THE REMEDIES OPINION AND CUSTOMARY DILIGENCE-THE REAL ESTATE SECURED TRANSACTION APPROACH: IS IT CONSISTENT WITH CUSTOMARY NON-REAL ESTATE LEGAL OPINION PRACTICE?[1]

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The authors,[2] a quartet of real estate lawyers who are the current and three (3) immediate past-chairs of the Legal Opinions in Real Estate Transactions Committee ("Committee") of the Real Property, Probate and Trust Law Section ("RPPT") of the American Bar Association ("ABA"), have undertaken an effort to analyze differences and similarities between customary real estate legal opinion practice ("Customary Real Estate Legal Opinion Practice") and customary non-real estate business transaction legal opinion practice ("Customary Non-Real Estate Legal Opinion Practice").[3]

The initial focus of the effort was to assume that the 1998 Report of the TriBar Opinions Committee (the "TriBar II Report")[4] was a representative statement of Customary Non-Real Estate Legal Opinion Practice and compare it to the New York Mortgage Loan Opinion Report (the "New York Report"),[5] the ABA/ACREL All-Inclusive Opinion (the "Inclusive Opinion")[6]

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[1] 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 authors are members or otherwise associated with. The authors do not describe minimum standards of practice. The authors reserve the right to assert positions contrary to those asserted in this paper.

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[3] This paper's consideration of Customary Real Estate Legal Opinion Practice is limited to the context of a real estate secured transaction (a "REST").

[4] Report of the TriBar Opinion Committee. "Third Party Closing Opinions", 53 BUS. LAW 591 (February 1998).

[5] Association of the Bar of the City of New York, Committee of Real Property Law, Subcommittee on Mortgage Loan Opinions and the New York State Bar Association, Real Property Section, Attorney Opinion Letters Committee, "Mortgage Loan Opinion Report," 54 BUS. LAW. 119 (November 1998).

[6] American College of Real Estate Lawyers, Attorneys Opinion Committee and the American Bar Association Section of Real Property, Probate and Trust Law, Committee on Legal Opinions in Real Estate Transactions, INCLUSIVE REAL ESTATE SECURED TRANSACTIONS OPINION IN WHICH ARE INCORPORATED THE PRINCIPAL CONCEPTS OF THE ABA SECTION OF BUSINESS LAW LEGAL OPINION ACCORD AND THE ABA SECTION OF REAL PROPERTY, PROBATE AND TRUST LAW AND THE AMERICAN COLLEGE OF REAL ESTATE LAWYERS REPORT ON ADAPTATION OF THE LEGAL OPINION ACCORD, http://www.abanet.org/rppt/cmtes/rp/is/inclusive-art.html (1999) (last visited Feb. 19, 2007). The Inclusive Opinion was adopted in 1999.

and the Real Estate Opinion Letter Guidelines (the "Real Estate Guidelines")[7] as representative statements of Customary Real Estate Legal Opinion Practice. The Real Estate Guidelines, adopted in 2003, accepted the Guidelines for the Preparation of Closing Opinions (the "Business Section Guidelines")[8] and the Legal Opinion Principles (the "Business Section Principles")[9] and, accordingly, accepted the concept of customary practice.[10]

The project will be a continuing effort. This paper addresses certain preliminary findings with respect to the meaning of, and necessity for, expressed qualifications to the remedies opinion and also the due diligence required to provide a remedies opinion. First, we have examined the interpretation of the remedies opinion under Customary Non-Real Estate Legal Opinion Practice and Customary Real Estate Legal Opinion Practice, the universal use of the so-called equitable principles and bankruptcy qualifications, the use of the so-called "generic" qualification and the related "comfort" and second, the diligence customarily utilized to provide a remedies opinion.

The generic qualification is nearly universally accepted in Customary Real Estate Legal Opinion Practice as is some form of "comfort." Because of the concern of real estate practitioners with respect to the meaning of the practical realization form of the "comfort," there is an evolving trend in Customary Real Estate Legal Opinion Practice favoring use of a limited, but more precise form of the "comfort."

The Remedies Opinion, the Bankruptcy Qualification and the Equitable Principles Qualification

The TriBar Approach

According to the TriBar II Report, the remedies opinion confirms that an agreement has been formed, that the remedies provided in the agreement will be given effect by the courts and that the provisions of the agreement will be given effect.[11] A typical remedies opinion would provide as follows:

> **"The Agreement is a valid and binding obligation of the Company enforceable against the Company in accordance with its terms."[12]**

If an opinion giver chooses to render an opinion that does not cover every undertaking or remedy in the agreement, the opinion must be subject to express or implied qualifications.[13] Two uniformly accepted qualifications of the remedies opinion relate to the effect on the enforceability of the loan documents resulting from of the bankruptcy of the client and the

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[7] American College of Real Estate Lawyers Attorneys Opinion 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 (Summer 2003).

[8] Section of Business Law of the American Bar Association, Committee on Legal Opinions, "Guidelines for Preparation of Closing Opinions", 57 BUS. LAW. 875 (February 2002)

[9] Section of Business Law of the American Bar Association, Committee on Legal Opinions, "Legal Opinion Principles", 53 BUS. LAW. 831 (May 1998).

[10] Real Estate Guidelines, *supra*, at 241.

[11] TriBar II Report, *supra*, at 620.

[12] *Id.*, at 619.

[13] *Id.*, at 622.

exercise of equitable principles.[14] Typical bankruptcy and equitable principles qualifications are phrased as follows:

> **"... except as may be limited by bankruptcy, insolvency or other similar laws affecting the rights and remedies of creditors generally and general principles of equity."[15]**

The New York Report

According to the New York Report, an enforceability opinion means that each and every covenant, condition, remedy or other provision of the agreement will be given effect.[16] However, the phrase "enforceable" is also to be understood to mean the judicial enforcement at law of the agreement and the remedies opinion expressly excludes the exercise of non-judicial remedies (e.g., the right to take possession, collect rents, etc.).[17] The remedies opinion as set forth in the New York Report is stated as:

> **"The Loan Documents are the valid and binding obligation of Borrower, enforceable against Borrower in accordance with their respective terms...."[18]**

The broad and comprehensive scope of the remedies opinion requires that it be limited by appropriate qualifications. The qualifications include the bankruptcy qualification[19] and the equitable principles qualification.[20] The New York Report indicates that any remedies opinion must be qualified by matters arising out of the Bankruptcy Code and the bankruptcy qualification customarily includes other similar laws affecting creditors rights generally such as fraudulent conveyance issues and certain state law insolvency issues.[21] According to the New York Report, there is general agreement that the equitable principles qualification should be broadly construed to include traditional equitable remedies, equitable defenses and other equitable concepts such as unreasonableness of conduct, materiality and the implied covenant of good faith and fair dealing.[22] The New York Report utilizes the following formulation of the bankruptcy and equitable principles qualifications:

> **"...except as may be limited by (i) bankruptcy, insolvency or other similar laws affecting the rights and remedies of creditors generally and (ii) general principles of equity."[23]**

Thus, the TriBar II Report and the New York Report appear to arrive at the same conclusion as to broad nature of the remedies opinion and the appropriateness of the bankruptcy and equitable principles qualifications.

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[14] *Id.*
[15] *Id.*, *supra* at 623
[16] New York Mortgage Loan Report, *supra* Note 32 at 153.
[17] *Id.*, *supra* Note 31 at 152.
[18] *Id.*, at 129. A similar opinion is stated with respect to a guaranty.
[19] *Id.*, Note 33 at 154.
[20] *Id.*, Note 32, at 154.
[21] *Id.*, Note 33 at 154.
[22] *Id.*, Note 34, at 154.
[23] *Id.*, at 129.

The Inclusive Opinion

The Inclusive Opinion was designed to show what an opinion would look like if it were to incorporate within its four corners the principal concepts of the Legal Opinion Accord (the "Accord")[24] and the Real Estate Adaptation of the Legal Opinion Accord (the "ABA/ACREL Report").[25] Accordingly, rather than relying on or adopting an external "treaty", the Inclusive Opinion expressly incorporates a great deal of the relevant language of the Accord and the ABA/ACREL Report as they would affect the intended meaning of the opinion provisions, including the remedies opinion and the bankruptcy and equitable principles qualifications.[26] The authors of this paper recognize that the Inclusive Opinion does not follow the more recent suggestions for opinions that rely on the concept of customary practice (and thus can be much briefer than the Inclusive Opinion), but we believe that the Inclusive Opinion may be viewed as indicative of the customary usage and interpretation of the remedies opinion and applicable qualifications utilized in Customary Real Estate Legal Opinion Practice.

The remedies opinion is stated in the Inclusive Opinion as follows:

> **"The Transaction Documents are legal, valid, binding and enforceable against the Client in accordance with their terms. [That is, under the law of contracts of the Opining Jurisdiction, and other laws of the Opining Jurisdiction that we, in the exercise of customary professional diligence would reasonably recognize as being directly applicable to the Client, the Transaction, or both: the Transaction Documents form a contract; a remedy will be available with respect to each agreement of the Client in the Transaction Documents or such agreement will otherwise be given effect; and any remedy expressly provided for in the Transaction Documents will be given effect as stated.]"**[27]

The bankruptcy qualification is stated in the Inclusive Opinion as follows:

> **"The opinion set forth in ____ [reference to Remedies Opinion] of this Opinion Letter is subject to the following qualifications: The effect of bankruptcy, insolvency, reorganization, receivership, moratorium and other similar laws affecting the rights and remedies of creditors generally. This exception includes:**
>
> **(a) the Federal Bankruptcy Code and thus comprehends, among others, matters of turn-over, automatic stay, avoiding powers, fraudulent transfer, preference, discharge, conversion of a non-recourse obligation into a recourse claim, limitations on *ipso facto* and anti-assignment clauses and**

[24] The "**Accord**" is part of the *Third-Party Legal Opinion Report, including the Legal Opinion Accord, of the Section of Business Law, American Bar Association,* 47 BUS. LAW. 167 (1991).

[25] Report on the Adaptation of the Legal Opinion Accord of the Section of Business Law of the American Bar Association for Real Estate Secured Transactions of the Section of Real Property, Probate and Trust Law of the American Bar Association and the American College of Real Estate Lawyers, 29 REAL. PROP. PROB. & TR.J. 569 (Fall 1994).

[27] *Id.*, at Section 2.4. Inclusive Opinion, *supra,* at Sections 3.3 and 3.4.

the coverage of pre-petition security agreements applicable to property acquired after a petition is filed;

(b) all other Federal and state bankruptcy, insolvency, reorganization, receivership, moratorium, arrangement and assignment for the benefit of creditors laws that affect the rights and remedies of creditors generally (not just creditors of specific types of debtors);

(c) all other Federal bankruptcy, insolvency, reorganization, receivership, moratorium, arrangement, and assignment for the benefit of creditors laws that have reference to or affect generally only creditors of specific types of debtors and state laws of like character affecting generally only creditors of financial institutions and insurance companies;

(d) state fraudulent transfer and conveyance laws; and

(e) judicially developed doctrines relevant to any of the foregoing laws, such as substantive consolidation of entities."[28]

The equitable principles qualification in the Inclusive Opinion is stated as follows:

"The opinion set forth in _____ [reference to Remedies Opinion] of this Opinion Letter is subject to the following qualifications: The effect of general principles of equity, whether applied by a court of law or equity. This limitation includes principles:

(a) governing the availability of specific performance, injunctive relief or other equitable remedies which generally place the award of such remedies, subject to certain guidelines, in the discretion of the court to which application for such relief is made;

(b) affording equitable defenses (*e.g.*, waiver, laches and estoppel) against a party seeking enforcement;

(c) requiring good faith and fair dealing in the performance and enforcement of a contract by the party seeking its enforcement;

(d) requiring reasonableness in the performance and enforcement of an agreement by the party seeking enforcement of the contract;

(e) requiring consideration of the materiality of (i) the Client's breach and (ii) the consequences of the breach to the party seeking enforcement;

(f) requiring consideration of the impracticability or impossibility of performance at the time of attempted enforcement; and

[28] *Id.* at Section 3.3.

(g) affording defenses based upon the unconscionability of the enforcing party's conduct after the parties have entered into the contract."[29]

The Inclusive Opinion is consistent with the "each and every" interpretation of the remedies opinion espoused by the TriBar II Report as customary practice.

Real Estate Guidelines

In 2003, the a subcommittee composed of members of the Legal Opinions Committee of the RPPT and the American College of Real Estate Lawyers ("ACREL") adopted the Real Estate Opinion Letter Guidelines.[30] The Real Estate Guidelines, unlike the Inclusive Opinion, do not endeavor to specify the meaning of a remedies opinion or to discuss the use or meaning of the bankruptcy qualification and equitable principles qualification. Rather, by adoption of the Business Section Guidelines and Business Section Principles, reliance on customary practice with regard to the meaning of opinions has been chosen as the appropriate route.

To the extent that the TriBar II Report represents a statement of Customary Non-Real Estate Legal Opinion Practice, there is evidence, through the New York Report and the Inclusive Opinion, that Customary Non-Real Estate Legal Opinion Practice and Customary Real Estate Legal Opinion Practice are generally consistent with respect to the broad scope of the remedies opinion and the appropriateness of the bankruptcy and equitable principles qualifications. However, as discussed below, Customary Real Estate Legal Opinion Practice contemplates that additional qualifications may be appropriate for RESTS. The next part of this paper analyzes the generic qualification to the remedies opinion and the comfort associated with it.

GENERIC QUALIFICATION AND PRACTICAL REALIZATION – IS THIS ANY ASSURANCE OF CUSTOMARY PRACTICE?

The TriBar II Approach

Two universally accepted qualifications to the remedies opinion cover matters related to the effect on the enforceability of loan documents of the bankruptcy or insolvency of the client and the application of equitable principles. These and other exceptions and qualifications, whether expressly stated or implied, mitigate the interpretation of a remedies opinion that each and every undertaking provided in the agreement is enforceable and that each and every stated remedy will be given effect.[31] It is Customary Real Estate Legal Opinion Practice to include an additional "generic" qualification to counter the "each and every" interpretation of the remedies opinion. The practical realization qualification is a kind of generic qualification. The TriBar II Report cites the following as a common example of a practical realization qualification:

"Certain of the [remedial] provisions in the Agreement may be further limited or rendered unenforceable by applicable law but in our opinion such

[29] *Id.* at Section 3.4.
[30] Real Estate Guidelines, *supra*, at 241.
[31] TriBar II Report, *supra*, at 622.

law does not make the remedies afforded by the Agreement inadequate for the practical realization of the principal benefits intended to be provided."[32]

The first part of such a generic qualification (that certain provisions in the Agreement may be unenforceable), standing alone, would not be acceptable to opinion recipients as it is overly broad and could be interpreted to mean that certain remedies that the opinion recipient regards as essential may not be enforceable. Thus, it is customary to include with a generic qualification an assurance that provides comfort to the recipient. The TriBar II Report states that this qualification and assurance (referred to in the TriBar II Report as the "practical realization" qualification) eliminates the need for opinion givers to spend the time and cost of analyzing each and every remedial provision and its relationship with other provisions and from taking numerous specific qualifications (frequently referred to as a "laundry list").[33]

The TriBar II Report notes that the practical realization qualification contains risks "for both opinion givers and opinion recipients [in] that each will understand "practical realization" to mean something different. Nevertheless, the TriBar II Report accepted the use of practical realization qualification, at least in certain circumstances, by stating "despite its inherent ambiguity, the practical realization language ." . . has been encrusted with tradition and become an aspect of customary practice."[34] The TriBar Opinion Committee believes that its continued use should be confined to its historical context of lease and secured financing transactions."[35] Because a REST is a secured financing transaction, the authors of this paper believe that the use of a generic qualification is consistent with this statement in the TriBar II Report. As discussed below, however, the wording of the generic qualification in RESTs often will differ from the practical realization formulation.

New York Report

According to the New York Report, enforcement of remedies in a REST will usually arise in the context of a breach of a particular obligation. The New York Report criticized the "each and every" premise of the remedies opinion as-taking a "narrow" position isolating each provision from the others rather than considering enforceability issues in the context of all relevant circumstances. Due to the broad nature of the remedies opinion, the New York Report indicates that will be necessary to identify those provisions of the documentation that are not enforceable. One approach, mentioned, but not favored by the New York Report, is to identify, like a laundry list, provisions and issues of concern. The New York Report suggests use of a generic qualification[36] and indicates that either a practical realization comfort provision or a material default comfort provision are acceptable.[37] The material default comfort provision is intended to avoid the "ambiguity inherent" in the practical realization approach.[38] The New York Report iteration of the generic qualification and related comfort, as applied to the borrower's obligations is as follows:

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[32] *Id.* at 626.
[33] *Id.*
[34] *Id*.
[35] *Id.*
[36] New York Mortgage Loan Report, *supra*, Note 36, at 156-157.
[37] *Id.*, Note 37, at 157
[38] *Id.*, Note 39, at 158.

"In addition, we advise you that certain provisions of the Loan Documents may be further limited or rendered unenforceable by applicable law, but in our opinion, such law does not render the Loan Documents invalid as a whole or [Insert Alternative 1 or Alternative 2].

[Alternative 1:

substantially interfere with realization of the principal benefits and/or security provided thereby.]

[Alternative 2:

preclude (i) the judicial enforcement of the obligation of the Borrower to repay the principal, together with interest thereon as provided in the Note, (ii) the acceleration of the obligation to repay such principal and interest upon a material default under the Loan Documents, (iii) the judicial foreclosure in accordance with applicable law of the lien created by the Mortgage upon failure to pay such principal and interest at maturity or upon acceleration pursuant to clause (ii) above and (iv) the judicial enforcement of the Assignment of Leases (and any similar provisions in the Mortgage) upon acceleration pursuant to clause (ii) for purposes of collecting rents accruing after the appointment of a receiver in an action to foreclosure the Mortgage.]"[39]

With respect to a guaranty of a mortgage loan, the generic qualification and related comfort is as follows:

"With respect to our opinion regarding the enforceability of the Guaranty, we note that the Guaranty contains provisions which purport to waive certain rights and defenses which the Guarantor might otherwise have with respect to, among other things, amendments and modifications of the Loan Documents, notice of default or the election of remedies by Lender following a default by Borrower under the Loan Documents. Although we believe that such provisions are generally enforceable (subject to the limitations and qualifications set forth in this paragraph 5), we advise you that certain waivers and other provisions may be further limited or rendered unenforceable by applicable law, but in our opinion, such law does not render the Guaranty invalid as a whole or [Alternative 1: substantially interfere with realization of the principal benefits provided thereby] [Alternative 2: preclude judicial enforcement of the Guaranty upon a material default by the Guarantor thereunder]."[40]

[39] *Id.* at 129.
[40] *Id.* at 129-130.

The ABA/ACREL Report[41]

A more precise and, in real estate secured transactions, increasingly commonly accepted, customary practice to deal with this issue has emerged as part of Customary Real Estate Legal Opinion Practice in connection with RESTs. This alternative consists of a generic qualification to the breadth of remedies coupled with specific and significant assurance to the opinion recipient as to certain benefits.[42] This formulation was based originally on a Statement of Policy ("SOP") issued by ACREL.[43] The ACREL SOP stated a preference for the use of a generic qualification with assurance over a laundry list (express or implied) of qualifications or the practical realization qualification due to the breadth of the generic assurance.[44] The ACREL formulation of the generic qualification provides that:

> **Certain [remedies, waivers, and other] provisions of the Transaction Documents may not be enforceable; nevertheless, such enforceability will not render the Transaction Documents invalid as a whole or preclude (i) the judicial enforcement of the obligation of the Client to repay the principal, together with interest thereon (to the extent not deemed a penalty) as provided in the Note, (ii) the acceleration of the obligation of the Client to repay such principal, together with such interest, upon a [material (*cf* Accord § 13(e))][45] default by the Client in the payment of such principal or interest, and (iii) the foreclosure in accordance with applicable Law of the lien on and the security interest in the Collateral created by the Security Documents upon maturity or upon the acceleration pursuant to (ii) above.[46]**

The ABA/ACREL Report utilized in the Inclusive Opinion stated that qualifying the remedies opinion only by the bankruptcy and equitable principles qualifications is inappropriate because in a REST the exercise of remedies following a breach (e.g., foreclosure) may be more complex than remedies sought in connection with an unsecured transaction, where a typical remedy is a cause of action for damages.[47] The ABA/ACREL Report supported the use of a laundry list of qualifications or use of a generic qualification. The ABA/ACREL Report stated:

> **The ACREL SOP form states succinctly the specific benefits of the Transaction Documents about which assurance is given. The clarity of the statement is in contrast to the general phrase "principal benefits intended**

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[41] American Bar Association, Section of Real Property, Probate and Trust Law, Committee on Legal Opinions in Real Estate Transactions, Subcommittee on Adaptation of the Legal Opinion Accord of the American Bar Association Section of Business Law and American College of Real Estate Lawyers Attorneys' Opinions Committee, "Report on Adaptation of the Legal Opinion Accord of the Section of Business Law of the American Bar Association for Real Estate Secured Transactions," 29 REAL PROP. PROB. & TR. J. 569 (Fall 1994) (the "ABA/ACREL Report")

[42] Real Estate Guidelines, *supra*, at 250-251.

[43] Cited in ABA/ACREL Report, *supra*, Note 36 at 591.

[44] *Id*. at 595.

[45] Accord, *supra*.

[46] *Id*.

[47] *Id.* at 583.

thereby" and may offer a definition of what was meant by the term "mortgage benefits" in [a related Texas state report].[48]

The ABA/ACREL Report further states that, if an opinion recipient desires comfort as to other benefits, these may be specifically negotiated and dealt with as part of the opinion process. This formulation achieves specificity and should pose less risk for opinion givers and recipients.[49]

The Inclusive Opinion.

The Inclusive Opinion incorporates the common qualifications of the Accord, adds additional common qualifications relevant to real estate transactions and adds a catch-all generic qualification.[50]

The "Laundry List" Qualification to the remedies opinion is stated as follows:

> **"Other Common Qualifications. The opinion set forth in Paragraph [_] of this Opinion Letter is subject to the following qualifications: To the extent the Law of the State applies any of the following rules to one or more of the [identify state law provisions] [provisions of the Transaction Documents] covered by an opinion to which this Paragraph [_] applies, that opinion is subject to the effect of generally applicable rules of Law that:**
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> **(a) 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;**
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> **(b) provide that forum selection clauses in contracts are not necessarily binding on the court(s) in the forum selected;**
>
> **(c) limit the availability of a remedy under certain circumstances where another remedy has been elected;**
>
> **(d) limit the right of a creditor to use force or cause a breach of the peace in enforcing rights;**
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> **(e) relate to the sale or disposition of collateral or the requirements of a commercially reasonable sale, including, without limitation, statutory cure provisions and rights of reinstatement [and limitations on deficiency judgments];**

[48] *Id.* at 595.
[49] *Id*. at 596.
[50] Inclusive Opinion, *supra* at Section 3.6..

(f) limit the enforceability of provisions releasing, exculpating or exempting a party from, or requiring indemnification of a party for, liability for its own action or inaction, to the extent the action or inaction involves gross negligence, recklessness, willful misconduct or unlawful conduct;

(g) 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;

(h) govern and afford judicial discretion regarding the determination of damages and entitlement to attorneys' fees and other costs;

(i) may, in the absence of a waiver or consent, discharge a guarantor to the extent that (i) action by a creditor impairs the value of collateral securing guaranteed debt to the detriment of the guarantor, or (ii) guaranteed debt is materially modified;

(j) may permit a party who has materially failed to render or offer performance required by the contract to cure that failure unless (i) permitting a cure would unreasonably hinder the aggrieved party from making substitute arrangements for performance, or (ii) it was important in the circumstances to the aggrieved party that performance occur by the date stated in the contract;

(k) limit or affect the enforceability of a waiver of a right of redemption;

(l) impose limitations on attorneys' or trustees' fees;

(m) limit or affect the enforceability of any provision that purports to prevent any party from becoming a mortgagee in possession, notwithstanding any enforcement actions taken under the Security Documents; and

(n) limit or affect the enforceability of provisions for late charges, prepayment charges or yield maintenance charges, acceleration of future amounts due (other than

principal) without appropriate discount to present value, liquidated damages and "penalties."[51]

In a sense, the Inclusive Opinion and the TriBar II Report are consistent in connection with the necessity of incorporating specific qualifications and use of the generic qualification in a REST. In addition to the specific qualifications noted above, the Inclusive Opinion included the following additional generic qualifications:

> **"The opinion set forth in Paragraph [2.4] of this Opinion Letter is subject to the qualification that certain [remedies, waivers, and other] provisions of the Transaction Documents may not be enforceable; nevertheless, [subject to the other qualifications set forth in this Opinion Letter,] such unenforceability will not render the Transaction Documents invalid as a whole or preclude (i) the judicial enforcement of the obligation of the Client to repay the principal, together with interest thereon (to the extent not deemed a penalty) as provided in the Note, (ii) the acceleration of the obligation of the Client to repay such principal, together with such interest, upon a [material] default by the Client in the payment of such principal or interest [*or upon a [material] default in any other material provision of the Transaction Documents*], and (iii) the foreclosure in accordance with applicable Law of the lien on and security interest in the Collateral created by the Security Documents upon maturity or upon acceleration pursuant to clause (ii) above."**[52]

Real Estate Guidelines

The Real Estate Guidelines specifically endorsed the use of a generic qualification coupled with the ACREL SOP form of assurance.[53]

> **"4.0 ENFORCEABILITY OPINIONS; GENERAL EXCEPTIONS AND RELATED ASSURANCES**
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> **The inclusion of some form of generic exception to an enforceability opinion, with a corollary assurance from the opinion giver, is nearly universal in real estate secured loan transaction opinions. In one form of assurance that is commonly used in connection with the generic exception, the opinion giver states that, notwithstanding a general exception to enforceability, such exception will not impair the "practical realization of the principal benefits included in loan documents" (or words to that effect). The "practical realization" assurance is increasingly disfavored, inasmuch as the parties may have significantly different understandings of the meaning of "practical realization" or "principal benefits." Instead, there is a growing consensus in favor of the use of a version of the ACREL formulation of generic exception: that is, that certain provisions of the loan documents may be unenforceable;**

[51] *Id.*
[52] *Id.*
[53] Real Estate Guidelines, *supra*, at 250-251.

however, such unenforceability will not render the transaction documents "invalid as a whole" nor preclude judicial enforcement of repayment, acceleration of the note or foreclosure of collateral in the event of a material breach of a payment obligation or other material provisions of the transaction documents.

Given the breadth of most formulations of generic exception and assurance and the scope of the generally accepted equitable principles exception, the typical "laundry list" of additional specific exceptions to enforceability in most cases can be considerably shortened or eliminated altogether.[54]

The Demise of the Laundry List?

The drafters of the Real Estate Guidelines believed that, while the laundry list qualification developed over many years of practice, the disadvantage of length and its nature as an inclusive qualification, such that anything not included within the laundry list risks being interpreted as not being excluded from the scope of the remedies opinion were not useful additions to Customary Real Estate Legal Opinion Practice. The authors' experience has been that the generic qualification has largely replaced the extensive laundry list in Customary Real Estate Legal Opinion Practice in RESTs. It should be noted that the gap has not been completely closed. The Real Estate Guidelines, in its discussion of the demise of the laundry list, provides as follows:[55]

". . . Such specific exceptions, when taken, should be unnecessary except with respect to (i) matters that may not be clearly encompassed by the bankruptcy, equitable principles or generic exceptions, and (ii) matters that may be of notable importance to the opinion recipient, such as unusual limitations on judicial or non-judicial remedies of which an out-of-state lender may not be aware (*e.g.*, anti-deficiency foreclosure legislation) or contractual provisions that are known by the opinion giver to have been controversial or heavily negotiated during the preparation of transactional documents."[56]

Because the TriBar II Report suggests the appropriateness of the generic qualification and practical realization comfort in the secured transaction context, Customary Non-Real Estate Legal Opinion Practice and Customary Real Estate Legal Opinion Practice may be viewed as consistent with each other. Customary Real Estate Legal Opinion Practice suggests the use of a tighter formulation of the "comfort" typically associated with the generic qualification.

At the core of a REST is the need to realize upon the collateral to collect principal and interest if something bad (i.e., a material default) happens. The opinion giver, often retained by the borrower in a REST, can provide this basic assurance. Anything beyond that is to be specifically requested. The authors note the growing trend of waiving enforceability opinions in wholly-intrastate transactions and the retention by real estate lenders of local state counsel in larger

[54] *Id.*
[55] Real Estate Guidelines, *supra*, at 251.
[56] *Id.*

matters who may be able to provide the lender with the assurances that one would give to one's own client.

ASSUMPTIONS AND FACTUAL DILIGENCE

On the surface, legal opinions in REST's tend to state more express assumptions and limitations on factual diligence than opinions in other business transactions. This is perhaps most obvious based on the examples of business opinions included in published reports such as the TriBar II Report.

Despite the apparent surface differences, however, the authors believe that Customary Real Estate Legal Opinion Practice behind the assumptions and factual limitations generally is consistent with Customary Non-Real Estate Legal Opinion Practice. We think that much of what is explicit in real estate opinions would be implied if it were not explicitly stated.

The real estate bar generally has approved of statements of the business bar as to the assumptions and factual diligence implied and required for legal opinions as exemplified by the Real Estate Guidelines' acceptance of the Business Section Guidelines and Business Section Principles.[57] The statements in the Business Law Guidelines with respect to assumptions and factual diligence, in turn, are consistent with the statements in the TriBar II Report.[58]

Although the Real Estate Guidelines did expand somewhat on the Business Law Guidelines, RPPT and ACREL in effect approved the following statements that appear in Section III of the Business Law Guidelines:

> **"A. The lawyers who are responsible for preparing an opinion letter do not ordinarily have personal knowledge of all of the factual information needed to support the opinions it contains. Thus, those lawyers necessarily rely in large measure on factual information obtained from others, particularly company officials. Customary practice permits such reliance unless the factual information on which the lawyers preparing the opinion letter are relying appears irregular on its face or has been provided by an inappropriate source.**
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> **B. As a matter of customary practice the lawyers preparing an opinion letter are not expected to conduct a factual inquiry of the other lawyers in their firm or a review of the firm's files, except to the extent the lawyers preparing the opinion letter have identified a particular lawyer or file as being reasonably likely to have or contain information not otherwise known to them that they need to support an opinion.**
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> **C. An opinion should not be based on a factual representation that is tantamount to the legal conclusion being expressed. An opinion**

[57] Real Estate Guidelines, *supra* at 241-242.
[58] *Id.* at 258.

ordinarily may be based, however, on legal conclusions contained in a certificate of a government official.

D. Opinions customarily are based in part on factual assumptions. Some factual assumptions need to be stated expressly. Others ordinarily do not. Examples of factual assumptions that ordinarily do not need to be stated expressly are assumptions of general application that apply regardless of the type of transaction or the nature of the parties. These include assumptions that copies of documents are identical to the originals, signatures are genuine and the parties other than the opinion giver's client have the power to enter into the transaction."[59]

Given this relatively consistent underlying approach, the question remains what should the opinion letter look like. For example, an illustrative opinion included at the end of the TriBar II Report includes the following brief statement with respect to the factual basis for the opinion letter:

"For purposes of this opinion letter we have reviewed such documents and made such other investigation as we have deemed appropriate. As to certain matters of fact material to the opinions expressed herein, we have relied on the representations made in the Credit Agreement and certificates of public officials and officers of the Company [and others]. We have not independently established the facts so relied on."[60]

By contrast, a customary real estate opinion letter would expressly state at much greater length the factual basis for the opinion letter.

One very common qualification that is expressed in opinions letters delivered in REST's (and many other business opinions) is that certain opinions based on "knowledge" are limited in at least two respects. One qualification would clarify that a statement made to the "knowledge" of the opinion giver does not imply the knowledge of the entire law firm. The Business Section Guidelines state that this qualification is implicit whether or not it is expressly stated but it is increasingly common as an explicit qualification. A second qualification would state that no inquiry has been made to support any statements made to the opinion giver's knowledge. The Business Section Guidelines and the Real Estate Guidelines invite this latter qualification (of course where it is appropriate). Here is one formulation that addresses these issues:

"Statements in this opinion letter which are qualified by the phrase "to our knowledge" or by words to similar effect are limited to the current actual knowledge of the individual attorneys in this law firm who have devoted substantive attention to the representation of the Client in connection with the Transaction (but not the knowledge of any other attorney in this Firm or any constructive or imputed knowledge of any information, whether by reason of our representation of any party or otherwise). We have not

[59] Business Law Guidelines, *supra*, at 883.
[60] TriBar II Report, *supra*, at 671.

undertaken any independent investigation to determine the accuracy of any such statement."

Even beyond the knowledge qualifications, real estate opinion letters tend to expressly state a fairly extensive set of assumptions and qualifications on factual diligence. Below is an example taken from the Inclusive Opinion. These simply added the last two assumptions (q and r below) to those assumptions that would be incorporated into an "Accord" opinion by reference:[61]

> **Scope of Review. [i]n connection with the opinions hereinafter set forth, we have reviewed such other documents and certificates of public officials and certificates of representatives of the Client, and have given consideration to such matters of law and fact, as we have deemed appropriate, in our professional judgment, to render such opinions.**
>
> **Reliance Without Investigation. We have relied, without investigation or analysis, upon information in [public authority documents]. Except to the extent the information constitutes a statement, directly or in practical effect, of any legal conclusion at issue, we have relied, without investigation or analysis, upon the information contained in representations made by the Client in [Sections ____ of] the Agreement and on information provided [by officials of the Client] [in certificates of officers of the Client], which we reasonably believe, in each case, to be an appropriate source for the information. Except to the extent the information constitutes a statement, directly or in practical effect, of any legal conclusion at issue, we have relied, without investigation or analysis, upon information provided to us by Lender, as set forth in [_____].**
>
> **Assumptions. In rendering the foregoing opinions, we have relied, without investigation, upon the assumptions set forth below unless in a given case the particular assumption states, directly or in practical effect, a legal conclusion expressed in the opinion:[62]**
>
> **(a) [A Client who is a natural person, and] natural persons who are involved on behalf of the Client, have sufficient legal capacity to enter into and perform the Transaction or to carry out their role in it.**
>
> **(b) The Client holds the requisite title and rights to any property involved in the Transaction.**
>
> **(c) Each party to the Transaction (other than the Client) has satisfied those legal requirements that are applicable to it to the extent necessary to make the Transaction Documents enforceable against it.**

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[61] Text quoted below from Inclusive Opinion, *supra* at Sections 1.4, 1.5 and 3.1.

[62] These assumptions are taken from Accord §4. Subsections (q) and (r) were added by ABA/ACREL Report ¶4. See ABA/ACREL Report, *supra*, at 580.

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

(e) Each document submitted to us for review is accurate and complete, each such document that is an original is authentic, each such document that is a copy conforms to an authentic original, and all signatures on each such document are genuine.

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

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

(h) The conduct of the parties to the Transaction has complied with any requirement of good faith, fair dealing and conscionability.

(i) Lender and any agent acting for Lender in connection with the Transaction have acted in good faith and without notice of any defense against the enforcement of any rights created by, or adverse claim to any property or security interest transferred or created as part of, the Transaction.

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

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

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

(m) *Other Agreements* and *Court Orders* (as such terms are defined in the attached Glossary) would be enforced as written.

(n) The Client will not in the future take any discretionary action (including a decision not to act) permitted under the Transaction Documents

that would result in a violation of law or constitute a breach or default under any Other Agreement or Court Order.

(o) The Client will obtain all permits and governmental approvals required in the future, and take all actions similarly required, relevant to subsequent consummation of the Transaction or performance of the Transaction Documents.

(p) All parties to the Transaction will act in accordance with, and will refrain from taking any action that is forbidden by, the terms and conditions of the Transaction Documents.

(q) The Security Documents have been or will be duly recorded and/or filed in all places necessary (if and to the extent necessary) to create the lien as provided therein.

(r) The description of the Collateral is accurate and is sufficient under Law (i) to provide notice to third parties of the liens and security interests provided by the Security Documents and (ii) to create an effective contractual obligation under Law.

We have no Actual Knowledge that the foregoing assumptions are false. We have no Actual Knowledge of facts that, under the circumstances, would make our reliance on the foregoing assumptions unreasonable.

Actual Knowledge: with respect to the Opinion Giver, the conscious awareness of facts or other information by the Primary Lawyer or Primary Lawyer Group.

Relevant Definitions from the Inclusive Opinion[63]

Primary Lawyer:

(a) the lawyer in the Opinion Giver's organization who signs the Opinion Letter;

(b) any lawyer in the Opinion Giver's organization who has active involvement in negotiating the Transaction, preparing the Transaction Documents or preparing the Opinion Letter; and

(c) 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: all of the Primary Lawyers when there are more than one.

[63] All Inclusive Opinion, *supra* in "Glossary".

Public Authority Documents: certificates issued by the Secretary of State or any other government official, office or agency concerning a person's property or status, such as certificates of corporate or partnership good standing, certificates concerning tax status, certificates concerning Uniform Commercial Code filings or certificates concerning title registration or ownership.

CONCLUSIONS

With respect to the remedies opinion, Customary Non-Real Estate Legal Opinion Practice and Customary Real Estate Legal Opinion Practice are generally consistent. Under both Customary Non-Real Estate Legal Opinion Practice and Customary Real Estate Legal Opinion Practice, a remedies opinion means that all provisions in the relevant documentation will be given effect. As with Customary Non-Real Estate Legal Opinion Practice, a bankruptcy qualification and equitable principles qualification is universally accepted. Customary Non-Real Estate Legal Opinion Practice recognizes the use of a "practical realization" generic qualification in secured financings and a generic qualification in a REST is universally accepted in Customary Real Estate Legal Opinion Practice. Customary Real Estate Legal Opinion Practice recognizes use of differing forms of the "practical realization" comfort, but there is an evolving trend toward use of a more precise formulation of the "practical realization" comfort. While Customary Real Estate Legal Opinion Practice tends to utilize lengthier descriptions of diligence than perhaps is found in Non-Real Estate Legal Opinion Practice, there seems to be little disagreement, as a practical matter, as to the scope of due diligence to be utilized in connection with the delivery of a remedies opinion. Additional areas of study would include testing these conclusions against state bar opinion reports issued after the TriBar II Report, analyzing whether the lengthier descriptions of due diligence in opinions typically provided in RESTs might be modified to more closely resemble Customary Non-Real Estate Legal Opinion Practice and contrasting and comparing other aspects of Customary Non-Real Estate Legal Opinion Practice and Customary Real Estate Legal Opinion Practice outside of the context of the remedies opinion.

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