The Real Estate Finance Opinion Report of 2012

History and Summary

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Three national bar associations have combined efforts to produce a new report on the current practice for giving and receiving third-party opinions in real estate-secured transactions in the United States.

The Real Estate Finance Opinion Report of 2012 (2012 Report) is a joint project of the ABA RPTE Real Property Division’s Committee on Legal Opinions in Real Estate Transactions, the Attorneys’ Opinions Committee of the American College of Real Estate Lawyers (ACREL), and the Opinions Committee of the American College of Mortgage Attorneys (ACMA). Although written primarily for the borrower’s lead counsel in a mortgage loan transaction, the 2012 Report provides extensive background and guidance that will be a valuable resource for others involved in the opinion process.

This article begins with a brief discussion of the history of the project, followed by a summary of the issues discussed in the 2012 Report. A copy of the complete 2012 Report is posted on the web site of the ABA RPTE Committee on Legal Opinions in Real Estate Transactions, at http://apps.americanbar.org/dch/commit-
History and Purpose of the 2012 Report

The drafting project that produced the 2012 Report began in 2009. Its purpose was to identify and explain third-party opinion practice in real estate secured transactions. Its starting reference point was the Inclusive Real Estate Secured Transaction Opinion (the Inclusive Opinion), which was published in 1998 as a joint project of the ABA RPTE Committee and ACREL. See http://apps.americanbar.org/dch/committee.cfm?com=RP213000 and www.acrel.org/Documents/PublicDocuments/Inclusive-RealEstateSecuredTransactionOpinion.htm.

The Inclusive Opinion was based on the ABA Legal Opinion Accord (the Accord), which 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) (reprinted in 29 Real Prop. Prob. & Tr. J. 487 (1994)), available at www.americanbar.org/content/dam/aba/uncategorized/1991_ababusiness_law_tripar_legal_opinion_accord.authcheckdam.pdf. The Accord includes a short form opinion letter, which incorporates the rest of the Accord by reference. The Accord, however, omits coverage of many substantive areas common to legal opinions in real estate secured transactions.

To make the Accord more usable for real estate lawyers, the ABA RPTE Committee and ACREL prepared the Report on 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 (1994) (the
Adaptation), available at http://apps.americanbar.org/dch/commit-
tee.cfm?com=RP213000. But in fixing one problem, the Adaptation exacerbated another: practitioners who wanted to issue an Accord-based real estate opinion needed to master two reports, the Accord and the Adaptation, both of which were incorporated by reference in opinion letters issued under the Accord model.

To make Accord-based real estate opinions user-friendly, the ABA RPTE Committee and ACREL collaborated on the Inclusive Opinion, containing all of its terms and provisions within the four corners of the opinion letter itself. The Inclusive Opinion does not reference any report or other external source.

The project that resulted in the 2012 Report was initially undertaken to develop an illustrative opinion letter that reflects current customary national practice in the giving and receiving of real estate finance opinion letters, but that is not limited to the Accord and its offspring. The joint drafting committee originally focused on the illustrative opinion letter that is part of the Report, which was heavily footnoted to explain many of the terms and provisions included, or not included, in the opinion. Because of these footnotes, the project initially was called the “Annotated Real Estate Finance Opinion.”

In the spring of 2011, the joint drafting committee changed its emphasis, focusing less on the opinion letter itself and more on a discussion about the purpose, intent, and meaning of the language used in opinion letters. To that end, the joint drafting committee removed all of the footnotes from the illustrative opinion letter and used them as a basis for Chapter Two of the 2012 Report, which is called the “Guide.” The Guide includes discussions about the various portions of opinion letters that are issued in real estate secured transactions, with a focus on the illustrative opinion letter that is now a chapter of the 2012 Report (the Illustrative Opinion Letter). The introduction to the 2012 Report is its Chapter One, and the Illustrative Opinion Letter is its Chapter Three. Because the Illustrative Opinion Letter is no longer directly annotated, the joint drafting committee changed the name of the project to the “Real Estate Finance Opinion Report of 2012.”
As explained in more detail below, the Illustrative Opinion Letter is written for the borrower’s lead law firm in a mortgage loan transaction and not for local counsel. Like the Adaptation and the Inclusive Opinion, the 2012 Report is limited to financing transactions that are secured by real estate located in the United States. With its Illustrative Opinion Letter and the Guide for practitioners, the 2012 Report can serve as an educational tool and a starting point for discussion and consideration by those who are involved in the opinion process.

Summary of Issues in the 2012 Report

Because the Guide (Chapter Two of the 2012 Report) is a discussion of the issues addressed in the Illustrative Opinion Letter (Chapter Three), and the Illustrative Opinion Letter reflects the 2012 Report’s analysis of the pertinent issues that are considered in the Guide, the section numbers of Chapters Two and Three of the 2012 Report are parallel. Unless otherwise noted, the section numbers below refer to Chapter Two, the Guide.

1. Professional Responsibility. The 2012 Report highlights some of the professional responsibility issues involved in the rendering of third-party opinion letters but does not contain a thorough examination of all of these issues. Although the 2012 Report notes that “[r]ules in several jurisdictions require consent of the client ‘after consultation’ to any evaluation by a lawyer of a matter for someone other than the client,” the 2012 Report also indicates that in some jurisdictions applicable rules of professional responsibility permit a lawyer to take such action “as is impliedly authorized to carry out the representation.” 2012 Report, at 2–3. Such permission is premised on the lawyer’s having consulted with the client about the means by which the client’s interest is to be pursued. See, e.g., Model Rules of Prof’l Conduct R. 1.2(a). Model Rule 2.3(b), however, requires the lawyer to obtain the client’s informed consent if the lawyer “knows or reasonably should know” that providing the opinion would materially and adversely affect the client’s interests. 2012 Report, at 3 (quoting Model Rules of Prof’l Conduct R. 2.3(b)).

3. Lead Counsel, Not Local Counsel. The 2012 Report focuses on the borrower’s only counsel in a mortgage loan transaction, if the borrower has only one counsel, or on the lead counsel for the borrower, if the borrower has more than one counsel in a transaction. The 2012 Report addresses some issues about which local counsel are not generally requested to opine (such as entity organization and authorization when the borrower and the guarantor were formed under the laws of a state other than the local counsel’s), and it does not address a number of the issues about which local counsel are sometimes asked to render opinions (such as certain state-specific matters). Id. at 6.

4. Parties. The 2012 Report is based on a loan to a borrower that is guaranteed by a separate guarantor. The Illustrative Opinion Letter never refers to those parties collectively, making it clear that the opinion giver and the opinion recipient should consider the opinions and the limitations about the borrower and the guarantor separately (because they may differ). Id. ¶ 0.4, at 9.

5. Authority Documents. The 2012 Report notes that it is a matter of personal preference as to whether the opinion giver refers to each examined authority document specifically or in general terms. If direct or indirect owners of the borrower or guarantor are entities and are to be covered by the opinion letter, the opinion giver must review
the organizational documents of all of the entities that are owners as well. Although the 2012 Report suggests that an opinion giver can deviate from this practice, if an opinion giver does so, it is best to say so explicitly. Id. ¶ 1.2, at 11, ¶ 3.3, at 21–22.

6. Opinion Jurisdictions. In the 2012 Report, the term “law” means the statutes, judicial and administrative decisions, and policies, rules, and regulations duly promulgated by applicable governmental agencies and instrumentalities. Covered law normally would include the law of the state that governs the transaction documents and the state or states of formation of the borrower and the guarantor. The 2012 Report notes, however, that “Local Law” is generally excluded from the scope of opinion letters. “Local Law” is defined as statutes and ordinances, administrative decisions, rules and regulations of counties, towns, municipalities, and special political subdivisions, and judicial decisions to the extent that they deal with any of the foregoing matters. See id., Illustrative Opinion Letter ¶ 4.6(g), at 52. The 2012 Report notes that federal law typically is not addressed in opinion letters except in situations in which certain expressly identified federal law is relevant to the transaction parties. The 2012 Report directs that if any federal law is to be deemed covered by an opinion letter, that law should be specifically identified. Out of caution, even though bankruptcy law is federal law, the 2012 Report includes in the bankruptcy exception a reference to federal bankruptcy law. Id. ¶ 1.3, at 11–12.

7. Scope of Review. A statement that the opinion giver has reviewed all instruments and agreements necessary to render the opinion is not needed because it is implicit in opinion letters. Id. ¶ 1.4, at 13–14.

8. Reliance on Other Sources Without Investigation. An opinion giver may rely on certificates and other information obtained from others unless the opinion giver has actual knowledge that the information is not accurate or the opinion giver reasonably does not believe that the source is appropriate. An opinion giver should not render an opinion that the opinion giver recognizes will be misleading about the matters addressed in the opinion letter. It is preferable for an opinion giver to include as an
assumption a legal conclusion or opinion rendered by other counsel involved in the
transaction instead of the opinion giver’s relying on the opinion of the other counsel
and rendering a pass-through or a “conduit” opinion. Id. ¶ 1.5, at 14–15.

9. Assumptions—Generally. The 2012 Report notes that there is no consistent prac-
tice about stating all assumptions that are part of an opinion letter or deeming certain
assumptions to be implied as a matter of customary practice. The 2012 Report states
that under customary practice, all of the assumptions listed in the Illustrative Opinion
Letter are deemed to be implicit. Id. ¶ 2.1(c), at 16. Excluding implicit assumptions
streamlines the opinion letter and enables the parties to focus on the opinions and spe-
cific limitations relevant to the particular transaction. Alternatively, many opinion
givers feel more comfortable with opinion letters that specifically include the assump-
tions that they are making. One reason for this is the belief that counsel for the opinion
recipient will understand that all of the assumptions that the opinion giver considers to
be implicit are intended to be (and are) part of the opinion letter, but it is an altogether
different matter to have confidence that a judge or jury will reach the same conclusion
in a lawsuit concerning the opinion letter. Lawyers who advocate stating all of the
assumptions that may be considered implicit find support for their position in Fortress
looked to particular language in the opinion letter regarding the authenticity of the sig-
natures on the loan documents when it dismissed the plaintiff’s complaint. See 2012
Report at 6, n.14. “The opinion [letter] was clearly and unequivocally circumscribed by
the qualifications that defendant assumed the genuineness of all signatures and the
authenticity of the documents, made no independent inquiry into the accuracy of the
factual representations or certificates, and undertook no independent investigation in
ascertaining those facts.” Id. ¶ 2.1, at 18.

10. Genuineness of Signatures. One of the assumptions included in the Illustrative
Opinion Letter is that the opinion giver assumes that all signatures are genuine. This is
often considered an implicit assumption that need not be stated, but many opinion
givers nevertheless explicitly state the assumption. This assumption extends to the
clients of the opinion giver, including the borrower and any guarantor. Typically, opin-
ion letters include an assumption that the signatures of all parties are genuine, but
opinion recipients sometimes request that this assumption apply only to the signatures of the parties that the opinion giver does not represent. If an opinion giver were to limit the assumption to nonclients, the opinion giver would essentially be giving an assurance that the signatures by the borrower and guarantors are not forgeries and that the individuals who signed are actually the persons that they purport to be. These are factual, not legal, opinions and should be beyond the scope of third-party legal opinion letters. Id. ¶ 2.1, at 17. For an example of the problems that arise if the signatures on the loan documents are not those of the borrower, see Fortress Credit Corp. v. Dechert LLP, 934 N.Y.S.2d at 119; see also the discussion about the execution and delivery opinion, 2012 Report ¶ 3.4(a), at 22.

11. Assumptions—Different Types. The 2012 Report points out the distinction between those assumptions that actually apply to the particular transaction that is the subject of the opinion letter and those assumptions that are applicable to the way that the parties have dealt, and are expected to deal, with each other with respect to any transaction. The 2012 Report notes that a number of opinion givers are concerned that inclusion of the latter type of assumptions can imply a greater breadth to the opinion letter than intended by the opinion giver. Id. ¶ 2.1, at 18.

12. Core Opinions. The first five opinions in the Illustrative Opinion Letter are considered to be the core opinions of the opinion letter. These opinions are discussed in further detail below and include the following: ¶ 3.1, Status; ¶ 3.2, Power; ¶ 3.3, Authorization; ¶ 3.4, Execution and Delivery; and ¶ 3.5, Enforceability. Id. at 20–24.

13. Status. The Illustrative Opinion Letter includes opinions that the borrower and the guarantor are in good standing and are qualified to do business in the named state or states. Because these opinions are given solely in reliance on certificates of public officials, the 2012 Report points out that many practitioners question the value of and the need for such opinions. Opinion recipients can read those certificates just as well as opinion givers can. The 2012 Report posits that in most real estate secured financing transactions, although it is typical to include an opinion about the current existence of
the subject entities, it is unnecessary to render a due formation opinion (that is, concerning the initial public filing of documents) or a due organization opinion (that is, concerning the initial organizational actions of the entities). Id. ¶ 3.1, at 20.

14. **Power.** This opinion refers to the legal power of an entity under its organizational documents and applicable law to enter into the loan transaction or to guaranty the loan, as applicable. It does not relate to the entity's financial ability to fulfill its legal obligations. Id. ¶ 3.2, at 20–21.

15. **Authorization.** The Illustrative Opinion Letter includes the opinions that all actions or approvals that are necessary to be taken or obtained by the borrower and the guarantor have been taken or obtained, so as to bind the borrower and the guarantor under the transaction documents. When there are tiers of ownership of the borrower or guarantor entities (depending on how the entities are structured and what their governing documents provide), it may be necessary that entities at more than one level have the power to enter into the transaction and authorize the transaction for the documents to be enforceable. After reviewing an opinion letter, however, it is not always clear whether the opinion giver is providing a power opinion or an authorization opinion that extends through all of the levels of ownership, or whether the opinion is limited to only the borrower or guarantor entity. Unless an opinion giver intends to render power and authorization opinions that extend through all levels of ownership, the 2012 Report advises opinion givers to expressly limit the scope of these opinions. The 2012 Report notes that the TriBar Opinion Committee has taken the view that opinion givers need only focus on the level of the entity about which they are specifically opining (for example, the borrower) and that they may assume that the member or manager of the borrower is authorized to approve the transaction. Id. ¶ 3.3, at 21; see also id. ¶ 1.2(b), at 11.

16. **Execution and Delivery.** To render an execution and delivery opinion, the opinion giver must be satisfied that an authorized person has both executed and delivered the loan documents, as permitted under applicable law. This may include use of electronic means. As noted in ¶ 2.1, the opinion giver may assume that all signatures are genuine. Id. ¶ 3.4, at 22–23.
17. **Enforceability.** Although the Guidelines suggest that in purely intrastate transactions, enforceability opinions should not be requested or given, nonetheless enforceability opinions are often given in connection with both interstate and multi-state transactions. Because an opinion recipient may believe that an enforceability opinion means that not just the material provisions, but each and every provision of the transaction documents is enforceable, the 2012 Report suggests that most opinion givers will prepare the opinion letter as if an enforceability opinion means that each and every provision of the documents addressed in the letter is enforceable. Id. ¶ 3.5(a), at 23.

18. **Enforceability—No Implicit Assurance.** Although enforceability opinions give assurance that the transaction documents are sufficient to meet their basic purposes, including that the form of the mortgage complies with the applicable legal requirements to be a mortgage on the subject real property, the enforceability opinion itself does not provide assurance that the mortgage actually encumbers the property, creates a lien, or has any particular priority. Moreover, the assurance in the generic enforceability qualification about the ability of the lender to foreclose under certain circumstances does not implicitly furnish opinions on any of these issues. Id. ¶ 3.5(b), at 23–24.

19. **Additional Opinions.** The following opinions, discussed below, are frequently also requested, but are not endorsed by the 2012 Report even though the Illustrative Opinion Letter contains forms of them: ¶ 3.6, Form of Security Documents; ¶ 3.7, No Breach or Violation; ¶ 3.8, No Violation of Law; ¶ 3.9, Choice of Law; ¶ 3.10, Usury; and ¶ 3.11, Legal Proceedings Confirmation. Id. at 24–33.

20. **Form of Security Documents.** Instead of providing an opinion that the mortgage creates a lien on real property, which is generally covered by title insurance, opinion givers typically opine that the security instrument is in a form sufficient to create an encumbrance and is in proper form to be recorded in the applicable records. The 2012 Report mentions that opinions may be given that the filing of a mortgage can create a lien on fixtures, but the Illustrative Opinion Letter does not refer to fixtures. The 2012 Report does not address opinions relating to UCC perfection requirements or security interests in personal property. Id. ¶ 3.6, at 24–25.
21. **No Breach or Violation.** A no breach or violation opinion relates to internal organizational documents of the borrower and the guarantor, specified agreements that the borrower and the guarantor have with other persons, and under-identified court orders. It should be read to apply to the date of the closing of the transaction and is not intended to relate to the future performance of any party. Consistent with the Adaptation, the 2012 Report limits the no breach or violation opinion to the payment obligations of the borrower; the opinion does not extend to the future performance obligations of the borrower. Id. ¶ 3.7, at 26.

22. **No Violation of Law.** The 2012 Report limits the no violation of law opinion to statutes and regulations in the relevant state and to judicial interpretations of those statutes and regulations, but common law is not generally included in the scope of the opinion. Likewise, the laws of counties, towns, municipalities, and special political subdivisions are not included in a no violation of law opinion. The reach of the opinion should be limited to the borrower’s payment obligations and should not include its other agreements that require future performance because the opinion letter speaks as of its date and should not be read to cover future performance or events. The 2012 Report notes that the no violation of law opinion may extend to a usury opinion. Id. ¶ 3.8, at 27–28.

23. **Choice of Law.** A choice of law opinion may seem to be implicitly part of an enforceability opinion unless the choice of law opinion is specifically excluded. The 2012 Report takes the position that a choice of law opinion should not be regarded as implicit in an enforceability opinion but should be stated specifically in the opinion letter. This is a complex and factually-based area, and when choice of law opinions are given, they are typically reasoned opinions that are accompanied by a number of assumptions. Id. ¶ 3.5(c), at 24. Although the Guide includes a discussion of choice of law issues, the Illustrative Opinion Letter excludes a choice of law opinion. Id. ¶ 3.9, at 28, and Illustrative Opinion Letter ¶ 3.9, at 49.

24. **Usury.** The 2012 Report provides that a usury opinion, or an opinion about the amount of interest or other charges that a lender can receive, is implicit in an enforceability opinion. Id. ¶ 3.5(d), at 24. Similarly, a usury opinion is implicit in a no violation
of law opinion. Id. ¶ 3.8(b), at 27. If the opinion giver does not want to render a usury opinion, usury must be specifically excluded from the opinion letter. Usury issues are state-specific, so the relevant issues and assumptions that are important will differ from state to state. Id. ¶ 3.10, at 31.

25. Legal Proceedings Confirmation. A statement that the borrower is not involved in litigation is not a legal opinion, but instead it is a factual confirmation. In light of cases such as Dean Foods Co. v. Pappathanasi, 18 Mass. L. Rep. 598 (Mass. Super. Ct., 2004), and the vagaries related to the knowledge of the opinion giver and its lawyers, many counsel are reluctant to provide such a statement. The Illustrative Opinion Letter includes only a confirmation of such matters relating to cases on which the opinion giver has worked. 2012 Report ¶ 3.11, at 31.

26. Certain Limitations. Paragraphs 4.1–4.3 pertain to core opinions; ¶ 4.4 pertains to specific transactional considerations; and ¶ 4.5 includes more general limitations. Id. at 33–37. The definition of “limitations” in the 2012 Report is broad and includes assumptions, qualifications, and exclusions. Id. at 5.

27. Bankruptcy. All opinion letters exclude the effect of bankruptcy and similar laws. This is an implicit exception, even if not stated. The bankruptcy exception applies to all opinions, not just the enforceability opinion. Any reference to bankruptcy law or other federal law in connection with this exception should not be deemed to limit the exclusion of federal law stated elsewhere in the opinion letter. Id. ¶ 4.1, at 33–34.

28. Equitable Principles. All opinions, not just the enforceability opinion, exclude “equitable principles.” This is an implicit exception if not stated. The 2012 Report includes an expansive definition of equitable principles. Id. ¶ 4.2, at 34–35.

29. Generic Enforceability Qualification with Assurance. This limitation is often referred to as the “generic qualification,” but the 2012 Report refers to it as the “generic enforceability qualification.” The limitation is stated in two parts, the first of which is a statement that not all provisions in the loan documents may be enforceable. Because this could be read broadly to render the enforceability opinion meaningless, it is followed by the second part: an assurance that certain specified remedies will be
available and the circumstances under which they will be available. Id. ¶ 4.3(a), at 35. The assurance is made specifically subject to all of the other limitations in the opinion letter. Id. ¶ 4.3(b), at 35.

The Illustrative Opinion Letter provides assurance that a lender will have its remedies on a material default in a payment provision, and the Illustrative Opinion Letter includes optional language that provides the assurance on a material default of any other material provision in the documents. The vagueness of the term “material” in this context could require the opinion giver to carefully consider what defaults might or might not cause acceleration of the indebtedness and invocation of the lender’s remedies, and, if appropriate, to state-specific exceptions to the assurance. Id. ¶ 4.3(e), at 36.

The language in the generic enforceability qualification should be amended for application in states that have laws limiting the enforceability of certain provisions of the documents, such as single form of action rules, limitations on deficiency judgments, and limitations on late fees. Id. ¶ 4.3(c), at 35–36.

The 2012 Report notes particular problems with assuring the enforceability of guaranties because a failure of the loan documents to include an effective waiver of rights of guarantors, such as the defense of material modification of a guaranty, can release a guarantor from all liability. Id. ¶ 4.3(c), at 36. The Illustrative Opinion Letter, therefore, provides that the assurance relating to guaranties is limited “to the extent not deemed a penalty and subject to the defenses of a surety that have not been or cannot be waived.” Id. Illustrative Opinion Letter ¶ 4.3, at 50.

The assurance in the Illustrative Opinion Letter provides that on a material default, the lender will be able to foreclose, but it does not indicate the method of foreclosure. Id. ¶ 4.3(f), at 36–37. The assurance given is not an opinion that the loan documents include “all customary provisions and remedies,” an opinion which is discouraged by the Guidelines. Guidelines, supra, § 1.1.b.
The 2012 Report disapproves of the use of the traditional practical realization assurance in real estate secured transactions because of its “apparent ambiguity and subjectivity.” 2012 Report ¶ 4.3(g), at 36.

30. **Other Transaction-Related Qualifications.** This section is a placeholder for matters that may be relevant under state law, such as issues relating to usury, prepayments, indemnification, and assignment of rents. Id. ¶ 4.4, at 37–38.

31. **Other General Qualifications.** The Illustrative Opinion Letter includes 17 “other general qualifications” (many of which relate to the method or means of pursuing remedies), but there is no current consensus on how many, if any, of the specific other general qualifications are necessary in light of the bankruptcy exception, the equitable principles exception, and the generic enforceability qualification. Clearly, a number of the other general qualifications could be omitted from an opinion letter without causing the opinion giver any additional exposure. Id. ¶ 4.5, at 37.

32. **Exclusions.** The exclusions are a list of the types of law that are not included in the Illustrative Opinion Letter. They include local law (that is, laws of counties, cities, towns, and other subdivisions), zoning law, land use law, and environmental law. Federal law is not listed as an exclusion in this section because the law covered by the opinion letter is only the law of the jurisdiction or jurisdictions listed in the Illustrative Opinion Letter ¶ 3.1. The Illustrative Opinion Letter specifically includes coverage of environmental laws, zoning laws, and land use laws. All the exclusions specified in the Illustrative Opinion Letter can be implied as exclusions under customary practice. Id. ¶ 4.6, at 38.

33. **Knowledge.** Even though the term “knowledge” of the opinion giver is not used in the Illustrative Opinion Letter, the Guide contains a formulation of “knowledge” that can be used if the concept of the knowledge of the opinion giver is applicable to an opinion. The term is limited to the conscious awareness of facts by a person included within the “primary lawyer group,” which includes the lawyers involved in the transaction or in preparing the opinion letter. Id. ¶ 4.7, at 39.
34. **Use of the Opinion Letter.** This part discusses limitations on the use of opinion letters, including the effective date, governing law, disclaimer of implied opinions, expression of professional judgment, and signatures. Id. ¶ 5.1–5.6, at 40–42. Each of these specific paragraphs is described in more detail below.

35. **Reliance.** The Illustrative Opinion Letter contains two alternatives for the use of the opinion letter. In the first, only the original lender may rely on the letter without the opinion giver’s consent. In the second, an assignee of all of the lender’s interest in the loan may also rely on the letter. The Illustrative Opinion Letter makes it clear that no subsequent beneficiary of the opinion letter may have any greater rights under it than the original lender. The 2012 Report states that it is not appropriate to request that the opinion recipient’s attorney rely on the opinion letter. The 2012 Report does not discuss the possible reliance on opinion letters by other parties, such as rating agencies. Id. ¶ 5.1, at 40–41.

36. **Effective Date—No Obligation to Update.** An opinion letter is effective as of its date only, and the opinion giver has no obligation to update the letter. This is implicit if not stated. Id. ¶ 5.2, at 41.

37. **Governing Law.** The opinion letter itself should be governed by the law of the state where the opinion giver practices. Opinion letters typically do not include a governing law provision that applies to them. Id. ¶ 5.3, at 41–42.

38. **Disclaimer of Implied Opinions.** As a matter of customary practice, opinion letters relate only to the issues specifically mentioned in them. It is not necessary to state this in an opinion letter. Id. ¶ 5.4, at 42.

39. **Expression of Professional Judgment.** As a matter of customary practice, legal opinions are expressions of the opinion givers’ professional judgment and are not guarantees of particular results. This assumption is considered to be implied whether or not the opinion letter expressly states it. The Illustrative Opinion Letter does not include such a statement. Id. ¶ 5.5, at 42.
40. **Signatures.** The opinion letter may be signed in any of several different ways, including by the firm or by an individual lawyer, and it may be signed manually or electronically. A recipient typically expects that the opinion letter is from the firm as a whole rather than only from an individual lawyer. Id. ¶ 5.6, at 42.

41. **No Incorporation by Reference.** The Illustrative Opinion Letter does not include a statement that the 2012 Report is included in the opinion letter by reference.

**Conclusion**

The 2012 Report is a comprehensive guide to the current practice for giving and receiving of opinion letters in real estate secured transactions in the United States today. The Illustrative Opinion Letter and the extensive commentary in the 2012 Report will be valuable resources not only for borrower’s counsel in a mortgage loan transaction but also for anyone involved in the opinion process.