

# The Post-Loan Origination Transaction and Legal Opinions: An Overview<sup>1</sup>

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The delivery of a legal opinion by one party's counsel to another party regarding certain elements of the transaction is often a condition to the closing of a transaction (for convenience, any such opinion delivered at the origination closing is referred to as an "Origination Opinion").<sup>2</sup> Opinions should be limited to matters reasonably related to the transaction.<sup>3</sup> Typically, an Origination Opinion will speak as of its date and does not impose an obligation on the opinion giver to update the closing opinion.<sup>4</sup> An Origination Opinion may, based upon various assumptions and subject to various qualifications, address the organization, existence and entity power and authority of a borrower and, if applicable, guarantor, the authorization, execution and delivery of loan documents by the borrower and, if applicable, guarantor, the enforceability against the borrower and, if applicable, guarantor, of those loan documents and, if applicable to the transaction, perhaps, other opinions and factual confirmations. After the delivery of the Origination Opinion, a variety of transactions may occur with respect to a mortgage loan, including, a loan modification, a loan assumption or a loan defeasance. Such transactions may affect any one or more of the parties, terms or structure of, or security for, the loan in question. This paper provides a very brief introduction to the context of such transactions and certain of the issues that may arise in connection with attorneys' opinions that may be requested or provided in connection with loan assumptions, loan modifications and defeasances that are the subject of a detailed program being presented at the 2008 Spring Symposia of the Real Property, Trust and Estate Law Section of the American Bar Association.

Sometimes the post-origination transaction is contemplated in the documentation that is executed and delivered in connection with the origination of the loan. For example, the loan documents may permit assumption of the loan or a defeasance upon satisfaction of certain conditions set forth in the loan documents. Such conditions may include execution and delivery of an assumption agreement, payment of an assumption fee, approval of the assumption by the

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<sup>1</sup> This paper does not provide legal, tax or accounting advice. This paper should not be construed as representing the views of any firm, committee or other organization of which the author is a member or otherwise associated with. The author reserves the right to assert positions contrary to those expressed in this paper.

<sup>2</sup> American College of Real Estate Lawyers Attorneys Opinions Committee and the American Bar Association Section of Real Property, Probate and Trust Law Committee on Legal Opinions in Real Estate Transactions, "Real Estate Opinion Letter Guidelines", 38 REAL PROP. PROB. & TR. J. 241, 243 (Summer 2003)(the "Real Estate Guidelines").

<sup>3</sup> Id. at 245.

<sup>4</sup> Report of the TriBar Opinion Committee, "Third Party Closing Opinions", 53 BUS. LAW. 591, 597 (1998). (the "TriBar II Report").

lender, and the lender's receipt and approval of an attorneys' opinion with respect to certain matters such as the existence, and power and authority of the entity that assumes the loan, the existence, power and authority of any replacement guarantor, the due authorization, execution and delivery of the assumption transaction documentation and the enforceability, as against the assuming party and, if applicable, replacement guarantor, of the assumption documents and the loan documents as assumed and modified by the assumption documents. The precise form of these opinions may not be spelled in the origination documentation. Sometimes the nature of the lender may dictate that the lender will want comfort with regard to certain tax implications pertaining to a post-origination transactions. Loans intended for securitization may, to the extent that they contemplate loan assumptions or defeasances might require comfort, in the form of an opinion of counsel, as to the effect of the transaction on REMIC status.

Loan modifications may occur in a variety of contexts. Sometimes a loan modification may occur in connection with a "workout" of a loan. In a loan workout scenario, any number of loan modifications may occur, including additional funding, waiver of reserve disbursement conditions, maturity extensions, interest rate relief, periodic payment relief, interest accruals, cash sweeps, delivery of additional security for the loan, deeds in lieu of foreclosure in escrow, and other matters. Loan modifications may occur in contexts other than a workout. If the loan is a performing loan, the lender and borrower may desire to continue or otherwise modify the relationship. For example, the parties might decide to extend the maturity of the loan and provide additional funds because the property may be performing better than initially projected. Each type of modification may present issue different issues and concerns for an opinion recipient and an opinion giver. Opinions that are requested or provided in connection with a loan modification may address many of the matters that might be addressed in an Origination Opinion. The lender might also have concerns as to the effect of a loan modification on REMIC status and might desire an opinion as to the effect that the relevant modification may have on REMIC status.

Sometimes, to accommodate a borrower's desire to effect an exit strategy and to preserve the intended income stream of a loan asset for a lender, the loan agreement will permit the borrower to defease the real estate security for the loan through the substitution of non-real estate collateral in place of real estate collateral. Among other things, such defeasance may be conditioned upon delivery of opinions as to the security interest granted in the replacement collateral and the tax effect of the defeasance on REMIC status.

Beyond the scope of this paper and the presentation to which it pertains is a discussion of opinions that might be required in connection with loan portfolio transactions with origination documentation that contemplates partial releases or substitutions of collateral. In these types of transactions substitutions of collateral may be permitted under the applicable loan documentation upon the satisfaction of various conditions including the delivery of closing opinions at the time the relevant collateral is substituted.

To what extent are attorneys' opinions appropriate in post-origination transactions? What types of opinions are required or appropriate in connection with loan modifications, loan assumptions and loan defeasances? Who provides these post-origination opinions? What special legal and ethical issues may be considered in connection with post-origination opinions? How does the opinion giver in the post-origination transaction context address the Origination Opinion

provided in connection with the loan being assumed, modified or defeased? Do the various opinion reports and literature provide guidance as to how post-origination opinions are to be addressed? How does the opinion giver address changes in fact or law that may have occurred since the date of the relevant Origination Opinion? Are there any issues affecting the ability of the opinion recipient to rely on the post-origination transaction opinion that may not be present in the context of an Origination Opinion? What assumptions and qualifications are appropriate in connection with attorneys' opinions that are provided in post-origination transactions? What role does customary practice play in the context of a post-origination opinion?