

OPINIONS MATTERS

The Newsletter of the Committee on Legal Opinions in Real Estate Transactions

From the Chair

On behalf of the Committee on Legal Opinions in Real Estate Transactions of the ABA Section of Real Property, Trust and Estate Law, it is my pleasure to present this issue of *Opinions Matters*, our Committee’s semiannual newsletter. The mission of the newsletter is to keep our members and other lawyers informed of developments in opinion practice, with a focus on real estate opinion practice. We monitor and report on actions and reports of various organizations, such as the Legal Opinion Committee of the ABA Business Law Section, the Working Group on Legal Opinions, and the TriBar Opinion Committee.

It is appropriate for this Spring issue that *Opinions Matters* has a new set of editors. They have bravely agreed to follow the tremendous work done for the initial four issues by Bill Dunn, Editor emeritus. I am privileged to introduce Ed Levin as the new Editor-in-Chief. Ed (an appropriate name in this context) has been an active leader and participant in the RPTE Section for years, serving as Chair of our Committee and as Group Chair of the Real Estate Financing Group under which our Committee falls. Ed has been involved in the three major recent works cosponsored by our Committee: he was a member of the Joint Drafting Committee that prepared the *Real Estate Finance Opinion Report of 2012*, the coeditor of the 2016 *Local Counsel Supplement* thereto and a coeditor of the *Uniform Commercial Code Opinions in Real Estate Finance Opinion Letters* (the “UCC Opinions Report”) discussed in this issue. Tony Todero is the new Articles Editor. He is admitted to practice in three states and has a significant third-party opinion practice deriving from his work in commercial finance, focusing on real estate and agricultural lending. Tony also is a faculty member at the Agricultural Lending Institute. Our newsletter seems to be in good hands.

In addition to our new editors, the big news for this issue is that the Reporter’s Final Draft of the *UCC Opinions Report* has been circulated to the Joint Drafting Committee for review and may be published later this year. Special thanks go to Bill Dunn, Steve Weise, Marshall Grodner, Ed Levin, Scott Willis, and Ken Jacobson. As you may recall, the Committee members participating in our April 2018 telephonic special meeting unanimously approved drafts

Edward J. Levin, *Editor-in-Chief*
Anthony D. Todero, *Articles Editor*

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of the *UCC Opinions Report* and its Illustrative Opinion Letter. Ed Levin provides some background on the *UCC Opinions Report* in his article in this issue.

There are a number of other items addressed in this issue. Scott Willis reports that the *Statement of Opinion Practices* (the “*Statement*”) project also is nearing a conclusion. He describes some of the history of the *Statement* and its predecessors in his article. Tony Todero examines a bankruptcy case in which the court considered the enforceability of certain obstacles to borrower’s ability to file bankruptcy. Those obstacles were provisions the lender required to be included in the borrower’s operating agreement as a condition to making the loan. In his *Primer*, Connor McNellis discusses in some detail the differences between traditional loan opinions and opinions dealing with loan modifications, assumptions, and joinders. He also provides suggestions that may facilitate the preparation and acceptance of such opinions.

In my article about UCF I Trust 1 below, I summarize the Ruling filed May 1, 2018, posted on the Committee’s listserve in May 2018, and the Amended Complaint filed May 31, 2018. Copies of the Ruling, the Amended Complaint, and the opinion letter underlying the claims are available on our Committee’s listserve.

Attorneys who provide HUD opinions will want to read the article written by Charlie Menges. The article is one in a series dealing with who should be permitted to rely on a real estate opinion letter and how that reliance should be expressed in the opinion letter.

We also summarize the activity on both our Committee’s and the Business Law Section Legal Committee’s listserves.

Mark your calendars! The Committee is planning to put on a panel to discuss the *UCC Opinions Report* and perhaps a second panel to expand on Conner McNellis’s *Primer* at RPTE’s 2019 Spring Symposia scheduled for Boston May 8-11, 2019. Should you become aware of any complaints, cases, or other developments with respect to third-party legal opinion letters, please share them with the editors, the chair, or the vice chairs.

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Editor’s Note

Following Bill Dunn, who edited *Opinions Matters* for its first two years, is a daunting task. He developed ideas for this publication, wrote for it frequently, and, of course, edited everything that appeared in it. And he did whatever else was necessary to produce the first four issues of *Opinions Matters*. As they say in the sports business, he did everything from selling the tickets to cleaning the stands after the events. He even named this publication and convinced us that its grammar was just fine.

I have worked with Bill on opinion matters since the meeting of the American College of Real Estate Lawyers in San Francisco in October 1991. Even then, Bill was a leader in this field. Since then, our efforts together have extended through the Real Property Adaptation to the Accord, the Inclusive Real Estate Secured Transaction Opinion, the Real Estate Opinion Guidelines, and The Real Estate Finance Opinion Letter Report of 2012. More recently, Bill was the reporter for the Local Counsel Report, which was published in 2016, and the UCC Opinions Report, which will be published later this year, and I (along with Scott Willis) served as one of his co-editors.

Bill’s personal motto is: “Never leave well enough alone.” I have seen that mantra play out over and over in the various projects that we have worked on together, the papers that we have written, and the seminars that we have presented – all for beneficial effect. I have also seen this slogan as applied to *Opinions Matters*. My hope is that we can continue in Bill’s manner of producing a fine publication twice a year for the benefit of real property lawyers who are interested in the subject of third-party opinion letters.

It is not even conceivable to think that a single person could adequately follow Bill in what he has begun here, and I would not have wanted to try. Fortunately, Tony Todero of Omaha, Nebraska volunteered to be the Articles Editor of *Opinions Matters*, and he has been my cohort in putting this issue together. We are ably supported by Dan Devaney of Honolulu, our Committee chair.

This issue of *Opinions Matters* follows the format that Bill has molded, with summaries of listserve e-mails, recent cases, status reports on current projects, and articles about opinion letter matters. We hope that you learn from all of these.

And most importantly, please contribute to *Opinions Matters*. Your thoughts, comments, and articles are most important to us – so send them along to Tony or me.

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A Primer: Legal Opinions in Loan Modifications, Assumptions, and Joinders

Legal opinions in loan modifications, assumptions, and joinders seem to have fewer generally accepted conventions than traditional loan opinions. This article is meant to be a primer on accepted expectations as well as points of contention that may arise with respect to such opinions. The only point of consensus may be that there is no consensus, and customary practices with respect to these types of opinions need further development.

When a borrower modifies or assumes an existing loan, it is generally appropriate and not controversial for a lender to request, and borrower's counsel to provide, legal opinions regarding: an entity's existence, power, and authority; execution and delivery; no conflicts and no litigation (any controversy here is not the subject of this article); perfection; and the recordability of those loan documents that the parties plan to record. The lender typically requires these legal opinions: for a modification, often to confirm prior opinions with respect to the borrower and any guarantors and generally opinions about the new documents, and for an assumption, to provide new assurances with respect to an assuming borrower and any new guarantor. In connection with a joinder agreement, where a new subsidiary of a borrower is joining the existing loan documents, for example, the lender may request different but similar opinions. What may be the source of disagreement is the proper scope of an enforceability opinion in these contexts.

Opinion recipients generally expect an enforceability opinion to mean a binding contract is created, and the documents do what they purport to do. That is, in the case of an assumption or modification, the new borrower has effectively assumed the loan, in accordance with the assumption documents, or the provisions in the existing loan documents have been validly modified, as per the modification documents. Lender's counsel should not expect borrower's counsel to "date down" any enforceability opinion provided in connection with the original transaction—especially if borrower's counsel was not involved in the original transaction. In that case, borrower's counsel should almost always seek to include assumptions that the original transaction documents are enforceable as of the time immediately prior to the execution of the modification or assumption documents and have not been waived, amended, or terminated. Lender's counsel will often accept the first of these assumptions because the lender should have received (or chose not to obtain) an enforceability opinion in connection with the original closing. If new documents are executed in connection with the transaction, a full enforceability opinion regarding such new documents would be appropriate, with customary limitations and assumptions.

Even though an opinion should not be requested or given regarding the original transaction documents, borrower's counsel should still review those documents in connection with the assumption or modification opinion to ensure: (1) structurally, the modification works, and (2) any defined terms or other provisions incorporated by reference into the documents for which an opinion is being rendered have been reviewed in the context of the current transaction. It is good practice to state a list of the original transaction documents reviewed by the opinion giver, and to include language that those documents are not the subject of the current opinions. This confirms the exact scope of review, making it more difficult for the lender to later argue that the opinion implied borrower's new counsel reviewed all of the original documents. This is particularly important when new counsel has no way of confirming the full list of documents executed in connection with the original transaction. To avoid misleading opinion recipients, the opinion giver should take care to state which documents are and are not the subject of the opinions. It may also be appropriate to expressly provide: the opinion provider has not reviewed the original transaction documents other than for the purpose of reviewing definitions common to the operative modification, assumption, or joinder agreement; the opinions assume that nothing in any of the original transaction documents materially changes any of the terms of the current transaction; and the opinions are without any regard to the effect of incorporation by reference or otherwise.

In limited circumstances, it may be appropriate for lender's counsel to request an opinion that the loan documents, as modified, are enforceable. Lender's counsel should almost never request that opinion in connection with a loan assumption. The extent of the modifications will bear on whether such a request is appropriate. If the modification involves an extension of the maturity date or other minor changes, an "as modified" enforceability opinion is not appropriate. If the original documents are undergoing a major overhaul, however, it may be reasonable to request an "as modified" enforceability opinion (although in that context, this raises the question why the documents are not being amended and restated in their entirety). An assumption that the original documents are enforceable immediately prior to the modification transaction may ameliorate concerns regarding "dating down" an enforceability opinion on loan documents "as modified." There is often language in the transaction documents themselves renewing representations and warranties, reaffirming the terms of the original documents, etc. In other words, it would be very unusual for a lender and borrower to close such a transaction without addressing any existing defaults or claims in the express language of the transaction documents themselves.

It may be worth considering, especially when the loan modification includes documents that are amended and restated, whether the transaction could be considered a novation. In *In re: Fair Finance Co.*, 834 F.3d 651, 667-70 (6th Cir.

2016), the 6th Circuit held that the question of whether the existing security interests, which were created in the original loan transaction, were extinguished by virtue of a loan modification was a factual matter and should not have been decided as a matter of law by the district court. In that case, the loan modification included an amended and restated note and loan agreement. However, the amended and restated documents did not include express language stating that the transaction was not a novation. The ambiguity about the intention of the parties noted in *Fair Finance* may be avoided in many circumstances if amendments to loan agreements or security agreements (or amended and restated agreements) expressly state that: (a) the transaction is not a novation, and (b) the existing security interests or liens created by the original transaction continue in full force and effect after the closing of the amendment transaction. If there is concern about a potential novation issue, the opinion giver should decline to opine that such transaction does not constitute a novation.

There may also be a distinction between enforceability opinions stating the original transaction documents are valid, binding, and enforceable, and opinions stating such documents are valid, binding, and enforceable against the original borrower. In the latter instance, lender's counsel may have a stronger argument for requiring an opinion on the original transaction documents "as modified." Some practitioners may believe, if the client is willing to pay, borrower's counsel should be willing to give an opinion on the loan documents "as modified." But the benefit to the recipient of a closing opinion and of any particular opinion should warrant the time and expense required to give them. Further, legal opinions should not be a substitute for adequate diligence. If there are risks inherent with the modification or assumption, the opinion letter should not be treated as an insurance policy.

Many limitations and assumptions relating to a standard enforceability opinion are also appropriate for a modification or assumption opinion, although each should be considered in light of the scope of the modification or assumption. For example, any assurance as to available remedies under the original loan documents (*e.g.*, the assurance portion of a generic enforceability qualification) should be revised so the assurance is limited to provide that the assumption or modification is not invalid. In many jurisdictions, specific qualifications relating to available remedies should be included. If California law governs the loan documents, for example, it would be appropriate in many instances to reference the one-action rule (Cal. Code Civ. P. §726) and clarify that the enforcement of a modification agreement to, for example, add collateral to an existing facility would be subject to the requirement that any foreclosure occur first (or in multi-property and multi-state transactions, the requirement that there can be only one action against the borrower for recovery of the debt, even if not all jurisdictions involved have such one-action rule).

If opining as to enforceability of a guaranty (or a reaffirmation) in relation to a modification or assumption transaction, counsel should confirm that the guarantor is expressly consenting to the modification or assumption, and that there is sufficient consideration to the guarantor, if required. Generally, the same assumptions, limitations, and qualifications that pertain to a typical enforceability opinion with respect to guarantees would apply to a modification or assumption transaction as well.

Many of the above considerations are implicated for opinions relating to joinders of new entities to existing facilities (such as when a corporate borrower forms a new subsidiary). Generally, a borrower's counsel will opine as to the enforceability of the joinder agreement (which provides the new subsidiary becomes a party to the underlying loan documents listed in the joinder agreement). If, in connection with a joinder, lender's counsel requests an opinion on the enforceability of the existing loan documents against the new subsidiary, then several additional issues must be considered, such as: (1) whether a subsidiary has the entity power to guaranty the debt of a parent (a question of whether the subsidiary has benefitted from the incurrence of the indebtedness by the parent or whether the benefit can be measured other than by reference to whether the loan proceeds are made available to the subsidiary); (2) whether incurring the indebtedness renders the subsidiary insolvent or meets the test of a fraudulent transfer under state law; and (3) whether consideration has to run to the joining subsidiary or if consideration in favor of the parent borrower is sufficient. Here, it would almost always be appropriate to assume that there is adequate consideration (provided such an assumption does not ignore facts to the contrary), and to state that no opinion is being given regarding whether the security documents will be deemed either a fraudulent conveyance or void for lack of consideration.

There may be fewer generally accepted conventions regarding legal opinions on loan assumptions, modifications, and joinders than on traditional loan closings. Some opinions may not be controversial, such as existence, power, authority, no conflict, no litigation, perfection, and recordable form. Enforceability opinions and their scope may be the cause of disagreement. Hopefully, this article serves as a starting point for a discussion regarding customary practices, potential issues, and the further development of opinion practice in the context of loan assumptions, modifications, and joinders.

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Contract and Negligent Misrepresentation Claims Against Opinion Giver (*UC Funding I, LP v. Berkowitz, Trager & Trager, LLC* also known as *UCF I Trust 1 v. Berkowitz, Trager & Trager, LLC*)

On May 31, 2018, Lender filed an Amended Complaint against Law Firm alleging (1) breach of contract, (2) breach of the implied covenant of good faith and fair dealing, and (3) negligent misrepresentation. The claims were based on a third-party opinion letter (the “*Opinion Letter*”) provided to Lender by Law Firm, which represented Borrower and Pledgor, among others, in connection with a loan from Lender. The Amended Complaint stated Lender brought the complaint in accordance with the Ruling on Motion to Dismiss (the “*Ruling*”) filed May 1, 2018. (The Ruling was discussed on the Committee’s listserve in May 2018.) *UC Funding I, LP, Trustee v. Berkowitz, Trager & Trager, LLC*, No. 3:17-CV-1325, 2018 WL 2023485 (D. Conn. May 1, 2018).

The Amended Complaint included the following allegations (among others): On November 1, 2012, Lender made a mezzanine loan to Borrower. In accordance with a loan agreement, Borrower was the 100% owner of Property Owner.¹ To induce Lender to extend the loan to Borrower, Pledgor entered into a guaranty secured by a pledge agreement in favor of Lender. In the pledge agreement, Pledgor represented that it was the sole member of Borrower and owned 100% of the membership interests of Borrower. After the loan funded and a subsequent default by Borrower, Lender learned that Pledgor did not own a 100% interest in Borrower. Instead, Borrower was owned 25% by its Parent and 75% by others. Per the Amended Complaint, the Opinion Letter stated that Parent owned 100% of the membership interests of Non-Pledgor and that Non-Pledgor owned 100% of the ownership interests of Pledgor. Because Pledgor did not own 100% of Borrower, Lender’s security interest did not attach to 100% of the ownership interests in Borrower. As a result, Lender suffered a loss with respect to the loan.

The Amended Complaint is silent as to whether the Opinion Letter included an express assumption as to title or an express exclusion of an opinion concerning title. See Paragraphs 2.1(b) and 4.6(u) in both the Illustrative Language

1. At times, both the Amended Complaint and the Ruling seem to conflate Property Owner with Borrower even identifying them with the same name. This summary assumes they are two separate entities and that, at all relevant times, Borrower owned 100% of the membership interests of Property Owner. This appears to be consistent with the descriptions set forth in the Opinion Letter.

of a Real Estate Finance Opinion Letter, Chapter Three of the *Real Estate Finance Opinion Report of 2012*, and the Illustrative Opinion Letter, Addendum to the *Local Counsel Supplement* thereto.

Opinion Letter

The Opinion Letter included statements that Law Firm (1) relied on certificates of its clients and representations made by them in the documents covered by the Opinion Letter, and (2) assumed the statements of fact in all certificates and other documents reviewed are accurate and complete. In addition, the Opinion Letter expressly excluded a title opinion as to some of its clients: “We express no opinion with respect to: (i) Borrower’s or Pledgor’s rights in or title to any real or personal property or as to the existence of any collateral. . . .”

Contract Claims

In the Ruling, the Court found that the breach of contract claim was based solely on Law Firm’s alleged failure to provide accurate information in the Opinion Letter, and therefore it sounded in tort rather than in breach of contract. The Court (a) dismissed the breach of contract claim because Lender was neither a party to a contract with Law Firm nor the intended third-party beneficiary of a contract between Law Firm and its clients, and (b) dismissed the implied covenant claim because such a covenant is only implied in a contractual relationship (distinguishing cases regarding wills where a lawyer owes duties to both the lawyer’s client and to third parties that are the client’s intended beneficiaries).

The Amended Complaint addressed the Court’s dismissal of the contract claims, alleging as follows: Law Firm and the entities related to Borrower entered into a contract in which Law Firm would represent the Borrower entities and provide the Opinion Letter. The Opinion Letter was prepared for the benefit of Lender and was to contain “accurate and verified information.” As a consequence, Lender was an intended third-party beneficiary of the agreements between the Borrower entities and Law Firm, and Lender had a right to enforcement of the agreements. Law Firm breached its contractual obligations as the Opinion Letter contained inaccurate information concerning the ownership of Borrower. As a direct and proximate result of Law Firm’s breach, Lender suffered monetary damages. Law Firm’s conduct as set forth in the Amended Complaint violated the covenant of good faith and fair dealing implied in every contract and, as a direct and proximate result of Law Firm’s conduct or omissions, Lender suffered monetary damages.

Negligent Misrepresentation Claim

With respect to the negligent misrepresentation claim, the Ruling stated that Lender did not sufficiently allege that it was reasonable for Lender to rely on the advice

of Law Firm, which was counsel to an adverse party in a financial transaction. In dismissing this claim, the Court noted that while detailed factual allegations are not required to defeat a Rule 12(b)(6) motion to dismiss, those allegations must raise a right to relief above the speculative level, and Lender's conclusory allegations failed to cross the line between possibility and plausibility of entitlement to relief.

The Amended Complaint addressed the Court's dismissal of the negligent misrepresentation claim first by explaining that it is customary in commercial loan transactions for the borrower's attorneys to issue an opinion letter, quoting an explanation from the *2003 Real Estate Opinion Letter Guidelines*.² In addition, the Amended Complaint noted that the Official Commentary to Connecticut Rules of Professional Conduct R. 2.3 "specifically contemplates the rendering of opinion letters by borrower's counsel to a lender and that the opinion letter does not violate or interfere with the attorney-client relationship between the borrower and its counsel. . . ." Thereafter, the Amended Complaint alleged that Law Firm made false representations to Lender with the express intention that Lender would rely on them and that Law Firm failed to exercise reasonable care. As a direct and proximate result of Lender's reliance on Law Firm's representations, Lender suffered monetary damages.

Conclusion

We will monitor this case and advise of further developments, whether in a future issue or on the Committee's listserve or webpage.

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2. Editor's note: The Amended Complaint states that the author of the *Guidelines* was the Attorneys' Opinion Committee of the American College of Real Estate Lawyers, but it fails to mention that our Committee was the co-author. See 38 REAL. PROP. PROB. & TR. J. 241 (2003).

Risk Management for Legal Opinions: Limiting Who May Rely on Your Opinion Letters in HUD Multi-Family Housing Projects³

As noted in the previous articles in this series, lawyers do get sued over legal opinions, and many opinion claims are asserted that never make their way into a court. One important risk management tool by law firms that issue third party opinion letters is to limit expressly who may rely on an opinion letter because courts recognize that a legal opinion may be relied upon only by its addressee and by any other person expressly authorized to rely. Limiting who may rely on an opinion letter, therefore, necessarily limits the potential plaintiffs when things go wrong.

HUD-Insured Loans

In examining the issue of who should be allowed to rely on opinion letters issued by real estate lawyers in financing transactions, we previously noted that the appropriate reliance parties are determined in large part by the type of financing transaction. As indicated, most financing transactions in which real estate lawyers issue opinion letters (as lead counsel or as local counsel) tend to fall into one of these categories: portfolio loans,⁴ conduit loans,⁵ HUD-insured loans, Fannie Mae/Freddie Mac loans, syndicated loans, and debt securities. This article examines the appropriate reliance parties in loans to finance a specific real estate project (e.g., multifamily housing) originated by a portfolio lender and to be insured by the Federal Housing Administration of the Department of Housing and Urban Development ("HUD").

Section 207/223(f) of the National Housing Act⁶ provides a federal mortgage insurance program in which HUD may insure lenders of multifamily housing projects against loss on mortgage defaults. Its purpose is to improve the availability of loan funds and permit more favorable interest rates, thereby facilitating the purchase or refinancing of existing multifamily rental housing. In a HUD-insured loan, there are two parties that customary opinion practice would dictate as appropriate reli-

3. This is the fourth of a series of articles examining the question of who should be allowed to rely on an opinion letter issued by a real estate lawyer in a financing transaction and how that reliance should be expressed (and limited) in the opinion letter.

4. For a discussion of the appropriate reliance parties for opinion letters issued in portfolio loans, see *Opinions Matters*, Vol. 2, No. 1 (Spring 2017).

5. For a discussion of the appropriate reliance parties for opinion letters issued in conduit loans, see *Opinions Matters*, Vol. 2, No. 2 (Fall 2017).

6. 12 U.S.C. 1715n(f).

ance parties: (a) the lender, which originates the loan and usually continues to own and service the loan after closing, and (b) HUD, which insures the lender against loan defaults and may need to enforce the loan documents after paying an insured claim. As noted in previous articles, lenders often expect an opinion letter to permit reliance by their successors and assigns, and one might also expect HUD to insist that its successors and assigns be permitted to rely as well.

However, customary opinion practice and the usual expectations of lender's and borrower's counsel do not apply in the case of HUD-insured loans. HUD mandates that borrower's counsel use only form HUD-91725M (Rev 04/11), "Opinion of Borrower's Counsel," when issuing an opinion letter for a HUD-insured loan. The instructions accompanying the HUD form of opinion state that, except for limited changes required by local law or by the unique or programmatic nature of the transaction, "the format of the Opinion must be followed and is not open to negotiation."⁷ The HUD form of opinion is addressed to the lender, to the lender's attorney, and to HUD. In addition, the last paragraph of the HUD form states that "The foregoing confirmations and opinions are for the exclusive reliance of HUD, [and Lender OR Lender and Lender's counsel], and have been made, presented, and delivered for the purpose of influencing an official action of HUD in insuring the Loan, and may be relied upon by HUD."

Addressing the opinion letter to the lender and to HUD is entirely appropriate since both parties, as originator and holder of the loan and as insurer of the loan, have a vital interest in the accuracy of the matters covered by the opinion letter.

However, normally borrower's counsel would be justified in refusing to address an opinion letter to the lender's attorney unless the lender's attorney were relying on the opinion of borrower's counsel to issue its own "umbrella" opinion that covered the same subject or that depended on the borrower's counsel opinion for one or more of the "building blocks" necessary to issue the opinion of lender's attorney. For example, lender's counsel might be relying on the entity status, power and authority, due authorization, and due execution and delivery opinions from borrower's counsel in order to give to the lender an enforceability opinion as to the borrower under the loan documents. Of course, in most cases, lender's counsel does not give an opinion to the lender as to the borrower, and even if it did, the trend in opinion practice for many years has been toward so-called "unbundled" opinions—namely, separate opinions by different lawyers directly to the lender on different aspects of the transaction with assumptions as to certain matters covered by other law-

7. Instructions to Opinions of Borrower's Counsel, HUD-91725M-INST (Rev. 04/11).

yers in their opinions. This results in the aggregate of the opinions issued by the different lawyers to the lender covering all of the bases without the necessity for any lawyer to rely on the opinion of any other lawyer.

Regrettably, HUD still requires borrower's counsel to address its opinion letter to the lender's attorney, regardless of whether reliance by lender's counsel is necessary or consistent with customary opinion practice. In 2014, when HUD last considered revisions to its forms of loan documents, including its form of opinion of borrower's counsel, representatives of the RPTE Committee on Legal Opinions in Real Estate Transactions met with lawyers in HUD's Office of General Counsel and argued that, among other things, HUD's requirement for the opinion letter of borrower's counsel to be addressed to lender's attorney was contrary to customary opinion practice. HUD declined to change that requirement. Although the last paragraph of HUD's form references "Lender OR Lender and Lender's counsel" in brackets in stating who may rely on the opinion (perhaps suggesting that such parties can be omitted in that paragraph), borrower's counsel should not assume that either lender or lender's counsel are not entitled to rely on the opinion. So long as lender and lender's counsel are addressees of the opinion letter, regardless of whether they are mentioned in the last paragraph, they are by definition "reliance parties."

However, the HUD form of opinion of borrower's counsel does not mention "successors and assigns" of the lender or of HUD. Therefore, the discussion between lender's counsel and borrower's counsel that often takes place regarding this issue, and that usually results in limitations on such a clause, should not be necessary. In fact, adding any language as to successors or assigns would violate HUD's mandate to adhere strictly to the format of its form of opinion.

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Bankruptcy Court Voids "Bankruptcy Blocking" Provisions in Operating Agreement—*In re* *Lexington Hospitality Grp., LLC*, 577 B.R. 676 (Bankr. E.D. Ky. 2017)

PCG Credit Partners, LLC ("Lender") loaned \$6,150,000 to Lexington Hospitality Group, LLC ("Borrower"). Lender conditioned the loan on the amendment of Borrower's operating agreement, to give an LLC owned and controlled

by Lender a 30% membership interest in Borrower, and to add provisions limiting Borrower's ability to file bankruptcy. The new provisions were: (1) Borrower could declare bankruptcy only with the consent of an independent manager, and then only upon a 75% vote of the members, and (2) Borrower could not file bankruptcy without the advance written consent of Lender and all members of Borrower (contradicting the 75% requirement).

Later, Borrower filed for chapter 11 bankruptcy and neither obtained the independent manager's authority nor a 75% vote. Lender filed a motion to dismiss, arguing that the filing violated the bankruptcy restrictions in the operating agreement.

The Court denied Lender's motion, holding the bankruptcy restrictions were void. There is a strong federal public policy in favor of a debtor's right to a fresh start in bankruptcy, and accordingly, prepetition agreements that prohibit a debtor's ability to file bankruptcy without a lender's consent are void. Members can agree among themselves not to file bankruptcy, but the decision cannot be controlled by a single minority equity holder with no duties to the debtor. Here, the bankruptcy restrictions enabled the LLC controlled by Lender to carry the deciding vote. Moreover, even if that member voted in favor, Lender still had a veto. The Court found these restrictions amounted to an absolute waiver of Borrower's right to file bankruptcy, and were therefore void.

In dicta, the Court noted the requirement for the consent of an independent manager does not necessarily offend federal public policy and avoids the risk of members and managers filing bankruptcy out of self-interest. But in this case, the independent manager was a pretense because of the requirements of a 75% vote and Lender's consent, which allowed Lender to block a bankruptcy filing, even if the independent manager was in favor of one.

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The UCC Opinions Report is Heading Your Way

The report entitled "Uniform Commercial Code Opinions in Real Estate Transactions" (the "UCC Opinions Report") has been completed and sent to the editors of the Real Property, Trust and Estate Law Journal for publication in the Fall 2018 issue.

The UCC Opinions Report is the third in the group of recent reports by The American Bar Association (ABA) Section of Real Property, Trust and Estate Law, Committee on Legal

Opinions in Real Estate Transactions; the American College of Real Estate Lawyers (ACREL) Attorneys' Opinions Committee; and the American College of Mortgage Attorneys (ACMA) Opinions Committee. The first of these reports was the Real Estate Finance Opinion Report of 2012 (the "2012 Report"), which was published at 47 REAL PROP. TR. & EST. L. J. 213 (2012). See <http://apps.americanbar.org/dch/committee.cfm?com=RP213000>. The 2012 Report was followed by "Local Counsel Opinion Letters in Real Estate Finance Transactions, a Supplement to the Real Estate Finance Opinion Report of 2012" (the "Local Counsel Report"), which was published at 51 REAL PROP. TR. & EST. L. J. 167 (Fall 2016). See https://www.americanbar.org/groups/business_law/migrated/tribar.html. For the UCC Opinions Report, the American College of Commercial Finance Lawyers joined in the fun.

As with the Local Counsel Report, William B. Dunn (Grand Rapids, MI) served as Reporter, and Edward J. Levin (Baltimore, MD) and Sterling Scott Willis (New Orleans, LA) toiled as Co-Editors. Two prominent experts in matters UCC, Steven O. Weise (Los Angeles, CA) and R. Marshall Grodner (Baton Rouge, LA), participated as Contributing Reporters. The other members of the Joint Drafting Committee included Edward N. Barad (Denver, CO), Kenneth P. Ezell, Jr. (Nashville, TN), Catherine T. Goldberg (Albuquerque, NM), Raymond S. Iwamoto (Honolulu, HI), Kenneth M. Jacobson (Chicago, IL), Robert J. Krapf (Wilmington, DE), Charles L. Menges (Richmond, VA), David L. Miller (McLean, VA), Laurence G. Preble (Denver, CO), Lydia C. Stefanowicz (Woodbridge, NJ), and Lawrence J. Wolk (New York, NY and Washington, D.C.). Robert A. Thompson (San Francisco, CA) actively participated on the Joint Drafting Committee until he passed away last year.

As stated in the UCC Opinions Report, it provides basic guidance for opinion practitioners in real estate finance transactions to consider in giving and reviewing opinions when there is a personal property security interest governed by the Uniform Commercial Code (the "UCC"). UCC security interests are not always important in routine real estate financings (other than with respect to fixtures) but are always significant in certain specialized real estate financings dealing with hospitality, healthcare, and living facilities and with mezzanine loans. In these real estate financing transactions, personal property, including deposit accounts and investment securities (which may include entity interests in non-corporate entities pledged in mezzanine financing), comprise a part of the security in the transaction. The UCC Opinions Report addresses the opinions that relate to all of these types of collateral.

The UCC Opinions Report also notes the special provisions of the UCC that apply to the real estate-related collateral of as-extracted collateral, standing timber to be cut, and growing crops and that are relevant if giving opinions about these subjects.

The UCC Opinions Report discusses the issues relating to requests for opinions on UCC matters that are governed by the law of a state other than where the opinion giver is admitted to practice. The Report points out the importance of the opinion giver's disclosing the limited extent of its experience with the law of the UCC jurisdiction and the sources of its information about that law.

The UCC concepts of creation, attachment, perfection, and priority as they relate to opinion letters are described in the UCC Opinions Report. The Report highlights issues that are peculiar to certain types of entities, including transmitting utilities, trusts, and series LLCs and LPs.

The UCC Opinions Report includes sections on opinion-related issues that relate to deposit accounts, which are a frequent type of collateral in real estate finance transactions, and to investment property, which includes the equity interest of the real property owner that is often pledged in mezzanine financing.

The UCC Opinions Report discusses the appropriateness of setting forth in an opinion letter lengthy assumptions and qualifications (sometimes called a "laundry list") that: recite portions of Articles 8 and 9 of the UCC; may relate to events that will occur, if at all, after the issues of the opinion letter; and may include provisions that are not applicable to the specific transaction at hand.

Sample opinion language for various points is included throughout the UCC Opinions Report. Importantly, the UCC Opinions Report includes as its addendum an illustrative opinion letter (the "2018 Illustrative Opinion Letter"). The 2018 Illustrative Opinion Letter is based on the illustrative opinion letter that is an addendum to the Local Counsel Report, and it adds to the Local Counsel Report's illustrative opinion letter content discussed in the UCC Opinions Report.

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Statement of Opinion Practices Nears Completion

After many years of deliberation and several fits and starts, it appears that the *Statement of Opinion Practices* (the "Statement") project is coming to a conclusion. The *Statement* is a joint effort by the Legal Opinions Committee of the Business Law Section ("BLS") of the American Bar Association and the Working Group on Legal Opinions Foundation ("WGLO"). In early June, a Joint Commit-

tee of WGLO and BLS Legal Opinions Committee members approved for submission to WGLO and the BLS Legal Opinions Committee a final revised draft of the *Statement*, and that Joint Committee unanimously approved the draft. That Joint Committee includes several real property practitioners who are active in and past chairs of the RPTE Legal Opinions in Real Estate Transactions Committee. The *Statement* is posted at the BLS website at http://apps.americanbar.org/webupload/commupload/CL510000/relatedresources/statement_201805.pdf. The sponsors hope that various organizations like our Committee will agree to approve the *Statement*. It is anticipated that the distribution draft will be adopted by the Business Law Section's Opinions Committee at its fall meeting in September and by the WGLO board in October (if not earlier).

Also posted on the BLS website are the Core Opinion Principles (http://apps.americanbar.org/webupload/commupload/CL510000/relatedresources/principles_201805.pdf) and an Explanatory Note with a table of sources from the existing Legal Opinion Principles and Guidelines for the provisions of the *Statement* (<http://apps.americanbar.org/webupload/commupload/CL510000/relatedresources/jcsop.pdf>). These items are planned to be published with the *Statement*.

A bit of background. When the *Third-Party Legal Opinion Report including the Legal Opinion Accord* was distributed in 1991 by the ABA Business Law Section, *Certain Guidelines for the Negotiation and Preparation of Third-Party Legal Opinions* were included. These *Guidelines* were not part of an *Accord* opinion that would have been adopted by reference in an opinion letter. While the *Accord* project was not universally received and did not gain traction as the basis for rendering third-party opinion letters, the *Guidelines* that were part of the *Legal Opinion Report* were favorably received as setting forth certain practices with respect to third-party opinion letters. Subsequently, the ABA Business Law Section's Legal Opinions Committee promulgated *Legal Opinion Principles* in 1998 and updated the *Guidelines* with the *Guidelines for the Preparation of Closing Opinions* in 2002. The real estate bar generally has been supportive of these efforts, and in 2003 it adopted the *Real Estate Opinion Letter Guidelines*. This was a joint effort of our Committee and the Attorneys' Opinions Committee of the American College of Real Estate Lawyers.

The new *Statement* updates the prior ABA Business Law *Principles* in its entirety, but it only updates selective provisions of the *Guidelines*. The other provisions of the *Guidelines* that are unaffected in the *Statement* are not repealed, and the *Statement* provides that no inference should be drawn from their omissions from the *Statement*.

Once the final *Statement* is adopted, it will be a good time for real estate practitioners to revisit the *Real Estate Opinion Letter Guidelines* to see if they need to be updated in light of not only the new *Statement* but also other developments

affecting the customary practice of real estate legal opinions, including the *Real Estate Finance Opinion Report of 2012* and the *Local Counsel Report of 2016*.

In addition to the *Statement*, the Joint Committee is proposing a summary of *Core Opinion Principles* that can be adopted by reference in an opinion letter or attached to an opinion letter. These *Core Opinion Principles* are more concise articulations of some of the points included in the *Statement*.

This Committee previously approved in principle the work of the Joint Committee and has been supportive of the *Statement*, subject to review and approval of the final version.

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Summary of Recent Committee on Legal Opinions in Real Estate Transactions Listserve Activity November 2017 – May 2018

This summary of listserv activity among members of the Committee on Legal Opinions in Real Estate Transactions does not necessarily represent the views of the Committee, but rather reflects views of individual members of the Committee on current practice topics. The comments referred to below may be viewed by clicking on the “listserv” item on the Committee’s web page at <http://ambar.org/rpteopinions>.

Zoning Opinion Addressed to Title Insurance Company. Charles Menges, Richmond, VA, noted that the issuance of such letters may not be widespread, generated seven responses to his question whether it is appropriate to address zoning opinion letters to, or allow reliance by, title insurers.

Several responders who issue zoning opinion letters indicated that addressing the letter to or permitting reliance by a title insurer was not inappropriate. John Mallin, Hartford, CT, commented that in Connecticut title insurance companies generally issue a zoning endorsement based on either a municipal reliance letter or on a report from a company that issues zoning information reports. Because there are only a very few communities in Connecticut, it is not uncommon for an attorney to issue to the title insurer a zoning opinion letter based on an independent examination of the zoning records.

Members of the Committee on Legal Opinions in Real Estate Transactions are encouraged to raise legal opinion

issues on the listserv and to participate in the exchanges. Members also are encouraged to bring new developments (such as recent case law or newly identified issues) to the attention of Committee members through the listserv.

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Summary of Selected Recent Business Law Section Legal Committee Listserv Activity October 2017 – May 2018

This summary of Business Law Section Legal Opinions Committee listserv activity among its members does not necessarily represent the views of the Committee on Legal Opinions in Real Estate Transactions, but rather reflects views of individual members of the Business Law Section Committee on Legal Opinions on current practice topics. The comments referred to below may be viewed by members of the Business Law Section Legal Opinions Committee by clicking on the “listserv” item on that Committee’s web page.

1. **Supplemental Response Audit Letters.** Amy Williams, Richmond, VA, wrote that the form of her supplemental audit response letter includes a statement that the letter is solely for the auditor’s information “in connection with [its] audit.” The auditor noted that it was performing a “review” and not an “audit” and asked the letter refer to its “review” rather than “audit.” She asked for committee members’ input regarding the requested change.

Two responders (Stanley Keller, Boston, MA, and Wallace Larson Jr., New York, NY) agreed that making the change to reflect the applicable facts would be appropriate. Paul Forrester, Chicago, IL, sought input regarding a possible supplemental response including a statement along the lines of: “nothing has come to our attention that would render our [recent audit response] materially incorrect.” Noël Para, New York, NY, described such a statement as being in the nature of a negative assurance and noted that the ABA Business Law Section Audit Responses Committee suggests that a supplemental response be prepared in accordance with the ABA Statement of Policy Regarding Lawyers’ Responses to Auditors’ Requests for Information, 31 Bus. Law. 1709 (1976). See Statement on Updates to Audit Response Letters, 70 Bus. Law. 289 (Spring 2015). As to the form of a supplemental response, the Statement on Updates notes there are many different forms, and no illustrative form, of supplemental response, unlike the form of initial response set forth in the Statement of Policy.

2. **Reliance by Successors and Assigns.** An institutional investor (as an LLC member) in tax equity credits for a renewable energy project insisted that the opinion letter include language permitting reliance by the investor and “its successors and assigns.” Noting that the transaction was not like a syndicated loan where the opinion giver knows there is a secondary market that requires opinion letters, Charles Menges, Richmond, VA, asked if any committee members know what is market or appropriate in that situation.

Two of the four responders were willing to include language permitting reliance by successors and assigns if Wachovia language were also included.⁸ Cynthia Baker, Chicago, IL, included in her response the Wachovia language that she uses and remarked that she would not include the requested reliance language without the Wachovia language. She noted that the various qualifications in the Wachovia language are really just a summary of the actual law as to reliance and misrepresentation and that she receives little or no push-back to including the language. James Fotenos, San Francisco, CA, did provide the requested reliance language with the Wachovia language after the opinion recipients insisted that the “successors and assigns” scope was uniformly given in tax equity deals.

The other two responders would not include the requested reliance language, but did not indicate whether they would include it if they were permitted to include the Wachovia language. According to Daniel Welytok, Milwaukee, WI, most opinion recipients accepted his push-back, but in some instances, the clients went to other firms that provided letters which included the requested language. Reade Ryan, Jr., New York, NY, reported that his partner, who deals with major players in connection with tax equity credits for renewable energy projects, states in his opinion letter that no other entity may rely on the letter without the “prior written consent” of the opinion giver.

3. **Addressing Opinions to Investors.** Amy Williams, Richmond, VA, commented that opinions are addressed to underwriters in public offerings and to initial purchasers and placement agents in Rule 144A offerings. In connection with a private notes offering, her draft opinion was addressed to the trustee, and the investor, who will be purchasing all of the notes, asked to be an addressee.

An investor in a directly negotiated securities offering generally will expect to be an addressee of most, if not all, opinions that are being given, according to Charles Sweet, Washington, DC. Stanley Keller, Boston, MA, notes that when a private offering is made to one or a limited number of institutional investors, it is not unusual for it to be treated in a manner similar to a venture capital, private equity or bank loan transaction where opinions are given to the in-

8. Editor’s note: Wachovia language includes the limitation that reliance by future assignees must be actual and reasonable under the circumstances as of the time of the assignment.

vestor/lender. He remarked that an opinion giver should not provide to an investor negative assurance as that is limited to underwriters in a public offering or placement agent in a 144A offering where a disclosure process similar to a public offering is followed.

4. **Ethical or Other Restrictions on Giving a Remedies or Enforceability Opinion.** Joel Greenberg, New York, NY, asked if anyone is aware of an ethics opinion or other authority to the effect that a Connecticut lawyer may not give enforceability opinions.

The question generated a number of responses, some dealing with Connecticut but most with Rhode Island.

Stanley Keller, Boston, MA, responded by providing both (1) the text of the Connecticut ethics opinion that is the basis for Connecticut lawyers reciting in their opinion letters that they are providing the opinions at the request of their client, and (2) a copy of an unpublished court opinion recognizing the role of third party opinion letters. Both he and Cynthia Baker, Chicago, IL, noted that the requirement that providing an opinion letter requires a client’s permission, but that is not unique to Connecticut.

Other responders (including Steven Weise, Los Angeles, CA, and Charles Menges, Richmond, VA) referred to an old Rhode Island ethics opinion that third-party legal opinions raise serious ethical questions. Arthur Field, New York NY, noted the opinion was rendered moot by the Rhode Island Supreme Court in *In re Ethics Advisory Panel*, 554 A.2d 1033 (1989). However, Rhode Island subsequently enacted a statute that (with limited exceptions) prohibited lenders from requiring borrower’s counsel to give an enforceability opinion in connection with a loan. R.I. Gen. L. §19-9-7. He notes that the statute does not prohibit borrower’s counsel from asking its borrower client if it can provide the opinion, and if the borrower agrees, the lender is happy.

5. **Electronic Chattel Paper.** Ronald Whitney, Detroit, MI, inquired about a requested opinion on perfection by control of electronic chattel paper (ECP) and noted that many assumptions would be needed.

Two responders noted that “ECP control” opinions are common in financings for consumer motor vehicles and equipment. Joseph Topolski, New York, NY, described some circumstances under which Standard & Poor’s requires a control opinion. He noted that many necessary assumptions about the ECP itself must be addressed whether or not a control opinion, often 20-30 pages long, is given.

Several responders (Susan Macaulay, Chicago, IL, Noël Para, New York, NY, Marshall Grodner, Baton Rouge, LA, and Richard Goldfarb, Seattle, WA) suggested appropriate assumptions and determinations to support the control opinion, including: (1) the standard security interest opinion

assumptions, (2) the collateral's status as ECP under UCC §9-102(a)(31), (3) the satisfaction of the requirements for "control" under UCC §9-105, (4) application of Uniform Electronic Transactions Act (UETA), Esign and, if applicable, consumer protection laws and regulations, and (5) whether the quantity of ECP justifies the cost of the opinion.

A number of responders noted the importance of obtaining a certificate from the third party providing "vault" services. Mr. Topolski noted that most of the large "vault" providers (eOriginal, RouteOne, etc.) established their systems with assistance of counsel and may have form opinions prepared by such counsel.

6. UCC Opinions. Amy Williams, Richmond, VA, asked how committee members deal with two common requests made in connection with repurchase agreement/warehouse financings: (1) an opinion that a security interest in mortgage notes perfected by possession by the Custodian on behalf of the Secured Party will be prior to any other security interest perfected by any means other than possession under UCC Article 9, and (2) an opinion or confirmation to the effect that we have reviewed UCC Search Results and confirm they do not include any financing statement purporting to cover the Collateral. She asked: Do you request this kind of opinion? Do you receive requests? If asked to give this opinion, would you do so?

Robert Olin, New York, NY, answered in the affirmative for all three questions on the two issues, but noted that many firms are unwilling to give a priority opinion. Two responders answered in the negative. As to the first issue, Daniel Devaney, Honolulu, HI, referred to an extensive discussion of priority opinions in *Special Report of the TriBar Opinion Committee, U.C.C. Security Interest Opinions-Revised Article 9*, 58 Bus. Law. 1451, 1477-85 (2003) and mentioned the upcoming Report entitled "*Uniform Commercial Code Opinions in Real Estate Finance Transaction Opinion Letters*." On the second issue, Herrick Lidstone, Jr., Greenwood Village, CO, added that it is, at best, a factual confirmation (not an opinion) and duplicates the UCC search.

Noël Para, New York, NY, provided a list of opinions he generally requests in these types of transactions, including opinions as to filing perfection, possession perfection and priority, and control perfection and priority. Commenting that the risk of providing a priority opinion does not create undue risk under the new UCC Article 9, Joseph Heyison, New York, NY, suggests limiting priority to cover only security interests or liens created under the UCC. He also notes the possible loss of perfection in proceeds under UCC §9-315 and provides alternate language to that provided in the original post.

7. Opinion on Agreement Subject to Conditions of Effectiveness. Peter Hosinski, New York, NY, noted that agreements relating to the amendment and restatement of exist-

ing credit documents become effective upon the satisfaction or waiver of extensive conditions, some of which are in the discretion of the lender. Lender's counsel objected to an assumption that all conditions have been satisfied on the basis that they had done other deals where counsel made no such assumption. Mr. Hosinski asked for thoughts.

The responses were numerous. Steven Weise, Los Angeles, CA, remarked that the fact that other opinion givers had not included the assumption is not a substantive answer to anything.

Jennifer Blumenthal, Charleston, SC, reported that she has never received push-back on an assumption included in the Illustrative Form of [Loan Closing] Opinion that is part of *The South Carolina Third Party Legal Opinion Report* (2014) to the effect that all conditions required by the lender have been met or the time for performance has been extended or waived by the lender. Jon Cohen, Phoenix, AZ, agreed and said in Arizona that would be a standard implicit assumption and there would be no objection if it were made explicit. David Brittenham, New York, NY, commented that it is completely reasonable to include the assumption and indicated that he would tell the lender's counsel (a) to fix the agreement so that execution by the lender acknowledges satisfaction or waiver of conditions, (b) accept the assumption, or (c) give the opinion themselves.

Lawrence Safran, New York, NY, distinguished between an opinion on (a) documents at an initial closing subject to conditions to closing that can be verified by the opinion giver, e.g., the delivery of documents, and (b) amendment documents that become effective upon satisfaction of conditions that are more difficult to verify, e.g., the absence of any default. He concluded that if the amendment never becomes effective if the conditions have not been satisfied, he would assume satisfaction thereof. Stanley Keller, Boston, MA, discussed this distinction and suggested, as an alternative to an assumption, to use the approach generally taken in an opinion as to the issuance of shares ("when the shares have been issued in accordance with the terms of the agreement").

Arthur Field, New York, NY, provided a lengthy discussion beginning with making a determination whether the condition is to (a) the effectiveness of the agreement, (b) a condition to lending, or (c) both. He suggests that it is not appropriate for borrower's counsel to assume satisfaction of the conditions to lending, noting that the remedies opinion deals with the enforceability of borrower undertakings, while conditions of lending are not "undertakings" and do not relate to the borrower. He discusses the possible alternative of relying upon a client certificate to the effect that the lending conditions have been satisfied but cautions that such a certificate raises the question of whether it is of fact (and can be relied upon) or matters of law (and cannot).

Multiple responders (including John Koenig, Concord, MA, and Arthur Cohen, Washington, DC) observed that the opinion would be delivered at closing, after all conditions precedent had been satisfied or waived.

A number of responders suggested relying on appropriate certificates and more typical assumptions, *e.g.*, the loan documents are enforceable against the lender, or a revised objectionable assumption to the effect that the conditions precedent were satisfied, waived or changed to conditions subsequent. (Thomas Rafferty, Baltimore, MD, Daniel Devaney, Honolulu, HI, and Kathleen Hopkins, Seattle, WA).

Joseph Heyison, New York, NY, commented that one alternative would be to escalate the issue to the responsible partner (assuming that partner is not the one objecting). Doing so, however, increases the costs incurred by your client and probably will not alter the lender's counsel's position. He also noted that someone else pointed out a solution: to shift the assumptions to a factual certificate and rely on that -- and that is what the original poster ultimately did.

8. Membership Ownership Opinion. Robert J. Gordon, Southfield, MI, explained that he was representing a US LLC ("*Target*") being acquired by a European company ("*Buyer*"). Buyer's US counsel insisted on receiving comfort that Target's sole member owned Target and would accept either (1) a government certification, or (2) a legal opinion. Although he does not normally provide ownership opinions, he asked about giving an opinion based solely on Target's record book and operating agreement accompanied by a manager's certification of relevant facts.

The responses included a number of suggestions as to addressing the request. Paul Forrester, Chicago, IL, referred to the statement that a lawyer cannot reasonably be expected to give a title opinion on personal property, citing TriBar Opinion Committee, Special Report of the TriBar Opinion Committee – Opinions on Secondary Sales of Securities, 66 Bus. Law. 625, 628 (2011) (the "*TriBar Report*").

Two responders described how they were able to satisfy similar requests without providing any opinion or confirmation. John Paschetto, Wilmington, DE, received approval from his LLC client to amend its certificate of formation to include a statement that its member was "X" and providing overseas counsel with a copy of the amended certificate, certified by the Delaware Secretary of State. Steven Weise, Los Angeles, CA, provided opposing counsel with a copy of the client's ownership records certified by the client.

Stanley Keller, Boston, MA, proposed giving a record ownership (not a title) opinion and described the necessary dil-

igence in the corporate context (such as relying on a review of an officer's certificate and organizational documents). He also drafted possible opinion language in an LLC context. Sandra Rock, New York, NY, concurred.

Richard Howe, New York, NY, described rendering an opinion to the effect that the sole member is the only owner of the LLC. He went into substantial detail on the diligence, including review of the relevant statutory scheme, necessary to provide such an opinion.

Several responders suggested crafting an opinion based on the UCC and similar to opinions on secondary sales of stock discussed in the TriBar Report. Three responders (Joseph Heyison, New York, NY, Richard Goldfarb, Seattle, WA, and Andrew Kaufman, Portland ME) noted these opinions are limited to UCC Article 8 securities. Thus, it may be necessary to amend the organizational documents in order to opt in to UCC Article 8. If the membership interest was a security (rather than a general intangible) for UCC purposes, these opinions generally rely on assumptions to ensure that the purchaser is a "protected purchaser" under UCC §8-303(a). Mr. Weise noted that a registered security that is held by a thief (or other non-owner) would not be endorsed by an "appropriate person" and, therefore, the purchaser would not be a "protected purchaser" who took free of adverse claims. UCC §§8-106, -107, -302, and -303.

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