

# **A PRIMER ON OPINION LETTERS: EXPLANATIONS AND ANALYSIS**

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## **I. INTRODUCTION**

This article discusses the use of legal opinion letters in a variety of business transactions. The discussion begins with a brief introduction to opinion letters, followed by a description of the most common types of opinion letters used in legal opinion practice. The analysis then turns to the history of legal opinion letters, the differences in use between east coast and west coast attorneys, and the most recent trend in opinion letters to date. Finally, two opinion letter forms, one involving real estate and the other involving personal property, are reproduced with annotations to explain some of the most relevant and pertinent points of opinion letter practice.

## **II. OPINION LETTERS, GENERALLY**

Opinion letters are a mystery to most attorneys outside of legal opinion practice, and interestingly, are often a mystery to attorneys within legal opinion practice as well. And yet, attorneys are issuing legal opinions at a high volume.<sup>1</sup> Why would an attorney potentially risk her professional reputation by issuing an opinion, which, because of the mystifying nature of legal opinion practice, will most certainly contain assumptions and legal conclusions that may be characterized as tenuous? The answer is obvious: because everyone else is doing it. Legal opinion letters are an absolute necessity in today's business world, even if their value is debatable.

An opinion letter is a communication between lawyers and their clients.<sup>2</sup> The letter serves as a statement of the attorney's professional opinion regarding the

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<sup>1</sup> Jonathon C. Lipson, *Price, Path & Pride: Third-party Closing Opinion Practice Among U.S. Lawyers (A Preliminary Investigation)*, 3 BERKELEY BUS. L.J. 59, 62 (2005) (quoting Committee on Legal Opinions, ABA Section of Business Law, *Law Office Opinion Practices*, 60 BUS. LAW. 327, 327 (2004)).

<sup>2</sup> ARTHUR NORMAN FIELD & JEFFREY M. SMITH, LEGAL OPINIONS IN BUSINESS TRANSACTIONS § 1:1, at 1-3 (Practising Law Institute, 2d ed. 2006).

legal matters addressed in the letter.<sup>3</sup> A legal opinion is by no means a guarantee, and should not be treated as such.<sup>4</sup> Nevertheless, a reasonable degree of competence and diligence is required when issuing an opinion.<sup>5</sup> Opinion letters are legal analyses of provided or assumed facts that are obtained from opinions of other counsel,<sup>6</sup> officer certificates, representations or statements from clients and other parties, and other sources of information.<sup>7</sup> Any assumptions the opinion issuer relies on must be true or assumed to be true; an attorney “cannot rely upon a stated assumption if the attorney knows it to be untrue.”<sup>8</sup>

Opinion letters can be categorized as either clean or reasoned.<sup>9</sup> Clean opinions, also known as unqualified opinions, typically state a clear expression of the law on a particular matter; whereas, reasoned opinion letters, or explained opinions, state how a judge *should* rule on a particular legal matter.<sup>10</sup> Clean opinion letters state standard exceptions,<sup>11</sup> while reasoned opinion letters discuss the current status of the law as well as the lack of authority on a particular legal issue.<sup>12</sup> Although most clients prefer clean opinion letters because they contain more certainty and standardization, reasoned opinions represent a significant portion of legal opinion practice.<sup>13</sup> Because of the fact-specific nature of these documents, legal opinions are

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<sup>3</sup> *Id.*

<sup>4</sup> RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 52 cmt. b (1988); FIELD & SMITH, *supra* note 2, § 3:11, at 3-20; GEORGE W. KUNEY, THE ELEMENTS OF CONTRACT DRAFTING WITH QUESTIONS AND CLAUSES FOR CONSIDERATION 159-60 (Thomson West, 2d ed. 2006).

<sup>5</sup> RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 52.

<sup>6</sup> Because an opinion can be based on another counsel’s opinion, opinion letters can sometimes be characterized as an inference based on an inference. *See infra* Part V.C.

<sup>7</sup> FIELD & SMITH, *supra* note 2, § 5:8, at 5-10; KUNEY, *supra* note 4, at 159.

<sup>8</sup> KUNEY, *supra* note 4, at 160; *see also* FIELD & SMITH, *supra* note 2, § 5:8, at 5-10 (stating that “[t]here can be no reliance on unreliable information”).

<sup>9</sup> KUNEY, *supra* note 4, at 160.

<sup>10</sup> *Id.*

<sup>11</sup> FIELD & SMITH, *supra* note 2, § 2:3, at 2-4.

<sup>12</sup> *Id.*, § 2:4, at 2-6.

created on a transaction-by-transaction basis and should not be relied upon by third-parties not addressed in the letter.<sup>14</sup> Finally, the basic rule of thumb with regard to opinion letters is to follow the golden rule: an attorney should never request an opinion letter that the requesting attorney would not provide herself.<sup>15</sup>

Typically, an attorney and her firm will issue several opinions relating to a single transaction, and these opinions are collectively referred to as the third-party opinion letter.<sup>16</sup> Third-party opinion letters are often used to analyze whether a party to the agreement will be able to fully perform.<sup>17</sup> Particularly in high dollar deals, transaction costs are expensive and clients want to be assured that the other parties to the agreement will be able to fully perform before expending a significant amount of time and money. Issues discussed within a third-party closing opinion consist of: (1) whether entering into the current agreement will cause a default in an existing agreement; (2) whether the financial outlook of the parties is affected by any pending civil action or investigation; and (3) whether the provisions of the agreement are enforceable as written.<sup>18</sup> Parties to a closing almost always require third-party opinion letters as a prerequisite to a closing.<sup>19</sup> As such, opinion letters are a crucial component in many transactions.

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<sup>13</sup> KUNEY, *supra* note 4, at 160.

<sup>14</sup> FIELD & SMITH, *supra* note 2, § 8:5.2, at 8-11. Some jurisdictions are more willing to hold an opinion preparer liable for a third-party's reliance on an opinion letter. Therefore, some attorneys will attempt to limit their liability by including the following statement in the opinion letter: "This opinion is furnished to you solely in connection with the transaction described above and may not be relied upon by anyone other than the addressee." *Id.* As always, the effectiveness of this disclaimer depends on the particular facts of the case and the law governing the transaction. *Id.*

<sup>15</sup> FIELD & SMITH, *supra* note 2, § 3:3.5, at 3-9; KUNEY, *supra* note 4, at 160.

<sup>16</sup> FIELD & SMITH, *supra* note 2, § 1.1, at 1-3.

<sup>17</sup> *Id.* § 1.2, at 1-5.

<sup>18</sup> *Id.* § 1.1, at 1-5.

<sup>19</sup> *Id.* § 1.4, at 1-7.

### III. GOVERNING LAW AND HISTORY OF OPINION LETTERS

Unlike most legal subjects, neither statutory nor case law governs legal opinion practice.<sup>20</sup> Instead, legal opinion practice is governed by three different sources: the Restatement (Third) of the Law Governing Lawyers (“Restatement”), the TriBar Reports (TriBar II, in particular), and the American Bar Association Legal Opinion Principles (“Principles”).<sup>21</sup> The Restatement is an important governance source for legal opinion practice because little case law exists that discusses or interprets opinion letters.<sup>22</sup> As such, courts turn to the Restatement for guidance.<sup>23</sup> The Restatement focuses on customary practice within the field and refers judges to the leading bar association reports such as TriBar II and the Principles.<sup>24</sup> An examination of the history of legal opinion practice clarifies both the lack of relevant case law and the significant reliance on the Restatement, TriBar II, and the Principles.

Prior to the early 1970’s, legal opinion practice existed but was somewhat chaotic and inconsistent.<sup>25</sup> Attorneys had little experience with opinion letters and did not fully understand the provisions and consequences of them.<sup>26</sup> Many attorneys drafted opinion letters using a firm’s standard form; however, it is unclear whether the issuing and receiving attorneys agreed on the meaning of the provisions.<sup>27</sup> In

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<sup>20</sup> See generally Donald Glazer, *It’s Time to Streamline Opinion Letters*, 9 BUS. L. TODAY 32, 35 (1999) (noting that opinion letters were once “more a matter of lore than of learned analysis”).

<sup>21</sup> *Id.* at 35. See generally RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS §§ 51, 52, 95 (1988); *Legal Opinion Principles*, 53 BUS. LAW. 831 (1998) [hereinafter *Principles*]; *Legal Opinions to Third Parties: An Easier Path*, 34 BUS. LAW. 1891 (1979) [hereinafter *TriBar Report*], superseded by *Third Party Closing Opinions: A report of the TriBar Opinion Committee*, 53 BUS. LAW. 592 (1998) [hereinafter *TriBar II Report*].

<sup>22</sup> Glazer, *supra* note 20, at 35.

<sup>23</sup> *Id.*

<sup>24</sup> *Id.* at 36.

<sup>25</sup> *Id.* at 32.

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

1972, the Securities and Exchange Commission (“SEC”) filed a sentinel suit<sup>28</sup> against the National Student Marketing Corporation (“NSMC”).<sup>29</sup> NSMC involved allegations by the SEC of securities fraud on the part of a client of a prestigious law firm, White & Case.<sup>30</sup> The allegations did not just extend to the client; rather, the SEC alleged that some of the closing opinions issued by White & Case attorneys enabled the securities fraud.<sup>31</sup> This case served as a wake-up call for attorneys who realized the necessity of some common understanding to enable attorneys to adequately protect themselves.<sup>32</sup> The NSMC controversy led James J. Fuld to write the first real treatise on opinion letter practice.<sup>33</sup>

Fuld’s article attempted to provide the legal opinion practice with that much needed common understanding. Unfortunately, the article seemed to *request* uniformity in legal opinion practice rather than actually *provide* uniformity.<sup>34</sup> Therefore, in 1979, the three leading bar associations in New York issued the TriBar Report.<sup>35</sup> The goals of the TriBar Report included standardizing the legal opinion format and answering attorneys’ questions regarding legal opinions.<sup>36</sup> While the TriBar Report became the benchmark for national legal opinion practice, it had a New York focus that allowed other states to develop their own customs and practices.<sup>37</sup> As a result, attorneys were inundated with information regarding opinion

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<sup>28</sup> SEC v. Nat’l Student Mktg. Corp., 457 F. Supp. 682, 686-87 (D.D.C. 1978).

<sup>29</sup> *Id.*

<sup>30</sup> Lipson, *supra* note 1, at 84.

<sup>31</sup> *Nat’l Student Mktg. Corp.*, 457 F. Supp. at 687.

<sup>32</sup> Lipson, *supra* note 1, at 84.

<sup>33</sup> James J. Fuld, *Legal Opinions in Business Transactions - An Attempt to Bring Some Order out of Some Chaos*, 28 BUS. LAW. 915, 917 (1973).

<sup>34</sup> Glazer, *supra* note 20, at 32.

<sup>35</sup> *Id.* at 33; *see TriBar Report*, *supra* note 21.

<sup>36</sup> *TriBar Report*, *supra* note 21, at 1894.

<sup>37</sup> Glazer, *supra* note 20, at 33.

letters, and the uniformity that the TriBar Report was designed to achieve did not occur.<sup>38</sup>

The ABA Business Law Section responded to the chaos on May 31, 1989, by sponsoring the Silverado Conference in California.<sup>39</sup> The purpose of the Silverado Conference was “to be the first step toward the establishment of a national consensus as to the purpose, format and coverage of a third-party legal opinion, the precise meaning of its language and the recognition of certain guidelines for its negotiation.”<sup>40</sup> The Silverado Conference Report highlighted the differences between east coast and west coast legal opinion practices, particularly with regard to the Remedies Opinion.<sup>41</sup>

The work product that emerged from the Silverado Conference Report included the Legal Opinion Accord (“Accord”) and the Guidelines for the Preparation of Closing Opinions (“Guidelines”).<sup>42</sup> The Accord contained a detailed set of rules for legal opinion practice that attorneys never fully embraced.<sup>43</sup> One reason for the Accord’s failure was that it codified legal opinion practice, and attorneys were hesitant to believe that such a fact-specific legal document could be codified.<sup>44</sup> Another reason for its failure was the cumbersome nature of the document; busy attorneys simply did not want to spend their time studying such a

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<sup>38</sup> *Id.*

<sup>39</sup> *Id.*

<sup>40</sup> *Third-Party Legal Opinion Report, Including the Legal Opinion Accord, of the Section of Business Law, American Bar Association*, 47 BUS. LAW. 167, 169 (1991) [hereinafter *Silverado Conference Report*].

<sup>41</sup> Glazer, *supra* note 20, at 33; *see supra* Part IV.

<sup>42</sup> *Silverado Conference Report, supra* note 40, at 170. The Legal Opinion Accord [hereinafter Accord] and Guidelines for the Preparation of Closing Opinions [hereinafter Guidelines] can both be found in the Silverado Conference Report. *Id.* at 179-220; 224-32. The Guidelines in the Silverado Conference Report were superseded in 2002 by Guidelines for the Preparation of Closing Opinions. *Guidelines for the Preparation of Closing Opinions*, 57 BUS. LAW. 875, 875 (2002). In addition, certain specialized ABA committees published their own set of guidelines. *See, e.g., Real Estate Opinion Letter Guidelines*, 38:2 REAL PROP. PROB. & TRUST J. 241, 241 (2003) (noting that the American College of Real Estate Lawyers and the Real Property, Probate and Trust Section of the American Bar Association (ACREL/ABA) jointly adopted guidelines with regard to real estate opinion letters).

<sup>43</sup> Glazer, *supra* note 20, at 33-34.

<sup>44</sup> *Id.* at 34.

“formidable document.”<sup>45</sup> In contrast, the Guidelines, a much shorter document consisting of broad rules that applied to opinion practice generally, were well-received by legal opinion practitioners.<sup>46</sup>

By 1998, the three primary sources of law governing legal opinion practice were issued—the Restatement, the Principles, and the TriBar II Report.<sup>47</sup> As previously stated, these three sources are the most cited and consulted regarding legal opinion practice.<sup>48</sup> The Restatement works in conjunction with TriBar II and provides guidelines regarding the level of diligence required and the related liability of an opinion issuer.<sup>49</sup> The Principles are contained in a basic two-page document and provide guidance on third-party closing opinions for attorneys who do not adopt the Accord.<sup>50</sup> Finally, TriBar II intended to modify and replace the original TriBar Report.<sup>51</sup> TriBar II focused on customary practice and eliminated the east coast versus west coast differences in legal opinions.<sup>52</sup> In order to appreciate the trend toward customary practice, a quick explanation of the east coast versus west coast differences is necessary.

#### IV. THE NEW YORK VS. CALIFORNIA REMEDIES OPINION DISPUTE

TriBar II focuses on customary practice and moves away from the decades old split between New York attorneys and California attorneys.<sup>53</sup> The east coast versus west coast dispute revolves around the Remedies Opinion, one of the most

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<sup>45</sup> *Id.*

<sup>46</sup> *Id.* at 33-34.

<sup>47</sup> *Id.* at 35.

<sup>48</sup> *Id.*

<sup>49</sup> *Id.*

<sup>50</sup> *Id.* at 36.

<sup>51</sup> *Id.*

<sup>52</sup> *Id.* at 33, 36.

<sup>53</sup> *Id.*

commonly provided third-party closing opinions.<sup>54</sup> Following the New York view of the Remedies Opinion, the opinion applies to “each and every” undertaking of the company under the subject transactional documents.<sup>55</sup> In contrast, under the California view of the Remedies Opinion, the opinion only covers “essential provisions” of the documents, thus making the agreement enforceable generally.<sup>56</sup> The difference is essentially a matter of degree; the New York view requires an understanding of every provision’s enforceability contained within the agreement,<sup>57</sup> while the California view focuses on the enforceability of the agreement as a whole.<sup>58</sup> The New York view, adopted by TriBar II, is more prevalent.<sup>59</sup>

Nonetheless, the latest trend set by TriBar II is for attorneys to move away from the east coast versus west coast distinction and to focus on customary practice when drafting legal opinions.<sup>60</sup> As the TriBar II Report acknowledges:

Customary practice establishes the ground rules for rendering and receiving opinions and thus allows the communication of ideas between the opinion giver and counsel for the opinion recipient without lengthy descriptions of the diligence process, detailed

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<sup>54</sup> ARTHUR NORMAN FIELD & DONALD W. GLAZER, THE LEGAL OPINION COMMITTEE WORKSHOP 2005, 13, 57 (Practising Law Institute 2005); State Bar of California Business Law Section, *Report on Third-Party Remedies Opinions* 7 (Sept. 2004) [http://calbar.ca.gov/calbar/pdfs/sections/buslaw/opinion-resources\\_2005\\_third-party-remedies-opinions.pdf](http://calbar.ca.gov/calbar/pdfs/sections/buslaw/opinion-resources_2005_third-party-remedies-opinions.pdf); *see infra* Part V.A.

<sup>55</sup> FIELD & GLAZER, *supra* note 54, at 57; Kenneth A. Leur, *The Silverado Report and the California Response*, 27 BEV. HILLS B. ASS’N. J. 61, 61 (1993).

<sup>56</sup> FIELD & GLAZER, *supra* note 54, at 57; Leur, *supra* note 55, at 61; State Bar of California Business Law Section, *supra* note 54, at 7.

<sup>57</sup> State Bar of California Business Law Section, *supra* note 54, at 9; *TriBar II*, *supra* note 21, at 619 n.69.

<sup>58</sup> Kurt E. Anderson, *New Jersey Commercial Loan Opinion Letters: The Remedies Opinion, Asset-Based Secured Transactions Opinions & Related Exceptions, Qualifications & Assumptions*, 25 SETON HALL L. REV. 141, 145 (1994).

<sup>59</sup> *TriBar II*, *supra* note 21, at 621 (“The remedies opinion should be read to cover each undertaking by the Company in the agreement. Any narrower reading would invite lengthy negotiations to determine which provisions of the agreement are being opined on and which are not.”).

<sup>60</sup> State Bar of California Business Law Section, *supra* note 54 at 8; *TriBar II*, *supra* note 21, at 600.



definitions of the terms used and laborious recitals of standard, often unstated, assumptions and exceptions.<sup>61</sup>

Customary practice is not a fleeting trend. In fact, as of March 12, 2007, the ABA Legal Opinion Committee is considering co-sponsoring a statement relating to the role of customary practice in the preparation and understanding of third-party legal opinions.<sup>62</sup> As a result of these efforts, opinion letters will likely become more uniform with regard to their meaning and their distribution. The consistency and standardization of opinion letters can only work in favor of attorneys by reducing the risks involved with issuing opinions and by allowing attorneys to more efficiently prepare opinions.

## V. COMMON TYPES OF OPINION LETTERS

Although there are a variety of opinion letters, the most common include the Remedies Opinion (or the Enforceability Opinion), the Non-Consolidation Opinion, and the Entity Status Opinion.<sup>63</sup> Each of these opinions plays an important role in legal opinion practice and is discussed below.

### A. The Remedies Opinion

The Remedies opinion is one of the most commonly requested opinion letters in high-dollar financial transactions.<sup>64</sup> These opinions convey whether “[t]he Agreement is a valid and binding obligation of the Company enforceable against the Company in accordance with its terms.”<sup>65</sup> The language used is purely a matter of

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<sup>61</sup> *TriBar II*, *supra* note 21, at 600-01.

<sup>62</sup> See *Statement on the Role of Customary Practice in the Preparation and Understanding of Third-Party Legal Opinions*, <http://www.bostonbar.org/sc/bl/lop/mat0607/customarypractice.pdf> (proposed February 14, 2007).

<sup>63</sup> Gerson, Gordon L., *Opinion Letters for Loan Closings*, <http://www.gersonlaw.com/opinion.html>. In his article, Gerson terms the Entity Status Opinion as the Due Organization, Authorization, Execution, and Delivery Opinion Letter in Gerson. However, the general topic of discussion is the Entity Status Opinion. *Id.*

<sup>64</sup> *Id.*

<sup>65</sup> *TriBar II*, *supra* note 21, at 619; *1989 Report of the Committee on Corporations Regarding Legal Opinions in Business Transactions*, 45 BUS. LAW. 2169, 2208 (1990); Anderson, *supra* note 58 at 145; Gerson, *supra* note 63.

custom and does not correlate precisely with the effect of the opinion.<sup>66</sup> A Remedies Opinion covers three related matters: (1) whether an agreement has been formed; (2) whether the remedies for a breach of the agreement are enforceable by a court of law; and (3) whether the provisions unrelated to a breach of the agreement are enforceable by a court of law.<sup>67</sup>

According to customary practice, Remedies Opinions should explicitly address each undertaking in the agreement and any limits of the provisions.<sup>68</sup> However, the Remedies Opinion does not address two specific qualifications: the bankruptcy exception and the equitable principles limitation.<sup>69</sup> Summarily, the provisions in the agreements are subject to “bankruptcy, insolvency, or other similar laws affecting the rights and remedies of creditors generally and general principles of equity.”<sup>70</sup> These two exceptions are implicit and need not be expressly addressed in the Remedies Opinion.<sup>71</sup>

Although initially interpreted narrowly, the bankruptcy exception has become more broadly interpreted as attorneys have become more sophisticated with regard to legal opinion practice.<sup>72</sup> The bankruptcy exception exists to inform the opinion recipient “that a specific body of law [, namely bankruptcy law,] has been excluded from the opinion.”<sup>73</sup> Because of this exemption, an opinion issuer generally need not contemplate bankruptcy law when rendering her opinion absent some special circumstance.<sup>74</sup>

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<sup>66</sup> *TriBar II*, *supra* note 21, at 619-20.

<sup>67</sup> *Id.* at 620.

<sup>68</sup> *Id.* at 622.

<sup>69</sup> FIELD & SMITH, *supra* note 2, § 6:16.1, at 6-15; *TriBar II*, *supra* note 21, at 622.

<sup>70</sup> FIELD & SMITH, *supra* note 2, § 6:16.1, at 6-15; *TriBar II*, *supra* note 21, at 623.

<sup>71</sup> *TriBar II*, *supra* note 21, at 623.

<sup>72</sup> FIELD & SMITH, *supra* note 2, § 6:16.2, at 6-17.

<sup>73</sup> *TriBar II*, *supra* note 21, at 623-24.

<sup>74</sup> *See id.* *See generally* FIELD & SMITH, *supra* note 2, § 6:16.

The equitable principles limitation is a more recent qualification.<sup>75</sup> This exception suggests that certain provisions that are enforceable at the time of the agreement may become unenforceable under different circumstances.<sup>76</sup> For example, a notice provision may be articulated in the agreement, but a court of equity may decide later that the notice provision is simply too short.<sup>77</sup> The equitable principles exception should only apply to provisions that are affected by circumstances subsequent to the agreement.<sup>78</sup> In other words, if the circumstances could easily be contemplated prior to the agreement, then this exception should not come into play.<sup>79</sup> Obviously, attorneys cannot define the limits of equity; therefore, this provision provides the issuing attorney with necessary leeway with regard to the unknown.<sup>80</sup> Because Remedies Opinions are one of the most commonly requested closing opinions, transactional attorneys should be intimately familiar with these opinions.

### **B. Entity Status Opinion**

Another common type of opinion letter is the Entity Status Opinion.<sup>81</sup> Lenders typically require these opinion letters from a borrower's counsel, and they can be issued in many forms.<sup>82</sup> An attorney may provide a Valid Existence Opinion, a Due Incorporation Opinion, or a Due Organization Opinion.<sup>83</sup> Alternatively, an attorney may combine the three opinions above into one opinion—the Due Organization, Authorization, Execution, and Delivery Opinion.<sup>84</sup> Regardless of the

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<sup>75</sup> FIELD & SMITH, *supra* note 2, § 6:16, at 6-18

<sup>76</sup> *Id.*; *TriBar II*, *supra* note 21, at 625.

<sup>77</sup> *TriBar II*, *supra* note 21, at 625.

<sup>78</sup> FIELD & SMITH, *supra* note 2, § 6:16, at 6-18; *TriBar II*, *supra* note 21, at 625.

<sup>79</sup> FIELD & SMITH, *supra* note 2, § 6:16, at 6-18.

<sup>80</sup> *See generally TriBar II*, *supra* note 21, at 624.

<sup>81</sup> *Id.* § 9:3, at 9-5. This type of opinion is also referred to as a “Due Organization, Authorization, Execution, and Delivery Opinion.” Gerson, *supra* note 63.

<sup>82</sup> Gerson, *supra* note 63.

<sup>83</sup> FIELD & SMITH, *supra* note 2, § 9:3, at 9-5 to 9-6.

<sup>84</sup> Gerson, *supra* note 63.

opinion's form, the overarching purpose of these opinions is to assure the receiving party that the company or borrower is duly organized, validly exists, is in good standing, is authorized to complete the transaction, and that execution of the agreement will not cause a breach of any other agreement.<sup>85</sup> The typical language is as follows: "The Borrower is a corporation duly incorporated, validly existing and in good standing under the laws of the State of \_\_\_\_\_ and qualified to do business in the States of \_\_\_\_\_ and \_\_\_\_\_."<sup>86</sup> Although Entity Status Opinions can be requested in a variety of transactions, it has been this author's experience that certificates, such as good standing certificates and certificates of formation, issued by the Secretary of State on behalf of the respective party can provide much of the same information as a Status Opinion.

### C. Non-Consolidation Opinion

One of the riskiest types of opinion letters is the Non-Consolidation Opinion, which is mainly used in structured finance transactions.<sup>87</sup> Under section 105(a) of the Bankruptcy Code, a court may consolidate various related entities with the debtor-entity in order to consolidate their assets and provide a better return to the debtor entity's creditors.<sup>88</sup> This could potentially be devastating to the financial health of the related entities. As a result, special purpose entities ("SPE") are often set up to complete a structured finance transaction.<sup>89</sup> The lender will likely require a Non-Consolidation Opinion stating that the SPE will not be consolidated with other entities in the event of bankruptcy, thereby protecting the SPE's assets.<sup>90</sup>

In order to clarify the need for a Non-Consolidation Opinion and to tie-in some of the opinion letter information already discussed in this article, the following is an oversimplified discussion of the securitization of a mortgage loan. In a securitization, a lender is often holding a loan portfolio that it does not want to hold

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<sup>85</sup> *Id.*

<sup>86</sup> FIELD & SMITH, *supra* note 2, § 9:3, at 9-6.

<sup>87</sup> Gerson, *supra* note 63; E. Kristen Moye, Bankruptcy Opinions in Securitized Real Estate Loan Transactions: Non-Consolidation and True Sale/Transfer Opinions, 1, May 14, 2004, [http://www.abanet.org/rppt/meetings\\_cle/spring2004/rp/Mindingpandq/moye.pdf](http://www.abanet.org/rppt/meetings_cle/spring2004/rp/Mindingpandq/moye.pdf).

<sup>88</sup> Moye, *supra* note 87, at 2.

<sup>89</sup> Gerson, *supra* note 63; Moye, *supra* note 87, at 1.

<sup>90</sup> Gerson, *supra* note 63; Moye, *supra* note 87, at 1.

for the full term of the loan. The lender prefers to bundle, or securitize, the mortgages and sell them to investors. This allows the lender to bring in more funds that can ultimately be re-loaned to other borrowers. In order to be bundled, the mortgages must carry the same loan terms, and these terms must be enforceable. As such, a lender's counsel may prepare a Remedies Opinion stating that the terms of the mortgages are enforceable. The lender then transfers the entire bundle to an SPE or a real estate mortgage investment conduit ("REMIC"), which will sell portions of the mortgages to investors. It is imperative that the SPE and the lender are separate entities and not consolidated in bankruptcy. The consequences of a consolidation are disastrous for both parties: SPEs often enjoy special tax benefits that would be lost in the event of a consolidation with the lender, and the lender could see all of its assets depleted in the event of a consolidation with the SPE.

As a result, the SPE's counsel will issue a Non-Consolidation Opinion stating that the SPE and the lender are in fact separate entities. This type of opinion is risky for several reasons. First, the bankruptcy court may ignore the Non-Consolidation Opinion and consolidate the entities. Second, the Non-Consolidation Opinion is to some extent based on the Remedies Opinion that the lender's counsel drafted. If the Remedies Opinion is erroneous or incomplete, the Non-Consolidation Opinion may be as well. Essentially, the opinion letters for this transaction are inferences based on inferences. Additionally, units of the SPE will be sold to investors. Investors' counsel will also prepare opinion letters based on the original opinions, which will extend the chain of inferences based on inferences. Even this extremely generic and over-simplified example illustrates the complexity and riskiness involved in opinion letter practice. Nevertheless, such practice remains a necessary evil in the world of structured finance transactions.

**VI. A FORM REAL ESTATE OPINION LETTER WITH ANNOTATIONS**

**INCLUSIVE REAL ESTATE SECURED TRANSACTION OPINION<sup>91</sup>**

[Date]<sup>92</sup>

[Name and Address  
of Opinion Recipient]<sup>93</sup>

Re: \$[\_\_\_\_\_] Loan (the “**T**ransaction”) from [\_\_\_\_\_] (“**L**ender”) to [\_\_\_\_\_] (the “**C**lient”)

Ladies and Gentlemen:

We provide this Opinion Letter to you at the request of the above referenced Client pursuant to Section [\_\_\_\_\_] of the [Agreement] described below.<sup>94</sup>

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<sup>91</sup> The sample opinion that follows is known as the “Inclusive Opinion” and was prepared by the ABA Section of Real Property, Probate and Trust Law and the American College of Real Estate Lawyers. ABA/ACREL Comm., *Inclusive Real Estate Secured Transaction Opinion*, <http://www.acrel.org/Documents/PublicDocuments/InclusiveRealEstateSecuredTransactionOpinion.htm> [hereinafter *Inclusive Opinion*]. The *Inclusive Opinion* is intended to educate attorneys regarding opinion practice; therefore, the *Inclusive Opinion* is exactly that—inclusive. *Id.* For an example of a brief opinion, see *infra* Part VI.B.

<sup>92</sup> The date of an opinion letter is important because it necessarily restricts the investigation time by the opinion preparer. *Principles, supra* note 21; see FIELD & SMITH, *supra* note 2, § 3:6, at 3-14. Additionally, an opinion preparer does not have a duty to update the opinion. *Principles, supra* note 21; FIELD & SMITH, *supra* note 2, § 1:7, at 1-10.

<sup>93</sup> Although the opinion preparer does not represent the opinion recipient, the preparer provides this opinion to the recipient on behalf of the opinion preparer’s client who is the other party to the transaction. FIELD & SMITH, *supra* note 2, § 3:3.1, at 3-5.

<sup>94</sup> The Client must consent to the issuance of the opinion letter; however, such consent may be implied if the Client executes a document that requires an opinion letter. *Inclusive Opinion, supra* note 91, at n.5.

## I. BACKGROUND

1.1 Documents Reviewed.<sup>95</sup> We have acted as [special] counsel to the Client in connection with the preparation of the following documents relating to the Transaction:

- (a) Promissory Note dated as of \_\_\_\_\_, made by the Client (the “**Note**”).
- (b) [Mortgage/Deed of Trust/Deed to Secure Debt] dated as of \_\_\_\_\_, executed by the Client (the “**Mortgage**”) with respect to certain property including real property located at \_\_\_\_\_ (the “**Real Property**”).
- (c) Assignment of Leases and Rents dated as of \_\_\_\_\_, executed by the Client (the “**Assignment of Leases**”).
- (d) Security Agreement dated as of \_\_\_\_\_, executed by the Client (the “**Security Agreement**”).
- (e) Loan Agreement dated as of \_\_\_\_\_, executed by the Client and Lender (the “**Agreement**”).
- (f) [[Two] unfiled] Uniform Commercial Code Financing Statements executed by the Client (the “**Financing Statements**”).

1.2 Transaction Documents. The documents described in items (a) through (e) above are referred to in this Opinion Letter as the “**Transaction Documents.**” The Transaction Documents described in items (b) through (d) above are referred to in this letter as the “**Security Documents.**” All property described in any of the Security Documents in respect of which provision is made by the Security Documents for a lien or security interest is referred to in this Opinion Letter as the “**Collateral.**” Except as otherwise indicated herein, capitalized terms

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<sup>95</sup> An opinion preparer is charged with nothing more than customary diligence with regard to a factual investigation. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 52 cmt. c (2007). Opinion preparers rely on facts provided by their clients, opinions of counsel, and other documents. KUNEY, *supra* note 4, at 159. However, this list of documents reviewed could be used as a helpful checklist for the attorneys on both sides in order to see what documents the opinion preparer has reviewed and to limit the opinion preparer’s knowledge to information contained within those documents.

used in this Opinion Letter are defined as set forth in the Agreement or the Glossary attached to this Opinion Letter.

1.3    Opining Jurisdiction.<sup>96</sup>    The **Law** (as defined in the attached Glossary) covered by the opinions expressed in this Opinion Letter is limited to the Law of the State of [\_\_\_\_\_] (the “**State**”)[, and the General Corporation Law of the State of Delaware ]. Except as set forth in Paragraphs 2.1 and 2.2 below, we express no opinion concerning the Laws of any other jurisdiction, [the other Laws of Delaware,] or the effect thereof.

1.4    Scope of Review.    In connection with the opinions hereinafter set forth, we have limited the scope of our review of the documents related to the Transaction to [originals/photocopies of] the Transaction Documents and the Financing Statements. In addition, in 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.<sup>97</sup>

1.5    Reliance Without Investigation.    We have relied, without investigation or analysis, upon information in **Public Authority Documents** (as defined in the attached Glossary). 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.<sup>98</sup> 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 [\_\_\_\_\_].

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<sup>96</sup> Coverage of the law in the state in which the client exists is implied in a Remedies Opinion. *Inclusive Opinion*, *supra* note 91, at n.9.

<sup>97</sup> See KUNEY, *supra* note 4, at 159.

<sup>98</sup> “An opinion should not be based on a factual representation that is tantamount to the legal conclusion being expressed. An opinion ordinarily may be based, however, on legal conclusions contained in a certificate of a government official.” *Principles*, *supra* note 21, at 833.



1.6 Opinions of Other Counsel. We note that various issues concerning [specify legal issues] are addressed in the opinion of [\_\_\_\_\_] (the “**Other Counsel**”), separately provided to Lender. [In rendering the opinions set forth below, we have relied upon the information contained in such opinion of the Other Counsel without investigation or analysis, and we express no opinion with respect to those matters.]<sup>99</sup>

## II. OPINIONS

Based upon and subject to the foregoing and to the qualifications set forth below, we are of the opinion that:

2.1 Status. The Client is a [corporation], validly existing in good standing in its jurisdiction of organization.<sup>100</sup>

2.2 Authorization. All actions or approvals by the Client, and its [shareholders], necessary to bind the Client under the Transaction Documents have been taken or obtained.<sup>101</sup>

2.3 Execution. The Client has duly executed and delivered the Transaction Documents and the Financing Statements for valid consideration.<sup>102</sup>

2.4 Remedies Opinion. The Transaction Documents are legal, valid, binding and enforceable against the Client in accordance with their terms.<sup>103</sup> [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

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<sup>99</sup> This is an illustration of an inference based on an inference. *See supra* Part V.C.

<sup>100</sup> This section is not typically included in the Accord Illustrative Opinion because it is included in the Remedies Opinion provided by the Accord. Edward J. Levin, *A User Friendly Opinion for Real Estate Lawyers*, 13 PROB. & PROP. MAG. 17, 20 (July/Aug. 1999). Additionally, this information could be provided in an Entity Status Opinion such as a Due Organization Opinion. *See supra* Part V.B. However, by allowing this section to remain in the opinion, issuing attorneys have a checklist that ensures that the appropriate diligence has been completed. Levin, *supra* note 100, at 22. Additionally, many clients and attorneys feel more comfortable when these types of provisions are set out in the language of the opinion. *Id.*

<sup>101</sup> *Inclusive Opinion, supra* note 91.

<sup>102</sup> *Id.*

<sup>103</sup> *See supra* Part V.A.; Levin, *supra* note 100, at 20.

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.]

2.5     Form of Security Documents. The Security Documents are in a form sufficient to create a lien on or security interest in all right, title and interest of the Client in the Collateral, except to the extent the Collateral includes items or types of **Personal Property** (as defined in the attached Glossary) in which a security interest cannot be created under Article 9 of the Uniform Commercial Code.

2.6     Usury Opinion.<sup>104</sup> Assuming that no fees, charges, benefits, or other compensation will be paid, directly or indirectly to Lender or for Lender's benefit, except as specified in the Transaction Documents, and assuming that no amounts to be paid as specified in the Transaction Documents constitute a penalty, the Transaction, as evidenced by the Transaction Documents, does not violate the usury laws of the State.

2.7     No Breach or Default Opinion.<sup>105</sup> Execution and delivery by the Client of, and performance of its agreements in, the Transaction Documents do not (i) violate the [articles or certificate of incorporation or bylaws; partnership agreement or certificate] of the Client, (ii) [to the best of our **Actual Knowledge** (as defined in the attached Glossary)], breach, or result in a default under, any existing obligation of the Client under the Other Agreements specified in Attachment [ ] hereto (the "**Specified Other Agreements**"), or (iii) [to the best of our Actual Knowledge] breach or otherwise violate any existing obligation of the Client under any Court Order which is identified in Attachment [ ] hereto (the "**Specified Court Orders**"), which the Client has certified to us are the only Court Orders. Our Opinion in this Paragraph does not extend to any action or conduct of the Client that a Transaction Document may permit but does not require, except to the extent that (i) such action or conduct takes place simultaneously with, and (ii) we had Actual Knowledge that it constituted part of, the consummation of the Transaction.

2.8     No Violation of Law Opinion.<sup>106</sup> Execution and delivery by the Client of, and performance by the Client of its payment obligations in, the

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<sup>104</sup> Usury opinions are typically provided in the remedies opinion and essentially state that loan evidenced by the transaction is not usurious. *Real Estate Opinion Letter Guidelines, supra* note 42, at 251.

<sup>105</sup> *See supra* Part V.B.

<sup>106</sup> *Id.*

Transaction Documents neither are prohibited by applicable provisions of statutory law or regulation of the State nor subject the Client to a fine, penalty or other similar sanctions under, any statutory law or regulation of the State. Our opinion in this Paragraph relates only to statutory laws and regulations that we, in the exercise of customary professional diligence, would reasonably recognize as being directly applicable to the Client, the Transaction, or both.

### III. QUALIFICATIONS

Notwithstanding any provision in this Opinion Letter to the contrary, the foregoing opinions are subject to the following additional qualifications:

3.1 Assumptions.<sup>107</sup> 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:

- (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.
- (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

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<sup>107</sup> Assumptions are necessary because the opinion preparer will rely on information provided by the client, other counsel, and other documents. *See* KUNEY, *supra* note 4, at 159.

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.<sup>108</sup> We have no Actual Knowledge of facts that, under the circumstances, would make our reliance on the foregoing assumptions unreasonable.

3.2 Exclusions.<sup>109</sup> None of the foregoing opinions include any implied opinion unless such implied opinion is both (i) essential to the legal conclusion

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<sup>108</sup> An opinion preparer could not rely on information provided that the opinion preparer knew was false. KUNEY, *supra* note 4, at 160. While the opinion preparer is not representing the opinion recipient, the opinion preparer does have a duty to exercise a reasonable degree of competence and diligence. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 52 (2007).

<sup>109</sup> Exclusions seek to limit the scope of a legal opinion. *See generally* Anderson, *supra* note 58 (discussing exclusions that are implicit because they are used to limit the scope of inquiry).

reached by the express opinions set forth above and (ii) based upon prevailing norms and expectations among experienced lawyers in the State, reasonable in the circumstances.<sup>110</sup> Moreover, unless explicitly addressed in this Opinion Letter, the foregoing opinions do not address any of the following legal issues, and we specifically express no opinion with respect thereto:

- (a) Federal securities laws and regulations administered by the Securities and Exchange Commission (other than the Public Utility Holding Company Act of 1935), state “Blue Sky” laws and regulations, and laws and regulations relating to commodity (and other) futures and indices and other similar instruments;
- (b) Federal Reserve Board margin regulations;
- (c) pension and employee benefit laws and regulations (e.g., ERISA);
- (d) Federal and state antitrust and unfair competition laws and regulations;
- (e) Federal and state laws and regulations concerning filing and notice requirements (e.g., Hart-Scott-Rodino and Exon-Florio), other than requirements applicable to charter-related documents such as a certificate of merger;
- (f) compliance with fiduciary duty requirements;
- (g) Local Law;<sup>111</sup>
- (h)
- (i) the characterization of the Transaction as one involving the creation of a lien on Real Property or a security interest in Personal Property except to the

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<sup>110</sup> Examples of implied opinions include the bankruptcy exclusion and the equitable principles limitation. *See supra* Part V.A.

<sup>111</sup> “An opinion letter should not be read to cover municipal or other local laws unless it does so expressly.” *Principles, supra* note 21, at 832.

extent that the enforceability of remedies against the Client set forth in the Transaction Documents is dependent on the characterization of the Transaction expressed by the parties to it;

- (ii) title to Collateral or the accuracy of its description;
  - (iii) the sufficiency of the description of the Collateral to provide notice to third parties of the lien or security interest provided for in the Security Documents;<sup>112</sup> and
  - (iv) the creation, attachment, perfection, or priority of a lien on Real Property Collateral or a security interest in Personal Property Collateral, or enforcement of a security interest in Personal Property Collateral separately from enforcement of the lien on Real Property Collateral as contemplated by §9-501([4] or [d]) of the Uniform Commercial Code.
- (i) fraudulent transfer and fraudulent conveyance laws;<sup>113</sup>
  - (j) Federal and state environmental laws and regulations;<sup>114</sup>
  - (k) Federal and state land use and subdivision laws and regulations;<sup>115</sup>
  - (l) Federal and state tax laws and regulations;

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<sup>112</sup> See U.C.C. §§ 9-108, 9-504 (2000).

<sup>113</sup> Remedies opinions do not “address the effect of fraudulent transfers on the other party’s rights under the agreement.” *Real Estate Opinion Letter Guidelines*, *supra* note 42, at 256. An opinion preparer would have to rely extensively on assumed facts in order to render such an opinion, therefore, a fraudulent transfer opinion is a rarity. *Id.*

<sup>114</sup> Because of the complexity and degree of expertise required to analyze such issues, zoning, land use, and environmental matters are not typically addressed in opinion letters. *Id.* at 255. Rather, these matters are typically considered issues for the lender to discover during due diligence. *Id.*

<sup>115</sup> *Id.*

- (m) Federal patent, copyright and trademark, state trademark, and other Federal and state intellectual property laws and regulations;
- (n) Federal and state racketeering laws and regulations (*e.g.*, RICO);
- (o) Federal and state health and safety laws and regulations (*e.g.*, OSHA);
- (p) Federal and state labor laws and regulations;
- (q) Federal and state laws, regulations and policies concerning (i) national and local emergency, (ii) possible judicial deference to acts of sovereign states, and (iii) criminal and civil forfeiture laws; and
- (r) other Federal and state statutes of general application to the extent they provide for criminal prosecution (*e.g.*, mail fraud and wire fraud statutes).

3.3 Bankruptcy and Insolvency Exception.<sup>116</sup> The opinion set forth in Paragraph [2.4] 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 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

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<sup>116</sup> This provision is assumed and need not be included in an opinion letter; however, the issuing attorney may choose to include it. *See supra* Part V.A.



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.

3.4 Equitable Principles Limitation.<sup>117</sup> The opinion set forth in Paragraph [2.4] 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;

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<sup>117</sup> See *supra* text accompanying note 112.

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

3.5 Other Common Qualifications.<sup>118</sup> The opinion set forth in Paragraph [2.4] 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 [3.5] applies, that opinion is subject to the effect of generally applicable rules of Law that:

- (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;
- (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;
- (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];

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<sup>118</sup> This section may be shortened considerably by making section 3.6 of the opinion, Generic Qualification, broader in scope. Levin, *supra* note 100, at 22. Ten of these "other common qualifications" are set out in section 14 of the Accord with the remaining four being derived from section 12 of the Real Property Adaptation. *Id.*

- (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.”

3.6 Generic Qualification. 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<sup>119</sup> 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.

3.7 Choice of Law.<sup>120</sup> The opinion set forth in Paragraph [2.4] of this Opinion Letter is given as if the Law of the Opining Jurisdiction governs each Transaction Document, without regard to whether the Transaction Document so provides, and without regard to any choice of law rules except as provided below in this Paragraph. While the preceding sentence excludes any opinion on the effectiveness of any governing law provision in the Transaction Documents, if a Transaction Document contains a governing law provision choosing the Law of the Opining Jurisdiction to govern the contract, the opinion set forth in Paragraph [2.4] of this Opinion Letter includes an opinion (subject to the other qualifications in this Part III) that such governing law provision choosing the Law of the Opining Jurisdiction will be given effect under the choice of law rules of the Opining Jurisdiction; however, the opinion set forth in Paragraph [2.4] of this Opinion Letter does not include an opinion as to what Law governs (i) if the Transaction Document contains a governing law provision choosing the Law of an **Other Jurisdiction** (as defined in the attached Glossary) or does not contain a governing law provision, or (ii) to the extent the opinion as to what Law governs requires a determination that the Law of the Opining Jurisdiction is not contrary to a fundamental policy of the Law of an Other Jurisdiction.

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<sup>119</sup> This provision is similar to a survival clause.

<sup>120</sup> This provision simply reiterates that the Remedies Opinion will be governed by the Opining Law found in section 1.3. Levin, *supra* note 100, at 22.

#### IV. ADDITIONAL CONFIRMATIONS

4.1 Legal Proceedings.<sup>121</sup> We hereby confirm to Lender, pursuant to the request set forth in Section [ ] of the Agreement, but without investigation, analysis, or review of court or other public records or our files, other than our litigation docket and information provided to us by the Client, that there are no actions or proceedings against the Client, pending or overtly threatened in writing, before any court, governmental agency or arbitrator which (i) seek to affect the enforceability of the Agreement, or (ii) except as disclosed in [the Agreement or an exhibit, annex or schedule thereto] [an officer's certificate], come within [the objective standard established in the Agreement for disclosure of such matters] [other objective threshold].

#### V. USE OF THIS OPINION

5.1 Scope of the Opinion. The opinions expressed in this Opinion Letter are solely for Lender's use in connection with the Transaction for the purposes contemplated by the Transaction Documents. Without our prior written consent, this Opinion Letter may not be used or relied upon by Lender for any other purpose whatsoever, except for the use of this Opinion Letter (i) in connection with review of the Transaction by a regulatory agency having supervisory authority over Lender for the purpose of confirming the existence of this Opinion Letter, (ii) in connection with the assertion of a defense as to which this Opinion Letter is relevant and necessary, or (iii) in response to a court order.<sup>122</sup>

Very truly yours,

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<sup>121</sup> This provision is designed to assure the opinion recipient that the client is not aware of any pending legal proceedings. *Id.* at 23. This is the type of provision that worries opinion preparers because, even with the "without investigation..." language, it looks like a guarantee of a result, and opinion letters are not intended to be guarantees. FIELD & SMITH, *supra* note 2, § 3:11, at 3-20; KUNEY, *supra* note 4, at 159.

<sup>122</sup> This provision simply reiterates the common principle that an opinion letter is not to be relied upon by third-parties that are not addressed in the opinion letter. FIELD & SMITH, *supra* note 2, § 8:5.2, at 8-11; Levin, *supra* note 102, at 23. An opinion letter is a transaction-specific document and does not apply generally to similar transactions. Field & Smith, *supra* note 2, § 8:5.2, at 8-11.

**VII. A FORM PERSONAL PROPERTY OPINION LETTER WITH ANNOTATIONS****Inside Counsel–Stock Purchase Agreement**<sup>123</sup>

[Letterhead of [General] Counsel]

[DATE]<sup>124</sup>

World Wide Ventures L.P.

Ten World Trade Center

New York, New York 10048

re: Macromoney Corporation Sale of Stock Under Stock Purchase Agreement dated as of \_\_\_\_

Ladies and Gentlemen:

I am [general] counsel of Macromoney Corporation, a Delaware corporation (the “Company”). This opinion letter is delivered to you pursuant to Section \_\_\_\_ of the Stock Purchase Agreement,<sup>125</sup> dated as of \_\_\_\_, between you and the Company (the “Stock Purchase Agreement”). [Describe participation, or lack thereof, in transaction.] Terms defined in the Stock Purchase Agreement are used herein as therein defined.

For purposes of this opinion letter, I have reviewed such documents and made such other investigation as I have deemed appropriate.<sup>126</sup> As to certain matters of fact material to the opinions expressed herein, I have relied on the representations

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<sup>123</sup> The sample opinion that follows was taken from *TriBar II*. *TriBar II*, *supra* note 21, at 673-74.

<sup>124</sup> See *supra* text accompanying note 92.

<sup>125</sup> Opinion letters are typically a prerequisite to a closing and are required by other transaction documents. FIELD & SMITH, *supra* note 2, § 1:4, at 1-7. By entering into an agreement that requires an opinion letter, a client implicitly consents to the issuance of an opinion letter. *Inclusive Opinion*, *supra*, note 91, n.5.

<sup>126</sup> Unlike section 1.1 of the Inclusive Opinion, this opinion letter does not set out which documents the opinion preparer has relied upon in issuing the opinion. Compare *supra* Part VI.A. (providing a list of documents reviewed) with *supra* Part VI.B (not including a list of documents reviewed).

made in the Stock Purchase Agreement and certificates of public officials and officers of the Company (and others). I have not independently established the facts so relied on.<sup>127</sup>

Based on the foregoing and subject to the other paragraphs hereof, I express the following opinions.

1. The Company is a corporation [duly incorporated and] validly existing under the law of the State of Delaware.<sup>128</sup>
2. The execution and delivery by the Company of the Stock Purchase Agreement do not, and the performance by the Company of its obligations thereunder will not,
  - (a) breach or result in a default under any agreement or instruments listed on Schedule I hereto [or result in the acceleration of (or entitle any party to accelerate) any obligation of the Company thereunder], or
  - (b) result in a violation of any court order listed on Schedule II hereto.<sup>129</sup>
3. Except as listed on Schedule III hereto, the Company is not a party to any pending [or overtly threatened in writing] action or proceeding known to me that may adversely affect the transactions contemplated by the Stock Purchase Agreement or that may have a material adverse effect on the Company.<sup>130</sup>

[Insert any other opinions.]<sup>131</sup>

The opinions expressed herein are limited to the federal law of the United States, the law of the State of New York, and the Delaware General Corporation Law.<sup>132</sup>

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<sup>127</sup> Opinion preparers rely on facts provided by their clients, opinions of counsel, and other documents. KUNEY, *supra* note 4, at 159.

<sup>128</sup> See *supra* Part V.B.

<sup>129</sup> *Id.*

<sup>130</sup> See *supra* text accompanying note 123.

<sup>131</sup> Specific Opinions such as usury opinions, outstanding equity securities, etc. may be inserted here.

This opinion letter is being delivered to you in connection with the above described transaction and may not be relied on by you for any other purpose.<sup>133</sup> This opinion letter may not be relied on by or furnished to any other Person without my prior written consent.<sup>134</sup>

Very truly yours,

## VII. CONCLUSION

In sum, opinion letters are a frustrating necessity in the legal field. Though some opinion letters are more a matter of custom than of logic, business attorneys constantly issue opinions to satisfy lenders, clients, and third-parties. In a field with so much unpredictability, the best way to reduce risk is to standardize; which has led opinion preparers to move away from the east coast method or the west coast method toward a deal-specific customary practice standard. As attorneys begin to question the usefulness and functionality of legal opinion practice, we may see a difference in the way that legal opinions are used. However, because of the widespread use of opinion letters, that dramatic shift is unlikely to occur anytime in the near future.

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<sup>132</sup> This provision limits the applicable law to that of states that the issuing attorney or firm is licensed in as well as Delaware, which is assumed to represent the “general corporate law” of the United States and also demonstrates how the bankruptcy exception and the equitable principles exception are implied in most opinion letters.

<sup>133</sup> See *supra* text accompanying notes 14, 122.

<sup>134</sup> *Id.*