

## **Opinions of Counsel in Lending Transactions: Scope and Assumptions, Substantive Opinions, and Qualifications**

Structuring Third-Party Opinion Letters to Lenders Which Minimize Risks to the Preparer

---

WEDNESDAY, MAY 27, 2020

1pm Eastern | 12pm Central | 11am Mountain | 10am Pacific

---

Today's faculty features:

Robert C. Brighton, Jr., Shareholder, **Becker & Poliakoff**, Ft. Lauderdale, Fla.

Jerome A. Grossman, Senior Counsel, **Gresham Savage Nolan & Tilden**, San Diego

Erik W. Hepler, Partner, **Kirkland & Ellis**, New York

---

The audio portion of the conference may be accessed via the telephone or by using your computer's speakers. Please refer to the instructions emailed to registrants for additional information. If you have any questions, please contact **Customer Service at 1-800-926-7926 ext. 1.**

## *Tips for Optimal Quality*

FOR LIVE EVENT ONLY

---

### Sound Quality

If you are listening via your computer speakers, please note that the quality of your sound will vary depending on the speed and quality of your internet connection.

If the sound quality is not satisfactory, you may listen via the phone: dial **1-877-447-0294** and enter your **Conference ID and PIN** when prompted. Otherwise, please **send us a chat** or e-mail [sound@straffordpub.com](mailto:sound@straffordpub.com) immediately so we can address the problem.

If you dialed in and have any difficulties during the call, press \*0 for assistance.

### Viewing Quality

To maximize your screen, press the 'Full Screen' symbol located on the bottom right of the slides. To exit full screen, press the Esc button.

## *Continuing Education Credits*

FOR LIVE EVENT ONLY

---

In order for us to process your continuing education credit, you must confirm your participation in this webinar by completing and submitting the Attendance Affirmation/Evaluation after the webinar.

A link to the Attendance Affirmation/Evaluation will be in the thank you email that you will receive immediately following the program.

For additional information about continuing education, call us at 1-800-926-7926 ext. 2.

If you have not printed the conference materials for this program, please complete the following steps:

- Click on the link to the PDF of the slides for today's program, which is located to the right of the slides, just above the Q&A box.
- The PDF will open a separate tab/window. Print the slides by clicking on the printer icon.

# INTRODUCTORY MATTERS

## *What is a legal opinion?*

### **A legal opinion is an assurance or conclusion about a matter of law**

Unless otherwise agreed and stated in the opinion letter, a legal opinion constitutes an assurance or conclusion about the application of law to a particular factual circumstance, and includes assurances or conclusions about compliance with law or enforceability of legal obligations. These assurances or conclusions are based on legal research and analysis customarily and reasonably appropriate in the circumstances.

It is also important to understand what a legal opinion is *not*: It is *not* a guarantee that a particular result will obtain; it represents the opinion giver's professional judgment as to how the highest court or other relevant decision maker in the relevant jurisdiction would decide the issue.

# INTRODUCTORY MATTERS

As a related matter, it is important to understand that an opinion should not be viewed as an insurance policy that can provide monetary compensation to the opinion recipient if the legal conclusions stated in the opinion letter are not accepted by a legal or regulatory tribunal or authority. That is, unless those legal conclusions were not based on legal research and analysis customarily and reasonably appropriate in the circumstances.

# INTRODUCTORY MATTERS

## *Why are legal opinions given?*

### **Legal Opinions are Frequently Required by a Party to a Transaction, Such as a Lender, or by a Regulatory Authority**

Legal opinions are most often given in the context of a transaction, such as a loan transaction, to provide the opinion recipient with an assurance that they will obtain a desired legal result, generally, an assurance that the transaction complies with applicable laws and is legally enforceable against the client of the attorney providing the legal opinion.

# INTRODUCTORY MATTERS

*What obligations does an attorney owe to a third party when rendering a legal opinion?*

**An attorney owes a duty of care to a non-client when the non-client is invited to rely on the attorney's opinion; this duty includes the obligation not to knowingly make false statements of fact or law**

The Restatement of the Law (Third) of the Law Governing Lawyers (the “**Restatement**”) provides that an attorney providing an opinion to a non-client who is invited to rely on the opinion owes a duty to use care based on customary practice regarding “the nature and extent of the factual and legal diligence to be employed by the opinion giver” in connection with rendering the legal opinion. The Restatement also provides that an attorney may not “knowingly make a false statement of a material fact or law to the non-client . . .” Rule 4.1 of the Model Rules of Professional Conduct also sets forth this principal as an ethical obligation of attorneys.

# INTRODUCTORY MATTERS

*What are some other basic precepts that an opinion recipient should understand about legal opinions?*

## **No Implied Opinions**

An opinion recipient is not entitled to assume that an express opinion on a particular matter is also an opinion on a related matter by implication unless the express opinion could not be given without reliance on an opinion on other matters of legal import. An example would be the “building block” opinions necessary to a remedies opinion (e.g., legal existence, power and authority, execution and delivery and authorization). For an implied opinion to be included in an express opinion it must be both necessary and reasonable under the circumstances and in accordance with customary practice.

# INTRODUCTORY MATTERS

## Due Diligence

In rendering a legal opinion, an attorney is expected to perform reasonable diligence or analysis in light of the circumstances and the limitations set forth in the opinion letter. As discussed below, these circumstances and limitations include the role of the opining attorney (special counsel vs. primary counsel to the client) and practical considerations, including the time and cost required to render the opinion vs. the importance of the opinion to the transaction.

The opinion letter will typically recite the specific factual data on which the attorney is relying in rendering each particular legal opinion. This would typically include agreements and other documents reviewed, certificates certifying as to factual matters by the client and certain public documents such as certified charters and good standing certificates. The legal opinion letter may also specifically state the limitations on the due diligence undertaken by the opining attorney (e.g., a legal opinion on outstanding litigation may recite that the diligence has been limited to a review of the attorney's files or a search of public records of certain jurisdictions within a particular time frame).

# THE SCOPE OF LEGAL OPINIONS

## *What defines the scope of a legal opinion?*

**The scope of a legal opinion is defined in the legal opinion letter based on customary practice, legal and ethical considerations, and agreement of the parties**

The scope of legal opinions are typically defined in the opinion letter and are designed to provide the assurances and conclusions about legal matters reasonably necessary in light of the circumstances and context of the transaction, but not more (or less). The scope of legal opinions may be determined by customary practice and legal and ethical considerations but may also be determined by negotiation between the parties to a transaction, including consideration of the time and cost required to render the opinion vs. the importance of the opinion to the transaction and whether another attorney might more appropriately render the requested opinion.

# THE SCOPE OF LEGAL OPINIONS

*What are some considerations in determining the scope of a legal opinion?*

**The “Golden Rule”**

**Counsel should never ask for an opinion, nor should it suggest to its client to ask for an opinion, that it would not be willing to give itself if qualified to render the opinion**

When negotiating the scope of a legal opinion, an attorney should never ask for, nor advise its client to demand, opinions that an attorney qualified to render such an opinion would not be willing to give.

# THE SCOPE OF LEGAL OPINIONS

## **Reasonableness; Inappropriate Subjects for Opinions**

### Opinions that are not cost effective

When requesting a legal opinion, an opinion recipient should consider the cost, in dollars and time, involved in conducting the necessary diligence to render such an opinion and whether such costs are reasonable in light of the circumstances, including the importance to the transaction of the opinion and the financial resources of the client of the attorney rendering the opinion, as well as the value of the transaction to which the opinion relates and the uncertainties of law and fact and potential liability to the attorney rendering the opinion.

# THE SCOPE OF LEGAL OPINIONS

## Inappropriate Scope

Some requested opinions may be inappropriate because their scope is virtually unlimited and because the type and degree of diligence to render such an opinion would be unreasonable as to cost, in dollars and time, if possible at all. Examples of such opinion requests include:

- qualification of the client as a foreign entity in every jurisdiction where it its property or activities require qualification
- necessary permits and licenses to conduct the client's business and own its properties
- the client is not in breach of any of its agreements or financial obligations
- a particular contract is "material" or that a particular breach is "material" or
- the client is not in violation of any federal, state or local law, regulation or administrative requirement

# THE SCOPE OF LEGAL OPINIONS

Although open-ended opinions on these subjects are likely unreasonable and inappropriate, opinions that are limited in scope may be proper and may reasonably be given. For example, an opinion regarding compliance with specific contracts or laws by the client may be reasonably given, as may opinions regarding qualification as a foreign entity in specific states (without opining that such qualification was required).

# THE SCOPE OF LEGAL OPINIONS

## Confirmation of Facts; Negative Assurances

Opining counsel should generally not be asked to confirm factual matters which are more appropriate to be confirmed directly by the client, such as the absence of prior security interests or the accuracy of representations in the transaction documents, even when such confirmations are limited to the “knowledge” of the attorney (which introduces a separate question about what “knowledge” means and whether there is an inherent obligation to conduct some degree of investigation). One exception to this relates to legal proceedings and no violations of judgments, decrees or orders which are generally given subject to a “knowledge” limitation and a defined degree of diligence and/or scope. Requests for confirmation of facts, including about outstanding litigation, should also consider the role and prior relationship of the opining counsel to the client. For example, an attorney who has served as general counsel to the client for a period of years would more appropriately provide opinions that are confirmation of factual matters than special counsel which has been newly engaged for the purposes of the transaction that is the subject of the opinion letter

# THE SCOPE OF LEGAL OPINIONS

Negative assurances are a variation on the confirmation of factual matters. Requests to “just tell what you know” are inappropriate and should be rejected. However, although negative assurances are to be resisted in most circumstances, in securities transactions customary practice has evolved that limited negative assurances may be given often phrased as follows:

“Nothing has come to our attention that would lead us to believe that the [transaction document] contains an untrue statement of a material fact or omits to state a material fact necessary in order to make the statements therein, in light of the circumstances under which they were made, not misleading.”

# THE SCOPE OF LEGAL OPINIONS

## Issues of Significant Legal Uncertainty

Opinions about areas of the law about which there exists significant legal uncertainty generally should be rejected consistent with the Golden Rule. However, in some limited circumstances, such opinions are critical to a transaction. They are given as “reasoned” or “explained” opinions and more closely resemble a research memorandum than a typical legal opinion since they rely heavily on a detailed description of the relevant facts and laws, both statutory and case law, and other factors, such as legislative history and public policy. Such opinions make a prediction about how a court of competent jurisdiction would hold if the matter were properly presented to it. They state that though the predicted opinion on the issue is not free from doubt and that potentially the court could reach a different holding with respect to the legal issue, the conclusion stated by the opinion giver is a reasonable prediction of what a court would hold concerning the issue. Examples of situations where these types of opinions are given are (i) true sale, substantive consolidation or other insolvency-related opinions and (ii) choice of law opinions. Recently, some practitioners have given reasoned opinions on the enforceability of force majeure provisions or the availability of the affirmative defenses of impossibility or impracticality of performance, and frustration of purpose. Other practitioners have been asked to opine as to the status of particular types of cryptocurrencies as securities.

# THE SCOPE OF LEGAL OPINIONS

In most cases, the preferred approach would be for the opinion recipient to receive this opinion from its own counsel since such issues are often highly fact sensitive and more closely resemble legal counseling that a party's own counsel might provide when making a determination about whether to proceed with the transaction or matter as a business matter in light of the risks and uncertainties associated with proceeding.

# THE SCOPE OF LEGAL OPINIONS

## Local Counsel Opinions

The scope of local counsel opinions, particularly where the transaction documents are governed by the laws of another state or other jurisdiction, are generally more limited in scope than other types of opinion letters. Typically, local counsel does not generally represent the client in its legal matters and may only represent some of the parties to a transaction, rather than all client-related entities. As a result, local counsel opinions typically involve more limited diligence, including fewer documents reviewed, and the procedure for examination of the documents may be different than for the primary counsel. Moreover, since local counsel opinions are generally restricted to one specific state, a local counsel opinion frequently includes assumptions about predicate (“building block”) opinions (or include language specifically stating reliance on other counsel opinions) involving the laws of other states or jurisdictions, and sometimes does not include opinions about documents, judgments or laws that are covered by the opinions given by the primary transaction counsel for the client or other local or counsel providing opinions on specialized matters (such as special regulatory counsel).

The need for a local counsel opinion is often driven by practical consideration or the specific requirements of governmental and non-governmental organizations (e.g., in auto receivables, ratings agencies sometimes require local counsel opinions where a certain portion of the assets are located in a particular jurisdiction).

# THE SCOPE OF LEGAL OPINIONS

## Ethical and Professional Issues

Codes of professional responsibility promulgated by various state bars (or in some cases by that state's highest legal tribunal), as well as the model code of professional responsibility promulgated by the American Bar Association, impact on legal opinions to non-client third parties, particularly insofar as they deal with confidentiality and obligations that an attorney has to its own client, including the duty of loyalty and the potential for conflicts between the interests of the client and the attorney (for example, when a client is insisting that an attorney render an opinion that it is uncomfortable rendering because of liability concerns).

In all cases, legal opinions may be given to a third party only at the request and with the consent of the attorney's client, which, under appropriate circumstances, may be inferred (e.g., where given to satisfy a condition precedent to a closing). In addition, the attorney requesting another attorney to render an opinion should abide by the "Golden Rule" and not encourage a client to request, and should discourage a client from requesting, an opinion that such attorney, if qualified, would not reasonably give itself.

# THE SCOPE OF LEGAL OPINIONS

In addition, if counsel for the recipient of the legal opinion is aware that the assumptions, information, facts or law upon which an opinion relies are incorrect, then such counsel should advise the opining counsel. In addition, opining counsel may not rely on such incorrect assumptions, information, facts or law without the informed consent of the opinion recipient (this might occur where counsel is asked to opine on the law of a jurisdiction where such counsel does not regularly practice, particularly in the case of a non-U.S. jurisdiction where the laws are significantly less likely to follow the same principals).

So why do opinion recipients sometimes request these opinions? The answer in most cases is to satisfy an underwriting requirement and to instill some form of due diligence as to the matter as to which the opinion is requested.

Counsel may not render an opinion that, although it is technically correct, it has reason to believe would be misleading to the opinion recipient or which could facilitate criminal conduct. This is also an ethical requirement under Rule 4.1(b) of the Model Rules of Professional Conduct.

## II. Sources for opinion practice and customary practice

### What is Customary Practice?

It is the “custom and practice” of opinion givers and counsel for opinion recipients that is applied to the preparation and interpretation of third-party legal opinions. It identifies the diligence that opinion givers are expected to perform when preparing and delivering legal opinions, and provides guidance as to how certain words and phrases commonly used in legal opinions should be understood. Per the Statement on the Role of Customary Practice in the Preparation and Understanding of Third-Party Legal Opinions (referenced below), customary practice applies to the preparation and understanding of a third-party legal opinion regardless of whether the opinion itself states that customary practice is applicable to those matters.

### Where is Customary Practice Found?

According to the American Law Institute’s Restatement (Third) of the Law Governing Lawyers, bar association reports provide evidence of customary practice, and can be valuable sources of guidance. Many such reports—by the American Bar Association and by bar associations and other groups of lawyers from a number of jurisdictions--are available at the ABA’s Legal Opinion Resource Center, at [http://www.americanbar.org/groups/business\\_law/migrated/tribar.html](http://www.americanbar.org/groups/business_law/migrated/tribar.html).

## II. Sources for opinion practice and customary practice (cont.)

### Specific Guidance Regarding Customary Practice (available at the LORC):

- Committee on Legal Opinions of the ABA's Section of Business Law, Legal Opinion Principles, 53 Bus. Law. 831 (1998) (the "Principles")
- Committee on Legal Opinions of the ABA's Section of Business Law. Guidelines for the Preparation of Closing Opinions, 57 Bus. Law. 875 (2002) (the "Guidelines")
- Statement on the Role of Customary Practice in the Preparation and Understanding of Third-Party Legal Opinions, 63 Bus. Law. 1277 (2008) (endorsed by 28 different bar and lawyer groups)
- Statement on Opinion Practices *and* Core Opinion Principles, 74 Bus. Law. 801 (2019), as well as related explanatory materials.

## II. Sources for opinion practice and customary practice (cont.)

### Sources Addressing Opinion Practice in the Context of Customary Practice:

As noted, many such reports may be accessed from the Legal Opinion Resource Center. The TriBar Opinion Committee's Third-Party "Closing" Opinions, 53 *Bus. Law.* 591 (1998) ("1998 TriBar Report"), is one of the most influential. The LORC also provides links to reports issued by several state (and even local) bar associations; if you practice in a jurisdiction that has issued one or more opinions reports, you should always refer to those when preparing, or reviewing, a legal opinion.

Reports are not limited to general discussions of legal opinions. This is just a partial listing of reports by the ABA Business Law Section available at the LORC:

- [Exchange Act Rule 14e-1 Opinions for Debt Tender Offers](#), 72 *The Business Lawyer*, 1047 (Winter 2017)
- [Cross-Border Closing Opinions of U.S. Counsel](#), 71 *The Business Lawyer*, 139 (Winter 2015/2016)
- [No Registration Opinions \(2015 Update\)](#), 71 *The Business Lawyer*, 129 (Winter 2015/2016)
- [Legal Opinions in SEC Filings \(2013 Update\)](#), 68 *The Business Lawyer* 1149 (2013)

## II. Sources for opinion practice and customary practice (cont.)

- [Model Stock Purchase Agreement with Commentary \(Second Edition\) - Exhibits 8.6\(a\) and 9.5\(a\), Legal Opinions](#), ABA Business Law Section, Mergers and Acquisitions Committee (2010)
- [Negative Assurance in Securities Offerings \(2008 Revision\)](#), 64 *The Business Lawyer* 395 (2009), Business Law Section, Securities Law Opinions Subcommittee, Federal Regulation of Securities Committee
- [No Registration Opinions](#), 63 *The Business Lawyer* 187 (2007)
- [Law Office Opinion Practices](#), 60 *The Business Lawyer* 327 (2004)
- [Legal Opinions in SEC Filings](#), 59 *The Business Lawyer* 1505 (2004)
- [Negative Assurance in Securities Offerings](#), 59 *The Business Lawyer* 1513 (2004)
- [Closing Opinions of Inside Counsel](#), 58 *The Business Lawyer* 1127 (2003)

New York's TriBar Opinion Committee has written several reports addressing opinion practice as it relates to a number of matters, most recently [Third-Party Closing Opinions: Limited Partnerships](#), 73 *The Business Lawyer* 1107 (Fall 2018)

## II. Sources for opinion practice and customary practice (cont.)

More general discussions addressing opinion practice can also be found at the LORC, including:

- [Common Qualifications to a Remedies Opinion in U.S. Commercial Loan Transactions](#), 70 *The Business Lawyer*, 121 (Winter 2014/2015)
- [Cost-Benefit Analysis and Third-Party Opinion Practice](#), 63 *The Business Lawyer*, 1187 (August 2008)
- [Courting the Suicide King](#), 17 *Business Law Today*, 4 (2008)
- [The Legal Opinion Risk Seminar Papers](#), 62 *The Business Lawyer*, 397 (2007)
- [Ethics Issues in Opinion Practice](#), 62 *The Business Lawyer*, 417 (2007)
- [No-Litigation Opinions Can Be Risky Business](#), 14 *Business Law Today*, 6 (2005)
- [Annual Review of the Law on Legal Opinions](#), 60 *The Business Lawyer*, 1057 (2005)
- [Statement on Updates to Audit Response Letters—Exposure Draft dated October 22, 2014](#), Business Law Section, Audit Responses Committee

## II. Sources for opinion practice and customary practice (cont.)

There is are a couple of highly-regarded treatises, as well:

Donald W. Glazer, Scott FitzGibbon & Steven O. Weise, Glazer and Fitzgibbon on Legal Opinions: Drafting, Interpreting and Supporting Closing Opinions in Business Transactions (3<sup>rd</sup> ed. 2008), published by Wolters & Kluwer.

It is updated regularly, and includes electronic copies of many state reports, as well as of many of the materials cited above.

(Arthur Norman Field & Jeffrey M. Smith, Legal Opinions in Business Transactions (4th ed. 2019).

And, if you're a member of the ABA Section of Business Law, the Legal Opinions Committee maintains a discussion listserv. The web version can be accessed at:

<https://connect.americanbar.org/businesslawconnect/communities/community-home?CommunityKey=64cee91d-6dbd-4bde-852e-ac3bdc056be2> :

# III. ASSUMPTIONS AND THEIR USE IN LEGAL OPINIONS

## *What is the role of assumptions in legal opinions?*

**Assumptions about factual and legal matters are useful and sometimes necessary ways to allow counsel to deliver opinions that are cost effective, in dollars and time**

Assumptions, which may be express or implicit, are routinely used by counsel rendering legal opinions. Assumptions may be made about factual matters such as actions taken, or which will or may be taken, by parties other than the client of the opinion giver. Assumptions may also be made about legal matters, particularly legal issues outside the legal expertise of opining counsel or relating to the law of jurisdictions where opining counsel is not admitted. By its use of assumptions, counsel limits the need for diligence that cannot be performed cost effectively or which is more appropriately undertaken by counsel for the opinion recipient (for example, the legal existence and power and authority of, authorization, execution and delivery by, and enforceability of transaction documents against, parties to the transaction other than the client of the opinion giver), or by local counsel retained for that purpose.

Counsel will typically disclaim the obligation to make any inquiry or investigation regarding the factual or legal matter assumed.

# III. ASSUMPTIONS AND THEIR USE IN LEGAL OPINIONS

***What are some of the limitations on the use of assumptions in legal opinions?***

Although counsel typically will disclaim the obligation to investigate the validity of any assumptions made, counsel may not make assumptions that it knows to be incorrect or where counsel reasonably would question such assumptions unless opining counsel has disclosed to the opinion recipient that such assumptions are incorrect or may not be correct and obtained its consent nonetheless to their use. An example is an “as if” opinion on the laws of a jurisdiction outside of the expertise of opining counsel.

Opining counsel should not assume the legal conclusion that is the subject of the legal opinion that such counsel is rendering. However, this should not be confused with using assumptions regarding predicate or “building block” opinions.

# III. ASSUMPTIONS AND THEIR USE IN LEGAL OPINIONS

If an assumption forms the factual or legal basis for which the opinion is being rendered, the fact that the assumption is incorrect or unreliable calls into question the validity of the opinion being rendered. However, there are situations where opining counsel will make an assumption that it knows to be incorrect or where it realizes there is a high likelihood that the assumption is incorrect, such as where counsel is asked to opine on the law of a jurisdiction where it is not admitted. Although many question the value of such opinions when based on an assumption that “the substantive law of the State of X is identical to the substantive law of the State of Y in all respects material to our opinion” (and which in any case may be made only with the consent of ,and after disclosing to, the opinion recipient that such assumption is likely incorrect), some see a value based on the diligence required of counsel if it were to give such opinion as to the law of its own state and adopt a view that “it is better than nothing,” that is, provides some comfort, or at least more than having no opinion at all. Such opinion is given when there exists significant cost or impracticality of obtaining a legal opinion from counsel qualified to opine on the laws of such a jurisdiction.

# III. ASSUMPTIONS AND THEIR USE IN LEGAL OPINIONS

A variation on this which some opinion givers or recipients prefer is an “as if” opinion where the opinion giver recites in the opinion letter that the opinion on some legal question is given “as if the law of the State of Y were held to govern the [transaction document], rather than the law of the State of X, as provided therein.

In either case, such opinions which assume that the law of subject jurisdiction would result in the same legal conclusion or affect are problematic at best and usually misleading in the case of non-U.S. jurisdictions and to be resisted. If used, the opinion giver should provide appropriate caveats regarding the legal conclusions that follow from the assumption.

# III. ASSUMPTIONS AND THEIR USE IN LEGAL OPINIONS

## *What are some of the typical assumptions incorporated into opinions rendered to third parties?*

Some typical assumptions expressly or implicitly included in an opinion letter are as follows:

- Legal capacity of each natural person to take all actions required to be taken in connection with the transaction;
- the legal existence of each person to the transaction other than the client;
- the power of each party to the transaction, other than the client, to execute, deliver and perform all of the transaction documents to which it is a party;
- the authorization, execution and delivery by each party, other than the client, of the transaction documents to which it is a party;
- the validity and binding effect and enforceability as to each party, other than the client, of each transaction document to which it is a party;

# III. ASSUMPTIONS AND THEIR USE IN LEGAL OPINIONS

- the absence of any undisclosed modification of any provision of any document reviewed by opining counsel and any undisclosed modification of any waiver of any right or remedy;
- the absence of any modifications to any provision of any document reviewed by opining counsel;
- the genuineness of each signature, the completeness of each document, the authenticity of each document which was presented as an original and the conformity to the original of each copy to the original of each copy and the authenticity of each original of each document received by opining counsel as a copy;
- the truthfulness of each statement as to all factual matters otherwise known to opining counsel to be untruthful or unreliable contained in any document include in the diligence review undertaken by opining counsel;
- the accuracy and completeness of each certificate or other document issued by a public authority;

# III. ASSUMPTIONS AND THEIR USE IN LEGAL OPINIONS

- the good faith of the opinion recipient, acting without notice of any defense against enforcement of rights created by, or the subject transaction, or any adverse claim against any property or security interest relevant to the opinions stated, and compliance with all laws applicable to the parties, other than by the client, that affect the transaction;
- the compliance with the requirements of good faith, fair dealing and conscionability of the parties to the transaction;
- the compliance with agreements (other than by the client as to transaction documents as to which opinions are being given) and judgments, decrees and orders reviewed;
- the absence of any discretionary action (including any decision not to act) that is permitted in the transaction documents that if taken by or on behalf of the client might result in a violation of law or constitute a breach of or default under any of the client's agreements or under any applicable court order;

# III. ASSUMPTIONS AND THEIR USE IN LEGAL OPINIONS

- the absence of any agreements or understandings among the parties, written or oral, or any usage of trade or course of prior dealing among the parties, that would, in any case, define, supplement, modify or qualify the terms other transaction documents or the rights of the parties thereunder;
- the payment of all required documentary stamp taxes, intangible taxes and all other taxes or fees imposed upon the execution, filing or recording of the documents (except to the extent expressly covered by the opinion letter); and
- the absence of any mutual mistake of fact or undue influence or any fraud or duress.

In addition in this age of virtual closings where the opinion giver is often not physically present to witness delivery of an agreement, delivery is often assumed or based on representations by the delivering party.

# III. ASSUMPTIONS AND THEIR USE IN LEGAL OPINIONS

*What are some additional assumptions that are sometimes required?*

Additional assumptions are sometimes required in connection with opinions on topics relating to specific areas of the law such as securities law matters, usury law, and areas outside of the expertise of the opining counsel.

## IV. SUBSTANTIVE OPINIONS

- “Predicate” opinions
- No conflicts/no consents
- Enforceability
- Specific Status Opinions

## Predicate Opinions

- Organization, existence and good standing
- Corporate power
- Due authorization
- Due execution

## Organization, Existence and Good Standing

- “Credit Party is an [entity] existing and in good standing under the [state entity law].”
- Opinion is often limited to information gained from certificates issued by the state in question

## Corporate Power

- “Credit Party has the [type of entity] power to execute, deliver and perform its obligations under the Opinion Documents to which it is a party”
  - Requires analysis of organizational documents of the Credit Party, as well as the relevant entity law of the state of organization
  - some entities may have restrictions on debt actions that they can take in their organizational documents

## Due Authorization

- “Credit Party has taken the [type of entity] action necessary to authorize its execution, delivery and performance of the Opinion Documents to which it is a party.”
- need to diligence that proper board/manager and/or shareholder/member action has been taken to authorize the transaction

## Due Execution

- “The Opinion Documents have been duly executed and delivered on behalf of the Credit Party.”
- ensure that documents are signed by properly authorized persons

## No Conflicts

“The execution, delivery by the Credit Party of the Opinion Documents [performance by the Credit Party thereunder/the payment by the Credit Party of its obligations thereunder] will not (i) constitute a violation of the organizational documents of the Credit Party, (ii) constitute a violation of any applicable provision of existing [covered state] law or United States federal statutory law or published regulation, or (iii) result in a violation of, or result in the creation of a lien under, any agreement indentified in Exhibit A attached hereto”

## No Conflicts (continued)

- No conflicts with other agreements should be limited to a specified list – not “all agreements” or “all material agreements”
  - need to review listed agreements to make sure there is no conflict
  - no conflicts merely requires that a reasonable future performance will not conflict – not that there is no way in the future (such as a default) there would not be a conflict
  - should state law be limited to statutory law and regulations as well?
  - treatment of financial covenants

## No Consents

- “No consent, approval, authorization or order of, or filing with, any United States federal or [covered state] governmental authority or body, is required for Credit Party to obtain the right to execute, deliver, and perform its obligations under, the Opinion Documents, except for (1) those already obtained, (2) those required by Credit Party for the ordinary course of business, and (3) those required under the Securities Laws.

## No Consents (continued)

- if Credit Party is a regulated entity (e.g., a public utility or a railroad), may exclude things relating to their regulation
  - sometimes separate regulatory counsel will cover those matters

## Enforceability Opinions

“Each of the Opinion Documents is a valid and binding obligation of the Credit Party and is enforceable against the Credit Party in accordance with its terms.”

## Specific Status Opinions

- Investment Company Act
- Litigation
- Regulation U

## Investment Company Act

- “The Credit Party is not an “investment company” required to be registered as such under the Investment Company Act of 1940, as amended, or the rules and regulations thereunder”
  - requires diligence on the Credit Party to determine its status
  - even if this opinion is not given, some consider it an element of enforceability

## Litigation

- “To our actual knowledge, (1) there are no actions, suits or proceedings pending or threatened against the Credit Party with respect to the Opinion Documents and (2) there does not exist any judgment, order or injunction prohibiting the consummation of the transactions contemplated by the Opinion Documents”
  - should not cover litigation in general (even material litigation), if not with respect to the Opinion Documents
  - trend away from giving this opinion at all

## Regulation U

- “Assuming application of the loans as contemplated by the credit agreement and that the lender is not subject to Regulation T, the execution and delivery of the credit agreement by the Credit Party and the making of the loans thereunder will not violate Regulation U or X.”
  - if no margin stock owned by Credit Party, simple opinion to give
  - where margin stock is present, more analysis is necessary

## V. QUALIFICATIONS

- A. State Practice – “Our opinions are limited to [the federal law of the United States and] the law of the State of \_\_\_\_\_.”
- B. Enforceability Exceptions (Examples):

- 1. Bankruptcy/Equitable Principles: apply to ALL opinions, whether or not stated:

Our opinions are subject to (a) bankruptcy, insolvency, reorganization, arrangement, moratorium, and other similar laws of general applicability relating to or affecting creditors’ rights generally; and (b) general principles of equity, including, without limitation, concepts of materiality, reasonableness, good faith and fair dealing, regardless of whether considered in a proceeding in equity or at law.

- 2. Freddie Mac Permitted Exceptions:

Each of the opinions and confirmations set forth in this opinion letter is subject to the effect of generally applicable rules of law that:

## V. Qualifications (cont.)

- i. 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;
- ii. provide that forum selection clauses in contracts are not necessarily binding on the court(s) in the forum selected;
- iii. limit the availability of a remedy under certain circumstances where another remedy has been elected;
- iv. limit the right of a creditor to use force or cause a breach of the peace in enforcing rights;
- v. relate to the sale or disposition of collateral or the requirements of a commercially reasonable sale, including statutory cure provisions and rights of reinstatement and limitations on deficiency judgments;
- vi. 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;
- vii. may, where less than all of a contract may be unenforceable, 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;

## V. Qualifications (cont.)

- viii. govern and afford judicial discretion regarding the determination of damages and entitlement to attorneys' fees and other costs;
- ix. may, in the absence of a waiver or consent, discharge a guarantor to the extent that (A) action by a creditor impairs the value of collateral securing guaranteed debt to the detriment of the guarantor, or (B) guaranteed debt is materially modified;
- x. may permit a party who has materially failed to render or offer performance required by the contract to cure that failure unless (A) permitting a cure would unreasonably hinder the aggrieved party from making substitute arrangements for performance, or (B) it was important in the circumstances to the aggrieved party that performance occur by the date stated in the contract;
- xi. limit or affect the enforceability of a waiver of a right of redemption;
- xii. impose limitations on attorneys' or trustees' fees;
- xiii. limit or affect the enforceability of provisions that purport to establish evidentiary standards;
- xiv. limit or affect the enforceability of provisions that provide for payment of increased interest rates upon delinquency in payment or upon any other default; or payment of liquidated damages or prepayment premiums to the extent such payments are deemed to be penalties or forfeitures; and

## V. Qualifications (cont.)

xv. limit or affect the enforceability of provisions that purport to select any state's law (other than that of the Property Jurisdiction) as the governing law for the Loan Documents.

3. Consider others, as appropriate (e.g., waivers of jury trials).

### C. General Exceptions

1. Illustrative short form, from the forthcoming Sample California Third Party Legal Opinion Letter for Personal Property Secured Financing Transactions:

Our opinions are limited to the federal law of the United States and the law of the State of California, but in each case only to laws that in our experience are typically applicable to transactions of the type exemplified by the Loan Documents. We express no opinion with respect to compliance with any law, rule or regulation that, as a matter of customary practice, is understood to be covered only when an opinion refers to it expressly. Without limiting the generality of the foregoing [and except as specifically addressed herein], we express no opinion on local or municipal law, antitrust, unfair competition, environmental, land use, antifraud, securities, tax, pension, labor, employee benefit, health care, privacy, margin, insolvency, fraudulent transfer, antiterrorism, money laundering, racketeering, criminal and civil forfeiture, foreign corrupt practices, foreign asset or trading controls, investment company laws, or laws or rules requiring preclearance with the Committee on Foreign Investment in the United States (or any successor thereto). The laws covered by this letter are referred to herein as the "Covered Law."

## V. Qualifications (cont.)

### 2. Freddie Mac Permitted Exceptions :

No opinions should be 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 and we specifically express no opinion with respect to any of the following legal issues:

- i. securities laws and regulations administered by the Securities and Exchange Commission, state “Blue Sky” laws and regulations, and laws and regulations relating to commodity (and other) futures and indices and other similar instruments;
- ii. Federal Reserve Board margin regulations;
- iii. pension and employee benefit laws and regulations (e.g., ERISA);
- iv. antitrust and unfair competition laws and regulations;
- v. laws and regulations concerning filing and notice requirements (e.g., Hart-Scott-Rodino and Exon-Florio), other than requirements applicable to charter-related documents such as a certificate of merger;
- vi. compliance with fiduciary duty requirements;

## V. Qualifications (cont.)

- vii. environmental laws and regulations;
- viii. zoning, housing codes, land use, condominium, cooperative, subdivision and other development laws and regulations;
- ix. tax laws and regulations;
- x. patent, copyright and trademark, state trademark, and other Federal and state intellectual property laws and regulations;
- xi. racketeering laws and regulations (e.g., RICO);
- xii. health and safety laws and regulations (e.g., OSHA);
- xiii. labor laws and regulations;
- xiv. laws, regulations and policies concerning (A) national and local emergency, (B) possible judicial deference to acts of sovereign states, and (C) criminal and civil forfeiture laws;
- xv. bulk transfer law;
- xvi. law concerning access by the disabled and building codes;
- xvii. 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;
- xviii. rank or priority of any lien or security interest;
- xix. parking regulations; and
- xx. dog licensing requirements.

## V. Qualifications (cont.)

3. Consider whether other exclusions are appropriate. Some opinion givers include, in certain transactions:
  - For a loan that includes one or more non-U.S. lenders: an exclusion of any legal opinion with respect to European (and similar) “bail-in” statutes and regulations (addressing bank and other regulated financial institution failures)
  - For a transaction that includes foreign investors: an exclusion of any legal opinion with respect to rules or regulations of the United States Department of the Treasury, acting as the chair of the Committee on Foreign Investment in the United States (“CFIUS”)
  - Some opinion givers are now addressing COVID-19-specific statutes and regulations; others consider them to be covered by the general bankruptcy exception, which includes other legal moratoriums.

# V. Qualifications (cont.)

## D. Other Qualifications:

### 1. Limitation on “knowledge”:

Freddie Mac form:

As used in this opinion letter, “Actual Knowledge” means, without investigation, analysis, or review of court or other public records or our files or inquiry of persons, with respect to the undersigned law firm (“Opinion Giver”), the conscious awareness of facts or other information by the Primary Lawyer or Primary Lawyer Group.

“Primary Lawyer” means the lawyer in the Opinion Giver’s organization who signs this opinion letter; any lawyer in the Opinion Giver’s organization who has active involvement in negotiating the Loan, preparing the Loan Documents or preparing this opinion letter; and solely as to information relevant to a particular opinion issue or confirmation regarding a particular factual matter (e.g., pending or threatened legal proceedings), any lawyer in the Opinion Giver’s organization who is primarily responsible for providing the response concerning that particular opinion issue or confirmation. “Primary Lawyer Group” means all of the Primary Lawyers when there is more than one.

## V. Qualifications (cont.)

Another example:

Where a statement is qualified by “to our knowledge” or any similar phrase, that knowledge is limited to the actual knowledge of lawyers currently in this firm who have been involved in representing [our client] in connection with the [transaction documents]. Except as otherwise expressly indicated, we have not undertaken any independent investigation to determine the accuracy of any such statement, and no interference as to our knowledge of any matters bearing on the accuracy of any such statement should be drawn from the fact of our representation of the Borrower.

### 2. Qualification regarding scope of obligation (Freddie Mac form):

This opinion letter is rendered as of its date, and we express no opinion as to circumstances or events which may occur subsequent to such date. Further, we undertake no, and hereby disclaim any, obligation to advise you of any changes in, or any new developments which might affect, any matters or opinions set forth in this opinion letter.

## V. Qualifications (cont.)

### 3. Limitations on reliance:

#### The “Wachovia” limitation:

The opinions expressed in this letter are solely for the benefit of the addressees and for the benefit of any successor to the Administrative Agent pursuant to Section \_\_\_ of the Credit Agreement, in each case in connection with the Subject Documents. We consent to reliance on the opinions expressed herein, solely in connection with the Subject Documents, by any party that becomes a Lender subsequent to the date of this opinion letter in accordance with the provisions of the Credit Agreement (each an "Additional Lender") as if this opinion letter were addressed and delivered to such Additional Lender on the date hereof, on the condition and understanding that: (i) in no event shall any Additional Lender have any greater rights with respect hereto than the original addressees of this letter on the date hereof nor, in the case of any Additional Lender that becomes a Lender by assignment, any greater rights than its assignor, (ii) in furtherance and not in limitation of the foregoing, our consent to such reliance shall in no event constitute a reissuance of the opinions expressed herein or otherwise extend any statute of limitations period applicable hereto on the date hereof, and (iii) any such reliance also must be actual and reasonable under the circumstances existing at the time such Additional Lender becomes a Lender, including any circumstances relating to changes in law, facts or any other developments known to or reasonably knowable by such Additional Lender at such time.

## V. Qualifications (cont.)

Another example:

This opinion letter is furnished to you solely for your benefit, the benefit of subsequent holders of the Note, and any statistical rating agency that provides a rating on securities backed in part by the Loan, all of which we understand may receive copies of this opinion letter. This opinion letter may not be used, quoted from or relied upon by any other person without our prior written consent; however, you or a subsequent holder of the Note may deliver copies of this opinion letter to (a) independent auditors, accountants, attorneys and other professionals acting on behalf of you or a subsequent holder of the Note, (b) governmental agencies having regulatory authority over you or a subsequent holder of the Note, (c) designated persons pursuant to an order or legal process of any court or governmental agency, and (d) prospective purchasers of the Note.

## VI. SPECIAL ISSUES AND OPINION TOPICS

- State Specific Transaction Taxes
- Usury
- Equity Issuances
- Choice of Law
- Coverage of out of state documents and parties
- Cross Border Issues
- Statute of Limitations

## State Specific Transaction Taxes

- A few states have specific taxes and fees in connection with certain parts of credit arrangements
  - Florida – documentary stamp tax – applies to notes and other documents evidencing obligations or relating to creation of a security interest, as well as some UCC filings
  - Tennessee – UCC filing tax
- Be aware of state specific issues

## Usury

- Another very state specific issue
- In some states, should not be covered at all
- In other states, should only be covered in certain types of transactions, or with certain types of borrowers and/or lenders

## Equity Issuances

- Sometimes equity rights are given as part of a lending transaction
- Opinions with respect to equity issuances involve different approaches
  - either need to exclude the equity issuance documents from the opinion, or cover them separately
  - need to consider effect on opinions addressing performance or limit those opinions appropriately
  - No registration opinion

## Choice of Law

- Inbound vs. Outbound
  - Inbound – that agreement choosing opinion law state as governing law is enforceable
    - can often be given (if there is a clear state law)
  - Outbound – that opinion law state will recognize choice of other jurisdiction's law
    - generally should be resisted

## Coverage of out of state documents and parties

- Some transactions may have credit parties from multiple jurisdictions, or agreements with different governing laws
- Where a firm does not practice in one or more such states, differing approaches to handling issues

## Coverage of out of state documents and parties (continued)

- For out of state parties
  - may use local counsel
  - may use “guide” opinion (relying on reading entity statute only)
    - common approach for Delaware

## Coverage of out of state documents and parties (continued)

- For out of state agreements
  - may refuse to cover them
  - may use local counsel
  - may use “as if” approach (opine on documents as if they were governed by covered law)
    - need consent of recipient for such approach

## Cross Border Issues

- Many of the same concerns as multi-state transactions, but heightened
  - Enforcement of foreign judgments opinion
    - can be given in reasoned form in certain states
  - outbound choice of law opinions
    - typically requested
    - ability to give in question (and can depend on state)
- Beware the as-if opinion

## Statute of Limitations

- Occasionally contracts attempt to extend statute of limitations for breach prospectively
- Recent decisions under New York law have held such provisions are not enforceable
  - Consider whether existing qualifications pick this up

## Thank You



Erik W. Hepler  
Kirkland & Ellis LLP  
601 Lexington Avenue  
New York, New York 10022-4611  
212-446-4776  
[erik.hepler@kirkland.com](mailto:erik.hepler@kirkland.com)

# Thank You



**Robert C. Brighton, Jr.**  
*Shareholder*  
**Becker & Poliakoff**  
Ft. Lauderdale, FL  
954.987.7550  
Rbrighton@beckerlawyers.com

# Thank You



JEROME A. GROSSMAN  
Gresham Savage Nolan & Tilden  
401 West A Street, Suite 925  
San Diego, CA 92101  
(619) 344-2992

[jerome.grossman@greshamsavage.com](mailto:jerome.grossman@greshamsavage.com)