines*, *supra* note 15, at 253 provide:

As these [questions] are often specific to a given transaction and not necessarily related to the overall operations of the lender or borrower, opinions with respect to such forms of taxation may be appropriate if the factual circumstances and legal analysis support the conclusions to be provided in the requested opinion. In such cases, in light of the relative costs and benefits of the opinion, the parties may determine, in those jurisdictions where such coverages are available, that an appropriate mortgage tax endorsement to a title insurance policy provides the requisite assurances to the lender.

The considerations in the text apply to third-party opinions, but should not be confused with local counsel's advice to lead counsel or the Borrower about structuring a transaction based on local or state laws applicable upon recordation of the Mortgage, which advice is independent of providing an opinion letter.

An affirmative statement, often expressed as an addition to the foregoing opinion statement, that whatever approvals are required have been obtained, is sometimes provided for logical completeness to cover a situation where consents and the like are required but have been obtained. For example:

... , other than those consents, approvals, authorizations, filings, actions, and registrations as to which the requisite filings have been accomplished, the requisite consents, approvals or authorizations have been obtained, the requisite actions have been taken, and the requisite filings and registrations have been accomplished.

In substance, there may be no difference between the first opinion and the expanded statement—nothing or nothing further is required.

The no-government-approvals-required opinion as presented above is not intended to address entity formation, existence, or qualification to do business, and it does not indicate that the Borrower has all permits ordinarily required to conduct business.¹⁰⁰ In the context of an opinion in a real estate secured financing transaction, the opinion is focused on the subject matter opined about, and it is not a corporate due diligence assurance as it might be in a merger or acquisition or in a corporate credit facility. This opinion is unnecessary and should not be requested unless the Borrower is engaged in business activity recognized as being subject to specific government regulation, such as being in a regulated industry or subject to a government program, and if so, there is some regulatory requirement for encumbering assets as security or for borrowing money. This opinion can be relevant in circumstances where the Borrower is a regulated entity whose actions must be approved by a governmental authority.

Even when the opinion is given, certain limitations are often expressed, particularly where the opinion giver has no specific familiarity with the Borrower. A limitation might read:

In rendering the opinions in paragraph [no government approvals], we have not made any independent investigation into the nature of the Borrower or its business that may require governmental or court approvals or procedures, and we are relying solely on information provided to us that has been the basis for our review; and our

¹⁰⁰ A request for an opinion that the Borrower has all governmental consents and approvals required to conduct its business is inappropriate. See *Real Estate Opinion Guidelines*, *supra* note 15, § 4.3.

opinion is rendered as if the Borrower is a general business entity authorized to conduct business in the State without special conditions.

It is not uncommon to see an opinion request for the addition of a phrase such as “**or to perform the Borrower’s obligations under them**” to the first portion of the opinion. The breadth of the opinion as to performance of obligations could be construed to provide implicitly an opinion about project compliance, covenants about which are ordinarily found in the transaction documents. The formulation of a no-violation-of-law opinion (see Illustrative Opinion Letter Paragraph 3.8) expressly limits the opinion to payment obligations, and project permitting for many real estate assets¹⁰¹ is disclaimed as a limitation (see Illustrative Opinion Letter Paragraph 4.6(k)). An opinion as to project permitting should not be implicit regardless of the broad language, but an opinion giver is well advised to take precaution to express disclaimers when providing an opinion that includes performance of obligations. If the opinion recipient expects to receive, and an opinion giver agrees to provide, an opinion as to project permitting, the opinion and its scope should be formulated expressly.¹⁰² As recommended for a no-violation-of-law opinion, if the assurance as to performance is limited to *payment* obligations, as long as appropriate due diligence is performed to render such an opinion, the concerns about an overbroad implication of this opinion should be alleviated.

If the no-governmental-approvals-required opinion is requested, it should be given by counsel who is primarily responsible for an opinion about the Borrower’s ability to enter into and perform the transaction under applicable law. Although this premise may cause lead counsel to request that local counsel provide this opinion if the law of the Local Opinion Jurisdiction will govern that issue, the nature of the Borrower may or may not be known sufficiently to local counsel to enable it to respond. Delving into the Borrower and its activities may well be beyond reasonable expectations of local counsel and may not be cost effective. The scope of local counsel’s duty for this opinion should be understood

¹⁰¹ The inclusiveness of the Exclusions in Illustrative Opinion Letter Paragraph 4.6 to a specific project should be considered. Granting a security interest in public utility property is clearly subject to regulation, but the performance of a covenant to operate a liquor-licensed establishment is also. Neither regulation is excluded in the form of Exclusions provided in Illustrative Opinion Letter Paragraph 4.6. See *Illustrative Opinion Letter, infra* para. 4.6.

¹⁰² See *infra* Part III.3.17.

clearly. It is reasonable to expect lead transaction counsel to identify specific regulatory concerns about the Borrower, but local counsel should not fail to consider the possibility of such concerns based on information about the Borrower and the content of the transaction documents on which local counsel bases its opinions, as well as local counsel's conscious awareness. In most cases, however, this opinion is given based either on a certificate of the Borrower concerning its business or on assumptions made in the opinion letter—in either case of little value to the recipient.

Some opinion givers limit the no-governmental-approvals-required opinion to the opinion giver's knowledge. If the Borrower is not an entity likely to be specifically regulated or local counsel does not know whether the specified actions of the Borrower would require governmental approval, then an opinion that no government approvals are required should either not be provided, or should be based on the absence of knowledge. Expressing the opinion "based on our knowledge of the Borrower, no governmental approvals are required" would be the equivalent of assuming that there is nothing actually known about the Borrower that would require specific governmental approval for the transaction.¹⁰³

3.14 Effect of Exercise of Remedies.

Opinion recipients sometimes request local counsel to address expressly in an opinion letter matters related to the relationship of foreclosure and the exercise of other remedies. These opinions present special issues for those jurisdictions in which there are laws affording debtor protection. Enforceability opinions address the enforceability of provisions of documents entered into by the parties, but they do not address the methods or sequence of enforcement that may be chosen by the secured party at some later date.¹⁰⁴ The assurances provided in connection with the generic enforceability qualification¹⁰⁵ refer to

¹⁰³ See 2007 Md. Bar Op. Report, Rev. 2009 § D.11, at 152, <http://www.msba.org/docs/opinionmatters.asp>.

¹⁰⁴ The 2012 Report notes that the enforceability opinion provides assurance that the contractual provisions are valid but does not address procedural actions necessary to pursue a remedy. See 2012 Report, *supra* note 1, at 240. In Chapter Two Paragraph 4.4(a), at 255, the 2012 Report notes that limitations to the opinions expressed may be required by applicable state law, although the matters addressed by the limitations are not related to the "means or manner of exercise of rights, but to the existence of the right itself." See *id.* at 255.

¹⁰⁵ See *Illustrative Opinion Letter*, *infra* para. 4.3.

exercise of remedies in accordance with applicable law. An express opinion on exercise of remedies addresses aspects of applicable law.

The law in many jurisdictions includes a variety of debtor protection statutes with respect to foreclosure and other secured loan remedies. These may include a requirement that a secured creditor may not pursue any collection action against the secured debtor or guarantor except as part of a judicial foreclosure proceeding (“one-action legislation”), the prohibition of a judicial deficiency judgment after non-judicial or improper foreclosure of collateral (“anti-deficiency legislation”), a requirement for a commercially reasonable sale under the Uniform Commercial Code, or a requirement that the foreclosure sale amount that does not satisfy the debt be at fair value. There are variations of these requirements. When local counsel in jurisdictions in which applicable law provides restrictions on exercise of remedies provide an express opinion about exercise of remedies, they commonly will state express limitations concerning them or will decline to give an opinion about this subject matter.

In a transaction in which all of the collateral for the obligation is located in one jurisdiction, it may be possible for counsel admitted in that jurisdiction to identify potentially applicable procedural restrictions or requirements, and the opinion giver will sometimes address those issues to the extent specifically raised by the recipient. If this opinion is given, it is typically expressed in a form that provides comfort to the secured party that it will not be prejudiced if it exercises certain rights on default. If consistent with the law of the Local Opinion Jurisdiction as regards anti-deficiency, one-action, or similar debtor protection statutes, example opinion language would be:

The foreclosure of the Mortgage in accordance with applicable Law will not restrict or impair the liability of the Borrower for the monetary obligations of the Borrower secured by such Mortgage to the extent that a deficiency remains unpaid after proper¹⁰⁶ application of the proceeds of such foreclosure.

In states that have anti-deficiency, one-action, or similar debtor protection legislation or rules, opinion givers would include such

¹⁰⁶ Addition of adjectives such as “proper” may prompt a question about whether the provisions of the Mortgage or other transaction documents for application of proceeds meet the requirements of the law of the Local Opinion Jurisdiction, further exacerbating a cost-benefit issue. Whether use of cautionary adjectives is necessary should be considered by the opinion giver.

information as specific limitations to an opinion on exercise of remedies,¹⁰⁷ which might read as follows:

Our opinion [in {paragraph on generic enforceability qualification with assurance}{paragraph on Exercise of Remedies}] is subject to the effect of the applicable provisions of the Law of the State which may, inter alia, limit or prohibit the recovery of a deficiency judgment on a debt after foreclosure or other sale in realization upon the security for the debt, require a lender to proceed against or exhaust the security for a debt before proceeding against the debtor, or otherwise require a lender to exercise foreclosure rights in a certain manner.

Note that the issues to be considered in connection with these opinions may be different when the grantor of a lien or security interest is a guarantor rather than a principal obligor.

In a transaction in which the collateral for the obligation is located in multiple jurisdictions, the issues can be more complicated. For example, the exercise of remedies in New York may trigger defenses to subsequent foreclosure or debt collection with respect to California real estate collateral; that is, if the secured party first exercises remedies in New York to collect the secured obligation, entry of a judgment against the debtor in New York may deprive the lender of the right to foreclose on California real estate. The opinion giver can opine only as to the law of the Local Opinion Jurisdiction and should not anticipate what the law of other jurisdictions may enable or require. Local counsel can only identify to the recipient provisions of Local Opinion Jurisdiction law, which, depending on the exercise of remedies in another state, could affect the availability of subsequent remedies in the Local Opinion Jurisdiction.

Many counsel believe that it is inappropriate to expect an opining attorney at the time of closing a transaction to provide assurance in the

¹⁰⁷ Some opinion givers, in the exercise of extra caution, include such a limitation to the assurance that might otherwise be afforded by the language that follows and accompanies the generic enforceability qualification. See *Illustrative Opinion Letter, infra* para. 4.3. This limitation if provided with respect to the enforceability opinion might begin as follows: “*The validity, binding nature, and enforceability of the Borrower’s obligations under the Mortgage are also subject to the effect [etc.] . . .*”

This form of limitation should not be construed as contrary to the view that the enforceability opinion itself does not opine about methodology of seeking remedies, but only the legal availability of them under applicable law. For this reason, there is no such limitation suggested in the 2012 Report. See *id.* at 251–58.

form of a legal opinion with respect to events that are yet to occur, about which determinative facts are presently unknown. The opinion, when limited appropriately, provides no meaningful comfort at the time of the transaction, and it would have little, if any, bearing on the content of the transaction documents addressed by the opinion. At most, the opinion giver can recite what the law of the Local Opinion Jurisdiction permits and requires with respect to the remedy about which this opinion is requested, at the date of the opinion letter. The lender should (and indeed always will) retain its own local counsel to advise it on remedial steps when the occasion to consider enforcing them arises.

3.15 All Customary or Specific Remedies.

Recipients sometimes request an opinion that the Mortgage contains all customary remedies, such as the following:

The Mortgage contains all of the remedial provisions customarily found in such documents for real estate secured loan transactions in the State.

Such opinions should not be requested.¹⁰⁸ The role of the opinion giver is not to provide legal advice to the recipient, but to address specific legal issues presented by the documents or pertaining to the Borrower itself. It is by no means clear what this opinion is to mean and what all such customary remedies would be.

Apart from the impropriety of such a request, a problem would be encountered when the assurance could not be given. The opinion giver may need permission of its client to advise the recipient why such an assurance cannot be provided, and a potential conflict of interest is posed. Although such a conflict could be resolved by client consent to advise the lender in these circumstances, the opinion giver should not be placed in the position of conflict of interest by a lender that is not informed of law and practice in the Local Opinion Jurisdiction.

Opinion givers confronted with these requests may respond by noting the comfort provided in the assurance to the generic enforceability

¹⁰⁸ See *Real Estate Opinion Guidelines*, supra note 15, § 1.1.b, at 243. The Real Estate Opinion Guidelines suggested instead providing an assurance such as: “The Mortgage does not omit essential remedies that in [the opinion giver’s] experience are generally found in similar documents for comparable real estate secured loan transactions in the State.” This language has become disfavored over time. This Supplement discourages any opinion that responds to the fishing expedition of this request.

qualification (see Illustrative Opinion Letter Paragraph 4.3), which is not otherwise altered by the customary remedies request.

3.16 Recipient Party Matters.

Opinions are sometimes requested to the effect that the opinion recipient is not required to register or qualify to conduct business or to pay taxes in the State solely in connection with the making the loan or entering into or enforcing the transaction documents or if required to qualify, the ability to rectify without disability. The Real Estate Opinion Guidelines¹⁰⁹ provide the following comment about such opinions:

Such opinion requests are generally not cost justified in view of the extensive and time-consuming legal and factual inquiry required and the often-limited value of the resulting opinion.

Opinions with respect to the need to qualify to do business with respect to an individual loan transaction are often difficult to give because of the inability to isolate relevant issues through factual assumptions, which themselves may be vitiated by facts or subsequent business activities of the lender, both of which are more readily known by the lender and its counsel. Similar challenges exist for opinions that a single loan transaction will not subject the lender to local taxation. An opinion based on assumptions, which may be rendered false by previous unknown activities of the lender or probable additional transactions in the future, rarely justifies the cost and effort. Indeed, the decision to qualify to do business in a given jurisdiction and to structure operations in a manner to avoid jurisdictional taxes is a decision that may have little to do with a given transaction. Such issues may often be best addressed by lender's own counsel, who has greater familiarity with the lender's overall operations and is in a position to provide advice to its client on these matters, as well as the state-by-state consequences of various business operations and strategies regarding taxation of the lender, rather than by counsel for the borrower in a single loan transaction. On the other hand, where the law is sufficiently clear, an advisory opinion as to the consequences of, and the ability to cure, improper failure to qualify to do business locally may be more feasible for the opinion giver and valuable to the recipient.

¹⁰⁹ See Real Estate Opinion Guidelines, *supra* note 15, at 253.

Among the many legal and factual issues to be considered would be the doing business laws of the Local Opinion Jurisdiction that may relate to the nature of the opinion recipient as subject to or pre-empted from doing business laws; the nature of the opinion recipient as having authority under law of the Local Opinion Jurisdiction to make or secure a loan or engage in activities relating to enforcement (e.g., restrictions on foreign trustees); the scope of activity of the opinion recipient when the opinion can relate only to the singularity of the transaction; the effect of acting as a mortgagee-in-possession itself or through agents; and the effect of managing the asset after foreclosure. As the opinion letter is effective only at delivery, it provides no assurance as to future facts and none would be properly implied.

3.17 Zoning and Land Use, Compliance with Laws.

It is not customary in most jurisdictions for a third-party opinion to address matters of zoning and land use, permitting, or environmental matters. These are matters to be addressed separately, if at all, by counsel who is qualified to provide such opinions after active involvement in pursuing compliance in such matters. In most situations, land use and environmental matters are the subject of recipient's due diligence, with reliance on certificates from professionals and public authorities,¹¹⁰ or, where available, title policy endorsements. Illustrative Opinion Letter Paragraph 4.6(g) and (k) expressly exclude such opinions, even when a no-governmental-approvals-required opinion (see Paragraph 3.13, above) is provided.

3.18 Negative Assurance.

A request is sometimes made that the opinion giver state expressly that it has no knowledge or has no reason to believe that any information disclosed to it in the course of due diligence in preparing the opinion—documents, certificates, representations, and the like—are untrue or fail to state a fact required so as not to make statements untrue or misleading. A statement providing such assurance is not a legal opinion but rather a statement about facts. The Real Estate Opinion Guidelines¹¹¹ state that a request for negative assurance is appropriate only when it is requested to assist the recipient as an underwriter in establishing a due diligence defense in connection with a securities offering. A “negative assurance”

¹¹⁰ See *id.* at 255.

¹¹¹ See *id.* (incorporating *Business Opinion Guidelines*, *supra* note 10, at 880).

is widely regarded as inappropriate in transactions that do not involve establishing a due diligence defense in connection with a securities registration or offering under the Securities Act of 1933 or in certain unregistered offerings under the Exchange Act of 1934.¹¹²

Further discussion of this topic can be found in a report of the ABA Section of Business Law Task Force on Securities Law Opinions,¹¹³ which, following analysis of the use and purpose of the assurance, provides a form of negative assurance statement for presentation either in a separate letter or in the opinion letter. By implication, as observed in Accord § 5, and discussed in Chapter Two Paragraph 1.5(a) of the 2012 Report at note 19, an opinion giver may not rely on information as to which the opinion giver has actual knowledge either that is false or of facts to make reliance unreasonable. Another view, cited also in Chapter Two Paragraph 1.5(a) of the 2012 Report at note 19 is that reliance is not permitted if the factual information appears irregular on its face. Assertion of either principle of customary practice can be made to resist a request for an express statement of negative assurance.

IV. CERTAIN LIMITATIONS¹¹⁴

This subject is discussed in Chapter Two Part IV of the 2012 Report at 251–58.

The opinions expressed in an opinion letter would ordinarily be qualified or limited out of necessity or custom. Limitations are provided in the Illustrative Opinion Letter Part IV. This Supplement provides certain additional discussion germane to local counsel opinion letters.

4.1 Bankruptcy Exception.

This subject is discussed in Chapter Two Paragraph 4.1 of the 2012 Report at 251.

4.2 Equitable Principles Exception.

This subject is discussed in Chapter Two Paragraph 4.2 of the 2012 Report at 252.

¹¹² See 15 U.S.C. §§ 77k, 771(a)(2). All statutory citations in this Article refer to the current statute unless otherwise indicated.

¹¹³ See *Negative Assurance in Securities Offerings, Special Report of the Task Force on Securities Law Opinions*, 59 BUS. LAW. 1513 (2004).

¹¹⁴ See *supra* note 4, the term “limitations” encompasses exceptions, exclusions, qualifications, and other limitations.

4.3 Generic Enforceability Qualification, with Assurance.

This subject is discussed in Chapter Two Paragraph 4.3 of the 2012 Report at 252.

In Illustrative Opinion Letter Paragraph 4.3, the words “with Assurance” are added in brackets to the caption of this limitation only to inform the reader. In the opinion letter, these words would be omitted.

(i) An additional assurance relating to exercise of an assignment of leases and rents may be considered where appropriate (see discussion in this Supplement Paragraph 3.6(a)), such as:

(iv) exercise of the assignment of rents contained in the Mortgage [(or) Assignment of Leases and Rents] in accordance with applicable Law.

(ii) The risks in providing assurance as to “material breach” are discussed at Paragraph 4.3(e) of Part IV of Chapter Two in the 2012 Report at 253.

(iii) The scope of the generic enforceability qualification is intended to be comprehensive; if given without the assurances, it would seem that no further qualifications as to the document provisions should be required. The assurances to the generic enforceability qualification, however, may call for specific limitations, as suggested in Paragraph 4.4 below; general limitations, as suggested in Paragraph 4.5 below, or adjustments, as suggested in subparagraph (v) below. Additional assurances to those listed in Illustrative Opinion Letter Paragraph 4.3 may be requested as to specific matters or documents. Any assurance should be read as subject to all limitations in the opinion letter, but a specific statement to that effect is often included.

(iv) Although the generic enforceability qualification broadly covers all transaction documents, the assurances provide that the documents are not invalid as a whole and that certain described actions relating to recovery of debt or recourse to collateral through foreclosure are not precluded. Although it may seem apparent, if the transaction documents themselves are not enforceable (valid), or there are unenforceable provisions in them, and such unenforceability affects the assurances, the expression of the assurance would need to be so qualified or a specific limitation about the document should be provided.

(v) The enumerated assurances may be tailored to a specific role of local counsel. If local counsel is opining only as to the Mortgage because other transaction documents are governed by the law of a jurisdiction other than the Local Opinion Jurisdiction, it may consider limiting the

assurance by omitting clauses (i) and (ii), and otherwise tailoring clause (iii) to reflect that omission.

4.4 Other Transaction-Related Qualifications.

This subject is discussed in Chapter Two Paragraph 4.4 of the 2012 Report at 255.

(i) Customary practice subjects the assurances given to the generic enforceability qualification to all other limitations in the opinion letter (see 2012 Report, Chapter Two Part IV, Paragraph 4.3(b) at 253). The Illustrative Opinion Letter Paragraph 4.4 adds to the lead-in phrase, after reference to the opinion given, a further limitation, which, although it should be unnecessary, confirms customary practice:

and the assurance(s) provided in [*paragraph containing the generic enforceability qualification and assurances*].

(ii) As noted in this Supplement Paragraph 3.5(b), (c), (d), and (f), and Paragraph 3.8, express limitations to implicit opinions should be considered where appropriate. Where the law of a jurisdiction other than the Local Opinion Jurisdiction is chosen to govern the interest charges in the transaction documents, it is appropriate to preface a limitation of either an implicit or express usury opinion, while avoiding a choice of law opinion, by referring to the law of the Local Opinion Jurisdiction as if applicable: **If the law of the State were to apply, . . .** [limitation language].

4.5 Other General Qualifications.

This subject is discussed in Chapter Two Paragraph 4.5 of the 2012 Report at 255.¹¹⁵

¹¹⁵ With respect to the limitation made at Illustrative Opinion Letter Paragraph 4.5(h), the validity of forum selection clauses was addressed in a dispositive manner in *Atlantic Marine Construction Co., Inc. v. United States District Court for the Western District of Texas*, 571 U.S. ____, 134 S. Ct. 568, 187 L. Ed. 2d 487 (2013), a unanimous decision of the United States Supreme Court, in which it was held that the parties' forum selection clause, if contractually valid, was to be given full effect by state and federal courts unless a "public-interest" factor exists that would make application of the clause contrary to the public interest, and, in any case, subject to application of the doctrine of forum non conveniens. A careful review of this case should be made before considering removing this limitation, the existence of which is well-accepted customary practice. The Generic Enforceability Qualification will also qualify any opinion as to validity or enforceability of such a clause, and the Equitable Principles Limitation will qualify the opinion as to forum non conveniens.

The 2012 Report states that the generic enforceability qualification, along with the bankruptcy exception and the equitable principles exception, may be sufficient to avoid use of an “exhaustive” laundry list of qualifications or other limitations. Nevertheless, the 2012 Report intimates that these three limitations perhaps may require a “selective”¹¹⁶ list of other limitations added to them. It should not be inferred that other limitations are essential because the generic enforceability qualification in its basic form is less than comprehensive. Because of its otherwise sweeping negation of the enforceability opinion, the generic enforceability qualification almost always includes some form of assurance, however, and the term “generic enforceability qualification” should be understood as referring to the whole of the qualification, including the assurances which themselves provide specific enforceability opinions.

Although the generic enforceability qualification supplants the need for exhaustive lists of enforceability limitations, the addition of limitations such as those in discussed in Paragraphs 4.4 and 4.5 of the 2012 Report and in the Illustrative Opinion Letter are suggested with respect to whatever exceptions are made to the negating effect of the generic enforceability qualification by express assurances as well as to opinions other than enforceability that are provided. The Accord Adaptation Report provides context for the inclusion of additional limitations to the enforceability opinion as follows:

*The necessity of any of [Other General Qualifications] . . . is related to the scope of the Generic [Enforceability] Qualification and Generic [Enforceability] Qualification Assurance. The more ambiguous the Assurance given after a Generic [Enforceability] Qualification, the more relevant the [Other General Qualifications] become.*¹¹⁷

The content of the list of other general qualifications that appears in Illustrative Opinion Letter Paragraph 4.5 derived from a model (Accord § 14) that sought to acknowledge a customary list of common qualifications that are always-taken, always-acceptable, as incorporated by

¹¹⁶ See 2012 Report, *supra* note 1, at 255–56.

¹¹⁷ See Report on Adaptation of the Legal Opinion Accord, *supra* note 8, at 601. At the time the Accord Adaptation Report was published, the generic enforceability qualification assurances were expressed in several forms, some of which referred to “practical realization” and others to “materiality,” and the language of specific assurances was not well established. Less ambiguity in the presentation of the qualification with assurances may exist at the date of this Supplement, but the relevance of qualification of assurances remains.

convention in all opinion letters.¹¹⁸ Accord section 14 listed provisions commonly unenforceable in almost every jurisdiction, as to which qualification was never resisted and no effort was made to avoid them or express document content differently.¹¹⁹

The limitations referred to in Paragraphs 4.4 and 4.5 of the 2012 Report and this Supplement pertain to the enforceability opinion as expressed through the assurances in the generic enforceability qualification and that also, as appropriate, apply to other specific opinions. In Illustrative Opinion Letter Paragraph 4.4, suggestions are made for inclusion of specific limitations. The list presented in the Illustrative Opinion Letter Paragraph 4.5 is provided as exemplification of additional limitations to enforceability generally applicable.¹²⁰ It is less than comprehensive by intent, expressing a limited list of commonly acceptable limitations that often relate to the enforceability assurances expressed.

Expression of a “selective” list of qualifications that includes limitations of general applicability is understood to be common practice for many opinion givers. Recital of a list of generally acceptable qualifications such as those in Illustrative Opinion Letter Paragraph 4.5 may reflect the hesitancy of opinion givers to rely on customary practice to incorporate such qualifications implicitly, as discussed in the 2012 Report.¹²¹

Although Paragraphs 4.4 and 4.5 as presented in the Illustrative Opinion Letter appear to suggest separation of categories of limitations, the limitations can be, and often are, listed without differentiation in a

¹¹⁸ The list in Accord § 14 was expanded in the Accord Adaptation Report to the content shown in Illustrative Opinion Letter Paragraph 4.5. See *ABA Business Law Accord Report*, *supra* note 7, at § 14.

¹¹⁹ See *ABA Business Law Accord Report*, *supra* note 7, at 206. The Accord did not recognize use of a generic enforceability qualification, and was prepared at a time when there was prevailing use of exhaustive lists of enforceability qualifications. Implicitly, further qualifications would be taken even with the Accord convention of certain practice-accepted limitations consisting only of the bankruptcy exception, the equitable principles exception, and the other general qualifications.

¹²⁰ Some subjects in the list are not related to the assurances, but to those matters that are already excluded by the limitation of the generic enforceability qualification and not excepted from it by an assurance. These subjects should not need to be expressed, but often are as a matter of practice. While express limitations that do not relate to the assurances or to specific opinions often appear in opinion letters, this practice should not be considered as derogating from the purpose of the generic enforceability qualification or as implying need for a comprehensive set of qualifications.

¹²¹ See *2012 Report*, *supra* note 1, at 222.

single section of limitations in the opinion letter. They are presented separately in the Illustrative Opinion Letter for illustrative purposes.

4.6 Exclusions.

This subject is discussed in Chapter Two Paragraph 4.6 of the 2012 Report at 256.

4.7 Knowledge.

This subject is discussed in Chapter Two Paragraph 4.7 of the 2012 Report at 257.

In many situations, local counsel would have little if any knowledge about the Borrower. Although the extent of the relationship between local counsel and the Borrower may vary considerably from matter to matter, the scope of a local counsel opinion letter would ordinarily preclude opinions concerning a Borrower's other agreements, court orders, and relationships, and such issues would be more appropriate for lead counsel for the Borrower to consider.

V. USE OF THE OPINION LETTER

5.1 Use and Reliance.

This subject is discussed in Chapter Two Paragraph 5.1 of the 2012 Report at 258.

There are many forms of reliance provisions requested by opinion recipients. The first example provided in the Illustrative Opinion Letter Paragraph 5.1 provides some basic restrictions and protections. Issues that may need to be considered in preparing a suitable reliance provision, in using this example or otherwise, include the following considerations, which are reflected in Paragraph 5.1 of the Illustrative Opinion Letter provided with this Supplement:

(i) The addressee of the opinion letter may be a lender, an agent for lenders, or other loan parties such as note holders. In the ordinary course, the addressee(s) should be referred to as the party or parties who may rely on the opinion letter.

(ii) Requests are sometimes made to include credit rating agencies (each more formally identified as a "nationally recognized statistical rating organization" or "NRSRO") as addressees or expressly entitled to rely on the opinion letter. The 2012 Illustrative Language Paragraph 5.1 correctly does not refer to rating agencies. Subsequent to publication of

the 2012 Report, many rating agencies have confirmed¹²² that 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 NRSROs' requirements. Reliance, as that concept may indicate legal liability to those invited to rely, could imply that rating agencies are parties to the transaction.

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 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-5.¹²³ 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.¹²⁴ The opinion disclosure provision below therefore makes reference to both delivery schemes, and has been approved by the rating agencies for use in real estate finance opinion letters:

() nationally recognized statistical rating organizations rating an issuance involving the Loan or otherwise entitled to access under Rule 17g-5 under the Securities and Exchange Act of 1934, as amended (or any successor provision to such subsection) by providing a copy of this opinion letter to the appropriate 17g-5 information provider for the securitization into which the Loan or a component of the Loan is deposited or as otherwise permitted by the

¹²² See William B. Dunn & Joseph Phillip Forte, *Loan Closing Opinions and Rating Agencies: Disclosure Not Reliance*, CRE FINANCE WORLD, Winter 2016, p.60, <http://www.crefc.org/crefc/crefw/Winter2016/index.html#60>.

¹²³ See 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 (SEC) under the Credit Rating Agency Reform Act of 2006.

¹²⁴ Accessed at http://www.crefc.org/CREFC/Industry_Standards/CREFC_IRP/CREFC_IRP_7.1.aspx?WebsiteKey=148a29c3-4a5a-4a0d-98a7-70be1a37d5a7.

applicable pooling and servicing agreement or trust and servicing agreement, as the case may be.

(iii) Some suggest expressly limiting reliance, even as to named or included persons, to those who actually and reasonably rely, incorporating the principle of justifiable reliance contained in RESTATEMENT (SECOND) OF TORTS, § 552(1).¹²⁵ Language to this effect is included in the example in subparagraph (iv) below.

(iv) Many recipients request that an opinion letter provide that it may be relied upon by successors and assignees of the addressee. Permission for and restrictions upon such reliance are not provided in Illustrative Opinion Letter Paragraph 5.1, and would need to be added to or incorporated in it when appropriate. An example of a provision that permits reliance by assignees of the lender subsequent to the date of the opinion letter, while imposing constraints on the scope of reliance by such assignees, is as follows:

The opinions expressed in this Opinion Letter are solely for the benefit of the addressee. We consent to reliance on the opinions expressed this Opinion Letter, solely in connection with the Borrower Documents, by any assignee of the Lender's interest subsequent to the date of this Opinion Letter (each an "Assignee") as if this Opinion Letter were addressed and delivered to such Assignee on the date of this Opinion Letter, on the condition and understanding that (i) any such reliance must be actual and reasonable under the circumstances existing at the time such Assignee becomes a Lender, including any circumstances relating to changes in law, facts, or any other developments known to or reasonably knowable by such Assignee at such time, (ii) our consent to such reliance shall not constitute a reissuance of the opinions expressed in this Opinion Letter or otherwise extend any statute of limitations period applicable to it on the date of this Opinion Letter, and (iii) in no event shall any Assignee have any greater rights with respect to the

¹²⁵ This section of the Restatement provides:

(1) One who, in the course of his business, profession or employment, or in any other transaction in which he has a pecuniary interest, supplies false information for the guidance of others in their business transactions, is subject to liability for pecuniary loss caused to them by their justifiable reliance upon the information, if he fails to exercise reasonable care or competence in obtaining or communicating the information.

RESTATEMENT (SECOND) OF TORTS § 552(1) (AM. LAW INST. 1977).

opinions expressed than those of the original addressees of this Opinion Letter on its date.¹²⁶

This provision prevents an assignee from potentially having greater rights with respect to the opinion letter than the original lender. For instance, an assignee who takes an assignment from a lender who knows that an opinion is incorrect, and who therefore cannot reasonably rely on the incorrect opinion, would not be permitted to rely on the opinion, even though the assignee did not know that the opinion was incorrect. The provision also prevents assignees from having a fresh start on the running of applicable statutes of limitations.

The opinion letter could provide that multiple reliance parties bringing an action may do so only through a single agent or in a consolidated action, to avoid a multiplicity of actions. Example language for this would be:

All rights hereunder may be asserted only in a single proceeding by and through the Administrative Agent or the Required Lenders.¹²⁷

This provision would be particularly applicable to syndicated loans about which this Supplement has not made specific reference otherwise. The language is a way to address concerns over the possibility of a multiplicity of lawsuits in diverse jurisdictions. It is intended to reflect the approach under many loan agreements that actions on behalf of the lenders are to be taken by the administrative agent or at the direction of the required lenders. Sometimes there are express provisions providing that only the agent or the required lenders may exercise rights with respect to the collateral, or other matters. In practice, important enforcement decisions, such as whether to accelerate the debt or foreclose on collateral, are reserved to a specific percentage of the lender group. No distinction is drawn in the suggested language between the original lenders and those who become lenders subsequently, leaving open the matter of acquiring the interest in good faith, for value, etc.

¹²⁶ The sample opinion language is based on a model that was presented at the Spring 2012 Meeting of the Working Group on Legal Opinions (WGLO) for syndicated loans, as reported in 69 BUS. LAW. 957, 959 (2014). The sample language provided here does not expressly cover successors other than by assignment or participants who are not assignees as it might in syndicated loans. As presented at WGLO, the provision refers to Additional Lenders instead of assignees, and it identifies parties such as an administrative agent and successors, which are not otherwise referred to in this Supplement.

¹²⁷ See A. Mark Adcock, Gail Merel, & Reade H. Ryan, Jr., *Legal Opinions—Who May Rely?*, 69 BUS. LAW. 957, 960 (2014).

5.2 Effective Date; No Obligation to Update.

This subject is discussed in Chapter Two Paragraph 5.2 of the 2012 Report at 259.

5.3 Governing Law.

This subject is discussed in Chapter Two Paragraph 5.3 of the 2012 Report at 259.

The 2012 Report notes that the standard of care of the opining lawyer ordinarily would be the standard recognized in the opinion giver's practice jurisdiction.¹²⁸ When the liability of an opinion giver is the subject of a proceeding in a state where the impact of an allegedly incorrect or misleading opinion letter is adjudicated, the issue of applicable standard of care may be a serious one. If the RESTATEMENT's view¹²⁹ of whose standard of care should govern is correct, an express statement to that effect in the opinion letter might be appropriate. Inclusion of such a statement in the opinion letter would also resolve uncertainty about whose customary practice governs. However, this has not become accepted practice at the time of this Supplement.

5.4 Disclaimer of Implied Opinions.

This subject is discussed in Chapter Two Paragraph 5.4 of the 2012 Report at 259.

5.5 Expression of Professional Judgment.

This subject is discussed in Chapter Two Paragraph 5.5 of the 2012 Report at 259.

5.6 Signatures.

This subject is discussed in Chapter Two Paragraph 5.6 of the 2012 Report at 260.

¹²⁸ See RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 52 cmt. b (AM. LAW INST. 2000), which recognizes that the duty of competence is ordinarily that of lawyers undertaking similar matters in the relevant jurisdiction (typically, a state). The comment also notes that there are national practices with national standards and gives as examples federal securities matters and litigation in federal court under federal legislation. *Id.*

¹²⁹ See *id.*

ADDENDUM

ILLUSTRATIVE OPINION LETTER

Below is an illustrative opinion letter (the “**Illustrative Opinion Letter**”) to accompany Local Counsel Opinion Letters in Real Estate Finance Transactions - A Supplement to the Real Estate Finance Opinion Report of 2012 (the “**Supplement**”). This Illustrative Opinion Letter is based on the Illustrative Language of a Real Estate Finance Opinion Letter (the “**2012 Illustrative Language**”), Chapter Three of the Real Estate Finance Opinion Report of 2012¹³⁰ (the “**2012 Report**”) with additions and changes that are discussed at length in the Supplement. As presented, this Illustrative Opinion Letter provides helpful guidance for addressing subjects not only common to local counsel opinion letters but also to opinion practitioners in commercial real estate finance transactions generally. Please refer to the 2012 Report and to the Supplement for a full discussion of the language of this Illustrative Opinion Letter and for the context in which such language is used, as this Illustrative Opinion Letter is not intended to be an independent document or to reflect fully the discussion in the text. Paragraph numbers in this Illustrative Opinion Letter correspond to the Paragraph numbers in Chapter Two of the 2012 Report and corresponding Paragraphs in the Supplement.

This Illustrative Opinion Letter could be used as a starting point to assist lead counsel or local counsel in connection with a real estate secured transaction. However, users are cautioned that many of the included opinions and provisions are illustrative only and will not be applicable in many contexts. Changes to and deletions from this Illustrative Opinion Letter will be necessary based on the facts and circumstances of each transaction and the law that is applicable.

Comments, notes, instructions, subheadings, numberings, and directions in italics and the footnotes in this Illustrative Opinion Letter are included for instructional purposes only and are not intended to be included in a final opinion letter. Bracketed items need to be selected or deleted in a final opinion letter.

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<sup>130</sup> See 2012 Report, *supra* note 1, at 213.

[date]

[Name and Address  
of Opinion Recipient]

Re: [\$ \_\_\_\_\_] Loan (the “**Loan**” or the “**Transaction**”)  
from [ \_\_\_\_\_ ] (the “**Lender**”) to  
[ \_\_\_\_\_ ](the “**Borrower**”) [guaranteed by  
[ \_\_\_\_\_ ] (the “**Guarantor**”)]

Ladies and Gentlemen:

We provide to you this letter (this letter, including any attachments, this “**Opinion Letter**”) at the request of the above-referenced Borrower [substitute for Borrower, or add, Guarantor, as applicable] [pursuant to Section \_\_\_\_ of the {Agreement} described below].

## I. BACKGROUND

1.1 Role of Counsel; Transaction Documents; Defined Terms. We have acted as counsel to the Borrower in the State of \_\_\_\_\_ (the “**State**”) [solely] for the purpose of providing this Opinion Letter in connection with the Loan.

In preparing this Opinion Letter, we have [been furnished with] [reviewed] unexecuted copies of the following documents relating to the Transaction [provided to us by \_\_][, each to be dated{as of the date of this Opinion Letter}{ \_\_\_\_\_ }]:

- (a) Promissory Note by the Borrower (the “**Note**”).
- (b) [Mortgage/Deed of Trust/Deed to Secure Debt] by the Borrower (the “**Mortgage**”) with respect to certain property including real property located [briefly describe location of property] and more particularly described in the Mortgage (such property to the extent comprising real property under the Law (defined below) of the State, the “**Real Property**”).
- (c) Assignment of Leases and Rents by the Borrower (the “**Assignment of Leases**”).
- (d) Security Agreement by the Borrower (the “**Security Agreement**”).
- (e) Loan Agreement by the Borrower and the Lender (the “**Agreement**”).

- (f) [Guaranty by the Guarantor (the “**Guaranty**”).
- (g) [A Uniform Commercial Code Fixture Financing Statement (the “**U.C.C. Fixture Financing Statement**”) naming the Borrower as debtor and the Lender as secured party].

The documents described in items [(a) through (f)] above are referred to in this Opinion Letter as the “**Transaction Documents.**” The Transaction Documents described in items [(a) through (e)] above [*correct the letters as appropriate*] are referred to in this Opinion Letter as the “**Borrower Transaction Documents.**” The Transaction Documents described in items [(b) through (d)] above [*correct the letters as appropriate*] are referred to in this Opinion Letter as the “**Security Documents.**” The Real Property, together with all other property described in any of the Security Documents in respect of which provision is made by the Security Documents for a lien or security interest, is referred to in this Opinion Letter as the “**Collateral.**”

*NOTE: Unless all of the Transaction Documents are governed by the Law of the State and are intended to be addressed in the Opinion Letter, the scope of review should be tailored. In many cases, local counsel will limit its review to those documents or provisions of them that are governed by State Law, such as the Security Documents. If the opinions given are to be limited to certain documents, a statement to that effect should be made, added to the foregoing language. An example follows:*

The Transaction Documents described in items [(a) and (e)] above [*correct letters as appropriate to refer to those documents that are not governed in whole or in part by the Law of the State*] are referred to in this Opinion Letter as the “**Other Transaction Documents.**” The Borrower Transaction Documents excluding the Other Transaction Documents are referred to in this Opinion Letter as the “**Opinion Transaction Documents.**”

In rendering our opinions, we have not reviewed the Other Transaction Documents except to the extent the Other Transaction Documents contain specific definitions that are expressly incorporated in the [Mortgage][Opinion Transaction Documents] and are necessary to our opinions. Our opinions are given (a) assuming that nothing in any of such Other Transaction Documents materially changes any of the terms of the [Mortgage][Opinion Transaction Documents], (b) assuming that such Other Transaction Documents will be enforced consistently with the opinions expressed in this Opinion Letter, (c) assuming that definitions

incorporated in the [Mortgage][Opinion Transaction Documents] will be construed in accordance with the Law of the State if applicable, and (d) without regard to the effect of incorporation, by reference or otherwise. We express no opinions concerning the Other Transaction Documents.

*NOTE: In some cases, Other Transaction Documents may not be provided for review by local counsel although such Other Transaction Documents may affect documents about which opinions are provided. For example, when defined terms are incorporated from a loan agreement that is not reviewed, an exception about unknown effects should be made. An example is:*

We have not [been furnished with][reviewed] the [name of document(s)][Other Transaction Documents]. Our opinions are given (a) assuming that nothing in any of such Other Transaction Documents materially changes any of the terms of the Opinion Transaction Documents, (b) assuming that such Other Transaction Documents will be enforced consistently with the opinions expressed in this Opinion Letter, and (c) without regard to the effect of incorporation by reference or otherwise. We express no opinions concerning the Other Transaction Documents.

Terms used in this Opinion Letter with initial capital letters and not otherwise defined in this Opinion Letter shall have the meanings ascribed to them in the [Mortgage].

*NOTE: When the scope of local counsel's role is limited to enforceability of a few documents that are governed (at least in part) by State Law, as is often the case, in place of providing a comprehensive list of transaction documents and creating defined terms for classes of documents, a more limited list of documents may appear, using the names of the specific documents in the opinions being provided. In the remaining portions of the Opinion Letter, reference to Borrower Transaction Documents or Opinion Transaction Documents might be replaced by reference to one or more specific documents. This Illustrative Opinion Letter does not provide all possible variations for this; and references to defined document groupings, such as Borrower Transaction Documents and Opinion Transaction Documents, in the text of this Illustrative Opinion Letter should be adjusted and coordinated as necessary.*

1.2 Authority Documents.<sup>131</sup> In connection with this Opinion Letter we also have reviewed the following documents (collectively, the “**Authority Documents**”):

(a) (i) [Certificate of Formation] of the Borrower as filed in the office of the [*name appropriate Public Authority*] of the State and certified in the Public Authority Documents described below; and (ii) Operating Agreement of Borrower dated [\_\_\_\_\_] as certified to us in the Client Certificates described below (collectively, the “**Borrower Organizational Documents**”).

(b) [Consent/Resolution of partners, members, board of directors, or other necessary persons of the Borrower] as certified to us in the Client Certificates.

(c) (i) [Certificate of Formation] of the Guarantor as filed in the office of the [*name appropriate public authority*] of the State and certified in the Public Authority Documents described below; and (ii) Operating Agreement of the Guarantor dated [\_\_\_\_\_] as certified to us in the Client Certificates described below (collectively, the “**Guarantor Organizational Documents**”).

(d) [Consent/Resolution of partners, members, board of directors, or other necessary persons of the Guarantor] as certified to us in the Client Certificates.

(e) (i) [certificate of status of the Borrower issued by the state of the Borrower’s organization, dated {\_\_\_\_\_}]; (ii) [certificate(s) of status of the Borrower in any other states in which the Real Property is located, dated {\_\_\_\_\_}]; (iii) certificate issued by the State [*or a defined Public Authority of the State*] stating that the Borrower [Guarantor, *whichever is the owner of the Real Property*] is qualified to do business in the State (the “**State Certificate**”); (iv) [certificate of status of the Guarantor issued by the state of the Guarantor’s organization, dated {\_\_\_\_\_}]; and (v) [where relevant, certificates concerning tax status, certificates concerning U.C.C. filings, or certificates concerning title registration or ownership] (collectively, the “**Public Authority Documents**”).

(f) Certificate of the Borrower and Certificate of the Guarantor attached hereto (collectively the “**Client Certificates**”).

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<sup>131</sup> This paragraph applies when the Opinion Letter is to cover entity matters pertaining to the Borrower or Guarantor.

*NOTE: If the Borrower or the Guarantor is organized outside of the State, local counsel will not opine about the entity aspects of the Borrower or the Guarantor and, therefore, will not need to review any of the foregoing Authority Documents issued outside the State other than, if needed, a Client Certificate. In such case, local counsel may opine with respect to the Borrower's or Guarantor's being qualified to do business in the State if such qualification is necessary to the opinions being provided, and will review only the applicable Public Authority Document of the State referred to in Paragraph 1.2(e). This Illustrative Opinion Letter does not provide all possible variations for this; and references to Public Authority Documents and Authority Documents in the text of this Illustrative Opinion Letter should be adjusted and coordinated as necessary.*

1.3 Opinion Jurisdiction[s]; Definition of Law. The statutes, the judicial and administrative decisions, and the policies, rules, and regulations duly promulgated by the governmental agencies (collectively “**Law**”) covered by the opinions expressed in this Opinion Letter are limited to the Law of the State [*the following text in this bracketed section would be omitted in most local counsel opinions, and if omitted, the term “State” would be used in place of “Opinion Jurisdictions” or “Entity State” in the Opinion Letter:* and the Limited Liability Company Act and General Corporation Law of the State of [*Insert name of state where entity was organized* (the “**Entity State**,” and together with the State, the “**Opinion Jurisdictions**”), in each case] as currently in effect. We express no opinion concerning federal law, the Law of any other jurisdiction[, the other Law of the Entity State,] or the effect thereof. Further, and without limiting the foregoing provisions of this Paragraph or other limitations on coverage, our opinions in this Opinion Letter relate only to such Law of the [State][Opinion Jurisdictions] that we, in the exercise of customary professional diligence, would reasonably recognize as being directly applicable to any or all of the Borrower, the Guarantor, or the Transaction. References in this Opinion Letter to the “**Uniform Commercial Code**” or “**U.C.C.**” refer to the Uniform Commercial Code as in effect in the State.

1.4 Scope of Review. In connection with the opinions set forth in this Opinion Letter and subject to the foregoing, we have reviewed [unexecuted copies of] the Opinion Transaction Documents and the [Authority Document{s}][State Certificate], [and the Client Certificates]. [Our opinions expressed in this Opinion Letter are limited to our review

of the foregoing Opinion Transaction Documents].<sup>132</sup> We have given consideration to such matters of Law [and facts], as we have deemed appropriate, in our professional judgment, to render such opinions.

1.5 Reliance on Other Sources Without Investigation. We have relied, without investigation or analysis, upon information in the [Authority Document{s}][State Certificate], [and the Client Certificates]. Except to the extent the information constitutes a statement, directly or in practical effect, of any legal conclusion at issue, we also have relied, without investigation or analysis, upon the information contained in representations and warranties made by both the Borrower and the Guarantor in the [Transaction Documents] and on information provided in the Client Certificates.

## II. ASSUMPTIONS

2.1 Assumptions. In rendering this Opinion Letter, we have relied, without investigation, upon the assumptions set forth below:

(a) A Borrower [or Guarantor] who is a natural person, and natural persons who are involved on behalf of [either of] the Borrower [or the Guarantor], each has sufficient legal capacity to enter into and perform the Transaction or to carry out that person's role in it.

(b) The Borrower [or the Guarantor] holds the requisite title and rights in and to any property involved in the Transaction.

(c) Each party to the Transaction (other than the Borrower [and the Guarantor]) [*if the Borrower or the Guarantor is organized outside of the State,*<sup>133</sup> *either delete the parenthetical content as to the entity organized outside of the State or change "other than" to "including" that entity*] has satisfied those legal requirements that are applicable to it to the extent necessary to make the Transaction Documents enforceable against it, and [*if one or more of the Transaction Documents, or a portion of, or certain issues under, one or more of the Transaction Documents are governed by Law other than that of the State, and counsel is rendering an enforceability opinion about the Transaction Document[s] or portion*

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<sup>132</sup> The bracketed sentence is appropriate if the opinions given are to be limited to specific documents, such as the Opinion Transaction Documents in this Illustrative Opinion Letter, which often is the case in a local counsel opinion. The scope of review may not be so effectively limited if the bracketed language is not included.

<sup>133</sup> If the Borrower or the Guarantor is organized outside the State, add Assumption Paragraphs 2.1(p) and 2.1(q) below relating to entity issues.

*thereof that is governed by the Law of the State, add the following: except as is expressly provided as to the Borrower {and the Guarantor} in Paragraph \_\_\_ {3.5 Enforceability} of this Opinion Letter,] each such party's obligations set forth therein are enforceable against it in accordance with all stated terms.<sup>134</sup> See discussion in Supplement Part II Paragraph (1).*

(d) Each party to the Transaction (other than the Borrower and the Guarantor) has complied with all legal requirements pertaining to its status as such status relates to its rights to enforce the Transaction Documents against the Borrower and the Guarantor.

(e) Each Transaction Document, Authority Document, and other document submitted to us for review is accurate and complete, each such document that is an original is authentic, each such document that is a copy conforms to an authentic original, and all signatures on each such document are genuine. The form and content of all Transaction Documents submitted to us as unexecuted copies do not differ in any respect relevant to this Opinion Letter from the form and content of such Transaction Documents as executed and delivered.

(f) Each Public Authority Document is accurate, complete, and authentic, and all official public records (including their due and proper recordation or filing, and their due and proper indexing) are accurate and complete.

(g) The [Security Documents have][Mortgage has] been or will be duly and properly recorded or filed and duly and properly indexed in all places necessary (if and to the extent necessary) to create the encumbrance and lien as provided therein.

(h) The description of the Collateral is accurate and reasonably identifies the Collateral.

(i) Legally adequate consideration has been given for the Transaction and the obligations of the Borrower and the Guarantor in the Transaction Documents.

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<sup>134</sup> See *supra* note 46, for a suggested additional assumption regarding the Borrower, the Guarantor, or both.



*Assumptions related to the ways the parties have dealt with and are anticipated to deal with each other, and to the state of the Law:*<sup>135</sup>

(j) [There has not been any mutual mistake of fact or misunderstanding, fraud, duress, or undue influence.]

(k) [The conduct of the parties to the Transaction has complied and will continue to comply with any requirement of good faith, fair dealing, and conscionability.]

(l) [The Lender and any agent acting for the Lender in connection with the Transaction have acted in good faith and without notice of any defense against the enforcement of any rights created by the Transaction, or of any adverse claim to any property, lien, or security interest transferred, or created as part of the Transaction, or of any agreement, or court or administrative order, writ, judgment, or decree that would be violated by entering into the Transaction, or by execution, delivery, or performance of the Transaction Documents.]

(m) [There are no agreements or understandings among the parties, written or oral, and there is no usage of trade or course of prior dealing among the parties that would, in either case, define, supplement, or qualify the terms of the Transaction Documents.]

(n) [All statutes, judicial and administrative decisions, and rules and regulations of governmental agencies, constituting the Law of the State are generally available (i.e., in terms of access and distribution following publication or other release) to lawyers practicing in the State, and are in a format that makes legal research reasonably feasible.]

(o) [The constitutionality or validity of a relevant statute, rule, regulation, or agency action is not in issue unless a reported decision in the State has specifically addressed but not resolved, or has established, its unconstitutionality or invalidity.]

*Additional Entity Assumptions:*

(p) *Insert if the Borrower and/or the Guarantor are not organized under the Law of the State.* [Each of][T]he Borrower and the Guarantor

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<sup>135</sup> Many opinion givers include assumptions as to the issues in some or all of the assumptions in bracketed Paragraphs 2.1(j) through (o). All these assumptions are implied. Please refer to the corresponding sections of Chapter Two of the 2012 Report for a full explanation of these bracketed assumptions. *See 2012 Report, supra* note 1, at 227–60.

(i) is a [*nature of entity*] duly organized, validly existing and in good standing under the Law of the jurisdiction of its organization or formation; (ii) has the power under its organizational documents and applicable [*nature of entity*] Law to execute, deliver, and perform its obligations under the Transaction Documents to which it is a party; (iii) has taken all action necessary under its organizational documents and applicable [*nature of entity in jurisdiction of formation*] Law to authorize the execution and delivery of the Transaction Documents to which it is a party and the performance of its obligations thereunder, and (iv) has duly executed and delivered the Transaction Documents to which it is a party.<sup>136</sup>

(q) Each of the persons whose consent is required to authorize the Borrower or the Guarantor to execute and deliver the Transaction Documents and perform its agreements thereunder, if an entity, (i) is validly existing and in good standing under the Law of the jurisdiction of its organization or formation and (ii) has taken all action necessary under any applicable organizational documents and applicable Law to authorize the execution and delivery of the Transaction Documents to which the Borrower or the Guarantor is a party and the performance of the Borrower's or the Guarantor's obligations thereunder.<sup>137</sup>

*Alternate assumptions as to execution and delivery by all parties, including the Borrower and/or the Guarantor:*

(r) The Transaction Documents have been duly executed and delivered by the respective parties thereto by their duly authorized officers or other representatives in accordance with the Law of the jurisdiction where executed and with the Law of any jurisdiction governing actions of the parties executing and delivering such documents. (*Supplement Part II Paragraph (2)*).

(s) The form of acknowledgment and action taken with respect to acknowledgment of each Transaction Document comply with requirements of the jurisdiction where acknowledged. (*Supplement Part II Paragraph (3)*).

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<sup>136</sup> See this Supplement, *supra* Part II.(1).

<sup>137</sup> See this Supplement, *supra* Part II.(5).

*Choice of Law Assumptions (Supplement Part II Paragraphs (1) and (4), and Part III Paragraphs (3.5 and 3.9)):*

(t) *When a choice of law opinion is not given:* To the extent governed by the Law of any jurisdiction other than the State, including conflicts of law principles thereof, we have assumed that the Transaction Documents are enforceable against the parties thereto in accordance with their respective terms. (*Supplement Part I Paragraph (1)(ii)*).

(u) *When a choice of law opinion is given under Restatement principles:* To the extent governed by the Law of any jurisdiction other than the State (an “**Other Jurisdiction**”), including conflicts of law principles thereof, we have assumed that: (i) the Transaction Documents are enforceable against the parties thereto in accordance with their respective terms under the Law of the Other Jurisdiction; (ii) the Other Jurisdiction has a substantial relationship to the parties or the Transaction, or there is other reasonable basis for the choice by the parties, and application of the Law of an Other Jurisdiction would not be contrary to a fundamental policy of the State; and (iii) the selection of application of the Law of the Other Jurisdiction will be honored by courts in the Other Jurisdiction. (*See Supplement Part II Paragraph (4)*).

*Additional U.C.C. Assumption (See Supplement Part II Paragraph (6)):*

(v) The Mortgage and any U.C.C. financing statement sufficiently provide the name of the Borrower as debtor.

*“No Governmental Approvals” Assumption:*<sup>138</sup>

(w) The Borrower [or the Guarantor] is a general business entity of a type that is not regulated by governmental authority or court order in a way that would restrict the ability of the Borrower [or the Guarantor] to

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<sup>138</sup> This assumption is discussed in this Supplement, *supra* Part III.3.5(f), and may be provided as an alternative to the limitation in 2012 Report. *See 2012 Report, supra* note 1, at 269. As an alternative to these assumptions, the factual basis of the “no governmental approvals” assumptions may be included in the Borrower’s certificate. More specific assumptions may include: (a) Neither the Borrower nor the Guarantor is subject to any federal, state, or local governmental programs that require governmental consent prior to the Borrower’s or the Guarantor’s entering into [commercial loan transactions]; (b) Neither the Borrower nor the Guarantor is engaged in an industry or business activity that is specially regulated by any federal, state, or local governmental entity or agency such that governmental consent is required prior to the Borrower’s or the Guarantor’s entering into [commercial loan transactions]; and (c) Neither the Borrower nor the Guarantor is subject to any court order that requires governmental consent prior to the Borrower’s or the Guarantor’s entering into [commercial loan transactions].

alienate or encumber its property to secure indebtedness [or to enter into the Transaction Documents].

*Other Assumptions:*

(x) [Placeholder if necessary and appropriate for other state, entity, or transaction-specific assumptions]

### III. OPINIONS

Based upon and subject to the foregoing assumptions and other matters, and to the exceptions, exclusions, qualifications, and other limitations set forth in this Opinion Letter, we are of the opinion that:

3.1 Status. [Based solely on the Public Authority Documents,] The Borrower is a [limited liability company], validly existing in the State. [Based solely on the Public Authority Documents,] The Guarantor is a [nature of entity], validly existing in the State. *Instead of the preceding sentences, if the Borrower or the Guarantor is not organized under the Law of the State:* Based solely on the Public Authority Document(s), the Borrower [Guarantor] is qualified to do business in the State.

3.2 Power. The Borrower has the [limited liability company] power to execute and deliver the Opinion Transaction Documents. The Guarantor has the [corporate] power to execute and deliver the Guaranty. *Omit this paragraph as to the Borrower or the Guarantor if it is not organized under the Law of the State and instead assume the subject matter.*<sup>139</sup>

3.3 Authorization. All [limited liability company] actions or approvals by the Borrower, [and its {members/managers},] necessary to bind the Borrower under the Transaction Documents have been taken or obtained. All [corporate] actions or approvals by the Guarantor, [and its {directors/shareholders},] necessary to bind the Guarantor under the Guaranty have been taken or obtained. *Omit this paragraph as to the Borrower or the Guarantor if it is not organized under the Law of the State, and instead assume the subject matter.*<sup>140</sup>

3.4 Execution and Delivery. The Borrower has duly executed [and delivered] the Borrower Transaction Documents. The Guarantor has duly executed and delivered the Guaranty. *Omit this paragraph as to the*

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<sup>139</sup> See *Illustrative Opinion Letter*, *supra* para. 2.1(p)(ii).

<sup>140</sup> See *Illustrative Opinion Letter*, *supra* para. 2.1(p)(iii).

*Borrower or the Guarantor if it is not organized under the Law of the State or the Law of the State does not apply to the acts described, and instead assume the subject matters.*<sup>141</sup>

3.5 Enforceability. The Opinion Transaction Documents are enforceable against the Borrower, in accordance with their terms. *If the Transaction Documents are governed in part by the Law of the State and in part by the Law of another jurisdiction, and the opinion giver is satisfied that selection of State Law will be honored, the opinion could read:*

To the extent that the Law of the State applies, giving effect to the choice of law provisions in the Borrower Transaction Documents choosing the Law of the State but excluding choice of law rules, the Opinion Transaction Documents are enforceable against the Borrower, in accordance with their terms. [The Guaranty is enforceable against the Guarantor in accordance with its terms.]<sup>142</sup>

3.6 Form of Documents; Suitability for Recording. The Mortgage is in a form sufficient to create a lien on all right, title, and interest of the Borrower [Guarantor] in and to the Real Property. *If a separate Security Agreement that is governed by Law of the State is included within the term Transaction Documents, add the following:* The Security Agreement is in a form sufficient to create a security interest in those items of the personal property stated as constituting part of the Collateral in which a security interest can be created under Article 9 of the U.C.C.

*Or, in place of the first sentence of the foregoing paragraph when appropriate:*

The Mortgage is in form sufficient to create (i) a lien on all right, title, and interest of the Borrower [*or the Guarantor*] in and to the Real Property[, including the Leases and Rents,] and (ii) an assignment of all right, title, and interest of the Borrower [Guarantor] in the [Leases and] Rents [for collateral purposes]. *If there is a separate assignment of*

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<sup>141</sup> See *Illustrative Opinion Letter*, *supra* para. 2.1(r).

<sup>142</sup> When transaction documents provide that they are to be governed by the Law of a jurisdiction other than the State and a choice of law opinion is disclaimed, requests are sometimes made that an “as if” enforceability opinion be given as follows: “**if a court of competent jurisdiction would rule that the Law of the State should govern the Opinion Transaction Documents, notwithstanding the choice of law of [chosen jurisdiction], the Opinion Transaction Documents are enforceable.**” See *this Supplement*, *supra* Part III.3.5(b)(3).

*leases and rents (or analogous document)*: The Assignment of Leases is in form sufficient to assign all right, title, and interest of the Borrower [Guarantor] in the [Leases and]Rents [for collateral purposes].

*Suitability for Recording*

The Mortgage is in form sufficient to permit recordation under the Law of the State. *Add if appropriate*: We note the possibility that recording offices in this State may apply Local Law, and no opinion is provided in this Paragraph \_\_[3.6 *Form of Documents*] that the Mortgage is in form suitable, or will be accepted, for, recording by reason of Local Law.

*If the requirements of U.C.C. section 9-502 are met by the Mortgage, the following opinion may be given:*

Upon recordation in the Recording Office [*define here unless defined elsewhere in this Opinion Letter*], the Mortgage is in form sufficient to serve as a U.C.C. fixture financing statement with respect to that portion of the Collateral that consists of goods that are or are to become fixtures under the real property law of the State.

3.7 No Breach or Violation. The borrowing of the Loan, and the execution and delivery by the Borrower of, and performance of its payment obligations in, the Opinion Transaction Documents, do not: (i) violate the Borrower Organizational Documents, (ii) breach any existing obligation of the Borrower under any of the agreements and documents specified in Attachment [ ] hereto, or (iii) violate any existing obligation of the Borrower under any orders, if any, which are identified as such in Attachment [ ] hereto, which the Borrower has confirmed to us are the only court and administrative orders that name the Borrower and are specifically directed to it or its property. Execution and delivery by the Guarantor of, and performance of its payment obligations in, the Guaranty, do not: (x) violate the Guarantor Organizational Documents, (y) breach any existing obligation of the Guarantor under any of the agreements and documents specified in Attachment [ ] hereto, or (z) violate any existing obligation of the Guarantor under any orders, if any, which are identified in Attachment [ ] hereto, which the Guarantor has confirmed to us are the only court and administrative orders that name the Guarantor and are specifically directed to it or its property. Our opinions in this Paragraph do not extend to any action or conduct of either the Borrower or the Guarantor that a Transaction Document may permit but does not require. In this Opinion Letter, the

agreements and documents referred to in clauses (ii) and (y) above in this Paragraph sometimes are referred to as “**Other Agreements,**” and the orders referred to in clauses (iii) and (z) above in this Paragraph sometimes are referred to as “**Court Orders.**” For purposes of this Paragraph, in addition to the other assumptions in this Opinion Letter, we assume that Other Agreements and Court Orders, if any, to the extent they are governed by Law other than that of the State, would be enforced to the same extent, and only to the same extent, as under the Law of the State.<sup>143</sup>

3.8 No Violation of Law. The execution and delivery by the Borrower of, and performance by the Borrower of its payment obligations in, the Transaction Documents, neither are prohibited by applicable provisions of Law comprising statutes or regulations duly enacted or promulgated by the State (“**Statutes or Regulations**”) nor subject the Borrower to a fine, penalty, or other similar sanctions, under any Statutes or Regulations. Execution and delivery by the Guarantor of, and performance by the Guarantor of its payment obligations in, the Guaranty, neither are prohibited by applicable provisions of Statutes or Regulations nor subject the Guarantor to a fine, penalty, or other similar sanctions, under any Statutes or Regulations. Our opinions in this Paragraph do not extend to any action or conduct of either the Borrower or the Guarantor that a Transaction Document may permit but does not require.

3.9 Choice of Law. [Except as expressly stated below in this Paragraph, this] [This] Opinion Letter does not express any opinion as to the enforceability of any choice of law or analogous provisions in the Transaction Documents.<sup>144</sup>

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<sup>143</sup> Local counsel typically do not render this opinion about breach or violation of organizational documents if Borrower is not formed under the Law of the State, or breach or violation of other obligations of the Borrower. Lead counsel is typically in a better position to render these opinions.

<sup>144</sup> This format is presented in the 2012 Illustrative Language. As the 2012 Illustrative Language in Paragraph 3.9 suggests, if no choice of law opinion is given, an express exclusion of choice of law (e.g., “This Opinion Letter does not express any opinion as to the enforceability of any choice of law or analogous provisions in the Transaction Documents.”) is more appropriately stated as in Illustrative Opinion Letter Paragraph 4.6(v) than in the opinions portion of the Opinion Letter.

*If a choice of law opinion can be given, based on applicable State Law (see Supplement Part III Paragraphs 3.5 and 3.9), the opinion language might read:*

A federal court sitting in the State and the State courts in the State, applying the choice of law rules of the State [would][should] give effect to the choice of law provisions contained in Paragraph \_\_ of the [Mortgage]. *NOTE: Use of this opinion statement would require either the Assumption noted in Paragraph 2.1(u) of this Illustrative Opinion Letter, where the Restatement (Second) Conflicts of Law has been adopted or other assumptions based on State Law.*

*If a choice of law opinion cannot be given under applicable Law, a disclaimer either such as that appearing in the opening sentence above, beginning with “This Opinion Letter . . .” would be included here or a Limitation as provided in Paragraph 4.6 of this Illustrative Opinion Letter would be included in the Opinion Letter.*

3.10 Usury.<sup>145</sup> *[If no opinion on usury or related interest regulation matters is to be provided implicitly:] No opinion is expressed by this Opinion Letter with respect to usury or whether any amounts might constitute unenforceable penalties.*<sup>146</sup>

*Or, if an opinion on usury is being rendered:*

The payment of any interest pursuant to the Transaction Documents will not violate the usury laws or laws regulating the use or forbearance of money of the State.

3.11 Legal Proceedings Confirmation. [In addition to the opinions contained in this Opinion Letter, we inform you that, based solely on a review of our litigation docket, {except as disclosed in Schedule \_\_ to \_\_ } we are not representing the Borrower or the Guarantor in any pending litigation, in which either is a named defendant, in which the pleadings request as relief that any of the obligations of the Borrower or

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<sup>145</sup> A usury opinion is implied by most enforceability opinions and most no violation of law opinions. If the only documents covered by this Opinion Letter are the Mortgage and Assignment of Leases, it may not be appropriate to issue a usury opinion. See discussion in this Supplement, *supra* Part III.3.5(c) and 3.10.

<sup>146</sup> This format is presented in the 2012 Illustrative Language. As the 2012 Illustrative Language Paragraph 3.10 suggests, if no usury opinion is given, an express exclusion of the subject matter (e.g., “This Opinion Letter does not express any opinion as to usury.”) is more appropriately stated in Illustrative Opinion Letter Paragraph 4.6(w) than in the opinions portion of the Opinion Letter.



the Guarantor under the Transaction Documents be declared invalid or subordinated or that the performance by either of the Borrower or the Guarantor of the Transaction Documents be enjoined.]

***The following opinions or confirmations are not necessarily or even ordinarily included in an opinion letter, but are provided as examples of expressions when these subject matters are addressed.***

3.12 Recording and its Effect. The recording of the Mortgage in the Recording Office [*define here unless defined elsewhere in this Opinion Letter*] is the only action, recording, or filing necessary [to publish record {or constructive} notice and] to establish of record the rights of the parties under the Mortgage in the real property, including, without limitation, leases and rents, and the goods described therein that are or are to become fixtures.<sup>147</sup>

*When appropriate (see Supplement Part III Paragraph 3.12):*

When duly recorded, the record of the Mortgage is sufficient as a U.C.C. financing statement for the purpose of perfecting the security interest of the Lender as Secured Party in the interest of the Borrower as Debtor in that portion of the Collateral that consists of goods that are or are to become fixtures under the real property law of the State.

3.13 No Governmental Approvals Required. No consent, approval, authorization, or other action by, or filing or registration with, any governmental authority or regulatory body of the State, or court order, is required by or on behalf of the Borrower as a condition precedent to execution and delivery by the Borrower of the Transaction Documents [other than those consents, approvals, authorizations, filings, actions, and registrations as to which the requisite filings have been accomplished, the requisite consents, approvals or authorizations have been obtained, the requisite actions have been taken, and the requisite filings and registrations have been accomplished].

3.14 Effect of Exercise of Remedies. *In states that do not have anti-deficiency, one-action, appraisal, or similar debtor protection legislation, and where it is customary to address the subject, counsel may be able to render the following opinion:* The foreclosure of the Mortgage in accordance with applicable Law will not restrict or impair the liability of the Borrower for the monetary obligations of the Borrower secured by

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<sup>147</sup> See this Supplement, *supra* Part III.3.12 for a discussion about requests for an opinion regarding future advances.

such Mortgage to the extent that a deficiency remains unpaid after application of the proceeds of such foreclosure.

*In states that have anti-deficiency, one-action, or similar debtor protection legislation counsel might include such specific limitations to an opinion on exercise of remedies as may be applicable, which might read as follows:*

Our opinion[s] [in Paragraph \_\_\_\_ {*Paragraph 4.3 on generic enforceability qualification with assurance*} [and in Paragraph \_\_\_\_ {*Paragraph 3.14 on Exercise of Remedies*}] [is] [are] subject to the effect of the applicable provisions of the Law of the State which may, inter alia, limit or prohibit the recovery of a deficiency judgment on a debt after sale of the security for the debt, require a lender to proceed against or exhaust the security for a debt before proceeding against the debtor, or otherwise require a lender to exercise foreclosure rights in a certain manner.

#### IV. CERTAIN LIMITATIONS

The opinions set forth in this Opinion Letter are subject to the following exceptions, exclusions, qualifications, and other limitations:

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

4.2 Equitable Principles Exception: The effect of general principles of equity, whether applied by a court of law or equity, including, without limitation, principles governing the availability of specific performance, injunctive relief, and other equitable remedies, and principles of diligence, good faith, fair dealing, reasonableness, conscionability, materiality, and other equitable defenses.

4.3 Generic Enforceability Qualification [with Assurance]: Certain provisions of the Transaction Documents may not be enforceable; nevertheless, subject to the other limitations set forth in this Opinion Letter, any such unenforceability will not render the Opinion Transaction Documents invalid as a whole or preclude (i) the judicial enforcement in accordance with applicable Law of the obligation of the Borrower to repay as provided in the Note the principal, together with interest thereon (to the extent not deemed a penalty), and the judicial enforcement in accordance with applicable Law of the obligation of the Guarantor to

repay as provided in the Guaranty the amounts set forth in the Guaranty (to the extent not deemed a penalty and subject to defenses of a surety that have not been or cannot be waived); (ii) the acceleration of the obligation of the Borrower to repay such principal, together with such interest, upon a material default by the Borrower in the payment of such principal or interest [or upon a material default by the Borrower in any other material provision of the Transaction Documents];[ and] (iii) the foreclosure in accordance with applicable Law of the lien on and security interest in the Collateral created by the Mortgage upon maturity or upon acceleration pursuant to clause (ii) above[ and (iv) the exercise of the assignment of rents contained in the Mortgage [(or) Assignment of Leases] in accordance with applicable Law].<sup>148</sup>

*If the Mortgage is governed by the Law of the State but the debt instrument is governed by the Law of another jurisdiction, counsel should not give assurance about remedies under the debt instrument. In that case, the assurance of the preceding paragraph would be modified to omit reference to the payment obligation as follows:*

. . . nevertheless, subject to the other limitations set forth in this Opinion Letter, any such unenforceability will not render the Opinion Transaction Documents invalid as a whole or preclude (i) the foreclosure in accordance with applicable Law of the lien on and security interest in the Collateral created by the Mortgage and (ii) exercise of the assignment of rents contained in the Mortgage [or Assignment of Leases] in accordance with applicable Law.

*The enforcement of the Guaranty would be separately treated if governed by the law of the State.*

4.4 Other Transaction-Related Qualifications: The opinion given in Paragraph \_\_\_\_ [*Paragraph 3.5 Enforceability*] and the assurances provided in Paragraph \_\_\_\_ [*Paragraph 4.3 Generic Enforceability Qualification [with Assurance]*] of this Opinion Letter are further limited by the following:

- (a) [consider: assignment of rents issues, usury, guaranties, environmental indemnities, jury trial waivers, special

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<sup>148</sup> Assurance about assignment of rents and assignment of leases may need to be tailored to exclude provisions that are more broadly written than would be enforceable. See discussion in this Supplement, *supra* Part III.3.6(i), and also the limitation in the *Illustrative Opinion Letter*, *infra* para. 4.5(e).

issues in arbitration, foreign trustees, real party in interest law, exercise of remedies, no violation of law, etc. – *see accompanying text*]

*Qualifications appropriate to specific opinions other than enforceability may be expressed as well. If the opinion is not qualified in the opinion paragraph itself, a limitation would be expressed here and be introduced by language such as:* The opinion given in Paragraph \_\_\_ [*relevant opinion paragraph*] is further limited by the following:

- (b) [consider: effect of recording, exercise of remedies, no governmental approvals, etc.—*see accompanying text*. By way of example: *This qualification may or may not be appropriate when an express opinion is given as discussed in Supplement Paragraph 3.13. In rendering the opinions in Paragraph \_\_ [3.13 No Governmental Approvals], we have not made any independent investigation into the nature of the Borrower or its business that may require governmental or court approvals or procedures for execution and delivery of the Transaction Documents or the performance of the Borrower's obligations thereunder. We are relying solely on information provided to us that has been the basis for our review; and our opinion is rendered as if the Borrower is a general business entity authorized to conduct business in the State without special conditions.*]

4.5 Other General Qualifications: The effect of generally applicable rules of Law that:

- (a) limit or affect the enforceability of a waiver of a right of redemption;
- (b) limit or affect the enforceability of any provision that purports to prevent any party from becoming a mortgagee in possession, notwithstanding any enforcement actions taken under the Security Documents;
- (c) limit or affect the enforceability of provisions for late charges, prepayment charges, or yield maintenance charges; acceleration of future amounts due (other than principal), without appropriate discount to present value; liquidated damages; penalties; or interest on interest;

[See discussion in Supplement Part III Paragraph 3.5(d).]

- (d) limit or affect the enforceability of provisions that provide for the acceleration of indebtedness upon any transfer, encumbrance, or change in the control, ownership, or management of any party;
- (e) [limit or affect the enforceability of provisions purporting to assign the rents, issues, and profits of the Collateral] [provide that the assignment in the {Opinion Transaction} {Security} Documents of the rents, issues, and profits of the Collateral for other than security purposes only; among other things, we express no opinion that any assignment of leases and rents included in the {Opinion Transaction} {Security} Documents is in form to be enforceable or effective to assign the leases and rents absolutely];
- (f) limit the enforceability of provisions releasing, exculpating, or exempting a party from, or requiring indemnification of a party for, liability for its own action or inaction, to the extent the action or inaction involves [gross] negligence, recklessness, willful misconduct, or unlawful conduct;
- (g) limit or affect the enforcement of provisions of a contract that purport to require waiver of the obligations of good faith, fair dealing, diligence, and reasonableness;
- (h) provide that forum selection clauses in contracts are not necessarily binding on the court(s) in the state or the forum selected;
- (i) limit the availability of a remedy under certain circumstances where another remedy has been elected;
- (j) limit the right of a creditor to use force or cause a breach of the peace in enforcing rights;
- (k) relate to the sale or disposition of collateral, or the requirements of a commercially reasonable sale, including, without limitation, statutory cure provisions, rights of reinstatement, and limitations on deficiency judgments;

- (l) where less than all of a contract may be unenforceable, may limit the enforceability of the balance of the contract to circumstances in which the unenforceable portion is not an essential part of the agreed exchange;
- (m) govern and afford judicial discretion regarding the determination of damages and entitlement to attorneys' fees and other costs;
- (n) [*This limitation may be used if the Opinion Letter relates to a Guarantor.*] in the absence of a waiver or consent, may discharge the Guarantor to the extent that (i) action by a creditor impairs the value of collateral securing guaranteed debt to the detriment of the Guarantor, or (ii) guaranteed debt is materially modified;
- (o) may permit a party who has materially failed to render or offer performance required by the contract to cure that failure unless (i) permitting a cure would unreasonably hinder the aggrieved party from making substitute arrangements for performance, or (ii) it was important in the circumstances to the aggrieved party that performance occur by the date stated in the contract;
- (p) impose limitations on attorneys' or trustees' fees; or
- (q) limit or affect the enforceability of provisions that provide for the application of insurance or condemnation proceeds to reduce indebtedness.

4.6 Exclusions. No opinions are implied beyond those expressly stated in this Opinion Letter. Without limiting the generality of the preceding sentence, unless explicitly addressed in this Opinion Letter, the opinions and confirmations set forth in this Opinion Letter do not address any of the following legal issues, and we specifically express no opinion with respect thereto:

- (a) securities Law, "Blue Sky" Law, and Law relating to commodity (and other) futures and indices and other similar instruments;
- (b) margin regulations;
- (c) pension and employee benefit Law and regulations;
- (d) antitrust and unfair competition Law;

- (e) Law concerning filing and notice requirements,<sup>149</sup> other than requirements applicable to charter-related documents such as a certificate of merger;
- (f) compliance with fiduciary duty requirements;
- (g) the statutes and ordinances, the administrative decisions, and the rules and regulations of counties, towns, municipalities, and special political subdivisions, and judicial decisions to the extent that they deal with any of the foregoing (“**Local Law**”);<sup>150</sup>
- (h) the characterization of the Transaction;
- (i) the creation, attachment, perfection, or priority of a lien, or security interest in, or to Collateral, or enforcement of a security interest in Collateral comprising personal property;
- (j) environmental Law;
- (k) zoning, land use, condominium, cooperative, subdivision, and other development Law;
- (l) tax Law;

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<sup>149</sup> This Exclusion and all Exclusions listed in *Illustrative Opinion Letter, supra* para. 4.6 have precedent in the Accord, see *ABA Business Law Accord Report, supra* note 7, as adapted and enhanced in the *Report on Adaptation of the Legal Opinion Accord, supra* note 8. The precedent to this Exclusion contained in the Accord at § 19(e), provided examples giving context to this Exclusion: “(e.g., Hart-Scott-Rodino and Exon-Florio).” The 2012 Report’s Illustrative Opinion Language omitted these examples because of their almost unlikely application to real estate finance transactions. Omission of these specific examples is not intended to broaden application of this Exclusion beyond requirements related to filing requirements that affect the validity of the transaction or its compliance with applicable Law, which was the scope implied by the examples. This Exclusion is historical, and, given an appropriate limitation of Law covered (see *Illustrative Opinion Letter, supra* para. 1.3) or the scope of opinions provided, its necessity is questionable.

<sup>150</sup> The words “matters in this Paragraph” appearing in the 2012 Report are deleted, conforming this Exclusion to its precedent. See *ABA Business Law Accord Report, supra* note 7, at Glossary. No substantive change was intended to the definition of Local Law as provided in the Accord by addition in the 2012 Report of the words omitted here, and none results by their omission here. The meaning is the same. The deletion is made for the purpose of clarity.

- (m) patent, copyright and trademark, state trademark, and other intellectual property Law;
- (n) racketeering Law;
- (o) health and safety Law;
- (p) labor Law;
- (q) Law concerning (i) national and local emergency, (ii) possible judicial deference to acts of sovereign states, and (iii) criminal and civil forfeiture Law;
- (r) Law of general application to the extent such Law provides for criminal prosecution (e.g., mail fraud and wire fraud statutes);
- (s) bulk transfer Law;
- (t) Law concerning access by the disabled and building codes;
- (u) title to any property, the characterization of any property as real property, personal property, or fixtures, or the accuracy or sufficiency of any description of collateral or other property;
- (v) choice of law or analogous provisions in the Transaction Documents;
- (w) usury and similar Law governing the legal rate of interest; and
- (x) [Placeholder if necessary and appropriate for possible others such as: anti-terrorism, anti-money laundering, arbitration, know-your-borrower, Equal Credit Opportunity Act (ECOA), Fair Debt Collection Practices Act (FDCPA), consumer protection Law, Servicemembers Civil Relief Act, Troubled Asset Relief Program/Term Asset Backed Securities Loan Facilities (TARP/TALF), Interstate Land Sales Act, federal Assignment of Claims/Contracts Acts, Controlled Substances Act, appointment of the Lender as attorney-in-fact, etc.].



## V. USE OF THIS OPINION LETTER

5.1 Use. The opinions expressed in this Opinion Letter are solely for the [Lender's][addressee's] use in connection with the Transaction for the purposes contemplated by the Transaction Documents. Without our prior written consent, this Opinion Letter may not be used or relied upon by the [Lender][addressee] for any other purpose whatsoever or relied on by any other person[, except that this Opinion Letter may be delivered by the [Lender][addressee] to an assignee from time to time for value in good faith of all right, title, and interest in and to the [Note] [Transaction Documents], and such assignee may rely on this Opinion Letter as if it were addressed and had been delivered to it on the date hereof]. 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][addressee] 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 circumstances other than those at the date of this Opinion Letter. This Opinion Letter may be delivered (i) to a regulatory agency having supervisory authority over the [Lender][addressee] for the purpose of confirming the existence of this Opinion Letter; (ii) to the court or arbitrator and parties to a litigation or arbitration in connection with the assertion of a defense as to which this Opinion Letter is relevant and necessary; (iii) to nationally recognized statistical rating organizations rating an issuance involving [the Loan] or otherwise entitled to access under Rule 17g-5 under the Securities and Exchange Act of 1934, as amended (or any successor provision to such subsection) by providing a copy of this Opinion Letter to the appropriate 17g-5 information provider for the securitization into which the Loan or a component of the Loan is deposited or as otherwise permitted by the applicable pooling and servicing agreement or trust and servicing agreement, as the case may be; and (iv) to other parties as required by the order of a court of competent jurisdiction in the United States.

*A further provision authorizing but limiting reliance by assignees of the lender may be added:*<sup>151</sup>

The opinions expressed in this Opinion Letter are solely for the benefit of the addressee[s]. We consent to reliance on the opinions expressed in this Opinion Letter, solely in connection with the Opinion Transaction Documents, by any assignee of the Lender's interest subsequent to the date of this Opinion Letter (each an "Assignee") as if this Opinion Letter were addressed and delivered to such Assignee on the date of this Opinion Letter, on the condition and understanding that (i) any such reliance must be actual and reasonable under the circumstances existing at the time such Assignee becomes a Lender, including any circumstances relating to changes in Law, facts, or any other developments known to or reasonably knowable by such Assignee at such time, (ii) our consent to such reliance shall not constitute a reissuance of the opinions expressed in this Opinion Letter or otherwise extend any statute of limitations period applicable hereto on the date hereof, and (iii) in no event shall any Assignee have any greater rights with respect hereto than the original addressee[s] of this Opinion Letter on its date.

*If there are multiple reliance parties, the opining counsel may want to include language such as the following so that if an action is brought under the Opinion Letter it is done so in through a single agent or in a consolidated action:*

All rights hereunder may be asserted only in a single proceeding by and through [the Administrative Agent] or [the Required Lenders].

5.2 Effective Date; No Obligation to Update. This Opinion Letter is rendered as of its date, and we express no opinion as to circumstances or events that may occur subsequent to such date. Further, we undertake no, and hereby disclaim any, obligation to advise you of any changes in the applicable Law or any new developments that might affect any matters or opinions set forth in this Opinion Letter.

*The following statements are not ordinarily expressed. Paragraphs 5.4 and 5.5 are implicit. Express selection of law governing the Opinion Letter as presented in Paragraph 5.3 is not recognized as customary*

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<sup>151</sup> This language is best placed in the main Illustrative Opinion Paragraph 5.1 following the sentence beginning "Nothing in the preceding sentences . . .," but may be used as a separate paragraph.

*practice. As Supplement Part V Paragraph 5.3 notes, it appears to be consistent with recognized standard of care but it may also implicate customary practice peculiar to a State.*

5.3 Governing Law. This Opinion Letter shall be governed by the Law of the State.

5.4 Disclaimer of Implied Opinions. This Opinion Letter deals only with the legal issues expressly stated in this Opinion Letter. No implied or inferred opinions should be read into this Opinion Letter.

5.5 Expression of Professional Judgment. This Opinion Letter includes expressions of professional judgment and not guarantees of particular results.

Very truly yours,

[SIGNATURE OF OPINION  
GIVER FIRM]

[PRIMARY LAWYER'S INITIALS]

ATTACHMENTS:

Attachment [ ]: Certificate(s) of the Borrower (*see Paragraph 1.2(f)*)

Attachment [ ]: Certificate of the Guarantor (*see Paragraph 1.2(f)*)

Attachment [ ]: Other Agreements of the Borrower (*see Paragraph 3.7*)

Attachment [ ]: Court Orders Regarding the Borrower (*see Paragraph 3.7*)

Attachment [ ]: Other Agreements of the Guarantor (*see Paragraph 3.7*)

Attachment [ ]: Court Orders Regarding the Guarantor (*see Paragraph 3.7*)

