

Issues to Consider when Preparing a Post-Closing Enforceability Opinion
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- **Who issued the original opinion at loan closing and what is the role of the opinion giver (mere local counsel opining as to specific documents generally governed by another state's law, or general outside counsel to the obligors)?**
 - Where the party issuing the post-closing opinion is new to the transaction, it would make sense to assume the enforceability of the original loan documents, including the documents being modified or assumed, or to rely on the accuracy of the original opinion as regards the enforceability of the underlying loan documents to be assumed or modified.
 - Even if the original enforceability opinion was issued by the party providing the post-closing opinion, it would make sense to assume in the post-closing opinion that nothing has occurred in the gap between closing and the post-closing event (such as a waiver, oral or other modification unknown to the opinion giver, or other event), that would render the original documents unenforceable. It may also be appropriate to add additional assumptions, qualifications or limitations not found in the original loan closing opinion, or to reiterate certain assumptions or qualifications found in the original loan closing opinion, to the post-closing opinion, depending upon the circumstances (e.g., in a financing involving the addition of tenant in common parties to a transaction as parties assuming a loan, should express exception be taken to provisions purporting to waive the right to partition, rendering the lender a third party beneficiary of a tenant in common agreement or providing that the tenant in common or other peripheral documents are incorporated by reference into the loan documents? Should an opinion as to choice of law included in the post-closing documents be excluded (whether newly or in the same fashion as the original opinion) from the post-closing opinion? Should documents incorporated by reference into documents covered by the opinion be excepted out from the post-closing enforceability opinion and if so, which documents and when?).
 - Where the lender is foregoing obtaining confirmations or reaffirmations of guaranty or third-party pledge in connection with documenting a loan assumption or modification, should the opinion giver take exception for the effect of that as part of providing a "date down" or update of the enforceability opinion rendered at closing as to these documents? Where the original documents fail to include waivers of suretyship defenses or advance consent to modification or assumption of the obligations covered under the security documents, should exception be taken for that in the post-closing opinion or an assumption be made that such waivers are effective in the jurisdiction at issue? Would requesting the lender to obtain confirmations or reaffirmations or to obtain amended and restated security documents including waivers of suretyship defenses and advance consent provisions constitute an ethical dilemma for the opinion giver who is designated

as borrower's or guarantor's counsel vs. lender's counsel in giving the updated enforceability opinion (arguably, the opinion giver is starting to move in the direction of "improving" the lender's documents)?

DRAFTING TIP: Where the original guaranty, third-party pledge or other similar document at issue includes a waiver of suretyship defenses and otherwise contemplates, and includes advance consent to, modifications and assumptions of the obligations thereby secured, such may (depending upon applicable local law) permit modification and assumptions without the need for additional consents, confirmations or concern).

- Mere local counsel, whether updating such counsel's original enforceability opinion or newly providing an opinion as to assumption or modification documents, should be sure to take all exceptions and make all assumptions typically made in the context of a closing opinion when giving an opinion in the context of a loan assumption or modification (e.g., where other state's law generally governs enforceability of the original loan and the new post-closing documents, the opinion giver would as is usual, assume there is nothing about that state's law that would change the enforceability of documents under the law of the opinion giver's jurisdiction, or would assume that all states' laws that may have a bearing on the enforceability of the document are the same as the laws of the opining jurisdiction; a post-closing enforceability opinion should include the usual bankruptcy, equity and other exceptions and limitations on enforceability).
- **What other issues bear consideration in light of the passage of time between original loan closing and the proposed assumption or modification?**
 - Have applicable laws changed in any relevant way that should be addressed in the opinion or the proposed modification or assumption documentation (e.g., are cites to local statutes set forth in documents still accurate? Have statutory notices or other provisions of statutes changed such that documentation should be revised? When does advising of these changes become necessary to provide the opinion as opposed to merely helpful, and does the opinion giver, when serving as borrower's counsel, cross an ethical line in being "helpful" to the lender?
 - Should there be an assumption that no individual guarantor is deceased or that the lender and any other addressees of the opinion lack knowledge of any events that would affect the coverage of the loan documents insofar as their being security for future advances or otherwise being enforceable is concerned?
- **What concerns might be raised by a request to give the "recordable form" or the "proper form of grant" opinion in a post-closing context?**
 - Are the original documents in recordable form (e.g., Do the original documents include appropriate spacing on first and last pages or cover pages, as the case may be and are all recording references that need to be included in the originally recorded documents so included? Are acknowledgements in both the original and the proposed new documentation in the proper form? Are references to other recorded instruments, such as memoranda of lease, prior modification documents and the like accurate?). It may be appropriate to assume the original documents are in recordable form, were actually recorded, and were recorded in the proper order, and that all recording references in the

original and proposed post-closing documentation are correct or otherwise take exceptions or modifications as part of reviewing and providing any opinion respecting the status of post-closing modifications, assignments and assumptions of lien instruments, including financing statements.

- Is the original and the proposed new form of grant language appropriate? Does the original grant of a security interest, in addition to being confirmed by the original grantor and assumed by the new grantor, need to be regranted or granted anew by the new grantor? If the form of post-closing opinion doesn't require that the "proper form" for recording and/or of grant be given, is either such opinion implied when giving an enforceability opinion? How does "customary practice" effect the analysis? What obligation, if any, does an opinion giver have to provide (or refrain from providing) guidance to the lender on these points?
- A review of the legal description of the land, and of the description of the other collateral encumbered, as between the original, and the proposed post-closing documents (including, financing statements and amendments thereto) may be appropriate, depending upon the original, and proposed new, opinions being requested. The scope of this review, and the nature of any corrections proposed by the opinion giver, will again depend on the opinions requested and the role of the opinion giver in the transaction.
- **What other unique concerns may bear attention when reviewing post-closing documentation for opinion purposes?**
 - Underlying documentation should be requested to assure conformity in use of capitalized/defined terms and to assure that various other aspects of the original documents "work" with the proposed new documentation and have otherwise been appropriately synchronized with the new documentation to the extent applicable and relevant to the giving of the applicable opinion.
 - This review may again raise issues of when is the opinion giver by making comments do documents merely doing the job to the level required to render the applicable opinion or perhaps inappropriately crossing a line to "improve" the lender's documents?
- **What assumptions, qualifications, limitations and exceptions should be included in a post-closing opinion?**
 - As noted above, most, if not all, of the same assumptions, qualifications, limitations and exceptions are included in the original loan closing opinion should be imported into an opinion respecting post-closing documentation; one should be particularly careful to insure that all appropriate assumptions, qualifications, limitations and exceptions are so imported where giving an opinion that the loan documents as modified and/or assumed are enforceable, as such would more clearly seem an opinion that updates in all respects, the original loan closing opinion (e.g., one should assume, in the context of an assumption, that documents are recorded in the proper order and that the new borrower has title to the assets being pledged, and should include a qualification that no opinion is rendered as to the creation, perfection or priority of liens except to the extent such opinion(s) may be expressly set forth in the opinion letter).
 - The trend in opinion practice is to utilize the "carve out" from the generic qualification regarding enforceability developed by the American College of Real Estate Lawyers ("ACREL"), as opposed to the "practical realization" formulation of this "carve out" (the "practical realization" formulation is arguably a more narrow carve out than the ACREL formulation, and in any event is more readily subject to varied interpretation) . However,

the ACREL formulation is not as easily adapted as the “practical realization” formulation for use in the context of a modification or assumption opinion, and some effort may be required to render the ACREL “carve out” suitable in this context. Further, the ACREL qualification is a bit more difficult to utilize in a way that avoids wholly updating the original enforceability opinion (i.e., it is harder to use the ACREL “carve-out” in a way that just deals with the status of the post-closing documents, as opposed to the status of the original documents as modified). Although as noted below, giving an enforceability opinion on a post-closing modification or assumption document, by implicitly or otherwise, given the nature of a modification and assumption document, constitute an opinion as to the enforceability of the original documents as modified or assumed and thus effectively result in updating the original enforceability opinion. Thus, if updating the original loan closing opinion in its entirety is a concern, the opinion giver should take care in how on the components of the post-closing opinion are structured.

Ex: Use of ACREL “carve out”:

Certain provisions of the **Assumption/Modification Documents** may be unenforceable, and certain remedies set forth in the **Assumption/Modification Documents** may be limited or unavailable, but, subject to the limitations set forth in paragraph(s) __ immediately above **[the bankruptcy and equity limitations on enforceability]** and the other assumptions, qualifications and limitations set forth in this opinion letter, and subject to the economic consequences of any judicial, administrative or other procedural delay experienced as a result of such unavailability or unenforceability, such unavailability or unenforceability, will not render the Assumption/Modification Documents invalid as a whole or preclude (a) the judicial enforcement of the obligation of the **[New] Borrower** to repay the principal, together with interest (to the extent not deemed a penalty) as provided in the **Note [as proposed to be assumed/modified by the Assumption/Modification Documents]****[NOTE: if opining jurisdiction doesn't govern the enforceability of the Note, there should be additional assumptions and qualifications inserted here: i.e., “as to which matter we express no opinion” or “as to which matter we assume for purposes of this qualification is governed by the law of the State of ____ or by the law of a State which is identical to the law of the State of _____]**, (b) the acceleration of the obligation of the **[New] Borrower** to repay such principal, together with such interest, upon a material default by the Borrower in the payment of such principal or interest, and (c) the foreclosure in accordance with applicable law of the lien on and security interest in the collateral created by the **Deed of Trust/Mortgage [as proposed to be assumed/modified pursuant to the Assumption/Modification Documents]** upon maturity or upon an acceleration of the maturity of the obligations pursuant to clause (b). We note, without in any way limiting the qualifications or assumptions otherwise made herein, that the **State of _____** requires clear and unequivocal evidence of acceleration of the indebtedness, and to the extent the **Loan Documents** as proposed to be **assumed/modified** pursuant to the **Assumption/Modification Documents** purport to provide for automatic acceleration of the indebtedness without further written notice or other clear and unequivocal evidence of acceleration being afforded to the Borrower

and Transferees we express no opinion as to the enforceability of such provisions in the **Loan Documents** as proposed to be assumed pursuant to the **Assumption/Modification Documents**. Further, specifically with respect to our opinion regarding the enforceability of the **Guaranty[ies]** as set forth in opinion paragraph(s) __ above **[bankruptcy and equity limitations on enforcement]**, certain provisions of the Guaranties may be unenforceable, and certain remedies set forth in the Guaranties may be limited or unavailable, but, subject to the limitations set forth in paragraph(s) __ immediately above **[bankruptcy and equity limitations on enforcement]** and the other assumptions, qualifications and limitations set forth in this opinion letter, and subject to the economic consequences of any judicial, administrative or other procedural delay experienced as a result of such unavailability or unenforceability, such unavailability or unenforceability, will not render any **Guaranty[ies]** invalid as a whole or preclude or preclude the judicial enforcement of such **Guaranty[ies]** upon a material default by the **applicable Guarantor** thereunder.

Ex.: “Practical Realization” Formulation:

Our opinions are **[also]** subject to the qualification that certain provisions contained in the **Assumption/Modification Documents** may not be enforceable and certain remedies set forth in the **Assumption/Modification Documents** may be limited or unavailable, but, subject to the qualifications and limitations otherwise set forth in this opinion, and subject to the economic consequences of any judicial, administrative or other procedural delay experienced as a result of such unavailability or unenforceability, such unavailability or unenforceability will not, in our opinion, render the **Assumption/Modification Documents** invalid as a whole or make the **Assumption/Modification Documents** inadequate for the practical realization of the principal benefits **[and security]** intended to be provided by the **Assumption/Modification Documents**. **[Note: This formulation, given its inherent vagueness, could also be interpreted as updating the entire original loan closing opinion, as frankly, might any opinion on the enforceability of post-closing documents, particularly, an assumption agreement, given the nature thereof].**

What resources are available regarding the drafting and interpretation of post-closing opinions?

- A relatively thorough review of treatises on opinions and a computer survey of other materials on post-closing opinions, failed to uncover any writings directly covering the subject. However, general resources covering the drafting and interpretation of opinions (see the bibliography material provided with the materials for this seminar) are useful in identifying the provisions generally appropriate for any opinion, regardless as to when rendered and as to what documents, and in identifying issues that may be unique to rendering an opinion in the post-closing context.
- Given the unique nature of post-closing opinions, to help spot issues and otherwise manage risk, engaging a “second set of eyes” on the opinion (whether by referral to the Firm’s committee, or use of second partner review) is recommended.