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The Newsletter of the Committee on Legal Opinions in Real Estate Transactions

From the Chair

On behalf of the Committee on Legal Opinions in Real Estate Transactions of the ABA Section of Real Property, Trust and Estate Law, it is my pleasure to present this Fall 2021/Winter 2022 issue of *Opinions Matters*, our Committee's semiannual newsletter. As always, the mission of this newsletter is to keep our members and other lawyers informed of developments in opinion practice, with a focus on real estate opinion letters. We monitor and report on actions and reports of various organizations, such as the Legal Opinions Committee of the ABA Business Law Section, the Working Group on Legal Opinions, and the TriBar Opinion Committee.

With the first issue of *Opinions Matters* in 2022, we want to express appreciation to Dan Devaney, the Immediate Past Chair of the Committee. Just over three years ago Dan took the helm of what should have been an easy tenure, following in the footsteps of Charlie Menges, the current Editor-in-Chief of *Opinions Matters*, who (as expected) left the Committee in even better shape than he found it. Unfortunately, 2020 brought with it the COVID-19 pandemic which (amidst many other disruptions) upended the usual rhythms of the Committee's work. Dan shepherded the Committee through, including presenting a CLE at the 32nd Annual RPTE National CLE Conference held virtually on May 14-15, 2020. I have big footsteps to fill in taking over as Chair, and wish Dan all the best as he enters retirement (and express the hope that he remains a part of RPTE).

And, now, onto some highlights of this issue:

In *New York City Bar – 2021 Mortgage Loan Opinion Report*, Scott Willis provides a summary of the New York City Bar's 2021 Mortgage Loan Opinion Report. Matters discussed include the addition of a usury opinion and opinions dealing with Uniform Commercial Code issues, opinions given with respect to the power and authority of a multi-tiered loan party to execute, deliver and perform its obligations under the loan documents, and reliance on the opinion by rating agencies.

Jim Levine and Evan Sharber report on *2021 Changes to the HUD Form of Opinion in HUD-Insured Multifamily Loans*. Among other things, they review changes to opinions required of borrower's counsel, the instructions to the opinion of borrower's counsel, and the borrower certification.

The Fall 2021 Meeting of the Working Group on Legal Opinions Foundation ("WGLO") concluded on November 2, 2021, and Ken Jacobson reports on the discussions at that meeting (which was held virtually over several days). The next WGLO conference is scheduled to occur on May 10, 2022, in New York City.

In *Bandera: An Epic Story of a Contrived Opinion Let-*

Charles L. Menges, Editor-in-Chief

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ter, Amy McDaniel Williams explains how the Delaware Court of Chancery's decision in *Bandera Master Fund LP v. Boardwalk Pipeline Partners, LP*, serves as a reminder to lawyers on some fundamental opinion practice issues that the law firm issuing a legal opinion in that case failed to observe.

Finally, in *When is a Local Counsel Opinion Letter Ripe for Release*, Charlie Menges offers a detailed review of conditions for the release (and delivery to the lender) of the opinion letter provided by borrower's counsel as part of the pre-closing delivery of documents.

Breaking news! The Committee is planning to present a program entitled *Opinions Potpourri: Hot Topics and Current Issues in Real Estate Finance Opinions*, at RPTE's 2022 National CLE Conference. That program will be held on Wednesday, May 27, 2022. Should you become aware of any developments in real estate finance opinion practice that might be of interest to other practitioners, please share them with the editors, the chair, or the vice chairs.

As always, we encourage our readers to suggest potential topics for articles, to submit articles, to review submitted articles or otherwise assist with keeping *Opinions Matters* a valuable resource for its readership and the broader opinions community. Wishing you the best for 2022.

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Editor's Note

As noted in the last issue of *Opinions Matters*, third party opinion letters span several practice areas, not just real estate finance transactions which are usually the focus of most real estate lawyers who issue opinion letters. In this issue, Amy McDaniel Williams has provided a short summary of a recent decision by the Delaware Court of Chancery in November, 2021 regarding a legal opinion that was issued by a major law firm to its client. The facts bear little relationship to transactions in which real estate lawyers typically issue opinion letters. The defendant in Bandera Master Fund LP v. Boardwalk Pipeline Partners, L.P. was a master limited partnership (i.e., its units were traded publicly on an exchange) that owned and operated interstate gas pipeline systems regulated by the Federal Energy Regulatory Commission (FERC). The defendant's partnership agreement contained a provision that granted to the general partner an option to re-purchase the limited partnership units, thereby allowing the general partner to take the partnership private, if the general partner received an opinion of counsel, acceptable to the general partner, that the partnership's tax status will reasonably likely have a material adverse effect on the rates that the partnership can charge its customers. When FERC proposed changes in its regulations that arguably could have made master limited partnerships an unattractive investment vehicle to pipeline companies, the general partner requested, and its outside counsel ultimately issued, an opinion letter that triggered the general partner's re-purchase of limited partnership units. Unfortunately for the general partner, certain of the limited partners disagreed with the law firm's opinion letter, filed an action against the partnership, the general partner and the principal in the general partner, obtaining a judgment of almost $690 million. Amy's article lists several lessons that Bandera teaches lawyers who are asked to issue legal opinions, whether they are issuing third party opinion letters in a real estate finance transaction or issuing legal opinions to clients in other circumstances. In particular, Bandera shows how law firms can succumb to client pressure in issuing an opinion that may not be supported by the facts and the law. The court's reported decision (even if it is 193 pages long) should be required reading for all business lawyers.

As this is the last issue of *Opinions Matters* in which I will serve as editor-in-chief, I would like to express my appreciation to all of the members of the Editorial Board and authors over the last two years for their support and contributions to *Opinions Matters*. Scott Willis with Fishman Haygood LLP in New Orleans has agreed to take over as editor-in-chief. Scott is one of the most knowledgeable lawyers in the field and has held numerous leadership positions in national bar organizations and with legal opinion committees in particular. We are fortunate to have Scott take the reins of *Opinions Matters*.

I would also like to recognize Dan Devaney, for his dedicated work as chair of the ABA/RPTE Committee on Legal Opinions in Real Estate Transactions, and thank him for his support of *Opinions Matters*, including his regular summaries of ABA list serv discussions of opinion issues.

Last but not least, congratulations to Imran Naeemullah on his appointment as chair of the Committee, succeeding Dan Devaney. As indicated in the *From the Chair* column, Imran is already off to a fast start organizing a program on opinion letters at the Spring 2022 RPTE National CLE Conference.

Although this issue of *Opinions Matters* is a little delayed from the Fall, 2021 target date for publication, I hope you will find it informative and hopefully worth the wait!

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New York City Bar – 2021 Mortgage Loan Opinion Report

The New York City Bar recently issued its 2021 Mortgage Loan Opinion Report (the "2021 Report").[1] The 2021 Report is an update of prior 1989 and 1998 Reports of the New York City Bar. The 2021 Report notes that the 1998 Report placed significant reliance on the Third Party Closing Opinions Report of the TriBar Opinion Committee and the Third Party Legal Opinion Report, including the Legal Opinion Accord, both published by the American Bar Association Section of Business Law. The Report also notes that the drafting committee considered the "influential" *Real Estate Opinion Letter Guidelines* issued by the American College of Real Estate Lawyers, Attorneys Opinions Committee, and the American Bar Association, Section of Real Property, Probate and Trust Law Committee or Legal Opinions in Real Estate Transaction.[2]

Format and Summary. The 2021 Report is in the form of a model opinion letter for a commercial real estate mortgage loan transaction for property located in New York State. The model opinion letter is also annotated with endnotes that discuss and explain various aspects of the model opinion form.

The 2021 Report has citations to other reports and a selected bibliography, including the *Real Estate Finance Opinion Report of 2012*, 47 Real Prop. Prob & Trust J. 213 (2012) (the "2012 Real Estate Finance Report") and the *Local Counsel Opinion Letters in Real Estate Finance Transactions*. A *Supplement to the Real Estate Finance Opinion Report of 2012*, 51 Real Prop. Tr. & Est. L.J. 167 (2016) (the "Local Counsel Report").

The model opinion form in the 2021 Report is similar to model opinion forms customarily seen in other recent real estate opinion reports. It contains a list of covered documents as typically seen in an opinion letter, including loan agreements, notes, security documents, guarantees and other loan documents. The model opinion form also contains language that the opinion giver has examined the customary organizational documents related to the borrower and the guarantor. The model opinion form also contains customary assumptions and qualifications that are often seen in current model opinion forms.

The model opinion form contains the following substantive opinions:

- entity existence and good standing
- entity power, authority and authorization
- due execution and delivery
- enforceability
- no breach of organizational documents, listed court orders or law
- a no-litigation confirmation
- security documents in proper form for recording to provide constructive notice of the lien
- no authorization or approvals required
- usury

Two significant changes in the 2021 Report are the addition of a usury opinion and opinions dealing with Uniform Commercial Code issues, neither of which were discussed in the prior reports.

As a general matter, the 2021 Report tends to follow in most respects the more recent opinion letter forms and model opinions, including those suggested by the 2012 Real Estate Finance Report and the Local Counsel Report. However, there are certain notable differences that in some instances depart from other opinion reports.

Up the Ladder Approvals. One issue posed by the 2021 Report concerns opinions given with respect to the power and authority of a multi-tiered loan party to execute, deliver and perform its obligations under the loan documents. In footnote 25 to the 2021 Report it is stated:

> "in the case of a Borrower organized in tiers, the Committee believes an opinion as to due authorization, execution and delivery by Borrower necessarily means that the action and the documents in question have in turn been duly authorized and executed and delivered by all appropriate entities. For example, if a limited partnership Borrower is acting through a corporate general partner it is not necessary to state explicitly that the delivery of Loan Documents have in turn been duly authorized, executed, and delivered by all requisite corporate action of such general partner. *Of course, counsel is required to exercise appropriate due diligence to assure that the execution, delivery and performance of the Loan Documents have been approved and authorized at all levels.* [emphasis added]

This position that appropriate due diligence has been done with respect to all levels of a multi-tiered organization departs from the TriBar position that upstream authorizations are an implicit assumption that need not be stated. The TriBar Opinion Committee, in *Third-Party Closing Opinions: Limited Liability Companies*, 61 Bus. Law. 679, 689 n. 52 (2006) states that:

> [T]he opinion preparers may assume, without so stating, that when an approval is given by a member or manager that is not a natural person, the member or manager is the type of entity it purports to be, that it

1. The 2021 Report can be found at: https://www2.nycbar.org/RealEstate/Forms/2020930-MortgageLoanOpinionReport.pdf.
2. 47 Real Prop. Prob. & Tr. J. 241 (2003).

was authorized to approve the transaction, and that those acting on its behalf had the approvals they required. As with any unstated assumption, opinion givers may not rely on this assumption if reliance is unreasonable under the circumstances in which the opinion is given or they know it to be false. [citation omitted] To avoid any misunderstanding, some opinion givers choose to state the assumption expressly. As noted in the 2012 Real Estate Finance Report and the Local Counsel Report[3], opinion givers should consider taking an express assumption to avoid having to rely on an implicit assumption.

No Litigation Confirmation. The model opinion form also has provisions that are qualified by the knowledge of the opinion giver with respect to litigation and conflicts with the borrower's contracts. As discussed in the 2012 Real Estate Finance Report, a request for no litigation confirmations "increasingly is recognized as an inappropriate request for opinion letters, and this Report recommends that it should be resisted."[4]

Generic Qualification and Assurance. The 2021 Report adopts the use of a generic qualification with assurance with respect to remedies available as to enforceability similar to that in the 2012 Real Estate Finance Report.[5] In footnote 34 to the 2021 Report, the Committee states that this a better formulation to use rather than using a practical realization (or stated in the Report "practical obligation" limitation to the overall generalness of the enforceability opinion).

Rating Agency Reliance. In the section on reliance at the end of the model opinion form, the 2021 Report allows reliance on the opinion by rating agencies. Rating agencies do not necessarily require reliance on legal opinions, as discussed in the Local Counsel Report.[6] Thus, the inclusion of reliance to rating agencies in this model opinion form should not be interpreted to mean that rating agencies either want, or need, reliance on legal opinions. Instead, as is the current customary practice, most rating agencies just want to be provided with a copy of the opinion for their due diligence purposes.

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3. *See*, 2012 Real Estate Finance Report at 239, Local Counsel Report at 195.
4. *See,* 2012 Real Estate Finance Report at 249.
5. *Supra* at page 242.
6. Local Counsel Report at p. 234.

2021 Changes to the HUD Form of Opinion in HUD-Insured Multifamily Loans

On Friday, August 13, 2021, HUD issued a 60-Day Notice requesting public comment on certain proposed changes to its multifamily form closing documents, including the Opinion of Borrower's Counsel (HUD-91725M), Exhibit A Certification of Borrower (HUD-91725M-CERT) and the Instructions to Opinion of Borrower's Counsel (HUD-91725M-INST). Comments were due on October 12, 2021. Below is a summary of certain substantive changes to these forms.

I. Opinion of Borrower's Counsel (HUD-91725M):

- Amendments to HUD's Firm Commitment no longer need to be listed separately in the opening paragraph of the opinion letter.
- The due authorization opinion in opinion 4 is revised to cover all entities in the organizational structure that are required to authorize the transaction. Previously, the opinion covered only controlling entities within the borrower's organizational hierarchy.
- HUD removed the definition of "Supporting Documents" and expands the definition of "Primary Loan Documents" to include the Assurance of Completion, the Assurance of Completion of Off-Site Facilities, the Latent Defects Agreement, the On-Site Deposit Escrow, and the Contractor's Prevailing Wage Certificate. The net effect of this change is that borrower's counsel must now opine on the enforceability of those documents.
- HUD revised the definition of "Public Entity Agreement" so that it is no longer limited to agreements with state and local entities and includes agreements with all governmental entities.
- Previously, opinions 10, 11, 12, and 13 opined that the HUD loan documents control over inconsistent provisions found in the "Primary Loan Documents" and the "Supporting Documents." Those opinion paragraph now no longer cover all of the provisions in documents that were formerly Supporting Documents and that are now not included as Primary Loan Documents, including provisions found in tax-exempt bond, low-income housing tax credit, public entity agreement, and private secondary financing-related documents.
- Opinion 11 is revised to add the opinion that the HUD Requirements would govern in the event of a conflict with the provisions of any low-income housing tax credit land use restriction agreement. Oddly, the opinion-giver is also now required to state that in the event of an apparent conflict between the HUD Requirements and a low-income housing tax credit land use restriction covenant, the parties and HUD will work

in good faith to determine which federally imposed requirement is controlling.

- Opinion 12 was revised to state that nothing in any Public Entity Agreement precludes enforcement of the Primary Loan Documents. Previously, this was an opinion that the Primary Loan Documents and Supporting Loan Documents governed in the event of an inconsistency with a Public Entity Agreement.

II. Exhibit A Certification of Borrower (HUD-91725M-CERT):

- The revised form now includes an acknowledgment by the borrower on the borrower's signature page that the submission of any false, fictitious, or fraudulent statement may result in criminal, civil and/or administrative action.

III. Instructions to Opinion of Borrower's Counsel (HUD-91725M-INST):

- A supplemental opinion required by Chapter 19 of the MAP Guide was added as an example of a situation in which changes to the form of Opinion Letter may be permitted by HUD field counsel.
- HUD added some clarification on the applicability and use of an Assurances of Completion and Contractor's Prevailing Wage Certificates.
- HUD excluded agreements with HUD from the definition of "Public Entity Agreement" and made some clarifying changes to what is included as a Public Entity Agreement.
- HUD added information regarding the timing and review and recording of LIHTC land use restriction agreements and provided for the inclusion of any such agreements as Primary Loan Documents to be listed in Section AA of the opinion letter.
- Paragraph DD of Section I is revised to clarify that a separate zoning certificate is required only when a zoning endorsement to the title policy is unavailable.
- Paragraphs HH and II of Section I is revised to reflect the new requirement in Chapter 19 of the MAP Guide that the Survey and Surveyor's Report must reflect that the field work/last inspection was done no earlier than 180 days prior to initial and initial/final closings and no earlier than 120 days prior to final closings.
- Paragraph JJ of Section I is revised to reflect the requirement for the assurance of utility services when additional (or changes to) utilities are needed to support the repairs required by the HUD Firm Commitment. Further, HUD states that the ALTA 17.2-06 utility access endorsement is required if available in the jurisdiction.
- Paragraph KK of Section I is revised to reflect the new requirement in Chapter 19 of the MAP Guide that docket searches may be performed within 60 days of closing, an increase from the prior 30-day requirement. Further, HUD clarified the instructions to reflect that litigation docket searches are required in the jurisdiction of the HUD-insured property and the borrower entity's business location jurisdiction and that the docket searches must consist of a search of the local and federal courts for the jurisdiction for all civil litigation, as well as a search of bankruptcy court records and tax lien records.

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Déjà vu All Over Again (The Sequel): The Fall 2021 Working Group on Legal Opinions Conference

The Fall 2021 Meeting of the Working Group on Legal Opinions Foundation ("WGLO") concluded on November 2, 2021 and consisted of sessions held on October 26, 2021, October 28, 2021 and November 2, 2021. As with the Fall 2020 and Spring 2021 meetings of WGLO, the Fall 2021 meeting was a virtual meeting in which all presentations were presented through a virtual electronic platform. Plenary sessions were conducted on October 26, 2021 and November 2, 2021. Meetings of various affinity groups occurred on October 28, 2021. The meetings were not recorded by WGLO (and attendees were instructed not to record the meetings) due to a desire to facilitate discussion among meeting panelists and other attendees, who might be more comfortable if they could speak without attribution.

As a reminder, WGLO (website: https://www.wglo.net/), is an organization whose mission, per its website, is "… to bring together all constituencies concerned with giving and receiving legal opinions in order to foster a national opinion perspective, broaden the consensus that exists and provide a continuing forum for discussion of opinion issues." There are three categories of members of WGLO: the ABA's Business Law Section, law firms and bar associations (such as the ABA's Section of Real Property, Trust and Estate Law and state bar associations). Among WGLO's activities is the hosting of a Spring meeting and a Fall Meeting each year.

Lawyers that are partners in, or, employed by, member law firms may, as of the date of this article, access written materials from the Fall 2021 meetings (https://www.wglo.net/publications/past-seminar-index/fall-2021-seminar). A log-in and password is required to access the materials. The materials include the meeting's agenda and written materials relevant to the discussion topics.

October 26, 2021

Four programs were presented during the October 26 sessions. The first program, "Laws Commonly Excluded From the Coverage of Third-Party Legal Opinions in U.S. Commercial Loan Transactions" discussed an article published in 2021 in The Business Lawyer.[1] The article discusses the practice of excluding coverage of certain laws from third-party legal opinions. The same group of authors previously wrote an article published in 2014 in The Business Lawyer.[2] The article pertains to some of the conclusions reached by the authors, who practice in several jurisdictions, regarding coverage in legal opinions of certain laws. Among the conclusions is that there is wide acceptance among practitioners that certain laws are excluded from the coverage of an opinion letter unless specifically requested, but there is variation among practitioners as to how exclusions are expressed.

The second program, "Takeaway: Opinion Restrictions: The Uncertain Tail Wagging the Opinion Dog" discussed opinion restrictions, such as the assumptions, exceptions and limitations, that help to define the opinions themselves. Evidently, the trend has been to expand the number of restrictions, but reports and judicial decisions have not exhaustively treated the meaning of restrictions and how they are to be understood to the same extent such reports and decisions have addressed the opinions themselves.

The third session of the day, "Current Ethics Issues Relating to Transactions Practice", was devoted to professional responsibility issues. One topic addressed the issue of "truthfulness" in lawyer communications with others. This topic was also addressed in the Spring 2021 conference programming. Another topic discussed was the duration of the attorney-client privilege.

The final session, "Opinions on Forum-Selection Clauses-Analytical Methodology," discussed forum selection opinions in the context of cross-border opinions and in domestic US opinions. In domestic US opinion letter practice, opinions on forum-selection provisions are often excluded from the coverage of the opinions expressed in an opinion letter.

October 28, 2021

The meetings on October 28 were devoted to meetings of various affinity groups. WGLO has organized groups within particular practice areas to discuss opinion issues that may be of concern to those that issue or receive opinion letters in transactions involving those practice areas. There were six affinity group meetings on October 28: Capital Markets/Public Securities, Commercial Law and Finance, Corporate/Alternative Entities, Cross-Border Transactions, Real Estate and Private Equity/Venture Capital. These sessions were staggered so that each session followed the session presented by a different affinity group, thus affording those that wished to do so the opportunity to attend the meetings of all affinity groups. The real estate affinity group meeting spent much of its meeting discussing the laws excluded from opinions in real estate transactions. In addition, there was a discussion of the recently issued New York Mortgage Loan Opinion Report.[3]

November 2, 2021

The meeting on November 2 consisted of three substantive sessions. The first session, "Uptiering and Drop-Downs: Rendering Opinions on Liability Management Transactions," addressed, among other things, opinions in the context of capital restructurings, which might include additional financing, and the interplay between the restructuring and additional financing, on the one hand, and existing financing, on the other hand.

The second session, "Formulating, Diligencing and Rendering 1940 Act Opinions", concerned opinions to the effect that a particular entity is not subject to registration as an investment company under the Investment Company Act of 1940.

The last session of the day continued a feature of the WGLO conferences, a discussion of recent developments in opinion letter reports and case law that pertains to opinions or might affect the substance of the opinions themselves. As with prior meetings, the session included a discussion of several judicial decisions on a variety of substantive legal topics that could affect opinion practice.

The next WGLO conference is scheduled to occur on May 10, 2022 in New York City.

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1. Gail Merel, et. al., "Laws Commonly Excluded From the Coverage of Third-Party Legal Opinions in U.S. Commercial Loan Transactions", 76 BUS. LAW. 889 (2021)(this article may also be accessed at https://www.americanbar.org/content/dam/aba/publications/business_lawyer/2021/76_3/article-commonly-excluded-202107.pdf).
2. Gail Merel et al., "Common Qualifications to a Remedies Opinion in U.S. Commercial Loan Transactions", 70 BUS. LAW. 121 (2014) (this article may also be accessed at https://www.americanbar.org/content/dam/aba/publications/business_lawyer/2015/70_1/article-remedies-opinion-201501.pdf).
3. Real Prop. Comm., N.Y. City Bar Ass'n, 2021 Mortgage Loan Opinion Report (Aug. 20, 2021)(accessible at https://www2.nycbar.org/RealEstate/Forms/2020930-MortgageLoanOpinionReport.pdf).

Bandera: An Epic Story of a Contrived Opinion Letter

In *Bandera Master Fund LP v. Boardwalk Pipeline Partners,* C.A. No. 2018-0372-VCL (Del. Ch. Nov. 12, 2021), the Delaware Court of Chancery told an epic story of how lawyers in a major law firm issued an opinion letter requested by their client and, in doing so, "contrived" to reach the result that their client wanted. According to the Court, the legal opinion "did not reflect a good faith effort to discern the actual facts and apply professional judgment" but instead "made a series of counterfactual assumptions" resulting in an opinion letter that failed to "fulfill its basic function." The court awarded the plaintiffs a judgment of almost $690 million against the law firm's client.

In analyzing the legal opinion, the Court relied extensively on legal opinion reports and literature developed to aid lawyers giving traditional third-party opinions, although the legal opinion actually given was far from traditional. The case serves as a reminder to lawyers that:

- Careful consideration should be given to the context in which a legal opinion is given, including who will use the opinion and for what purpose.
- Lawyers should not rely upon representations or assumptions that are tantamount to a legal conclusion, nor should lawyers rely upon counterfactual assumptions that mislead the opinion recipient or others who intend to rely upon the opinion.
- Non-Delaware lawyers should be careful when interpreting Delaware law in non-routine matters.
- If your client consults with other counsel on a matter, candor with that other counsel is an essential part of your duty to your client.
- Legal opinions involve applying the law to specific facts, all in good faith. If the facts and law do not support a client's expectations, it may be best not to give an opinion at all.

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When is a Local Counsel Opinion Letter Ripe for Release?

Escrow Conditions for Pre-Closing Delivery

A. Introduction

The traditional in-person closings for commercial real estate loans, as well as other types of commercial finance transactions, are largely a thing of the past. Instead, most lawyers representing borrowers (or the borrowers themselves) deliver pdf copies of executed closing documents in escrow to the lender's counsel via email in advance of the closing, with originals (if required at all) to follow or to be delivered to the title insurance company for recordation, as applicable. Often only executed signature pages are delivered. Lender's counsel becomes the depository for closing documents, attaches executed signature pages to and otherwise compiles closing documents, and determines if all closing conditions have been satisfied.

One of the closing documents typically delivered in advance is the borrower's counsel signed opinion letter. Unlike most of the loan documents, however, the opinion letter confirms (or relies upon the premise) that many of the other closing conditions have been satisfied. As a result, it should not be released to the lender until borrower's counsel has determined that those conditions have been satisfied and that (to borrow a term familiar to our litigation colleagues) the opinion letter is "ripe" for release. However, it is the lender's counsel, rather than borrower's counsel, who holds the signed closing certificates with authorizing resolutions, executed loan documents and other closing documents and who may be in the best position to make that determination.

Often the way to accomplish this logistically is for the issuer of the opinion letter to place the opinion letter in escrow under a set of conditions that provides when the letter may be released to the lender.

If the opinion letter in question is to be issued by one or more local counsel rather than by or in addition to the borrower's lead counsel on the loan transaction, determining when those conditions have been satisfied may become even more difficult. Particularly in large syndicated loans with collateral in several states and/or subsidiary guarantors organized under the laws of different states, the local counsel retained to issue opinion letters regarding the laws of their respective states probably will have little or no contact with the borrower or its affiliates, with the lender or with lender's counsel. The local counsel's principal point of

contact will be borrower's lead counsel, who likely reached out to local counsel on the borrower's behalf to request the local counsel opinion letter, but who is not necessarily in a position to determine when closing conditions that matter to local counsel have been satisfied.

B. The Local Counsel Opinion

For purposes of this discussion, let's assume that you have been asked by a major law firm based in New York ("Lead Borrower's Counsel") to issue a local counsel opinion letter in a syndicated credit facility (the "Credit Facility") between ABC Bank, as administrative agent and collateral agent (the "Lender"), and XYZ Manufacturing Company (the "Borrower"). The Borrower operates its business and owns real property in several states, including your state (the "Local State"). The Borrower also has several subsidiaries that will guarantee the loans made under the Credit Facility and will grant security interests in collateral to secure those loans. One of those subsidiaries ("Local Sub") is a corporation that is organized under the laws of the Local State (the "Local Law") and owns real property in the Local State that will be mortgaged to secure the Credit Facility. All of the loan documents are governed by the laws of the State of New York, except that the deed of trust or mortgage to be recorded in the Local State (the "Mortgage") is governed by the Local Law with respect to the creation, perfection and enforcement of liens.

You have been asked to give the following opinions, among others, to the Lender, in each case as to Local Law:

- Local Sub is a validly existing corporation and in good standing under the Local Law.
- Local Sub has the corporate power and authority to execute, deliver and perform the guaranty agreement, the security agreement, the Mortgage and other documents to which it is a party (the "Local Sub Documents").
- Local Sub has taken all necessary corporate action to authorize the execution, delivery and performance of the Local Sub Documents.
- Local Sub has duly executed and delivered the Local Sub Documents.
- To the extent governed by Local Law, the Mortgage is a valid and binding obligation of Local Sub, enforceable against Local Sub in accordance with its terms.

You are allowed to assume in your opinion letter, among other things, the genuineness of signatures.

You have no prior relationship with the Borrower, Local Sub and or any other affiliates of the Borrower, and you will have no direct contact with them during the course of the transaction. You also will have no contact with the Lender or, except for responding to comments on your draft opinion letter, the lead counsel to the Lender ("Lead Lender's Counsel"). Almost all of your communications are with a second-year associate at Lead Borrower's Counsel who is clearly stressed out working on this transaction and the others the associate is juggling at the same time

You have reviewed early drafts of the credit agreement, guarantee agreement and the security agreement, but you did not provide any comments on them because they are governed by New York law, and, even though they may be mentioned in the Mortgage and in your opinion letter, you are not giving any opinion on them. You have reviewed Local Sub's organizational documents and a draft of a secretary's certificate for Local Sub, but Lead Borrower's Counsel has not yet prepared the authorizing resolution to be attached to the certificate. You have also reviewed a revised draft of the Mortgage which incorporates comments you submitted earlier. You have not been provided with copies of any closing documents as executed or with a good standing certificate for Local Sub.

In order for Lead Borrower's Counsel and Lead Lender's Counsel to determine that all conditions to closing have been satisfied so that funding of the loan may proceed immediately thereafter or as soon thereafter as contemplated by the credit documents, it is entirely appropriate for Lead Borrower's Counsel to expect to receive signed opinion letters from local counsel *in escrow* in advance of closing and with clearly understood conditions as to when the opinion letters may be released from escrow. But, as often is the case, the devil is in the details.

C. Delivering the Opinion Letter in Advance of Closing

The stressed-out second year associate at Lead Borrower's Counsel finally advises you that your opinion letter has been approved as to form by Lead Lender's Counsel and that closing is anticipated to occur in three days, pending finalization of the credit agreement and other documents not covered by your opinion letter. The associate asks you to overnight that evening your original, signed opinion letter in escrow, as the associate has responsibility for several local counsel opinions and needs everything in advance to get organized for the closing. The associate directs you to leave the opinion letter undated so that the associate may insert the date of closing (in case closing doesn't occur on the anticipated date). The associate states that your opinion letter will be dated and released when Lead Borrower's Counsel releases its opinion letter.

How should you respond? Lawyers legitimately may differ in how they would deliver a signed local counsel opinion letter under these circumstances. The following represents responses that I would make in order to minimize the risk of the opinion letter's being issued before it is "ripe" for release.

1. Should the Original, Signed Opinion Letter be Delivered in Escrow or Just a PDF Copy?

When I am local counsel in this type of situation, I only provide a pdf copy of the signed opinion letter, *not* the original, in advance of closing, and I provide the original, if requested, after the closing. Admittedly, it shouldn't matter inasmuch as delivery of a copy of the signed opinion letter is binding on the opinion giver just as a copies of signed loan documents can be binding on the borrower. However, I take some comfort (even if misplaced) that the Lead Lender's Counsel will not have my original opinion letter, if at all, until all of the closing conditions that the Borrower is required to satisfy have in fact been satisfied. If the closing date changes from the date of the opinion letter or perhaps never happens, I would rather not have an original, signed opinion letter sitting in the office of Lead Lender's Counsel or Lead Borrower's Counsel that needs to be destroyed, and I have no way of making sure that happens. Once the closing has occurred, and if specifically requested, local counsel can overnight the original, signed opinion letter to Lead Lender's Counsel or Borrower's Counsel, as appropriate; however, often Lead Lender's Counsel is satisfied with the pdf copy emailed in advance of closing.[1]

2. Should the Opinion Letter be Undated?

I don't deliver signed opinion letters that are undated, in large part it looks unprofessional for an opinion letter to have a date that has been inserted by hand and in part because, in delivering an undated opinion, I would be relying on the stressed-out second year associate to insert the closing date without my participation. As noted below, if the opinion letter is not delivered until the eve of the closing, dating the opinion letter in advance is seldom an issue.

3. When Should the Opinion Letter be Delivered in Escrow?

I do not deliver a signed opinion letter in escrow until the closing date is a certainty, or a near certainty. This usually means sending a pdf copy of the signed opinion letter by email on the evening before the closing is to occur, or first thing in the morning of the closing, after making a determination that, notwithstanding any past postponements in the targeted closing date, it appears that the closing will in fact take place on that date. This approach has two advantages. First, the opinion letter can be dated before it is sent, and it is not likely that an updated opinion letter will need to be sent to replace the first one because the closing is postponed. Second, it increases the likelihood that any remaining documents relevant to the opinion letter will have been finalized (and approved by the opinion giver) before the opinion letter is sent in escrow so that there will be fewer contingencies to release of the opinion letter.

4. To Whom Should the Opinion Letter be Delivered in Escrow?

To some extent, your answer to this question may depend on how much you trust Lead Borrower's Counsel or Lead Lender's Counsel in the transaction. In theory, of course, liability should not attach to the opinion issuer unless the conditions for release of the opinion letter from escrow are satisfied, regardless of who holds the opinion letter in escrow and then releases it, but who wants to explain after the fact that the opinion letter that was released improperly and circulated to all parties should not have been "out there"? Often Lead Borrower's Counsel tells local counsel to send its opinion letter to Lead Borrower's Counsel so that it can deliver everything at the same time. Perhaps the best approach is to send the pdf copy in escrow to both Lead Lender's Counsel and Lead Borrower's Counsel so that both are well aware of the conditions to release.

5. What Conditions Should be Placed on Release of the Opinion Letter from Escrow?

Depending on the facts associated with each transaction and the practices of the lawyers involved, the conditions under which local counsel opinion letters are delivered in escrow can vary widely and include the following:

- **The opinion letter may be released when Lead Borrower's Counsel releases its opinion letter.** This condition works well for Lead Borrower's Counsel, of course, but it may not take into account matters that are still outstanding for local counsel's opinion letter that are not relevant to the issuance of Lead Borrower's Counsel's opinion letter. For example, in the facts recited earlier, local counsel is giving an opinion as to the entity status and power and authority of Local Sub and as to due authorization, execution and delivery by Local Sub of the Local Sub Documents. If Local Counsel has not yet received a copy of the signed secretary's certificate with all necessary attachments or copies of the Local Sub Documents as executed by Local Sub in order to confirm all of the foregoing, its opinion letter should not be released even though Borrower's Counsel is perfectly willing to release its opinion letter because it is not giving those opinions. On the other hand, if local counsel is not giving an opinion as to the foregoing matters and instead is only giving an opinion as to the enforceability of a Mortgage, based on an assumption that the Mortgage has been duly authorized, executed and delivered, this condition may be entirely appropriate for local counsel if local counsel has already received and approved a copy of the Mortgage in final (if not executed) form.
- **The opinion letter may be released at the closing of the loan transaction.** This escrow condition may be

1. Electronic signatures and documents are valid in every jurisdiction in the United States. Specifically with respect to opinion letters, see TriBar Opinion Committee, "Comment concerning use of Electronic Signature and Third-Pary Opinion Letters" dated March 24, 2020. https://www.americanbar.org/content/dam/aba/administrative/business_law/opinions/tribar/materials/esignatures.pdf

too vague to protect local counsel from release of its opinion letter before it should be released. What if Lead Borrower's Counsel determines, after long hours of hard work on the loan documents and persistent pressure by their clients to allow funding, that conditions to closing have been satisfied without remembering (or perhaps without having been told) that local counsel never received copies of Local Sub's good standing certificate or some other document that forms a basis for one of the opinions it is giving? On the other hand, as noted above, if local counsel is not giving an opinion as to the foregoing and instead is only giving an opinion as to the enforceability of a Mortgage, based on an assumption that the Mortgage has been duly authorized, executed and delivered, this condition may be entirely appropriate and sufficient for local counsel if local counsel has already received and approved a copy of the Mortgage in final (if not executed) form.

- **The opinion letter may be released only upon release by Local Sub of its executed signature pages.** As noted above, physical delivery of loan documents from the borrower to the Lender seldom occurs in the closing of modern commercial lending transactions. Instead, executed loan documents (or at least executed signature pages) are emailed to Lead Lender's Counsel in escrow, and thereafter the borrower or Lead Borrower's Counsel notifies the Lender or Lead Lender's Counsel at the appropriate time that the borrower has "released" the executed documents. This is understood by parties on both sides of the transaction to mean that the loan documents have been "delivered" in the final step of the closing process so as to have the effect of making the loan documents a binding obligation of the parties.[2] If local counsel has determined that all other outstanding items for its opinion letter have been provided other than delivery of the Local Sub Documents, this condition provides assurance that the Local Sub Documents have been "delivered" for purposes of the "duly executed and delivered" opinion. It also allows the local counsel opinion letter itself to be released without separate authorization from local counsel on the day of closing, as Lead Borrower's Counsel will likely know before or at least the same time as local counsel when the borrower has released its executed signature pages. As additional assurance, local counsel may request a separate certificate from Local Sub to the effect that it has authorized release of the signature pages (or executed documents) from escrow and that its release of the signature pages (or executed documents) is intended to constitute delivery of the Local Sub Documents.
- **The opinion letter may be released only upon express authorization by local counsel.** This condition obviously is most favorable to local counsel. When there is uncertainty as to the status of certain items needed for local counsel to release its opinion letter (other than simply release of executed documents), such a broad, unilateral escrow condition may be entirely appropriate. However, this condition often is unacceptable to Lead Borrower's Counsel who need to know that the local counsel opinion letters can be released when they are ready to close rather than waiting for separate authorizations from each local counsel at the last minute. In addition, such a broadly stated condition fails to provide Lead Borrower's Counsel with any guidance as to what items may remain outstanding in order for local counsel to authorize release of its opinion letter. In the fact pattern set forth above, the outstanding items that local counsel needs in order to release its opinion letter are copies of the following:

(a) an officer's certificate (or equivalent) certifying as to (i) true and correct copies of the organizational documents of Local Sub, (ii) the adoption of resolutions authorizing the Local Sub Documents and (iii) the persons authorized to execute the Local Sub Documents with specimen signatures of each, in form approved by local counsel;

(b) a current good standing certificate (or equivalent) from the Local State as to Local Sub;

(c) final versions of the Local Sub Documents, each in form approved by local counsel and *as executed* by the appropriate person on behalf of Local Sub; and

(d) final versions of the credit agreement and any other loan document referenced in, but not the subject of, the opinion letter (unexecuted or executed).

If the foregoing are actually listed in the escrow instructions provided by local counsel when its signed opinion letter is transmitted to Lead Borrower's Counsel, local counsel should advise Lead Borrower's Counsel when those conditions have been satisfied in advance of closing and modify its escrow instructions to a more limited set of conditions. If all have been satisfied before closing, the only remaining condition may be "release" by Local Sub of the Local Sub Documents.

D. Post-Closing Deliverables

Promptly after the closing, local counsel should request Lead Borrower's Counsel to deliver to local counsel copies of the final versions of all documents relevant to local counsel's opinion letter, including the loan documents as executed by the applicable parties. Even if local counsel did not provide an opinion as to execution and delivery of certain loan documents, it may be helpful in the future to be able to retrieve those documents as executed.

2. See *Glazer and FitzGibbon on Legal Opinions* (Third Edition), §9.5.

Finally, before the stressed out, overworked second year associate at Lead Borrower's Counsel moves on to the next deal, don't forget to congratulate the associate for successfully closing the transaction. Chances are that you, as local counsel, helped the associate in some small way to understand better the process for issuing opinion letters in financing transactions.

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