WHEN IS AN OPINION LETTER ADVISABLE?

Standards and Drafting Tips

Sterling Scott Willis, Esq.
Fishman Haygood Phelps Walmsley Willis & Swanson, L.L.P., New Orleans, LA
PRIOR NATIONAL REPORTS

• Accord (1991)
• Real Estate Adaptation (1994)
• Inclusive Real Estate Secured Transaction Opinion (1998)
• Statement of the Role of Customary Practice in the Preparation and Understanding of Third-Party Legal Opinions (2008)
REAL ESTATE FINANCE OPINION REPORT OF 2012

A Report of

the American Bar Association Section of Real Property, Trust and Estate Law, Committee on Legal Opinions in Real Estate Transactions (RPTE)

the American College of Real Estate Lawyers, Attorneys’ Opinions Committee (ACREL)

the American College of Mortgage Attorneys, Opinions Committee (ACMA)

"Under customary practice, the meaning of the words used in an opinion letter, and the diligence required to provide such an opinion letter, are determined by the customary practice of lawyers who give and receive such opinion letters. The Real Estate Opinion Guidelines provide valuable guidance regarding customary real estate opinion letter practice."
"Customary practice permits an opinion giver and an opinion recipient (directly or through its counsel) to have common understandings about an opinion without spelling them out. The use of *customary practice* does this in two principal ways:

1. It identifies the work (factual and legal) opinion givers are expected to perform to give opinions….

2. It provides guidance on how certain words and phrases commonly used in opinions should be understood…."
Chapter Three of the Report contains what is referred to as "language of an Illustrative Opinion" to avoid publication of a model or approved opinion form.

- Are we trapped or are we served by an "illustrative opinion"?
- Why use a form?
LOCAL REPORTS

What is and what should be the role of state, county, city, or specialty bar reports?

• In intrastate transactions?
• In interstate transactions?
ETHICS

• A client must consent to the rendering of an opinion

• Types of consent
  – Implied (e.g. commitment letter)
  – Required by loan or other agreement client executory
  – Based on context of relationship
ETHICS

• Duty not to disclose client confidential information without consent (Model Rule 1.6)
ETHICS

• The loan documents are flawed
  – What to do?
  – Can you advise lender?
  – Can it be assumed borrower/client consents if loan documents or committees require valid loan documents?
  – Best remedies- executory process?
ETHICS

Negligent Misrepresentation or Malpractice?
“The opinion was clearly and unequivocally circumscribed by the qualifications that defendant assumed the genuineness of all signatures and the authenticity of the documents ….”
"I'VE LOOKED AT IT, BUT I'M NOT OPINING ABOUT IT"

• REPORT, CHAPTER TWO, SECTION 1.4(c) – Pg. 9

"On occasion, an opinion recipient might request that the opinion giver list in the opinion letter, as reviewed, transaction documents as to which the opinion giver is not providing any opinions and that are not otherwise necessary to support the express opinions that are being given. The opinion giver should not be expected to identify as reviewed any such documents. If any such documents are reviewed, whether at the request of the opinion recipient or at the election of the opinion giver, and whether or not identified in the opinion letter as reviewed, the opinion recipient should not infer from such review or identification that any opinions on those documents are implied by the opinion letter." (emph. added)
"I'VE LOOKED AT IT, BUT I'M NOT OPINING ABOUT IT"

- What is "necessary to support the express opinions?"
- Does reviewing what is necessary require acceptance of what the document says?
- Can an enforceability opinion on a mortgage (opined about) that incorporates default provisions in a credit agreement (not opined about) be given without opining on the enforceability of the credit agreement provisions?
- How will this differ between lead and local counsel opinions?
DEALING WITH SUBSTANTIVE ISSUES

• Identify substantive issues early
• Common “scope of opinion” issues
• Define the firm’s role
• Governing law:
  – Jurisdictions of Organization of entities
  – Governing law of documents to be covered
• UCC Issues – type of collateral, type of opinion
• Obtain and draft “corporate” authority documents
• Golden Rule
• Reliance on other opinions
  – Reasonableness and appropriateness
  – Extent and purpose
• Golden Rule
• 3.1 Status
The Borrower is a limited liability company validly existing in Louisiana

– Due Formation/Organization
– Good Standing
CORE OPINIONS PER THE 2012 REPORT

• 3.2 Power
The Borrower has the limited liability company power to execute and deliver the Loan Documents
CORE OPINIONS PER THE 2012 REPORT

- 3.3 Authorization

All necessary limited liability company actions or approvals by the Borrower necessary to bind the Borrower under the Loan Documents have been obtained.
CORE OPINIONS PER THE 2012 REPORT

• 3.4 Execution and Delivery
The loan documents have been duly executed and delivered by the Borrower.
• 3.5 Enforceability

The Loan Documents are enforceable against the Borrower in accordance with their terms.
CORE OPINIONS PER THE 2012 REPORT

• 3.6 Form of Security Documents
The Mortgage is in sufficient form to create a lien on that portion of the collateral described in the mortgage that is immovable property.
CORE OPINIONS PER THE 2012 REPORT

- 3.7 No Breach or Violation
The borrowing of the loan and execution and delivery by the Borrower and the performance of the payment obligations in the loan documents will not violate (i) the Borrower’s organizational documents or (ii) any agreement listed on _____ or any orders listed on _____ and as to each list the Borrower has conformed to us they are the only agreements or orders binding on Borrower.
CORE OPINIONS PER THE 2012 REPORT

• 3.8 No Violation of Law
The execution and delivery by the Borrower and the performance by the Borrower of its payment obligations in, the Loan Documents, do not violate any laws applicable to Borrower or subject the Borrower to any penalty
• Federal law
• Local law
• Performance of non-payment obligation
• Usury?
CORE OPINIONS PER THE 2012 REPORT

• 3.9 Choice of Law
This opinion does not express any opinion as to any choice of law provision in the Loan Documents. The Choice of Law provisions in the Loan Documents should be enforceable against the Borrower.
• Louisiana
• New York
• Inherent in enforceability opinion?
CORE OPINIONS PER THE 2012 REPORT

• 3.10 Usury
No opinion is expressed with response to usury
The Loan Documents do not violate any usury laws
• Louisiana
• Texas
• Inherent in enforceability opinion
• No violation of laws?
CORE OPINIONS PER THE 2012 REPORT

- 3.11 Legal Proceedings Confirmation
We inform you that except as set form on Exhibit ___, based solely on a review of our litigation docket, we are not representing the Borrower in any litigation which may affect the Borrower’s obligations under the Loan Documents.
- Confirmation; not an opinion
- Based on docket review, not knowledge
- Limited to effort on loan documents
- Disfavored since Dean Foods case
LIMITATIONS

• Use of limitations, including customary assumptions, exclusions, and qualifications

• Customary practice—Report 2.1(c). Assumptions (a)-(o) implied even if not stated. Others may be also

• Long form vs. short form opinion letters
  – Real Estate Practice
  – Business Practice
  – Risks with either approach?
ENFORCEABILITY OPINION

The Transaction Documents are [legal,] valid and binding obligations of the Client, enforceable in accordance with their terms.
QUALIFICATIONS TO THE ENFORCEABILITY OPINION

• Bankruptcy
• Equitable Principles
• Generic Enforceability Qualification
• Other Transaction-Related Qualifications
• Other General Qualifications
The opinion set forth in Paragraph ___ of this Opinion Letter [the “Remedies” Opinion] is subject to the effect of bankruptcy, insolvency, reorganization, fraudulent transfer or conveyance, receivership, moratorium and other similar laws affecting the rights and remedies of creditors generally.
The opinion set forth in Paragraph ____ of this Opinion Letter [the “Remedies” Opinion] is subject to the effect of general principles of equity, whether applied by a court of law or equity. No opinion is rendered herein regarding the availability of the remedies of specific performance or receivership.
Other Common Qualifications. The opinion set forth in Paragraph ___ of this Opinion Letter is subject to the following qualifications: To the extent the Law of the State applies to any of the following rules to one or more of the provisions of the Transaction Documents covered by an opinion to which this Paragraph ___ applies, that opinion is subject to the effect of generally applicable rules of Law that:

(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;
LAUNDRY LIST QUALIFICATION

(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;
(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;
LAUNDRY LIST QUALIFICATION

(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 any provision that purports to prevent any party from becoming a mortgagee in possession, notwithstanding any enforcement actions taken under the Security Documents;

(l) 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”;

LAUNDRY LIST QUALIFICATION
LAUNDRY LIST QUALIFICATION

(m) limit or affect the enforcement of time is of the essence clauses;

(n) limit or affect the enforcement of confession of judgment clauses;

(o) limit or affect the enforcement of provisions that attempt to change or waive rules of evidence or fix the method or quantum of proof or otherwise establish evidentiary standards to be applied in litigation or similar proceedings;

(p) limit or affect the enforcement of forum selection clauses and consent to jurisdiction clauses (both as to personal jurisdiction and subject matter jurisdiction);

(q) limit or affect the enforcement of provisions restricting access to courts or to legal or equitable remedies (including waivers of the right to trial by jury);
LAUNDRY LIST QUALIFICATION

(r) limit or affect the enforcement of provisions attempting to restrain the alienation or transfer of property;

(s) provide for the enforcement of provisions granting powers of attorney or authority to execute documents or to act by power of attorney on behalf of the Client;

(t) relate to the enforcement of provisions that decisions by a party are conclusive;

(u) relate to enforcement of provisions purporting to grant to or limit rights of persons who are not parties to such documents;
LAUNDRY LIST QUALIFICATION

(v) relate to the enforcement of self-help remedies provided in the Operative Documents (other than those remedies available pursuant to an exercise in accordance with the provisions of Article 9 of the UCC); or

(w) limit or affect the enforcement of provisions purporting to provide remedies inconsistent with the UCC, to the extent the UCC is applicable thereto.
"ENFORCEABLE, BUT MAYBE NOT; THEN AGAIN..."

The Generic Enforceability Qualification (before adding the Assurance)

Generic Enforceability Qualification [, with Assurance]: Certain provisions of the Transaction Documents may not be enforceable . . .
"ENFORCEABLE, BUT MAYBE NOT; THEN AGAIN…"

The Generic Enforceability Qualification and its companion Assurance

Generic Enforceability Qualification [, with Assurance]: Certain provisions of the Transaction Documents may not be enforceable; nevertheless, subject to the other limitations set forth in this Opinion Letter, any such unenforceability will not render the Transaction Documents invalid as a whole
"ENFORCEABLE, BUT MAYBE NOT; THEN AGAIN….."

The Generic Enforceability Qualification and its companion Assurance

Generic Enforceability Qualification [, with Assurance]: Certain provisions of the Transaction Documents may not be enforceable; nevertheless, subject to the other limitations set forth in this Opinion Letter, any such unenforceability will not render the Transaction Documents invalid as a whole or preclude (i) the judicial enforcement in accordance with applicable Law of the obligation of the Borrower to repay as provided in the Note the principal, together with interest thereon (to the extent not deemed a penalty) . . . ;
"ENFORCEABLE, BUT MAYBE NOT; THEN AGAIN…"

The Generic Enforceability Qualification and its companion Assurance

Generic Enforceability Qualification [, with Assurance]: Certain provisions of the Transaction Documents may not be enforceable; nevertheless, subject to the other limitations set forth in this Opinion Letter, any such unenforceability will not render the Transaction Documents invalid as a whole or preclude (i) the judicial enforcement in accordance with applicable Law of the obligation of the Borrower to repay as provided in the Note the principal, together with interest thereon (to the extent not deemed a penalty) . . . ; (ii) the acceleration of the obligation of the Borrower to repay such principal, together with such interest, upon a material default by the Borrower in the payment of such principal or interest [or upon a material default by the Borrower in any other material provision of the Transaction Documents];
"ENFORCEABLE, BUT MAYBE NOT; THEN AGAIN....."

The Generic Enforceability Qualification and its companion Assurance

"Generic Enforceability Qualification [, with Assurance]: Certain provisions of the Transaction Documents may not be enforceable; nevertheless, subject to the other limitations set forth in this Opinion Letter, any such unenforceability will not render the Transaction Documents invalid as a whole or preclude (i) the judicial enforcement in accordance with applicable Law of the obligation of the Borrower to repay as provided in the Note the principal, together with interest thereon (to the extent not deemed a penalty) . . . ; (ii) the acceleration of the obligation of the Borrower to repay such principal, together with such interest, upon a material default by the Borrower in the payment of such principal or interest [or upon a material default by the Borrower 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."
"ENFORCEABLE, BUT MAYBE NOT; THEN AGAIN….."

The Generic Enforceability Qualification and its companion Assurance

"Generic Enforceability Qualification [, with Assurance]: Certain provisions of the Transaction Documents may not be enforceable; nevertheless, subject to the other limitations set forth in this Opinion Letter, any such unenforceability will not render the Transaction Documents invalid as a whole or preclude (i) the judicial enforcement in accordance with applicable Law of the obligation of the Borrower to repay as provided in the Note the principal, together with interest thereon (to the extent not deemed a penalty) . . . ; (ii) the acceleration of the obligation of the Borrower to repay such principal, together with such interest, upon a material default by the Borrower in the payment of such principal or interest [or upon a material default by the Borrower 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."
"ENFORCEABLE, BUT MAYBE NOT; THEN AGAIN…"

- **Ambiguities and Alternatives**
  - What is a "material provision?"
    - Should assurance be limited to payment obligations only?
    - Which payment of obligations?
    - Does customary practice define what is a material provision?
    - Is the solution creating a normative list of what is material? A laundry list?
    - Would a non-recourse carve-out be a material provision?
    - Is it really "an enforceable" material provision?
"ENFORCEABLE, BUT MAYBE NOT; THEN AGAIN..."

• What remedies can be exercised?
  ▪ Suit on Note
  ▪ Foreclosure
  ▪ By whom?
  ▪ Importance of qualifier "under applicable law"
  ▪ Other actions may need to be covered, such as assignment of rents

• Alternative assurance forms
  ▪ Practical realization
The generic qualification provides no implicit assurance that the mortgage actually --

- encumbers the property,
- creates a lien, or
- has any particular priority
EXCLUSIONS

• Laws not covered by the opinion letter.
  – Local law

• Do you need to list federal laws?
USURY

• Implicitly subject to enforceability opinion
• Implicitly subject to no violation of law opinion
• If you do not want to opine about usury, you must say so explicitly.
The effectiveness of a choice of law provision in a transaction document is not implicitly included in an enforceability opinion. Report, Chapter Two, Section 3.9(c).

- Differs from other authority.
- Would customary practice disagree?
- Matters of choice of law should be dealt with expressly, even to confirm exclusion.

  - **Report, Chapter Three, Section 3.9:**
    
    "[Except as expressly stated below in this Paragraph, this] [This] Opinion Letter does not express any opinion as to the enforceability of any choice of law or analogous provisions in the Transaction Documents."

  - **Do not leave this to chance**
Under New York General Obligations Law §5-1401, the parties’ choice of New York law means that New York substantive law governs even though the statute does not include the words “without regard to conflict of laws principles.”
Go up the ladder
Perform the due diligence that is necessary to render the authorization opinion.

Report, Chapter Two, Section 3.3(b)

- The Report takes no position on what is substantively necessary to opine on due authorization.

- Is the statement appropriately ambiguous? Should a more definitive statement be made?
INCORPORATION BY REFERENCE

• The Report is not incorporated by reference in the illustrative opinion

• Other reports are incorporated by reference
  ○ The Accord
  ○ The Maryland Report
WHAT THE REPORT DOES NOT ADDRESS OR RESOLVE

- An opinion on single or cumulative remedies.
- An "all customary remedies" opinion.
- Alternatives to generic re-assurance.
- Local counsel opinions.
- A selection of the law that is to govern the opinion letter
OPINIONS OFTEN ASKED OF LEGAL COUNSEL

• These are dependent on the law of the opinion giver:
  – Effect of exercise of remedies
  – Documents contain all customary or specific remedies
  – Perfection; effect of recording; place of recording; recording taxes
  – Recipient party matters – not doing business; no taxes
WHO CAN RELY ON YOUR OPINION?

- REPORT, CHAPTER TWO, SECTION 5.1 – Pg. 25
- REPORT, CHAPTER THREE, 5.1 – Pg. 34
  - defined person (the Lender)
  - assignee of the defined person
    - for value
    - in good faith
    - of all interest in the opinion documents
WHO CAN RELY ON YOUR OPINION? (cont.)

• Other possible reliance parties:
  o Addressee of the Opinion Letter
  o Other lenders participating with Lender
    ▪ Agent for loan participants
  o Not counsel for recipient
• Delivery to, but not for reliance
  o Regulatory agencies
  o Courts and arbitrators
  o As ordered by a court
  o Rating agencies?