

1998

MORTGAGE LOAN OPINION REPORT

Association of the Bar of the City of New York
Committee on Real Property Law
Subcommittee on Mortgage Loan Opinions

New York State Bar Association
Real Property Law Section
Attorney Opinion Letters Committee

June 1, 1998

INTRODUCTION

In 1989, a committee composed of members of the Real Property Law Committee of the Association of the Bar of the City of New York and the Real Property Law Section of the New York State Bar Association prepared a Mortgage Loan Opinion Report (the "1989 Report") relating to legal opinions in commercial mortgage loan transactions.¹ The attached Mortgage Loan Opinion Report (the "1998 Report") is a complete revision and restatement of the 1989 Report.

Since publication of the 1989 Report, a number of important developments have occurred in opinion letter practice. One of the most significant developments is the publication of a report entitled "Third Party "Closing" Opinions" by the TriBar Opinion Committee (the "TriBar II Report").² The TriBar Opinion Committee was formed more than twenty years ago and its membership includes representatives from the three largest New York bar associations as well as selected members from outside of New York. Its reports are widely regarded as benchmarks of opinion letter custom and practice.

Another significant report is the Third Party Legal Opinion Report, Including the Legal Opinion Accord (the "Accord") published by the Section of Business Law of the American Bar Association.³ The Accord was intended to establish a national consensus regarding the purpose, format and coverage of third party legal opinions. It includes definitions of certain terms, recommended opinions, assumptions, exceptions, qualifications and guidelines for negotiations. The Accord was a product of significant effort by the Business Law Section and other groups, including representatives of the ABA Real Property, Probate & Trust Law Section. In a significant departure from customary opinion practice, the Accord proposed a format which

¹ *Joint Mortgage Loan Opinion Report*, 62 N.Y.St. B.J. 55 (1990) (hereinafter the *1989 Report*).

² *Third Party "Closing" Opinions*, 53 Bus. Law. 591 (1998) (hereinafter the *TriBar II Report*).

³ *Third Party Legal Opinions Report, Including the Legal Opinion Accord*, 57 Bus. Law. 167 (1991) (hereinafter the *Accord*).

permitted the parties to adopt the Accord by reference, thereby including its definitions, limitations, exceptions and qualifications without requiring repetition in the opinion. Perhaps because of its format, the Accord has not achieved the national consensus which its sponsors sought. On the other hand, it is widely recognized for its scholarship and many of its concepts are now a customary part of opinion letter practice. In addition to the TriBar II Report and the Accord, many other thoughtful reports on opinion letter practice have been issued by state and local bar association committees. A bibliography of selected reports is attached to this 1998 Report.

Although the TriBar II Report and the Accord cover many important opinion issues, they do not address (and are not intended to address) opinions in real estate secured transactions. Without modification, the Accord, by itself, is an inappropriate basis for an opinion in a real property secured transaction. In order to adapt the Accord to include real estate opinion issues, a joint committee composed of members of the ABA Real Property, Probate & Trust Law Section and the American College of Real Estate Lawyers published the "Report on Adaptation of the Legal Opinion Accord of the Section of Business Law of the American Bar Association for Real Estate Secured Transactions" (the "ABA/ACREL Report")⁴. The ABA/ACREL Report includes an extensive discussion of the enforceability opinion based on the Accord format.⁵ If an opinion giver elects to follow the Accord, he or she should consult the ABA/ACREL Report for suggestions for adapting the Accord for real estate transaction opinions.⁶

The TriBar II Report, the Accord, the ABA/ACREL Report and the reports issued by other state and local bar association committees have all influenced opinion letter practice. Accordingly, in response to these recent developments, a new Joint Opinions Committee (the "Committee") was created by the Committee on Real Property Law of the Association of the Bar of the City of New York and the Real Property Law Section of the New York State Bar Association to review the 1989 Report and to revise it and update it as appropriate. The 1998 Report is the product of the work of the Committee together with assistance and input from many members of the New York bar.

The Committee elected to retain the format of the 1989 Report, i.e., a form of mortgage loan opinion (the "Model Opinion") with explanatory endnotes. The Committee also elected to revise the 1989 Report in a manner consistent with the TriBar II Report to the extent both reports cover similar issues. On the other hand, the scope of the TriBar II Report is generally limited to opinions with respect to unsecured obligations arising under a hypothetical credit agreement or a stock purchase agreement between a Delaware corporation and certain financial institutions. As

⁴ *Report on Adaptation of the Legal Opinion Accord of the Section of Business Law of the American Bar Association for Real Estate Secured Transactions*, 29 Real Prop. Prob. & Tr. J. 569 (1994) (hereinafter the *ABA/ACREL Report*).

⁵ The enforceability opinion is referred to in the *TriBar II Report* and herein as the "remedies" opinion. The terms are often used interchangeably. See *TriBar II Report* § 3.1 n. 61; *ABA/ACREL Report* at 578.

⁶ The 1998 Report does not address the concept of the Accord or its utility as a basis for legal opinions in real estate secured transactions. For a discussion of some of the issues arising out of the Accord, see Alan Joel Robin & Edward M. Pollock, *An Approach to Opinion Letters - The Silverado Accord and Other Model Forms From A Recipient's Perspective*, 29 Real Prop. Prob. & Tr. J. 611 (1994); Karl B. Holtzschue, *Opinions on Real Estate Transactions in a Post-Accord World: The Opinion Giver's Perspective*, 29 Real Prop. Prob. & Tr. J. 655 (1994).

such, the TriBar II Report does not address many of the difficult opinion issues that arise in real estate secured transactions. These important real estate-related issues are addressed in the 1998 Report.

The 1998 Report is based on a hypothetical transaction involving a commercial loan secured by a mortgage on a single parcel of commercial property (e.g., a suburban office building) located in New York State. The Borrower is assumed to be a single-purpose, New York entity and the lender is assumed to be a New York institutional lender. The collateral for the loan does not include any significant personal property other than (i) customary fixtures, equipment and other personal property located on or used in connection with the real estate and (ii) other incidental contract rights (including permits, licenses and other intangibles). Repayment of the loan is guaranteed by a person who is an affiliate of or otherwise related to the Borrower. The loan documents include a loan agreement, note, mortgage, assignment of rents, financing statements and guaranty.

The 1998 Report includes new and/or expanded discussion of (i) opinions with respect to non-corporate entities (e.g., partnerships and limited liability companies), (ii) the enforceability opinion (including alternative forms of the "generic" qualification and assurance), (iii) the enforcement of guarantees and (iv) reliance on the opinion by persons other than the opinion recipient. The Committee believes that these changes are necessary to reflect current opinion letter practice and to facilitate the negotiation of opinions in commercial mortgage loan transactions.

The TriBar II Report focuses primarily on corporations and does not include any significant discussion of opinion issues with respect to non-corporate entities. Although the 1989 Report covered partnerships, it did not mention limited liability companies because such entities were not then authorized under New York law. However, as a result of the passage of the Limited Liability Company Law,⁷ limited liability companies are rapidly becoming the entity of choice for many real estate secured transactions. As a result, additional discussion is included regarding opinion issues relating to the valid existence of non-corporate entities and their power to execute and deliver the loan documents and enter into the transactions contemplated thereby.

The 1989 Report referred to opinions regarding guarantees but did not include any significant discussion regarding whether any additional exceptions or qualifications would be required. Guarantees are customary in certain mortgage loan transactions (e.g., construction loans) and the Committee concluded that an expanded discussion of related opinion issues would be appropriate. Accordingly, the Model Opinion contained in the 1998 Report includes an opinion with respect to the enforceability of a payment guaranty, together with an explanatory endnote regarding suggested additional qualifications and exceptions.

The most significant change in the 1998 Report relates to the format of the remedies opinion. In lieu of a "laundry list" of specific exceptions, the 1989 Report suggested the inclusion of a "generic" qualification (i.e., a statement that "certain provisions contained in the Loan Documents may not be enforceable") and a form of "assurance" (i.e., a statement that such

⁷ Act of July 26, 1994, Ch. 576, 1994 NY Laws 1347 (codified at NY Limited Liability Company Law § 201).

limitations "will not render the Loan Documents invalid as a whole or substantially interfere with realization of the principal benefits and/or security provided thereby"). This form of assurance is often referred to as the "practical realization approach" (even though the 1989 Report did not include the word "practical"). Although its continued use is acknowledged by TriBar, several bar association committees have criticized the practical realization approach because it is ambiguous and may be misleading.⁸ Instead, they recommend a different form of assurance that includes a statement to the effect that the limitations of the generic qualification would not preclude the exercise of certain specified remedies following a material default. This latter formulation is usually referred to as the "material default" approach.

The Committee reviewed both approaches and discussed the merits of each in considerable detail. Although the practical realization approach was recommended in the 1989 Report (and, according to TriBar, is "encrusted with tradition"), the Committee agrees with TriBar and with other bar association opinion committees that the practical realization approach is inherently ambiguous and that there is a risk that opinion givers and opinion recipients will each understand the phrase to mean something different. Proponents of the material default approach believe that it has less ambiguity and more certainty than the practical realization approach. They argue that it is narrower in scope and deeper in analysis and that it is gaining increasing acceptance in opinion letter practice. On the other hand, some lawyers have expressed concern that the material default approach could be a "trap for the unwary" because it requires the opining lawyer to consider the enforceability of every provision in the loan documents.⁹ In response, proponents of the material default approach argue that, although the opining lawyer should be expected to review every provision, by limiting the scope of the assurance to the exercise of certain specified remedies following a material default, the opinion is narrower, easier to understand and more responsive to the lender's concerns.

The Committee considered the advantages and disadvantages of each approach and concluded that the material default approach should be included in the 1998 Report. However, the Committee also concluded that it may be unwise to depart completely from tradition. Accordingly, after considerable discussion, the Committee elected to include both approaches in the 1998 Report. As a result, the 1998 Report includes, in addition to the practical realization approach recommended in the 1989 Report, an alternative form of assurance that limits the scope of the opinion to the enforcement of the note and, following a material default, the exercise of the specific remedies of acceleration, enforcement of the assignment of rents and foreclosure.

The 1998 Report also includes an expanded discussion regarding whether persons other than the opinion recipient are entitled to receive copies of the opinion and to rely upon it. This issue is not discussed in any significant detail in the 1989 Report, the TriBar II Report or the Accord. Nevertheless, in light of the likelihood that many commercial loans will be made by a syndicate of lenders or included in a mortgage loan pool for purposes of securitization, the Committee believes that an expanded discussion of reliance issues is appropriate. The 1989 Report also included a Model Land Use and Zoning Opinion. For the reasons set forth in endnote 18, the Committee elected not to include such an opinion in the 1998 Report.

⁸ See *ABA/ACREL Report* at 589-600; (See *infra* California, Florida and Texas Reports listed in the Bibliography.)

⁹ See *ABA/ACREL Report* at 598, n.52.

The Committee solicited and received comments on the 1998 Report from lawyers representing both borrowers and lenders and from representatives of financial institutions, rating agencies and other capital markets participants. The 1998 Report was approved by the Committee on Real Property Law of the Association of the Bar of the City of New York and by the Executive Committee of the Real Property Law Section of the New York State Bar Association.

The introduction to the 1989 Report mentioned certain fundamental principles that lawyers and their respective clients should keep in mind in requesting and issuing opinions. The Committee believes that such principles are worth restating (with some additional detail) here. First, the purpose, scope and text of the opinion should be addressed as early as possible in the transaction. If the lender has a standard form that it expects to receive, it should be provided to borrower's counsel in sufficient time to enable such counsel to negotiate the opinion and complete any required due diligence. Too often, such matters are left to the eve of closing. Both counsel share an obligation to their respective clients to work together to resolve opinion issues in an efficient, cost-effective manner. Second, the focus of the opinion of borrower's counsel should be primarily on matters outside the knowledge of the lender's counsel (e.g., opinions with respect to the borrower's status and authority and its compliance with law and other agreements) and on the remedies opinion. Opinions on other issues should be requested only if they are relevant to the transaction. Third, lender's counsel should not ask for an opinion that such counsel would not be willing to give in similar circumstances.¹⁰ Fourth, the burden imposed on borrower's counsel of doing the due diligence and research necessary to give the opinion should not be disproportionate to the benefit to the lender. Fifth, it is not appropriate to ask for an unqualified opinion on an uncertain legal principle. While it may be acceptable for the parties to the transaction to enter into a contract that has legal uncertainty and to allocate such risk as they may deem appropriate, it is inappropriate to place such risk on the opining lawyer or law firm. On the other hand, in certain circumstances, a qualified, "reasoned" opinion may be an appropriate way to address important, but uncertain, legal issues. Finally, the analytical process necessary to give the opinion is at least as important as the product, and in most cases more so. Counsel for both parties should assume that their respective clients desire to enter into an enforceable agreement. Accordingly, if an important legal issue is encountered during negotiations, the transaction should be restructured, if possible, to remove any legal uncertainty. Important economic or structural issues should not be ignored or concealed by broadly stated exceptions and qualifications to the opinion.

The introduction to the 1989 Report also included the following statement:

"We believe that the work product, as a whole, is fair to both borrowers and lenders and their counsel, and can be used to guide parties in reaching agreement on the issues raised by the requirement that borrower's counsel deliver an opinion letter in a real estate mortgage loan transaction."

¹⁰ This concept is often referred to as the "Golden Rule." See *TriBar II Report* § 1.3. TriBar also notes that the opinion giver has a duty to avoid misleading the opinion recipient. *TriBar II Report* § 1.4(d).

The Committee believes that the same is true with respect to the 1998 Report. We hope that the 1998 Report is a useful resource to members of the real estate bar.¹¹

Respectfully submitted,

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¹¹ This Report reflects the consensus of the Committee. It does not necessarily reflect the views of individual members of the Committee or their respective firms or organizations. The 1998 Report has been prepared for educational purposes only. Its suggestions and recommendations are not intended to establish an independent measure of the standard of care or to constitute evidence of the appropriate standard of care for the issuance of legal opinions.

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¹² Persons whose names are marked with an asterisk (*) are members of the Joint Opinions Committee. The persons listed for the New York State Bar Association, Real Property Law Section, are members of its Executive Committee. The persons listed for the Association of the Bar of the City of New York are members of the Committee on Real Property Law. In addition to the members listed here, the Joint Opinions Committee gratefully acknowledges the contributions of many former members of such Committees.

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MODEL MORTGAGE LOAN OPINION

[Letterhead of Law Firm]

[Date]¹

[Name and address of Lender]²

Re: \$ _____ Mortgage Loan to _____³

Ladies and Gentlemen:

We have acted as counsel⁴ to _____, a _____ [corporation] [general partnership] [limited partnership] [limited liability company] ("**Borrower**"), in connection with that certain \$ _____ mortgage loan (the "**Loan**") from _____ ("**Lender**") to Borrower pursuant to a Loan Agreement [use exact title] (the "**Loan Agreement**") [of even date herewith] [dated as of _____] between Borrower and Lender. This opinion is delivered to you pursuant to Section __ of the Loan Agreement.⁵ [Except as otherwise indicated, all capitalized terms used herein and defined in the Loan Agreement shall have the meanings given such terms in the Loan Agreement.]⁶ In such capacity, we have reviewed the following documents, all dated as of _____ (the "**Closing Date**") unless otherwise noted, as executed and delivered in connection with the Loan⁷:

- (a) The Loan Agreement;
- (b) The Mortgage Note [use exact title] (the "**Note**") made by Borrower to the order of Lender in the principal amount of \$ _____;
- (c) The Mortgage [use exact title] (the "**Mortgage**") made by Borrower in favor of Lender as security for the Note and describing therein certain real property located at _____, New York (the "**Real Property**") and certain personal property (including fixtures and other rights) located thereon or used in connection therewith⁸ (the "**Personal Property**");
- (d) The Assignment of Leases and Rents [use exact title] (the "**Assignment of Leases**") made by Borrower in favor of Lender as further security for the Note;
- (e) [Unfiled] copies of UCC-1 Financing Statements (the "**Financing Statements**") executed by Borrower as Debtor and naming Lender as Secured Party;
- (f) Guaranty of [Payment] [Completion] [use exact title] (the "**Guaranty**") made by _____ (the "**Guarantor**") in favor of Lender.

The Loan Agreement, the Note, the Mortgage, the Assignment of Leases, and the Financing Statements [if applicable: add any other pertinent documents] are hereinafter

collectively referred to as the "**Loan Documents**".⁹ The Real Property and the Personal Property are collectively referred to herein as the "**Collateral**".

In rendering our opinion we have also examined the [describe Borrower's organizational documents: e.g., its articles, bylaws, partnership agreements, articles of organization, operating agreements, and all amendments thereto] of Borrower (the "**Organizational Documents**"), certificates of public officials, and such other records, certificates, documents and instruments as we have deemed necessary for the purposes of the opinions herein expressed.¹⁰ As to various questions of fact material to our opinion, we have relied upon certificates and written statements of [officers] [partners] [members] of Borrower.¹¹¹² We have assumed that the Mortgage and the Assignment of Leases will be duly recorded in the Office of the [Clerk] [Register] of the county in which the Real Property is located and that all applicable mortgage recording tax imposed thereon will be paid.¹³ We understand that the UCC-1 Financing Statements [have been/will be] filed by _____ in the appropriate filing offices.¹⁴

We express no opinion with respect to (i) the title to or the rights or interests of the Borrower in the Collateral, (ii) the adequacy of the description of the Collateral, or (iii) the creation, attachment, perfection or priority of any liens thereon and/or security interests therein. We understand that, with respect to the title to the Real Property and the creation and priority of the lien of the Mortgage, you will be relying upon the title insurance policy issued to you by [title company] and dated as of the Closing Date.^{15 16}

The law covered by this opinion is limited to the federal law of the United States and the law of the State of New York.¹⁷ We express no opinion with respect to the law of any other jurisdiction and [, unless otherwise specified,] no opinion with respect to the statutes, administrative decisions, rules, regulations or requirements of any county, municipality, subdivision or local authority of any jurisdiction.¹⁸ We have assumed that you have complied with all state and/or federal laws and regulations applicable to you arising out of the Loan or your status as Lender therein.¹⁹

[Add any appropriate additional assumptions]²⁰

Based on the foregoing, and upon such investigation²¹ as we have deemed necessary, and subject to the qualifications and exceptions herein contained, we are of the opinion that:

1. Borrower is a [corporation] [general partnership] [limited partnership] [limited liability company]²² validly existing^{23 24} under the law of the State of New York²⁵.

[If applicable, add similar provisions regarding the Guarantor]

2. Borrower has the power²⁶ under its Organizational Documents and applicable [corporate] [partnership] [limited liability company] law to [own][lease][and operate] the Collateral²⁷ and to execute, deliver, and perform its obligations under, the Loan Documents.

[If applicable, add similar provisions regarding the Guarantor]

3. Borrower has taken all action necessary²⁸ under its Organizational Documents and applicable [corporate] [partnership] [limited liability company] law to authorize the execution and delivery of the Loan Documents and the performance of its obligations thereunder and has duly executed and delivered the Loan Documents.²⁹

[If applicable, add similar provisions regarding the Guarantor]

4. The Loan Documents are the valid and binding³⁰ obligations of Borrower, enforceable³¹ against Borrower in accordance with their respective terms,³² except as may be limited by (i) bankruptcy, insolvency or other similar laws affecting the rights and remedies of creditors generally³³ and (ii) general principles of equity.³⁴ [If Alternative 1 below is selected, also include the following: Our opinion with respect to the enforcement of the Assignment of Leases (and any similar provisions in the Mortgage) is limited to the enforcement of such assignment upon acceleration of the debt following a material default for purposes of collecting rents accruing after the appointment of a receiver by a court of competent jurisdiction in an action to foreclose the Mortgage.]³⁵ In addition, we advise you that certain provisions of the Loan Documents may be further limited or rendered unenforceable by applicable law, but in our opinion, such law does not render the Loan Documents invalid as a whole³⁶ or [Insert Alternative 1 or Alternative 2]³⁷

[Alternative 1:³⁸

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

[Alternative 2:³⁹

preclude (i) the judicial enforcement of the obligation of the Borrower to repay the principal, together with interest thereon as provided in the Note, (ii) the acceleration of the obligation to repay such principal and interest upon a material default⁴⁰ under the Loan Documents, (iii) the judicial foreclosure in accordance with applicable law of the lien created by the Mortgage upon failure to pay such principal and interest at maturity or upon acceleration pursuant to clause (ii) above and (iv) the judicial enforcement of the Assignment of Leases (and any similar provisions in the Mortgage) upon acceleration pursuant to clause (ii) for purposes of collecting rents accruing after the appointment of a receiver in an action to foreclose the Mortgage.]

5. The Guaranty is the valid and binding obligation of the Guarantor, enforceable against the Guarantor in accordance with its terms, except as limited by (i) bankruptcy, insolvency or other similar laws affecting the rights and remedies of creditors generally and (ii) general principles of equity. With respect to our opinion regarding the enforceability of the Guaranty, we note that the Guaranty contains provisions which purport to waive certain rights and defenses which the Guarantor might otherwise have with respect to, among other things, amendments and modifications of the Loan Documents, notice of default or the election of remedies by Lender following a default by Borrower under the Loan Documents. Although we believe that such provisions are generally enforceable (subject to the limitations and qualifications set forth in this paragraph 5), we advise you that certain waivers and other

provisions may be further limited or rendered unenforceable by applicable law, but in our opinion, such law does not render the Guaranty invalid as a whole or [Alternative 1: substantially interfere with realization of the principal benefits provided thereby] [Alternative 2: preclude judicial enforcement of the Guaranty upon a material default by the Guarantor thereunder.]⁴¹

6. The execution and delivery by Borrower of the Loan Documents do not, and the payment of the indebtedness evidenced by the Note will not⁴², result in (a) a violation of its Organizational Documents⁴³, (b) a breach or a default under any agreement or instrument listed on Schedule ___ hereto⁴⁴ or result in the acceleration of (or entitle any party to accelerate) any obligation of Borrower thereunder, or (c) a violation of any court order listed on Schedule ___ hereto.

[If applicable, add similar provisions regarding the Guaranty]

7. The execution and delivery by Borrower of the Loan Documents do not, and the payment of the indebtedness evidenced by the Note will not, result in any violation of any law of the United States of America or the State of New York, or any rule or regulation thereunder.^{45 46}

[If applicable, add similar provisions regarding the Guaranty]

8. To our actual knowledge,⁴⁷ Borrower is not a party to any pending [or overtly threatened in writing] actions or proceedings that may adversely affect the transactions contemplated by the Loan Documents [or that would have a material adverse effect on Borrower] and that is not listed on Schedule ___ hereto.⁴⁸

[If applicable, add similar provisions regarding the Guarantor]

[If appropriate, add any additional opinions or exceptions.]⁴⁹

This opinion is furnished by us as counsel for Borrower solely for the purposes contemplated by the Loan Documents. The opinions expressed herein may be relied upon only by you [and by permitted transferees of the Note, including a person or entity acting as agent or trustee and rating agencies in connection with a securitization of the Loan] and only in connection with the Loan. Our opinion may not be used, quoted from, referred to or relied upon by you or by any other person for any other purpose, nor may copies be delivered to any other person, without in each instance our prior written consent; except that you may deliver copies of this opinion to (a) your independent accountants, attorneys and other professional advisors acting on your behalf in connection with the Loan or the transactions contemplated thereby, (b) governmental regulatory agencies having jurisdiction over you to the extent disclosure of the opinion is required by applicable law or regulation, (c) designated persons pursuant to order or legal process of any court or governmental agency or authority of competent jurisdiction [and (d) prospective purchasers of the Note and permitted participants in the Loan.] We shall have no obligation to revise or reissue this opinion with respect to any change in law or any event, fact, circumstance or transaction which occurs after the date hereof. In addition, we express no opinion with respect to any issue arising out of or related to (i) the identity or status of any

transferee of the Note or participant in the Loan, (ii) a securitization of the Loan, or (iii) any subsequent transaction.⁵⁰

Very truly yours,

[name of opinion giver]⁵¹

	<i>Special Joint Committee on Lawyer Opinions in Commercial Transactions</i> , 45 Bus. Law. 705 (1990)
<i>1989 Report</i>	Committee on Real Property Law, Association of the Bar of the City of New York and Real Property Law Section of the New York State Bar Association, <i>Joint Mortgage Loan Opinion Report</i> , 62 N.Y. St. B.J. 55 (July 1990).
<i>Pennsylvania Report</i>	Real Property Section, Pa. Bar Ass'n, <i>Pennsylvania Legal Opinions</i> , reprinted in <i>Pennsylvania Legal Opinions Handbook</i> (Pa. Bar Institute 1992)
<i>Thompson</i>	Thompson, <i>Real Estate Opinion Letter Practice</i> , (John Wiley & Sons, Inc., 1993)
<i>Texas Report</i>	Committee on Lawyer's Opinion Letters in Mortgage Loan Transactions, Real Estate, Probate and Trust Law Section, State Bar of Texas, <i>Opinion Letters in Mortgage Loan Transactions 1996 Texas Supplement</i> , (May 1, 1996)
<i>TriBar Bankruptcy Report</i>	Report of the TriBar Committee: <i>Opinions in the Bankruptcy Context: Rating Agency, Structured Financing and Chapter 11 Transactions</i> , 46 Bus. Law. 717 (1991)
<i>TriBar II Report</i>	Report of the TriBar Committee: <i>Third Party "Closing" Opinions</i> , 53 Bus. Law. 591 (1998)
<i>TriBar UCC Report</i>	Report of the TriBar Committee: <i>UCC Security Interest Opinions</i> , 49 Bus. Law. 359 (1993)

ENDNOTES

1. The opinion is usually dated the date it is delivered, which is usually the closing date. If the opinion is delivered in advance of the Closing Date (as is sometimes the case in multistate transactions where the opinion giver is acting as local counsel), it is usually delivered to counsel for the opinion recipient in "escrow" with conditions specifying whether and when it can be dated and released to the opinion recipient.
2. The opinion is usually addressed to the Lender. In a syndicated transaction, the opinion may be addressed to a financial institution "for itself and as agent for the Lenders." For a discussion with respect to who is entitled to rely on the opinion, *see infra* note 50.
3. The "Re:" is optional and is for convenience of reference only. Sometimes it is used to introduce various defined terms, such as "Borrower", "Loan", "Collateral", etc. This form introduces those terms in the body.
4. The opening sentence is intended to indicate the capacity in which counsel is rendering the opinion and to identify the transaction. The formulation "acted as counsel . . . in connection with" is intended to make clear the limited nature of the opinion giver's engagement. It is particularly appropriate where the opinion giver has been retained for a particular transaction; it is not necessarily appropriate where the opinion giver's role is substantially broader as, for example, that of general counsel to Borrower. Where the opinion giver is not the regular counsel for Borrower and is only responsible for closing the mortgage loan, some lawyers will state that "We have acted as special counsel" (emphasis added) since that term denotes somewhat less contact with Borrower and Borrower's affairs than in other situations. However, the term "special counsel" does not, by itself, limit the opinion giver's responsibility or affect the standard of care. If the opinion preparers wish to limit their responsibility to review certain documents or conduct due diligence activities, such limitations should be expressly set forth in the opinion. In some transactions, such as multistate transactions where the opinion giver is acting only as local counsel, such limitations may be appropriate.

The TriBar II Report defines the term "opinion preparers" to mean the lawyer or lawyers in a law firm who are responsible for preparing an opinion letter. *TriBar II Report* § 1.8. The term "opinion giver" refers to the lawyer or law firm in whose name the opinion letter is signed. *TriBar II Report* § 1.9(e). Although such a distinction is irrelevant if Borrower's counsel is a sole practitioner, it may be relevant if the Borrower is represented by a law firm. TriBar notes that the opinion preparers are not responsible for everything known by all lawyers in the firm nor, as a matter of customary practice, are they required to circulate the proposed opinion to every member of the firm. *TriBar II Report* § 2.2.2(a). Although an opinion expresses the legal conclusion of the firm, not merely of the opinion preparers, the opinion preparers determine the content of the opinion and are responsible to perform the work required to support the opinions being expressed. *TriBar II Report* § 1.8. Finally, TriBar notes that customary practice establishes the ground rules for rendering and receiving opinions and that, unless otherwise indicated, an opinion

recipient is entitled to assume that the opinion giver has followed customary practice in rendering an opinion. *TriBar II Report* § 1.4. The Committee concurs.

5. A lawyer has a professional obligation to protect the confidences and secrets of his or her client. NYSBA Disciplinary Rule 4-101. The issuance of a legal opinion to a third party regarding the validity and enforceability of the transaction may affect or limit the client's ability to raise issues or defenses in the future. Thus, the client must consent, specifically or by implication, to disclosures about the client or the transaction. *TriBar II Report* § 1.7. The reference to the Loan Agreement provision regarding the delivery of a legal opinion confirms that the client has consented to the delivery of the opinion to the recipient, that the acceptance of the opinion by the recipient satisfies the condition and that the recipient is entitled to rely upon it. The issuance of an opinion to a non-client does not create an attorney-client relationship, but it usually creates a duty of care to the opinion recipient and it may create a duty of care to other third parties who foreseeably and reasonably rely upon it. *TriBar II Report* § 1.6. For a discussion of reliance on the opinion by the recipient and other persons, *see infra* note 50.
6. Inclusion of this sentence may simplify the use of terms which are customarily defined in the Loan Agreement and avoid repetition of such definitions in the opinion. If the transaction does not involve a Loan Agreement, references to the Loan Agreement should be deleted and the opinion preparers should consider whether any additional terms should be defined for purposes of the opinion.
7. The recital of the Loan Documents is not exhaustive. The responsibility of the opinion preparers is not ordinarily limited by a listing of documents reviewed unless an express limitation is included. In some transactions, such as multistate transactions where the opinion preparers are acting as local counsel, the parties may agree that only a limited review is appropriate. In such cases, if the opinion preparers are asked to review only the Mortgage (and perhaps the Note, the Assignment of Leases and the Financing Statements) and are not expected to review the Loan Agreement or other Loan Documents, an express statement to such effect should be included in the opinion. An example is set forth below:

"At your request and with your permission, we have reviewed only the Mortgage [and the Assignment of Leases and the Financing Statements]; we have not reviewed the Loan Agreement or the other Loan Documents nor have we made any other investigation or inquiry."
8. Mortgages typically include a description of real property, personal property and fixtures and are intended to constitute both a mortgage and a security agreement. The Mortgage may also be intended to operate as a fixture filing. As set forth in notes 15 and 16 below, the opinion does not typically cover the attachment, creation, perfection or priority of security interests in personal property. For an analysis of such opinions, *see TriBar UCC Report*. However, the remedies opinion would include the enforceability of the Mortgage as a security agreement among the parties inter se.

9. The Financing Statements are included in the definition of "Loan Documents," even though they technically impose no obligations on Borrower, because they are properly the subject of an opinion as to authority, execution and delivery. Therefore, it is often convenient to include them in the definition of "Loan Documents". Such inclusion does not, however, imply any opinion with respect to the attachment, creation, perfection or priority of any security interest in the Collateral. *See infra* note 16. The Guaranty is not included in the definition of "Loan Documents" because the Guarantor is a separate entity and because its obligations under the Guaranty are not secured by the Mortgage. Accordingly, it is more suitable to cover the Guaranty separately in the opinion.
10. Some opinions recite at length the documents examined with respect to the existence and authority of Borrower. The Committee believes that no purpose is served by doing so unless the opinion giver intends by the listing of such documents to limit the scope of the opinion solely to the documents listed, in which case such limitation should be stated explicitly. The mere listing of certain documents will not have the effect of limiting the basis of the opinion to such documents. The Model Opinion states that the opinion giver has relied on "such other records, certificates, documents and instruments" as counsel has deemed necessary for purposes of the opinion. The Committee believes that this statement represents customary practice. If the opinion giver is opining as to the Borrower's valid existence, power and authority, it may be assumed that the opinion preparers have examined the appropriate certificates from public officials and organizational documents evidencing Borrower's existence and its power to enter into the contemplated transaction and to execute and deliver the Loan Documents. *TriBar II Report* §§ 2.1, 2.2, 6.1, 6.3, 6.4. Such examination will be particularly relevant and critical in the case of a general or limited partnership or a limited liability company where the applicable agreements may set forth limitations on the authority of the partners or managers to enter into mortgage transactions without the consent of the other partners or members. In addition, non-corporate entities may not always act with the same degree of formality as corporations. Accordingly, the opinion preparers should consider whether further due diligence is required in order to confirm that the entity is validly existing and that the transaction was duly authorized or approved. *See infra* notes 22, 26, 28. *See also, Due Diligence: Dealing with Entities*, New York State Bar Association Real Property Section Meeting (Program Materials, July 25, 1997) (*hereinafter Entity Program Materials*); *Thompson*, §§ 4.2-4.10.
11. Officers' certificates have traditionally been used to establish factual matters. *TriBar II Report* § 2.5. In the case of a non-corporate entity (e.g., a partnership or a limited liability company) reliance may be placed on certificates or written statements from the managing partner, managing member or other appropriate person. Reliance on oral "statements", however, is discouraged. *TriBar II Report* § 2.2.1(d)(iii). If the Loan Documents contain various representations of fact by the Borrower, it may be appropriate to permit reliance on such representations so long as such representations are based on the client's actual knowledge. On the other hand, representations, warranties and covenants are often intertwined and sometimes represent risk allocation concepts. For example, the Borrower may be willing to assume the risk of compliance with building codes or environmental laws and statements to such effect may be included in the Loan Documents. The

Borrower may also be willing to state that it has obtained all licenses and permits necessary for the ownership and operation of the Collateral. Although such matters are usually excluded from the opinion (*see infra* notes 17, 18), if an opinion on such matters is requested, reliance on the Borrower's representations as the sole basis for such an opinion may be inappropriate. *TriBar II Report* § 2.2.1(d)(ii). In addition, representations often include statements that constitute legal conclusions (e.g., a statement that the Loan Documents have been duly authorized, executed and delivered and are valid, binding and enforceable). The opinion preparers should not rely upon representations in Loan Documents insofar as they express "ultimate" facts or legal conclusions. *TriBar II Report* § 2.2.1(b).

The statements and certificates relied on by the opinion preparers are typically not presented to the Lender and the Committee sees no reason to depart from this practice. *TriBar II Report* § 2.5.3. Some opinion givers annex copies of the certificates to their opinion. This practice has the merit of disclosing to the opinion recipient the basis for the opinion and, perhaps, foreclosing any argument by the opinion recipient or its counsel that reliance on the certificates was unjustified. However, the Committee believes that attaching such certificates is unnecessary. In any case, the Committee cautions that reliance on a statement or certificate which the opinion preparers know is false or unreliable cannot be justified. *TriBar II Report* § 2.1.4; *Accord* § 5; *See infra* notes 22, 26, 29. *See also, Entity Program Materials supra* note 10; *Thompson* § 3.14.

12. Another recital commonly found in the opinion is an assumption along the following lines:

"In all our examination, we have assumed the genuineness of all signatures, the authenticity of all documents submitted to us, the conformity to the originals of all documents submitted to us as copies, and the legal capacity of natural persons."

The Committee believes that such assumptions of general application need not be stated in the opinion. *See infra* note 20. Only assumptions that are not of general application or that are unusual or specific to the transaction should be stated in the opinion letter. Of course, the opinion preparers are not entitled to rely on an assumption (whether stated or unstated) if they know it to be contrary to the facts or if they have reason to believe that reliance on such assumption would be unreasonable. *See Accord* § 5; *TriBar II Report*, §§ 2.1.4, 2.3. However, in certain circumstances, it may be acceptable to include an assumption that is contrary to fact (e.g., an assumption that the Loan Documents are to be construed as if they are governed by New York law notwithstanding a contrary choice-of-law provision) if such assumption is expressly stated and acceptable to the opinion recipient. *TriBar II Report* § 4.6 n. 98. Nevertheless, any such assumption is subject to the limitation that it should not be reasonably expected to mislead the opinion recipient. *TriBar II Report* § 1.4(d).

13. Section 253 of the Tax Law of the State of New York imposes a tax on the recording of mortgages. Certain cities are authorized by state law to impose (and do impose) their own

mortgage recording tax in addition to the state tax. Section 258 of the Tax Law of the State of New York provides that no mortgage may be recorded unless appropriate mortgage recording taxes are paid. In addition, the Mortgagee may be unable to assign, release or satisfy the mortgage. Furthermore, no judgment or final order in any action or proceeding will be made for the foreclosure or enforcement of any mortgage if the mortgage recording taxes are not paid. Even if a mortgage is accepted by the County Clerk or Register and recorded, a subsequent determination by The Department of Taxation and Finance or by a court that the proper amount of tax has not been paid will render the mortgage unenforceable unless and until the appropriate taxes are paid. It should also be noted that the procedural requirements of New York statutes relating to mortgage foreclosures anticipate that the Mortgage will be recorded. Therefore, it is appropriate that any opinion with respect to the enforceability of a mortgage expressly assume both recording of the mortgage and due payment of the mortgage recording tax.

14. In commercial loan transactions which do not involve real property collateral, financing statements are often filed prior to the Closing Date in order to insure priority over certain competing security interests. *See, e.g.*, NY U.C.C. § 9-312. However, in loans secured by both real and personal property where the personal property is not a material part of the collateral, financing statements are usually filed on the Closing Date or shortly thereafter. In such circumstances, Borrower's counsel may not be responsible for filing the financing statements. Accordingly, an assumption is included to confirm that Lender's counsel, a title company or other service company is responsible for filing matters. It should be noted that, since no opinion is being given on the perfection of security interests in personal property (*see infra* note 16), it is not necessary to include an assumption that the Financing Statements have been duly filed. Instead, the statement is included in the Model Opinion to confirm that the opinion giver is not responsible for filing the Financing Statements.
15. The Model Opinion excludes any opinion with respect to the title to the Real Property or the creation and priority of the lien of the Mortgage. Although an opinion that a mortgage is enforceable implicitly includes both contract and conveyancing issues, conveyancing issues are typically excluded. As a result, the opinion with respect to the enforceability of the mortgage usually covers only the following issues: (i) the mortgage has been duly authorized, executed and delivered, (ii) it is in a form sufficient to create an enforceable lien, and (iii) the mortgage, as a contract, is enforceable between the parties inter se. Lawyers customarily do not opine on matters of title, adequacy of legal descriptions, recording and payment of mortgage tax. In lieu of an opinion, lenders customarily obtain a title insurance policy insuring the validity and priority of the lien created by the mortgage. Title insurance also covers certain matters relating to the status of the mortgagor as an entity capable of granting the insured Mortgage, and the mortgagor's execution and delivery of the Mortgage. Of course, a title insurance policy is subject to its terms, provisions, exceptions and exclusions from coverage. Accordingly, although a title policy implicitly covers certain matters relating to the status of the Borrower and the execution and delivery by it of the Mortgage, these issues are also covered by legal opinions. Because title and conveyancing issues are excluded from the opinion, a reference to the issuance of a title insurance policy is included in the Model Opinion to

confirm that (i) such exclusions are reasonable, (ii) the opinion preparers have no duty to independently verify such matters and (iii) the Lender is relying on the title policy for assurance with respect to such matters. *See TriBar II Report* §§ 1.4, 2.3(b), 2.6.

Although the remedies opinion implicitly includes an opinion that a mortgage is in a form sufficient to create a lien, in multistate transactions where the opinion giver is acting as local counsel, a specific opinion that the mortgage is in proper form is sometimes requested. Such an opinion may also be requested by rating agencies when the loan is to be included in a subsequent securitization. *See, e.g., Structured Finance Ratings Real Estate Finance: Legal and Structured Finance Issues in Commercial Mortgage Securities*, Standard & Poor's Ratings Group at 126-27 (1995) (*hereinafter "S&P Ratings Guide"*). A request may also be made for an opinion that identifies the proper place for recording the mortgage and assures the opinion recipient that, upon due recordation, the mortgage will create a "perfected" lien on the real property. "Perfection" is a concept under the Uniform Commercial Code and has no direct counterpart in real property law. Instead, the focus of any such opinion should be on the concept of "constructive notice" created by the recording laws. Accordingly, suggested language for such opinions is as follows:

"The Mortgage is in a form sufficient to create a valid mortgage lien on the Real Property under New York law. The recording of the Mortgage in [describe location of recording office] is the only filing or recording necessary to give constructive notice of the lien created by the Mortgage to subsequent purchasers and mortgagees of the Real Property. No other recordation, filing, re-recording or re-filing is necessary in order to maintain the validity or priority of the lien created by the Mortgage."

If the transaction involves a construction loan, the opinion preparers should consider whether a reference should also be made to the requirement of filing the building contract in order to preserve the initial priority of the mortgage against the claims of mechanics' liens filed subsequent to the recording of the mortgage. *See Lien Law* § 22. The foregoing opinion relates only to that portion of the Collateral that constitutes real property under New York law. To the extent a similar opinion is requested regarding personal property and fixtures, *see infra* note 16.

16. The Model Opinion form also does not cover the attachment, creation, perfection or priority of liens on personalty. As a matter of customary practice, the remedies opinion does not cover the creation, perfection and priority of security interests in the Collateral. Opinions on the effectiveness of security interests are always given separately and not as a part of the remedies opinion. *TriBar UCC Report* at 368. However, there are loan transactions where the non-real property assets may be of major significance. Although lenders typically rely on title insurance regarding the validity and priority of the lien of the mortgage, title insurance does not insure the lender's security interest in personalty (such as furniture, furnishings and equipment) nor on intangibles such as licenses, permits and contract rights. Therefore, an opinion of borrower's counsel as to the enforceability of the lender's security interest in such assets may be appropriate in certain

specialized situations (e.g., loans secured by hotels, hospitals or nursing homes) where the personal property is a material part of the Collateral or where certain licenses, permits and other rights are essential for the operation of the Real Property. However, even in such transactions, the opinion usually covers only certain matters relating to perfection by filing or possession and does not purport to cover all issues that may arise with respect to the attachment, creation, perfection and priority of security interests in such collateral. For a discussion of the issues involved in such opinions, *see TriBar UCC Report*.

17. The TriBar II Report states that the term "law" means statutory, decisional and regulatory law at the state or federal level, but not at the local level. *TriBar II Report* § 1.9(n). Within that framework, the opinion preparers are responsible only for areas of law customarily understood to be covered by the opinion. *Id.* As a matter of customary practice, the opinion does not cover tax laws, insolvency laws, antitrust laws and securities laws. *TriBar II Report* § 3.5.2(c). The Committee also notes that, with respect to opinions in real estate secured transactions, as a matter of customary practice, the term "law," when used in the opinion, also does not include federal, state and local environmental laws. Accordingly, the opinions set forth in paragraphs 2, 3 and 7 of the Model Opinion exclude any opinion with respect to compliance with environmental laws and regulations. Instead, the opinion recipient usually relies on appropriate reports by engineers and other environmental experts, letters and certificates from governmental officials, and representations, warranties and indemnities from the Borrower. If an opinion is desired on a specific environmental issue, it should be specifically requested. Often such opinions are more efficiently issued by lawyers who specialize in environmental matters. *See Florida Report*, Section VIII at 49; *Maryland Report* at 775; *Thompson*, §§ 8.1-8.10.

Some borrowers may be organized under the law of another state (typically Delaware). With respect to Delaware corporations, partnerships or limited liability companies, many New York lawyers are willing to give limited opinions under Delaware law regarding issues relating to the Borrower's valid existence and its power to enter into the transaction. *TriBar II Report* § 4.1, n. 85. If so, the foregoing language should be modified by including an appropriate reference to Delaware law (e.g., "and the present General Corporation Law of the State of Delaware").

If New York counsel cannot or chooses not to opine as to the law of another state, then an opinion of local counsel should be obtained. In some instances, such local counsel opinion will be addressed directly to the opinion recipient. In other instances, it will be addressed to the New York opinion giver who will be permitted to rely on it for purposes of issuing an "umbrella" opinion letter to the opinion recipient. *TriBar II Report* §§ 5.1, 5.2. In the latter case, the following language should be included in the opinion:

"With respect to the opinion(s) expressed in paragraphs ___ and ___ below, [Insert cross reference to any opinions governed in whole or in part by the law of another state] we have relied (with your permission) upon the opinion of [insert name of firm], dated the date hereof, a copy of which

has been delivered to you, as to [describe scope of local counsel opinion:
e.g., "as to matters of Delaware law"]."

If a local counsel opinion is obtained for matters other than the Borrower's valid existence and its power to enter into the transaction, it is better practice to arrange for such opinion to be addressed directly to the lender rather than to the borrower's New York counsel. This format may not always be practical in complex, multistate transactions. In such instances, the opinion giver may be asked to review, approve and/or rely upon the opinions of local counsel. In other transactions, the opinion giver may be permitted to issue an opinion based on an assumption that New York law applies. *See TriBar II Report* § 4.6, n. 98. For a discussion of the issues involved in local counsel opinions, *see* Laurence G. Preble, *Choice of Law Opinions: Making the Right Choice*, 11 *Probate & Property* 13 (July/August 1997).

18. The second sentence of this paragraph makes it clear that matters of local law (e.g., zoning and land use laws and building codes) are not covered by the opinion unless specifically requested. Opinions on such matters are not customary and, if requested, should be limited to specific issues of material importance to the transaction. *TriBar II Report* § 1.9(n). Although the 1989 Report included a Model Land Use and Zoning Opinion, (*see 1989 Report* at 66), the Committee elected not to include such an opinion in this Report. The 1989 Report noted that, although opinions regarding compliance with zoning, land use and building codes were not customary in New York City, such opinions were customary in other areas of New York State. *Id.* at 65, n 58. However, members of the Committee who practice outside of New York City confirmed that such opinions are no longer customary and, if given at all, are more narrowly focused, cover only specific issues relating to the Real Property and do not purport to cover compliance with all such laws generally. As a result, compliance with such laws is usually determined by the opinion recipient as a part of its due diligence activities (with the assistance and cooperation of the Borrower and its counsel) and reliance is usually placed on representations and warranties from the Borrower, certificates and reports from architects, engineers, surveyors and other experts and letters from utility companies and local governmental officials. In some circumstances, it may be appropriate to request an opinion on a specific issue (e.g., the issuance of a permit or other entitlement) which is material to the transaction. For a discussion of the issues involved in giving zoning and land use opinions, *see Thompson*, §§ 8.2-8.8.
19. Certain institutional lenders may be limited by applicable laws or other regulations with respect to permitted investments, the aggregate amount of loans to a single borrower, compliance with ERISA and FIRREA, qualification to do business, licensing and other similar matters. In the Committee's view, matters relating to compliance with such requirements and with other laws relating to or arising out of the lender's status as a regulated financial institution should be appropriately addressed by lender's counsel, not by borrower's counsel. TriBar concurs and states that the remedies opinion should not, as a matter of customary practice, be deemed to include regulatory statutes applicable solely to the opinion recipient. *TriBar II Report* § 3.5.3(a)(ii). However, in real estate loans, certain compliance issues (e.g., compliance with FIRREA, limitations on the aggregate

amount of loans to one borrower, etc.) may arise out of the nature of the transaction covered by the opinion and not out of the lender's activities generally. Accordingly, the Committee believes that a specific assumption regarding compliance is appropriate. On the other hand, the absence of such an assumption should not be deemed to imply that such matters are included in the opinion.

20. In most commercial loan transactions, it may not be necessary to list additional specific assumptions. Some opinion givers routinely include assumptions regarding the legal capacity of individuals, the genuineness of documents and signatures, the binding effect of the Loan Documents on the other parties and other similar matters. Tribar states that it is not necessary to include assumptions of general application and the Committee concurs. *TriBar II Report* § 2.3(a). However, if the opinion giver is acting as local counsel and is not otherwise involved in the overall transaction, certain assumptions may be appropriate (e.g., the execution, delivery and recording of documents and the satisfaction of conditions precedent). Assumptions that are not of general application require disclosure in the opinion letter. *TriBar II Report* § 2.3(b). An assumption should not be included if it would mislead the opinion recipient unless further disclosure is made regarding the purpose and scope of the assumption. *TriBar II Report* § 2.3(c).
21. The mere listing of documents does not limit the scope of the opinion. The opinion recipient is entitled to assume that the opinion giver has followed customary practice in issuing the opinion. *TriBar II Report* §§ 1.4, 1.5 The term "investigation" is understood to relate to both law and fact. If counsel desires to limit the scope of investigation, an explicit disclaimer should be made.

The appropriateness of disclaimers will probably depend on the breadth of matters on which counsel ultimately opines. The Committee believes that an opinion limited to the items set forth in paragraphs 1-5 of the Model Opinion does not require qualification of the "such documents . . . and such investigation" language. On the other hand, if counsel is required to go beyond those items and, for example, issue the "no breach or default" or "no litigation" opinions, then disclaimers or qualifications as to the scope of the examination conducted might be appropriate. See paragraphs 6 and 8 of the Model Opinion and the notes thereto. Where counsel is rendering a special opinion, such as when acting as local counsel, a limitation of the scope of the investigation and/or examination of documents may be appropriate.

22. The "status" opinion appears as the first opinion in most opinion letters and serves as a cornerstone for the opinions that follow. *TriBar II Report* § 6.1. Traditionally, opinions regarding the status and existence of the borrower have included an opinion that the borrower has been "duly organized". Tribar notes that "duly organized" opinions can be onerous or even impossible if the actions were taken a long time ago and that such opinions are most often requested when the entity has been formed specifically for the transaction. *TriBar II Report* § 6.1.2. Accordingly, a "duly organized" opinion may not always be necessary or appropriate and should not be routinely requested. The Committee has elected to follow Tribar's recommendation and has excluded the "duly organized" opinion from the Model Opinion. On the other hand, many opinion recipients

expect such an opinion and it is often requested by rating agencies. *See S&P Ratings Guide* at 126. If the Borrower has been recently organized specifically for the transaction, such an opinion may be appropriate and issuing the opinion should not be difficult or burdensome. For a discussion of the issues involved in "due organization" opinions for corporations, *see TriBar II Report* § 6.1.

With respect to non-corporate entities, reliance is usually placed on a review of the Borrower's Organizational Documents and, in the case of a limited partnership or a limited liability company, a copy of its certificate of limited partnership or articles of organization, respectively, certified by the New York Department of State. If the entity is organized in a jurisdiction other than New York, an opinion of local counsel may be required. *See supra* note 17. In such a case, the entity may be required to qualify to do business in New York. With respect to such qualification, the opinion preparers usually obtain a copy of the Borrower's certificate of authority to do business in New York issued by the New York Department of State. However, TriBar notes that opinion preparers customarily rely solely on such certificates for purposes of the opinion; as a result, some opinion recipients may agree to rely directly on such certificates and not require an opinion. *TriBar II Report* § 6.1.6.

The principal documents governing a non-corporate entity (*e.g.*, its partnership agreement or operating agreement) are not usually a matter of public record. Normally, the opinion preparers will rely on copies of these agreements certified by the general partner or managing member, as the case may be. However, the due diligence responsibility of the opinion preparers may involve more than a review of documents submitted by the client. Under certain circumstances, the opinion preparers may have a duty to make a reasonable inquiry if the documents appear on their face to be inconsistent or incomplete. For example, if an original partnership agreement refers to partners A, B and C, and if the lawyer knows (or is informed by the client) that the present partners are A, B and D, the opinion preparers should ask to see the amendment in connection with the withdrawal of C and the admission of D. While the responsibility to make such an inquiry would seem to be self-evident, it emphasizes that the due diligence process is not intended to be a purely mechanical exercise. The review must be undertaken in the context of the transaction, the obligations to be undertaken by the partnership and the opinion to be issued by the opinion giver. Determining whether the documents presented for review are accurate and complete is often the most difficult part of the due diligence procedure. On the other hand, the opinion preparers may rely on information provided by an appropriate source unless reliance would be unreasonable under the circumstances. *TriBar II Report* § 2.1.4.

In New York, a "joint venture" is not a statutorily recognized form of legal entity, but rather a description of a business enterprise. Typically, a joint venture will constitute a general partnership formed for a specific project or purpose, although some joint ventures purport to conduct business as tenants in common. In most cases, partnership law will govern the rights, duties and obligations of the venturers. *See* 16 N.Y. Jur.2d § 1937 (1996). In any event, in order to issue the opinion, counsel must determine the nature of the entity and the legal relationships of its members to themselves and to third parties.

The status of the entity may also be important with respect to compliance with legal investment laws or usury laws. *TriBar II Report* § 6.1.3(b) n. 114.

23. TriBar notes that many opinion recipients are comfortable accepting an opinion that simply addresses the Borrower's current status as an entity capable of entering into the transaction. *TriBar II Report* § 6.1.3(b). The "validly existing" opinion covers the Borrower's existence as of the date of the opinion letter. With respect to corporations, and as a matter of customary practice, such opinions are usually based on an examination of a certified copy of the company's charter and on a "good standing" certificate of the Secretary of State as of some recent date. *See TriBar II Report*, § 6.1.3. With respect to non-corporate entities, reliance is usually placed on a review of the Borrower's Organizational Documents certified by the general partner or the managing member, as the case may be. For limited partnerships and limited liability companies, reliance is also placed on certified copies from the New York Department of State with respect to the Borrower's certificate of limited partnership or articles of organization. *See infra* notes 26, 28; *See also, Entity Program Materials supra* note 10; *Thompson* §§ 4.2 - 4.10.
24. Another traditional opinion relates to the entity's "good standing" under applicable law. With respect to corporations, "good standing" generally means that the corporation is validly existing and is not delinquent in its filings of required reports and tax returns with the Secretary of State and taxing authorities. To render the opinion with respect to a New York corporation, opinion preparers customarily obtain two certificates, one from the Secretary of State and one from the Department of Taxation and Finance. *TriBar II Report* § 6.1.4. Because opinion preparers customarily rely solely on certificates from public officials, TriBar notes that the benefits of a "good standing" opinion are marginal and suggests that opinion recipients rely directly on such certificates and not require an opinion. *Id.* § 6.1.4. The Committee concurs and has deleted the "good standing" opinion from the Model Opinion. Nevertheless, many opinion recipients may expect an opinion with respect to "good standing" issues and the Committee believes that a request for such an opinion would not be unreasonable.
25. The "law of the State of New York" is a convenient way to cover both corporate and non-corporate entities. If the entity is organized under the laws of another state, some opinion recipients may request an opinion that the entity is "duly qualified" in New York. Such an opinion provides the recipient with comfort that the entity has taken the steps required to qualify as a foreign entity in New York and is not subject to fines, penalties or administrative sanctions for failure to qualify. *TriBar II Report* § 6.1.6. However, the "due qualification" opinion is required only in the case of a foreign corporation, a foreign limited partnership or a foreign limited liability company. General partnerships (and joint ventures organized as general partnerships) are not now subject to "doing business" qualification requirements. However, a foreign general partnership or joint venture would still have to file the "doing business" certificate required under Section 130 of the New York General Business Law. The "due qualification" opinion applies only to the entity's status in a jurisdiction other than its state of organization and is customarily based solely on certificates of state officials. *Id.* § 6.1.6. Accordingly, TriBar believes that the benefits of such duly qualified opinions are marginal and suggests that opinion recipients consider

deleting the opinion and rely instead directly on such certificates. The Committee concurs.

26. A "power" opinion means that the Borrower has the power under its Organizational Documents and applicable law governing its status as a legal entity to enter into the Loan transaction and carry out its obligations thereunder. The phrase "power and authority" is also used. TriBar notes that both are intended to have the same meaning. *TriBar II Report* § 6.3, n.138. The term "applicable [corporate] [partnership] [limited liability company] law" covers only the law governing the Borrower's status as an entity; it does not cover other laws or regulations that might affect the Borrower's business activities. These other laws are generally excluded from the opinion (*see supra* notes 17, 18), or are addressed by the "no violation of law" opinion (*see infra* notes 45, 46). With respect to corporations, few unusual issues are likely to arise. Applicable corporate law and the corporation's articles and bylaws will usually provide a broad grant of power and authority to enter into the transaction. Unless the transaction involves an unusual activity (*e.g.*, accepting deposits or issuing insurance), the transaction is not likely to be ultra vires or require any special governmental approval. For a discussion of the issues involved in such opinions, *see TriBar II Report* § 6.3.

With respect to non-corporate entities, the issue of the power of the entity to enter into the transaction may be a bit more difficult. It is not unusual for the partnership agreement or operating agreement to contain limitations on the business and activities of the entity and on the power of its partners or managers to enter into certain transactions without the approval of some or all of the other partners or members. Accordingly, the opinion preparers must review the relevant documents and understand the decision-making process of the entity. If the agreement is silent with respect to such matters, the power and authority of the partners or members may be governed by applicable law relating to partnerships or limited liability companies. For example, in a general partnership, every partner has an equal voice in the management and control of the firm unless the agreement provides otherwise. In large partnerships, however, managerial authority is often delegated to a managing partner or committee. In limited partnerships, the general partners conduct the affairs of the business; the limited partners generally may not participate in management, except with respect to certain limited issues, without jeopardizing their limited liability.

Accordingly, the opinion preparers must examine the partnership agreement and applicable partnership law to determine whose consent is required for the contemplated transaction. In some cases, the partnership agreement or applicable partnership law may require the unanimous consent of all partners. Additionally, transactions outside the normal scope of partnership business may require unanimity.

New York law requires the unanimous consent of all partners for certain transactions. For example, Section 20(3) of the New York Partnership Act provides:

"Unless authorized by the other partners or unless they have abandoned the business, one or more but less than all the partners have no authority

to: (a) Assign the partnership property in trust for creditors or on the assignee's promise to pay the debts of the partnership, (b) Dispose of the good-will of the business, (c) Do any other act which would make it impossible to carry on the ordinary business of the partnership, (d) Confess a judgment, (e) Submit a partnership claim or liability in arbitration or reference." N.Y. Partnership Law § 20(3) (McKinney 1988) (emphasis added).

The New York Limited Partnership Act further provides:

"A general partner shall have all the rights and powers and be subject to all the restrictions and liabilities of a partner in a partnership without limited partners, except that without the written consent or ratification of the specific act by all the limited partners, a general partner or all of the general partners have no authority to: (a) Do any act in contravention of the certificate, (b) Do any act which would make it impossible to carry on the ordinary business of the partnership, (c) Confess a judgment against the partnership, (d) Possess partnership property, or assign their rights in specific partnership property, for other than a partnership purpose, (e) Admit a person as a general partner, (f) Admit a person as a limited partner, unless the right to do so is given in the certificate, (g) Continue the business with partnership property on the death, retirement or insanity of a general partner, unless the right so to do is given in the certificate." *Id.* § 98 (emphasis added).

The above consent requirements underscore the importance of examining applicable partnership law and cases decided thereunder in addition to the provisions of the partnership agreement.

Under applicable law, every general partner is an agent of the partnership for the purpose of its business. Accordingly, general partners have the power to enter into mortgage loan transactions to the extent that such transactions are reasonable and proper for the partnership business. If the transaction is outside the apparent scope of partnership business, the partnership will not be bound absent unanimous consent of all partners. *See* N.Y. Partnership Law § 20(2).

To determine whether a transaction is within the scope of partnership business, the opinion preparers should examine "past transactions indicating a custom or course of dealing peculiar to the firm in question or ... the general custom of parties and firms similarly situated." 59A Am. Jur. 2d Partnership §264 (1987). Accordingly, the opinion preparers should consider whether any contemplated mortgage or guaranty transaction is within the "usual course of business" of the partnership. If a partnership is engaged in the real estate business, transactions involving the mortgage of its assets are likely to be within the usual course of business of the partnership. However, contracts of guaranty or suretyship may require special consideration because guaranteeing obligations of third parties may or may not be within the scope of partnership business. For example, it is not

uncommon for a developer or investor (the "sponsor") to form a separate limited partnership or limited liability company to own each project or asset. Although the sponsor may serve as the general partner or managing member of each entity, the other investors may vary from project to project. If the sponsor elects to enter into a mortgage loan transaction whereby the loans on the various projects will be cross-secured and cross-defaulted, is such a transaction within the ordinary purpose of each entity? Although there may be significant advantages to such transactions, it could also be argued that such transactions involve, directly or indirectly, a guaranty by one entity of the indebtedness of another. In such circumstances, does the sponsor have the power to enter into such transactions without the consent of the other partners or members? Is a broad grant of authority in the entity's organizational documents to the sponsor a sufficient basis for a legal opinion?

How should the opinion preparers determine whether a transaction is within the usual course of business of the partnership? Obviously, the partnership agreement may specifically state the partnership's business purpose, identify permitted transactions and activities and specify approval requirements. In addition, the opinion preparers, as counsel to the partnership, should normally be involved in the transaction and may reasonably be expected to have discussed it with the managing partner. Thus, the opinion preparers should be in a position to know whether the transaction is consistent with the business purpose of the partnership. If, for some reason, the opinion preparers are not involved in the transaction, do not generally represent the partnership, and are being retained solely for the purpose of issuing the opinion, the opinion preparers should consider whether further due diligence is required or whether a limitation on the scope of inquiry should be specifically set forth in the opinion.

The opinion preparers should also be alert to warning signals that may suggest that further inquiry would be appropriate. For example:

1. Does it appear that the transaction involves a sale or mortgage of all or substantially all of the partnership's assets? Have all of the partners been notified regarding the transaction?
2. Are the opinion preparers aware of any dispute among the partners regarding the transaction or the authority of the managing partner to enter into it?
3. Does the transaction appear to involve a potential breach of fiduciary duty? For example, does it create a conflict of interest, involve related parties or appear to primarily benefit one or more of the partners and not the partnership?

Ordinarily, absent knowledge that a partner is acting beyond his or her real or apparent authority, a third party is not obligated to investigate further or search for some limitation on that partner's authority. 1 Restatement (Second) of Agency §§ 159, 161, 166 (1958). In addition, transactions between related parties may be expressly permitted by the

partnership agreement or otherwise approved by the partners. However, if a third party knows of disputes among the partners or if other special circumstances exist, it may have a duty to investigate. See *Whitney v. Citibank, N.A.*, 782 F.2d 1106 (2nd Cir. 1986) (Bank held liable for participating in the misconduct of certain partners in the partnership notwithstanding apparent power and authority of managing partners; court noted that "red flags were flying all over the place"). With respect to legal opinions, TriBar states that the opinion preparers may rely on information provided by an appropriate source unless reliance is unreasonable under the circumstances. *TriBar II Report* § 2.1.4. On the other hand, a partner's authority may not be determined solely by reading the partnership agreement. Instead, the opinion preparers should also consider limitations imposed by applicable law in light of the proposed transaction. Accordingly, if the factors set forth above are present, the opinion preparers should consider whether further due diligence and analysis would be appropriate before the opinion is issued. In addition, if the opinion preparers are aware of a dispute among the partners regarding the transaction, they should consider whether these facts should be disclosed to the opinion recipient. See *Roberts v. Ball, Hunt, Hart, Brown & Baerwitz*, 128 Cal. Rptr. 901 (1976) (complaint against law firm for failure to disclose existing dispute among the partners held to state a cause of action).

Similar issues may exist with respect to limited liability companies ("LLCs"). For example, in a member managed LLC, New York Limited Liability Company Law ("LLCL") § 402(a) provides that, unless otherwise provided in the LLC's Operating Agreement, the members of the LLC vote in proportion to their respective interests in the profits of the LLC, as determined pursuant to LLCL § 503. Unless the Operating Agreement specifies otherwise, the incurrence of indebtedness by the LLC other than in the ordinary course of business would require an affirmative vote of a majority in interest of the members entitled to vote. LLCL § 402(c). In addition, unless the Operating Agreement specifies otherwise, the sale, exchange, lease, mortgage, pledge or other transfer of all or substantially all of the assets of the LLC would require an affirmative vote of at least two-thirds in interest of the members entitled to vote. LLCL § 402(d).

In a manager managed LLC, the delegation of authority to the manager as set forth in the Articles of Organization and the Operating Agreement controls. Accordingly, the opinion preparers should review the operating agreement and applicable limited liability company law to determine whether additional approvals are required from the managers or members. See also, *Entity Program Materials supra* note 10; *Thompson* §4.7 - 4.10.

Similar issues may also arise with respect to other entities, such as non-profit, religious or charitable corporations, pension funds, and other similar entities. These special entities may not have the power to enter into the transaction without a court order or other special approval. *Id.* However, participation by such entities as Borrowers in real estate mortgage loan transactions is not common and the Committee has elected not to include an extensive discussion of due diligence issues in this Report.

27. An opinion that the Borrower has the "power" to execute and deliver the Loan Documents and to perform its obligations thereunder may implicitly include an opinion

that it has the power to own and operate the Collateral. However, some lenders may request a specific opinion regarding the Borrower's power to own and operate the Collateral as an activity meriting special mention because the income derived from operating the Collateral may be the primary source of repayment of the Loan. With respect to real estate assets, such an opinion could be construed to cover matters of local law (e.g., zoning and land use laws and building codes) or other required governmental licenses and permits. The Committee believes that, as a matter of customary practice, such a construction is not intended and that the opinion is limited to the Borrower's Organizational Documents and applicable law governing the Borrower's status as an entity. Matters of local law, including the existence of necessary licenses and permits, are usually excluded from the opinion. *TriBar II Report* § 6.3; *see supra* note 18.

28. The "power" opinion reflected by paragraph 2 of the Model Opinion addresses the issue of *ultra vires*, *i.e.*, whether the Borrower has the power under its Organizational Documents and applicable law governing its status as an entity to enter into the Loan. The "all action necessary" opinion reflected by paragraph 3 of the Model Opinion means that the Loan was approved (and the execution and delivery of the Loan Documents were authorized) in a manner consistent with the Borrower's Organizational Documents and applicable law and by the proper persons (e.g., officers, directors, stockholders, partners, members, etc.). The opinion preparers are entitled to assume, without so stating, that the persons executing the documents had the legal capacity to do so and that the signatures are genuine. *See TriBar II Report* §§ 2.3(a), 6.4. In the case of a Borrower organized in tiers, the Committee believes that an opinion as to due authorization, execution and delivery by Borrower necessarily means that the action and the documents in question have in turn been duly authorized, executed and delivered by all appropriate entities. For example, if a limited partnership Borrower is acting through a corporate general partner, it is not necessary to state explicitly that the delivery of the Loan Documents has been duly authorized by all requisite corporate action of such general partner. Of course, the opinion preparers are required to exercise appropriate due diligence to assure that the execution, delivery, and performance of the Loan Documents have been approved and authorized at all levels.

With respect to corporations, reliance is usually placed on appropriate resolutions and on incumbency certificates signed by the secretary or other appropriate officers of the corporation. With respect to partnerships and limited liability companies, such resolutions and certificates may not be routinely prepared by the Borrower. Accordingly, the opinion preparers should consider whether it is appropriate to rely on a certificate of the general partner or managing member or whether additional due diligence is required. For example, if the Borrower's Organizational Documents specify that certain actions require the approval of a majority of the partners or members, the opinion preparers should review evidence of such approval and determine whether it is broad enough to encompass the transaction as finally documented. *See Entity Program Materials supra* note 10 at 56-62.

29. The phrase "all action necessary" refers only to the Borrower's internal approval requirements and to applicable law governing the Borrower's status as an entity; it does

not cover authorization which might be required from governmental bodies or other third parties. Issues relating to required consents from third parties are typically covered by the "no breach or default" and the "no violation of law" opinions set forth in paragraphs 6 and 7 of the Model Opinion.

30. The "valid and binding" opinion confirms that a contract has been formed. Although some lawyers use the phrase "legal, valid and binding," many opinion reports state that the word "legal" is redundant and that, despite minor variations, no difference in meaning is usually intended. *TriBar II Report* § 3.1 The opinion means that all of the elements of contract formation have been satisfied and that there are no fundamental defenses to the enforcement of the contract, such as the statute of frauds. Thus, the opinion preparers must confirm that (i) the transaction involves competent parties who have acted with requisite authority, (ii) the agreement is a product of mutual intent based on adequate consideration, (iii) the transaction does not involve an illegal purpose or activity (*e.g.*, usury, gambling, etc.), and (iv) the Loan Documents have been duly executed and delivered and all conditions precedent have been satisfied or waived. To the extent that contract formation depends on the competency, authority, intent and actions of the opinion recipient, the opinion preparers are entitled to assume that all such elements have been satisfied. *TriBar II Report* § 2.3(a). Normally, the closing is evidence of the execution and delivery of documents, the receipt of consideration and the satisfaction of conditions. However, if the lawyer is acting as local counsel and is not present at the closing, it may be necessary and appropriate to cover these issues with assumptions. *See supra* note 20. Although the opinion preparers are entitled to assume the legal capacity of individuals acting on behalf of the Borrower (*TriBar II Report* § 2.3(a)); the competency of the Borrower as an entity capable of entering into the Loan Documents is covered by the "validly existing" and "power" opinions set forth in paragraphs 1 and 2 of the Model Opinion.

Although the "valid and binding" opinion implicitly covers all of the traditional elements of contract formation, it is customary in legal opinions to address some of them separately (*e.g.*, valid existence, authority, execution and delivery). *See Accord* § 10.4. In addition to the factors listed above, there may be other issues that affect contract formation, such as anti-trust laws, securities laws, treaties, environmental laws, special regulatory issues and other similar matters. These issues are deemed to be implicitly excluded from the scope of the remedies opinion and need not be specifically covered unless the opinion preparers, in the exercise of customary professional judgment, recognize that they may be applicable to the transaction. *TriBar II Report* §§ 3.5.1, 3.5.2(c).

31. An opinion on a legal issue provides the opinion recipient with the opinion giver's professional judgment of the expected legal result in the event that the opinion recipient commences litigation against the Borrower following a material default under the Loan Documents. *TriBar II Report* § 1.2. Accordingly, the phrase "enforceable" is intended to mean judicial enforcement at law in a court of competent jurisdiction. Compliance with applicable jurisdictional and procedural requirements is assumed and a reference to the statutes or other provisions of law that regulate the enforcement and foreclosure process

is not necessary. For example, some lawyers prefer to include a reference to the "one-action" provisions of Section 1301 in the New York Real Property Actions and Proceedings Law. However, such provisions do not affect the validity or enforceability of the Mortgage or the Note; instead they merely specify the required judicial enforcement procedure and impose certain limitations on the exercise of remedies and the recovery of a deficiency judgment if such procedures are not followed. The Committee believes that such limitations are implicitly excluded from the remedies opinion and need not be separately stated. However, in multistate transactions involving multiple mortgages securing a single loan governed by New York law, the application and effect of Section 1301 may be uncertain. *See* Steven G. Horowitz & Jonathan A. Reiss, *How Does Deficiency Judgment Law Apply to Multiple Mortgages?* New York Law J. (Nov. 14, 1994). In such cases, the opinion preparers should consider whether a specific exception would be appropriate.

In addition, the remedies opinion implicitly excludes the exercise of non-judicial remedies. Although it is customary for loan documents to contain provisions which purport to grant the lender certain nonjudicial, "self-help" remedies (such as the right to take possession, to collect rents, to make repairs or to act on behalf of the mortgagor pursuant to a power of attorney), these provisions are not intended to be covered by the remedies opinion. *See, e.g., Maryland Report at 737.* If such remedies can not be exercised consensually, it is likely that they will be required to be exercised, if at all, through the appointment of a receiver. Accordingly, the Committee believes that the remedies opinion should be deemed to be limited to the judicial enforcement of the obligations under the Loan Documents in accordance with and subject to the jurisdictional and procedural requirements of the forum court applying forum law. Notwithstanding such limitation, certain judicial enforcement actions (*e.g.*, an action for the appointment of a receiver or for specific performance) also may be excluded from the remedies opinion by the equitable principles limitation. *See infra* note 34.

In some transactions, the loan documents may contain a provision requiring the parties to submit all or certain disputes to binding arbitration. TriBar II takes the position that arbitration provisions are implicitly included within the scope of the remedies opinion. *TriBar II Report* §3.6. While such provisions are usually enforceable in commercial contracts, they may be inconsistent with the customary mortgage remedies of foreclosure, the appointment of a receiver and the enforcement of the assignment of rents, all of which may require a judicial proceeding. The issues arise primarily out of the relief sought in the arbitration proceeding. If the purpose of the arbitration is solely to determine liability, few complex issues may arise. However, if the arbitrator is expected to award damages, appoint a receiver or conduct a foreclosure sale, the arbitration procedure may conflict with applicable foreclosure statutes and "one-action" rules. Accordingly, the Committee believes that the remedies opinion in a mortgage loan transaction should be deemed to be limited to the judicial enforcement of the obligations under the Loan Documents in accordance with and subject to the jurisdictional and procedural requirements of the forum court applying New York law. If an opinion is desired with respect to an ancillary remedy, such as an arbitration provision, it should be specifically requested.

32. An opinion that an agreement is enforceable "in accordance with its terms" is intended to mean that each of the borrower's undertakings in the agreement will be given legal effect. *TriBar II Report* § 3.1 (including note 69). This includes all express covenants (such as the covenant to pay interest and principal or to repair and maintain the collateral), all conditions and remedies (*e.g.*, the right of the lender to accelerate the debt, to impose late charges or default interest, to appoint a receiver to collect rents and to foreclose the mortgage) and all rules of procedure or interpretation (such as choice of law clauses, severability clauses, waivers of jury trial, etc.). Thus, the remedies opinion expresses the opinion giver's professional judgment that each and every covenant, condition, remedy or other provision in the loan documents will be given legal effect. The broad and comprehensive scope of such an opinion requires that it be limited by appropriate qualifications and exceptions. Thus, the remedies opinion is qualified by the phrase "except as limited by" followed by a list of exceptions. These exceptions generally fall into three categories: (i) the bankruptcy exception; (ii) the equitable principles limitation; and (iii) other specific exceptions. *See infra* notes 33-40.

An opinion that the Loan Documents are enforceable in accordance with their respective terms implies that the Loan is not usurious. *TriBar II Report* § 3.5.2(a)(iii). Accordingly, a separate opinion with respect to usury is not necessary. However, usury is often an important and difficult issue. Many opinion recipients request a specific opinion that the Loan is not usurious and such opinions are sometimes requested from local counsel in securitized transactions. *See S&P Ratings Guide* at 127. In such circumstances, the Committee believes that a request for a specific usury opinion is not unreasonable.

33. The Bankruptcy Code gives the debtor broad powers to reject contracts, restructure agreements and avoid obligations. Accordingly, any remedies opinion must be qualified by an appropriate exception for matters arising out of the Bankruptcy Code. The bankruptcy exception also customarily includes other similar laws affecting creditor's rights generally including fraudulent conveyance issues, certain state law insolvency proceedings and other similar matters. *TriBar* notes that the bankruptcy exception relates to a body of law, rather than to a specific proceeding involving a particular person or entity, and thus refers to all situations in which insolvency principles apply. *TriBar II Report* § 3.3.2.
34. Courts of equity have inherent power and discretion with respect to the enforcement of agreements. Foreclosure has its origins as a proceeding in equity and because of its perceived harshness as a remedy, its exercise may be limited by equitable principles. In addition, although the appointment of a receiver is customary in connection with mortgage foreclosure, it nonetheless retains its status as an equitable remedy. *See* Bruce J. Bergman, *Mortgage Foreclosures in New York*, pp. 338-40, New York State Bar Association (1996) (*hereinafter* "*Bergman*"). Accordingly, the remedies opinion must be qualified by a reference to such limitations. There is general agreement that the equitable principles limitation should be broadly construed to include: (i) equitable remedies (*e.g.*, specific performance, injunction, receivership, etc.); (ii) equitable defenses (*e.g.*, waiver, laches and estoppel); and (iii) other (non-traditional) equitable concepts, such as unreasonableness of conduct, the materiality of the breach, the implied covenant of good

faith and fair dealing, impossibility, unconscionability and other similar matters. *TriBar II Report* § 3.3.4. The TriBar II Report notes that the concepts of good faith and fair dealing and unreasonableness of conduct include elements of coercion, duress, unconscionability, undue influence and, in some cases, estoppel. *TriBar II Report* § 3.3.4 n.78. In its broadest form, the equitable principles limitation encompasses many of the issues that trouble lawyers issuing opinions in real estate secured transactions. Nevertheless, because of the unique nature of most real estate-related remedies, most lawyers agree that the equitable principles limitation, by itself, is not sufficient and that additional qualifications are required. These additional exceptions usually relate to issues that arise under real property law and to the consequences of foreclosure as the primary remedy for default. *See infra* notes 36-40.

35. There has been substantial controversy regarding the enforceability of an assignment of rents. *See, e.g.*, John C. Nelson, *Does a Separate Document Assigning the Landlord's Interest in Leases Serve Any Purpose?*, 21 N.Y. Real Prop. Law Section Newsletter 12 (January 1993); John K. Bouman & John R. O'Connor, *The Conditional Assignment of Rents in New York: Enforcement Concerns in Bankruptcy*, 22 N.Y. Real Prop. Law Section Newsletter at p. 8 (Spring 1994); John K. Bouman, *Powers, Limitations and Liabilities of Mortgagees in Possession and Receivers of Rents and Profits*, 23 N.Y. Real Prop. L.J. 105 (Summer 1995). Most of the discussion and debate relates to the following issues: (i) whether such assignments are enforceable if they purport to be present and "absolute" assignments; (ii) whether "self-help" provisions which purport to grant the lender the right to collect rents and manage and operate the property are enforceable; and (iii) whether such assignments will be deemed to be "perfected" for bankruptcy purposes. However, many of the troublesome issues may be avoided if the opinion with respect to such assignments is limited to circumstances involving judicial enforcement by a receiver after the occurrence of a material default and acceleration of the debt. *See supra* note 31. As with other issues, no opinion is expressed regarding the enforceability of the assignment in a bankruptcy proceeding. The opinion does not address (and is not intended to address) issues relating to "absolute" assignments or the enforceability of "self help" remedies and other similar provisions.
36. As noted above, an opinion that an agreement is "enforceable in accordance with its terms" means that each of the borrower's undertakings in the agreement will be given legal effect. *See supra* note 32. Although the "each and every" approach requires a separate analysis of each provision in the agreement, in practice most enforcement issues will be inextricably linked to other provisions and to the circumstances surrounding the breach. For example, it is difficult to imagine circumstances where provisions granting a lender the right to accelerate the debt or to impose late charges or requiring the borrower to pay attorneys' fees or waive its right to a jury trial would be separately enforced; instead such issues will usually arise, if at all, in the context of a breach of some other provision, usually a monetary default or a material non-monetary default. In such circumstances, the enforceability of these ancillary provisions may be affected or limited by the nature of the primary default. Thus, the problem with the "each and every" premise of the remedies opinion is that it takes a narrow view of the loan documents with each provision isolated and separated from the others; the opinion preparers, however,

instinctively know that judges and juries are likely to take a broader view of the transaction and decide enforceability and liability issues in the context of all relevant circumstances.

Accordingly, many lawyers believe that if the "each and every" approach is utilized as the basis for the opinion, it will be necessary to identify every provision in the loan documents that might not be enforceable. This approach, usually referred to as the "laundry list," can result in a long and detailed list of exceptions to the remedies opinion. Many lawyers also include a long list of assumptions which are intended to exclude many issues from the scope of the remedies opinion. Such exceptions and assumptions often overwhelm the opinion and make it very difficult to understand. An extensive list of exceptions also creates unnecessary debate and controversy between borrower's and lender's counsel. As a result, the laundry list has been widely criticized. *See, e.g., ABA/ACREL Report* at p. 585; *Thompson* § 5.13; Alan Joel Robin & Edward M. Pollock, *An Approach to Opinion Letters — the Silverado Accord and Other Model Forms From A Recipient's Perspective*, 29 Real Prop. Prob. & Tr.J. 611 (1994). According to the ABA/ACREL Report, its principal defects are that it may not be comprehensive in all cases, that it may include vague, broadly stated and overlapping issues, and that, inevitably, it becomes a treatise on the law of secured transactions which merely increases the cost of the opinion without any corresponding benefit to the opinion recipient. *Id.* One noted commentator observed that the laundry list does not "place in perspective, in any practical fashion, either the relative importance of the doubtful provision or the degree of doubt as to enforceability." *Thompson* § 5.13 at 154. Nevertheless, despite such criticism, many opinion reports include a substantial "illustrative" laundry list of exceptions and other qualifications. For example, the Accord includes ten standard exceptions. *Accord* § 14. The ABA/ACREL Report adds four more exceptions for real estate transactions. *ABA/ACREL Report* at 600. The California Report includes seventeen "California Qualifications". *California Report* at 3. Despite the best of intentions, a codified laundry list is still a laundry list. Like Pinocchio's nose, it has a tendency to get longer and longer.

As a result of dissatisfaction with the laundry list approach, many lawyers have searched for an easier, more comprehensive, method of narrowing the scope of the remedies opinion while at the same time providing adequate assurance to the opinion recipient. These efforts have created various formulations based on a broad "generic" qualification, which purports to exclude certain potentially unenforceable or ineffective provisions in the loan documents (without identification), coupled with some assurance regarding the overall validity of the transaction and the ability of the lender to realize on its security following default. Its purpose is to address the consequences of the "each and every" premise of the remedies opinion by focusing on the remedies and other provisions that are most important to the opinion recipient: enforcement of the debt, acceleration, enforcement of the assignment of rents and foreclosure.

The 1989 Report recommended the use of a generic qualification rather than a "laundry list" of specific exceptions and the Committee confirms that recommendation. *1989 Report* at 64, n. 44. The statement "certain provisions of the Loan Documents may be

further limited or rendered unenforceable by applicable law" is the form of generic qualification recommended by the Committee. It warns the opinion recipient that certain (unidentified) provisions may not be enforceable as written. TriBar notes that such an exception is often used in lease and secured financing transactions. *TriBar II Report* § 3.4.1. However, because the generic qualification does not identify the relevant unenforceable provisions, it could permit an opinion to be issued even if the loan documents contain a fatal legal flaw. Accordingly, without some form of assurance, the opinion would be unacceptable. The Model Opinion sets forth two such assurances: (i) an assurance that the loan documents are not "invalid as a whole," and (ii) a further assurance that such limitations do not substantially interfere with a "realization of the principal benefits or security" provided by the Loan Documents (Alternative 1) or preclude the exercise of specified remedies following a material default (Alternative 2).

The first assurance effectively reinstates the "valid and binding" opinion. It confirms that, whatever legal defects may exist in the loan documents, they do not affect contract formation or the common law remedy of an action at law for damages following breach. However, few lenders in commercial mortgage loan transactions would be content with such an opinion without some further assurance. The remedies of acceleration, enforcement of the assignment of rents and foreclosure are the very essence of the transaction. Accordingly, the Model Opinion provides two alternative forms of such further assurance.

37. The "practical realization" approach and the "material default" approach set forth in the Model Opinion as Alternative 1 and Alternative 2, respectively, are both customary forms of the generic qualification and assurance. Both are intended as substitutes for the laundry list and both adequately achieve that objective. The Committee recognizes that the "practical realization" approach and the "material default" approach have both gained wide acceptance by opinion givers and opinion recipients in real estate secured transactions. Accordingly, the Committee believes that both approaches are acceptable and has included both forms as alternatives in the Model Opinion.
38. Alternative 1 in the text sets forth a customary statement to the effect that such limitations "will not substantially interfere with realization of the principal benefits and/or security" provided thereby. This statement is identical to the form of assurance recommended in the 1989 Report. *1989 Report* at 57. The TriBar II Report (and many other opinion reports) insert the words "intended to be" before the word "provided" and the word "practical" before the word "realization". *TriBar II Report* § 3.4.1. Despite these minor variations, no significant difference in meaning is intended. The Committee has elected not to include the words "intended to be" and "practical" in Alternative 1. The words "intended to be" are sometimes included to avoid a tautological interpretation of the opinion. The word "practical" is often included and, according to TriBar, the phrase "practical realization" is "encrusted with tradition." *Id.* However, the word "practical" has no precise meaning and the 1989 Report deleted it in order to reduce the possibility that the opinion could be construed to mean that the exercise of remedies would proceed efficiently and without undue delay, difficulty or expense. Notwithstanding the deletion of the word "practical", this form of assurance is usually referred to as the "practical

realization" approach, although some believe that "principal benefits" is a more accurate description. The use of the term "security" is not intended to imply any opinion with respect to the creation or priority of any liens on or security interests in the Collateral. *See supra* notes 15, 16.

The purpose of the practical realization approach is to suggest a way to avoid dealing with relatively unimportant provisions whose enforceability is problematic. *1989 Report*, at 64, n. 44. Opinion givers also use it to avoid the time, effort and cost of analyzing each provision, and to eliminate the need to include a laundry list of specific exceptions. *TriBar II Report* § 3.4.1. However, it has been criticized because (i) it is ambiguous and may be misleading; (ii) the use of the term "practical" appears to focus on economic results rather than legal conclusions; and (iii) it does not identify which provisions are among the principal "benefits" of the transaction. *TriBar II Report* §3.41; *Texas Report* §4.2, *California Report*, at 3; *Florida Report*, Section VIII at 43; *Maryland Report* at 739. How does the opinion giver know what benefits the opinion recipient expects? What about due-on-sale clauses, late charges, prepayment penalties, waivers of jury trial or nonjudicial, "self-help" remedies? Are such benefits included or excluded from the practical realization opinion? What is meant by "realization?" Does it mean that the lender will be able to successfully foreclose and be repaid out of the proceeds? The *TriBar II Report* states that the opinion means that the provisions, taken as a whole, will provide the lender with its bargained-for ability to realize upon its security and to pursue a claim for damages. *TriBar II Report* § 3.4.1. In any case, words and phrases like "substantially interfere," "realization" and "principal benefits" are elastic terms that may be interpreted differently by opinion givers than they are by opinion recipients. However, the practical realization approach is cost effective and customary in opinions involving real estate secured transactions. The Committee joins *TriBar* in concluding that its continued use is acceptable.

39. Alternative 2 in the text (usually referred to as the "material default" approach) sets forth a formulation of the assurance which is intended to avoid some of the ambiguity inherent in the practical realization approach. It focuses on the four remedies which are likely to be most important to the lender: (i) enforcement of the debt; (ii) acceleration following a material default; (iii) enforcement of the assignment of rents and (iv) foreclosure. This formulation (with minor variations) has been recommended by bar association opinion committees in several states including Florida, Texas and California. *Florida Report*, Section VIII at 43; *Texas Report* § 4.2; *California Report* at 3. It is also discussed in the ABA/ACREL Report. *ABA/ACREL Report* at 598. Although the intended scope of these various formulations is substantially the same, the Committee believes that the term "material default" most accurately expresses the underlying concept. *See infra* note 40.

The principal area of controversy relates to the meaning of "material" in clause (ii). Although "material" is a term that may not be defined with precision, it is also a familiar and fundamental common law concept. Unlike the terms "practical realization" and "principal benefits," it has a long tradition of application by courts in contractual disputes. Although any breach may theoretically give rise to a cause of action for damages, it is only a material breach which excuses performance by the other party. A

material breach is one that the injured party can elect to treat as a total breach, thus excusing further performance by the non-breaching party and permitting such party to terminate the contract. See, Restatement of the Law (Second), Contracts § 237. Thus, only a material default will permit the lender to accelerate the debt and commence foreclosure. See *Bergman*, at 217-18. As used herein, the term "material default" is intended to mean that a court has concluded that all of the legal elements necessary to permit acceleration and foreclosure have occurred. Thus, the only remaining issue is whether there is some other provision of law or supervening illegality that would prevent the exercise of remedies.

Some concern has been expressed regarding the material default approach because it requires the opinion preparers to read and analyze each and every provision (including relatively unimportant provisions) in the loan documents to determine whether such provisions would be enforceable if a material default occurred. However, to the extent that such concern is based on a desire to avoid the obligation to review and consider all of the provisions in the loan documents, it is misplaced. TriBar states that the opinion covers "each undertaking by the Company in the agreement." *TriBar II Report* § 3.1. The Committee concurs and believes that a review of the entire transaction (including "boilerplate" and other ancillary provisions) is an expected and customary part of the opining lawyer's professional responsibility. On the other hand, the existence of a material default depends on future facts and circumstances which are unknown at the time the opinion is issued. The opinion preparers have no way to predict whether a future breach will constitute a material default. Thus, many lawyers have elected to include a long laundry list of potential exceptions to enforceability. As noted above, this result is generally unsatisfactory to both the opinion giver and opinion recipient.

The solution to this dilemma is to base the opinion on an assumption that a material default has occurred. Thus, the opinion preparers are required to identify in the opinion only the legal consequences of such a breach. The opinion preparers are not required to determine, in the abstract, whether a provision is material or whether its breach would constitute a material default. See *infra* note 40. Accordingly, the material default concept assumes that (i) a breach has occurred, (ii) the lender has been damaged as a result of the breach, (iii) all required notices have been given and all grace periods have expired, (iv) the lender has accelerated the loan and commenced foreclosure litigation, and (v) the court has determined that, based on the circumstances existing at the time, the breach constitutes a material default. Thus, the narrow legal issue to be determined is whether the specified remedies of acceleration, enforcement of the assignment of rents and foreclosure would then be available. If a breach is determined to constitute a material default, the lender should be permitted to accelerate the debt, and, in accordance with applicable law and procedure, commence and complete a foreclosure and obtain a judgment for the amount of all outstanding interest and principal and, if applicable, all late charges, default interest, protective advances, prepayment charges and reasonable costs and expenses of enforcement. If enforcement would not be permitted notwithstanding a material default, a specific exception should be included in the opinion.

In most cases, the list of additional exceptions, if any, should be very short. For example, a covenant to pay interest at a specified rate could be materially breached but still not be enforceable if such covenant violates applicable usury laws. In such cases, the opinion giver should include a specific exception in the opinion or restructure the transaction to comply with applicable law. Similar issues may arise with respect to "due-on" clauses, prepayment charges, late charges and other similar provisions. In many transactions (including securitization and other capital markets transactions), such provisions are an important part of the bargain and the parties expect them to be enforceable. Accordingly, if the opinion preparers believe that enforcement would not be permitted notwithstanding a material default, a specific exception should be included in the opinion. However, any such exception should be based on applicable statutes and case law and not on vague and unidentified fears. For example, the Committee believes it is inappropriate to include a statement in the opinion to the effect that a specified prepayment provision may be enforceable only "to the extent not deemed a penalty." See *ABA/ACREL Report* at 595. Such tautological opinions are useless and an exception should not be included unless the opinion preparers believe, based on experience and research, that there is a significant risk that such provision will be unenforceable. Important economic issues like due-on clauses, prepayment charges and late charges should not be swept under the rug. Instead, counsel should cooperate in drafting a provision that complies with applicable law and that will be enforceable following a material default. Indeed, spotting and resolving such issues is one of the principal purposes of the opinion process.

The "material default" approach is intended to assure the opinion recipient that legally sufficient elements exist in the loan documents or under applicable law to enable the opinion recipient to exercise certain specific remedies against the borrower following a material default, including the right to accelerate and enforce the debt and, in accordance with applicable law, to foreclose the lien of the mortgage and to enforce the assignment of rents. No assurance is intended with respect to the enforcement of any provision in circumstances which do not constitute a material default nor is any assurance intended with respect to the enforceability of ancillary provisions such as "self help" remedies or other common law or statutory rights relating to notice, opportunity to cure and rights of reinstatement or redemption.

Although the material default approach focuses on the exercise of specific remedies as a result of acceleration of the loan following a material default, one noted commentator observed that it is important for the opinion preparers to understand that all provisions are included within the scope of the opinion. Karl B. Holtzschue, *Opinions on Real Estate Transactions in a Post Accord World: The Opinion Giver's Perspective*, 29 Real Prop. Prob. & T.J. 655 at 709 (1994) (an opinion that a loan can be accelerated for a material breach of a provision subsumes an opinion that such provision is not unenforceable; such "back door" enforceability opinions may provide a "trap for the unwary" and opinion preparers should not take undue comfort from the fact the opinion is limited merely to an opinion on acceleration).

40. The term "material default" has been deliberately selected instead of other similar formulations, such as "a material breach of a material provision", which are often

suggested by bar association committee reports. *See ABA/ACREL Report* at 592-98; *California Report* at 3; *Florida Report*, Section VIII at 42; *Texas Report* at 16. Although these other formulations are intended to have substantially the same meaning, the term "material default" more accurately describes the underlying concept. It also clarifies and resolves the concern expressed by TriBar that the term "material provision" may imply that an analysis must be made with respect to whether each covenant or provision is, in the abstract, "material". TriBar notes that such an approach may be "unworkable". *TriBar II Report* § 3.1 n. 69. However, under the material default approach, no such analysis is required. Materiality is always a function of the nature, circumstances and consequences of the breach. A breach of a covenant may be material in one context and not in another. For example, the failure of a mortgagor to provide fire insurance may be a material breach in the context of a mortgage creating a lien on an office building but not a material breach in a mortgage covering agricultural land with no valuable structures. *Freeman v. Lind*, 181 Cal. App. 3rd 791, 226 Cal. Rptr. 515 (1986). In addition, it might be possible to have a material breach of an immaterial covenant (e.g., a failure to provide a required notice or certificate) or an immaterial breach of a material covenant (e.g., an inadvertent late payment which is promptly cured). In either case, it is unlikely that a court would conclude that a material default has occurred and permit the lender to terminate performance and complete a foreclosure. *Bergman*, at 217-18. Materiality must also be considered in the context of the specific terms of the agreement. The parties to commercial mortgage loan transactions usually have significant freedom to determine the scope of their bargain and the consequences of a breach. Mortgage loan documents typically contain detailed provisions regarding events of default, notice, opportunity to cure and the procedure for the exercise of remedies. Principal economic terms (e.g., covenants relating to payment of principal and interest, late charges, prepayment penalties, repair and maintenance, taxes, insurance, financial covenants, delivery of financial statements, removal of liens, due-on-sale clauses and other similar provisions) most always will be deemed to be material although a breach may not be. Although a "material default" may constitute an "Event of Default" under the Loan Documents, the reverse is not always true; therein lies the problem for the opinion giver. A default may not always be deemed to be material and a remedy may not always be available even if the contract specifies otherwise. Because there is no effective way for the opinion preparers to determine whether a provision is material and, if so, to predict what the circumstances will be on the date of the breach, the material default approach is based on an assumption that a material default has occurred. *See supra* note 39.

The assumption that a material default has occurred changes the focus of the remedies opinion. It addresses the concerns expressed by TriBar that a "material provision" test requires the opinion preparers to identify whether a provision is "material". *TriBar II Report* § 3.1 n.69. However, even if it were possible to identify all material provisions, there could be some circumstances where a breach of such provision would permit enforcement and others where enforcement would be denied. Because the possibilities are nearly limitless, the scope of the opinion could be uncertain. The material default approach addresses such uncertainty by (i) including every provision within the scope of the opinion and (ii) limiting the opinion to the legal consequences of a breach based on an assumption that a material default has occurred. As a result, the analysis is simplified:

either a specified remedy will then be available or it will not be. Unless the provision is clearly invalid or illegal, enforcement should be permitted. If not, a specific exception should be included in the opinion. As indicated in note 39, the list of additional exceptions, if any, should be very short. The material default approach does not require the opinion preparers to look forward from the date of the opinion and to anticipate all possible consequences of a breach; instead, it permits them to look backward from the date of the breach and to assume that all relevant facts necessary to constitute a material default have occurred. In addition, because the material default approach is limited to the exercise of certain specified remedies, issues relating to the enforcement of ancillary remedies, self-help provisions and rules of interpretation and procedure are eliminated. Thus, because the material default approach is both more comprehensive (all provisions are potentially covered) and narrower (only specified remedies are covered following a material default), it is more responsive to the concerns of both the opinion giver and the opinion recipient.

41. The enforcement of guarantees raises many complex legal issues. It is customary for guarantees to contain provisions which purport to waive all rights and defenses which the guarantor might otherwise have. The Model Opinion assumes that the Guaranty contains such provisions. Such rights and defenses usually arise under the common law of suretyship and include exoneration and subrogation. Generally, a surety is exonerated if (i) the underlying obligation is altered in any material respect, (ii) the remedies of the creditor against the debtor are impaired, and (iii) the creditor fails to pursue the debtor first or otherwise fails to marshal its remedies and security and, as a result of the creditor's actions, the rights of the surety against the debtor are thereby impaired. In addition, to the extent the surety pays or performs the underlying obligation, it is entitled to be subrogated to the rights of the creditor against the debtor, including the right to enforce any lien on collateral then held by the creditor.

These common law rights and defenses are usually waived in most customary forms of guaranty and additional provisions are included to confirm that the guarantor remains liable under any and all circumstances. Although a guarantor is, in form, secondarily liable for the obligations of the borrower under the loan documents, in substance, such waivers and other provisions effectively create primary liability. In some respects, such liability may be more burdensome than the obligations under the loan documents. While most provisions which waive rights and defenses otherwise available to a guarantor are likely to be enforceable in commercial loan transactions, there may be some limit to the effectiveness of certain provisions. *See Thompson* §§ 6.16-6.17. Accordingly, the Committee believes that it may be appropriate to consider whether the opinion should include additional qualifications regarding the enforceability of these waivers and other provisions.

For example, most guarantees contain provisions to the effect that the guarantor remains liable notwithstanding material amendments and modifications to the underlying obligations. In addition, guarantees typically contain provisions which grant to the lender broad rights to enforce the obligations of the borrower under the loan documents or to take other actions following a default, in each case without notice to the guarantor. In

most cases, provisions entitling the lender to modify the underlying obligation or to elect its remedies against the borrower or against the guarantor should be enforceable. See *American Bank & Trust Co. v. Koplik*, 87 A.D.2d 351, 451 N.Y.S.2d 426 (1st Dept. 1982) (a change in the payment terms did not vitiate the guaranty); *Fidelity Union Trust Co. v. Robert J. Ball Sales Inc.*, 99 A.D.2d 436, 470 N.Y.S.2d 613 (1st Dept. 1984) (guarantors were bound to satisfy obligations in spite of modifications to their obligations); *Thompson* §§ 6.16-6.17. Nevertheless, because of the absolute (and usually one-sided) nature of customary provisions relating to modifications of the underlying obligation, waivers of notice or election of remedies, there could be circumstances where such provisions would not be strictly enforceable as written. Of course, it could be argued that any exceptions to enforcement are implicitly included in the equitable principles limitation. The requirement of notice and other similar concepts of contractual "due process" are probably included in the implied covenant of good faith and fair dealing which is excluded from the opinion by the equitable principles limitation. *TriBar II Report* § 3.3.4. Nevertheless, the Committee believes that it is appropriate to include a specific exception in the opinion. Accordingly, paragraph 5 of the Model Opinion includes a generic qualification and alternative forms of assurance similar to the qualification and assurances recommended in paragraph 4 of the Model Opinion for the remedies opinion with respect to the Loan Documents. The absence of a specific exception does not, however, imply that all such waivers are enforceable. On the other hand, the Committee believes that it is not necessary to include a reference to statutes or other provisions of law that regulate or affect the procedure for enforcing the guaranty. For example, there is authority to the effect that the "one-action" provisions of Section 1301 of the New York Real Property Actions and Proceedings law apply to actions against guarantors of mortgage debt. See Michael J. Feinman & William Zeena, Jr. *Election of Remedies Statute's Effect on Holders of Mortgage Loan Guaranties*, 207 NY Law J. 1 (March 11, 1992). Nevertheless, the Committee believes that such limitations, if any, are implicitly excluded from the remedies opinion and need not be separately stated. See *supra* note 31.

There are other issues that may affect the enforcement of guarantees. If a guaranty is given by a subsidiary or an affiliate (sometimes referred to as an "up stream" or "cross stream" guaranty), issues may arise with respect to its enforceability. Such issues usually include (i) whether the issuance of such a guaranty is *ultra vires*, (ii) whether it is supported by adequate consideration, and (iii) whether it is void or voidable under applicable bankruptcy, insolvency or fraudulent conveyance laws. The Committee believes that issues (i) and (ii) are included in the "power" and "remedies" opinions, respectively, and that issue (iii) is excluded from the opinion by the bankruptcy exception. Nevertheless, in certain circumstances, a specific exception or limited opinion may be appropriate. Likewise, special issues may arise with respect to guarantees given by charitable, religious, non-profit or other similar institutions or by unincorporated associations. Such issues usually relate to the power of such an entity under its Organizational Documents and applicable law to issue the guaranty. As noted above, the Committee believes that such issues are implicitly included in the opinion regarding the power of the guarantor to execute and deliver the guaranty. See *Entity Program Materials supra* note 10 at 45-6; *supra* note 26. Accordingly, if the guaranty is to be issued by such

an entity, the opinion preparers should consider whether further research and/or evidence of authority is required in order to issue the opinion.

Finally, to the extent the guaranty covers performance by the borrower of certain obligations under the loan documents (such as the obligation to construct and complete the project), certain additional issues may arise. Many construction loans include a "Completion Guarantee", *i.e.*, a promise by the Guarantor to complete the project "lien free" and on time. If the borrower defaults, is the guarantor entitled to access to or possession of the site? Is it entitled to an assignment of the construction contract and other agreements? If it elects to perform, is it entitled to receive the undisbursed balance of the loan proceeds? What happens if the lender forecloses and thereafter elects to complete the project itself or to abandon it and sell it to a third party? In such instances, what is the extent of the guarantor's liability? Notwithstanding broad language in the guaranty, the lender may not be able to compel the guarantor to specifically perform the borrower's obligations under the loan documents. Instead, if the guarantor defaults, the most likely remedy would be an action at law for damages against the guarantor. The Committee believes that the issues referred to above primarily relate to the measure of damages to be recovered and not to the enforceability of the guaranty and that any defenses available to the guarantor in such circumstances are included in the equitable principles limitation and need not be separately stated.

42. The opinion expressed in paragraph 6 of the Model Opinion is often referred to as the "no breach or default" opinion. The TriBar II Report notes that, historically, such opinions addressed whether the execution and delivery of the Loan Documents and the performance by the Borrower of its obligations thereunder would "conflict" with the Borrower's Organizational Documents or with its other agreements and court orders. *See TriBar II Report § 6.5.2.* However, because of a growing concern regarding the imprecision of the word "conflict," TriBar elected to replace the word "conflicts" with "violations" when the opinion refers to the Borrower's Organizational Documents and court orders, and with "breaches" and "defaults" when the opinion refers to other agreements. *Id.* The Committee concurs.

The "no breach or default" opinion recommended by TriBar includes a reference to the "performance by the Company" of its obligations under the agreement. *TriBar II Report § 6.5.* TriBar notes that such an opinion covers breaches or defaults that could occur in the future and that, in many cases, the consequences of a future breach may be beyond the intended scope of the opinion:

"Provisions in existing contracts that will be breached or result in a default only if specified events have (or have not) occurred or specified circumstances exist (or do not exist) at the time the Company is called on to perform its obligations under the agreement are beyond the scope of the no breach or default opinion since the opinion preparers have no way to determine on the date of the opinion letter what the effect of those provisions will be when performance by the Company is required to occur." *TriBar II Report § 6.5.4 (footnote omitted).*

With respect to real estate loans, the issue is equally difficult, if not more so. The Loan Documents will typically contain provisions requiring the Borrower to construct improvements, to repair and maintain the Collateral, to lease and manage the project, to comply with laws and other similar matters. In the ordinary course of business, such activities may require the consent or approval of ground lessors, tenants, the holders of easements, contractors, neighbors, other lien holders, insurers, governmental authorities and other third parties. Accordingly, it is not possible to predict whether the Borrower's future "performance" will constitute a breach or default with respect to any agreement with any such person. For these reasons, the 1989 Report limited the scope of the opinion to the "payment by Borrower of the indebtedness evidenced by the Note." *1989 Report* at 57-58. The Committee has elected to continue that practice. If an opinion is desired with respect to a particular activity of Borrower and/or compliance with the requirements of a particular agreement, it should be specifically requested.

43. TriBar also notes that to the extent that the "no violation" opinion covers the Borrower's Organizational Documents, it may be redundant with the power and remedies opinions. However, TriBar observes that the practice of requesting such opinions is "well established." *TriBar II Report* § 6.5.1. However, if the Borrower is a newly formed, special purpose entity whose only asset is the Collateral and whose only obligations are the Loan Documents, the "no breach or default" opinion may be unnecessary.
44. TriBar notes that "unless the Company is very small or newly formed, the opinion preparers are unlikely to have personal knowledge of every contract and court order to which the opinion might conceivably apply." *TriBar II Report* § 6.5.5. Accordingly, the parties should agree on a method for identifying the contracts and court orders that the opinion preparers are expected to review. In many transactions, the most practical solution is for the opinion preparers to rely upon a certificate of an appropriate officer, partner or member of the Borrower which identifies the relevant contracts, agreements and court orders and to list such documents in a schedule attached to the opinion. In real estate transactions, identifying such documents should be relatively easy, especially if the Borrower is a special purpose entity whose only asset is the Real Property. Typically, such documents would include ground leases and other leases, existing financing, intercreditor agreements, reciprocal easement agreements, construction contracts, development agreements and other similar matters. The use of a schedule identifying specific agreements and orders may make it unnecessary to qualify the opinion by the phrase "to our knowledge." *See infra* note 47. TriBar also notes that, in many cases, inside counsel may be more knowledgeable about contracts and court orders binding on the company than outside counsel, and thus opinion recipients often accept (and may prefer to receive) the no breach or default opinion from inside counsel even if other opinions are provided by outside counsel. *Id.*

Traditionally, the "no breach or default" opinion also included a statement to the effect that the execution and delivery of the Loan Documents by Borrower would not result in the "creation or imposition of a lien, charge or encumbrance upon any of the properties or assets of Borrower." *1989 Report* at 58. The issue of whether the execution and delivery of the Loan Documents will result in the creation of a lien on the Borrower's assets (other

than the liens and security interests created thereby) arises, if at all, primarily in circumstances where the Borrower is a party to an agreement with some third party that includes a "negative pledge," i.e., a promise not to further encumber the Borrower's assets or, if a lien is granted to someone else, a promise to grant such third party an equal and ratable lien. If such an agreement exists, a breach of the "negative pledge" covenant will not ordinarily create a lien on the Borrower's assets in favor of such third party; instead, it will merely constitute a default under such other agreement, a circumstance covered by clause (b) set forth in paragraph 6 of the Model Opinion. In addition, the lender's policy of title insurance will usually provide affirmative insurance against any such "springing" lien. *See supra* note 15. Transactions involving a "negative pledge," particularly those which purport to provide for "springing liens," are not common in loans secured by commercial real estate. Such provisions are more common in unsecured lines of credit to operating companies. Thus, an opinion to the effect that the execution and delivery of the Loan Documents will not result in the creation of a lien on the Borrower's assets would seem to be unnecessary in most real estate transactions. The Committee notes that such an opinion is not included in the "no breach or default" opinion recommended by TriBar. *TriBar II Report* § 6.5. Accordingly, the Committee has not included such an opinion in the 1998 Report.

45. The "no violation of law" opinion addresses the legal consequences of the transaction that may be significant to the opinion recipient. *TriBar II Report* § 6.6. Despite its apparent breadth, it does not cover all laws and is generally deemed to exclude laws relating to tax, insolvency, antitrust and securities matters, environmental laws as well as local laws, such as city ordinances, zoning regulations, building codes and other similar laws. *See supra* notes 17, 18. As in the case of the remedies opinion, the no violation of law opinion is understood as a matter of customary practice to cover only those laws and published rules and regulations that, given the nature of the transaction and the parties to it, the opinion preparers exercising customary diligence would reasonably recognize as being applicable.
46. As noted above, the TriBar II Report includes the phrase "performance by the Company" of its obligations under the agreement in lieu of the phrase "payment of the indebtedness evidenced by the Note." However, TriBar observes that, to the extent the opinion covers future performance, the analysis applied to the "no breach or default" opinion should also apply to the "no violation of law" opinion. *TriBar II Report* § 6.6; *supra* note 42. For the reasons set forth in note 42, the Committee believes that the scope of the opinion should be limited to the payment of the indebtedness evidenced by the Note and should not include "performance" by the Borrower of its obligations under the Loan Documents. An opinion that the performance of the Borrower's obligations will not violate applicable law could be interpreted as an opinion that the Borrower's obligation to construct, repair and maintain the Collateral and other similar activities will then comply with and be permitted under applicable zoning, building and other laws. The Committee believes that such an interpretation is not appropriate. Matters of local law are ordinarily excluded from the scope of the opinion. *See supra* note 18. If an opinion regarding the Borrower's "performance" is requested, the opinion giver should be entitled to assume that the Borrower will perform its obligations in compliance with applicable law and will obtain,

in the ordinary course, such licenses and permits as may then be required. On the other hand, if there is some fundamental requirement of law that would prevent (instead of merely regulate) future performance by the Borrower, and if the opinion preparers exercising customary diligence would reasonably recognize it as being applicable to the transaction, it should be identified as an exception in the opinion. *TriBar II Report* §§ 6.5.4, 6.6. It should be noted that, whether or not the opinion covers performance under the Loan Documents, an opinion that payment of the indebtedness evidenced by the Note will not violate any applicable law implies an opinion that the Loan is not usurious. *See supra* note 32.

47. TriBar suggests that the phrase "to our actual knowledge" or some similar phrase is unnecessary and the inclusion of the phrase does not limit the customary diligence that lawyers undertake to support the opinion. *TriBar II Report* §2.6.1. Nevertheless, TriBar also notes that, as a matter of customary diligence, the opinion preparers are not expected to check court records or review the Borrower's files. *Id.* Although the Committee concurs in TriBar's view, it believes that the phrase "to our actual knowledge" appropriately alerts the opinion recipient regarding the limited investigation undertaken by the opinion preparers. *TriBar II Report* § 1.4(d). Such a limitation may be especially important in circumstances where pending litigation may, directly or indirectly, affect the Collateral but not name the Borrower as a party. *See infra* note 48. A similar limitation was set forth in the 1989 Report. *1989 Report* at 58.
48. The opinion set forth in paragraph 8 of the Model Opinion is usually referred to as the "no litigation" opinion. TriBar notes that opinion recipients sometimes seek information regarding pending or threatened actions against the Borrower that may affect the transactions contemplated by the Loan Documents. TriBar also states that such opinion is usually given by inside counsel for the Borrower. *TriBar II Report* § 6.8. It is important to note that the "no litigation" opinion does not pass on the merits of particular actions or predict their likely outcome and, in most cases, an evaluation of pending or threatened litigation would not be appropriate. *Id.* § 6.8. According to TriBar, the opinion has the following purpose:

"The no litigation opinion is intended to elicit information regarding the existence of pending and threatened actions and proceedings ("litigation" for purposes of the following discussion) that might be of concern to the opinion recipient. Thus, the opinion often takes the form of a statement that the Company is not a party to any litigation known to the opinion preparers that may have an adverse effect on the transaction or a material adverse effect on the Company and that is not identified in a schedule to the agreement, an officer's certificate or some other list of litigation referred to in the opinion letter. The presence or absence of a "to our knowledge" qualifier does not change the meaning of the opinion. With or without "to our knowledge," the opinion does nothing more than provide comfort to the opinion recipient that the opinion preparers do not know the list of litigation referred to in the opinion letter to be incomplete or unreliable. As a matter of customary diligence the opinion does not require

that the opinion preparers check court or other public records or review the firm's files (and an express disclaimer to that effect in the opinion letter is not necessary). Nevertheless, the opinion preparers may check the firm's litigation docket (if one exists) and, if they are not themselves familiar with the litigation the firm is handling for the Company, may seek the advice of a litigator or other lawyer in the firm who is." *Id.* § 6.8 (*footnote and cross references omitted*).

It is also important to note that the opinion addresses only actions pending or threatened against the Borrower; it does not cover actions which might affect the Collateral. This is a change from the 1989 Report which covered actions "specifically applicable to the Premises". 1989 Report at 58. TriBar notes that an opinion regarding litigation to which the Borrower is not a party but is otherwise subject can raise a variety of problems for the opinion giver and, if given at all, normally should be given only by inside counsel (or by outside counsel who performs a similar function). *TriBar II Report* § 6.8, n.177. The Committee believes that including an additional limitation on the scope of the opinion is appropriate because it may be very difficult to determine whether any actions affect Collateral if the Borrower is not named as a party in such action. For example, an environmental group could bring an action against a local governmental authority contending that its general plan, zoning laws or discretionary approvals were invalid or that the development of certain projects should be stayed until an environmental review has been completed. Such actions could directly or indirectly affect the transactions contemplated by the Loan Documents, but they may not name the Borrower as a party nor specifically identify the affected property. As a result, discovering the existence of such litigation (or confirming that no such litigation exists) may be difficult, time consuming and not cost effective. Accordingly, litigation affecting the Collateral is not included in the "no litigation" opinion unless specifically requested by the opinion recipient. In any case, the no litigation opinion does not pass on the merits of particular actions or predict their likely outcome. *TriBar II Report* § 6.8.

49. If appropriate, the opinion giver should include any additional opinions requested by the opinion recipient and any additional exceptions. With respect to the remedies opinion, if a generic qualification and assurance are included in the opinion, is it necessary or appropriate to also include additional specific exceptions and qualifications? The generic qualification is intended to address the consequences of the "each and every" premise of the remedies opinion. *See supra* note 36. Accordingly, the generic qualification, together with the bankruptcy exception and the equitable principles limitation, are intended to cover, in the aggregate, all or substantially all of the provisions of doubtful enforceability that may be included in customary commercial mortgage loan documents. Nevertheless, several opinion reports suggest that a standard list of specific exceptions also be included. *Id.* However, an examination of these suggested standard exceptions discloses that all or substantially all of them relate to issues which generally affect the enforcement and/or foreclosure of all mortgages and not to limitations that may arise in a particular transaction. In substance, such exceptions usually constitute a mini-treatise on the law of secured transactions which is of little practical benefit to the opinion recipient. These standard exceptions clutter the opinion and encourage unnecessary debate and

controversy. Accordingly, the Committee believes that, in most commercial mortgage loan transactions, if an appropriate generic qualification and assurance are included in the opinion, it should not be necessary to also include an additional list of specific exceptions. Of course, the opinion giver should consider including specific exceptions relating to provisions of doubtful enforceability if such provisions would not otherwise be covered by the bankruptcy exception, the equitable principles limitation or the generic qualification. *See supra* note 39.

50. The opinion is usually addressed to the lender or, in a syndicated loan, to an agent acting on behalf of all lenders. Normally, the named opinion recipient will be the only person entitled to rely on it. *TriBar II Report* § 1.6; *Accord* § 20. However, it is customary for lenders to request that certain additional persons be entitled to receive copies of and rely on the opinion. Such additional persons may include transferees of the Note, participants in the Loan, trustees or agents acting on behalf of noteholders in a subsequent securitization transaction and rating agencies. In such circumstances, it may or may not be appropriate to permit persons other than the opinion recipient to receive copies of the opinion and to rely on it. The closing paragraph of the opinion usually includes a limitation on the ability of persons other than the named opinion recipient to receive copies of the opinion or to rely on it.

"Reliance" on the opinion by a person other than the client usually means that the opinion giver has a professional duty of care to the persons who are permitted to rely on it and who reasonably do so. If the opinion is negligently given and results in damage to such persons, they may have a claim against the opinion giver. *TriBar II, Report* § 1.6, n. 29. Accordingly, the opinion giver should carefully consider reliance issues on a case-by-case basis. Reliance should not be implied or assumed. On the other hand, if the lawyer knows that the opinion will be relied on by third parties and directly or indirectly permits the opinion to be used for such purpose, limitations contained in the opinion disclaiming reliance may not be effective to limit liability.

Reliance by the opinion recipient is, of course, to be expected although there are circumstances where even the named addressee may not be entitled to rely on the opinion. *See e.g., United Bank of Kuwait PLC v. Enventure Energy Enhanced Oil Recovery Associates - Charco Redondo Butane*, 755 F. Supp. 1195 (S.D.N.Y., 1989) (lawyer had no duty of care to addressee where opinion was not rendered at the request of opinion giver's client); *City National Bank v. Rodgers & Morgenstein*, 399 N.W. 2d 505 (Mich. App. 1986) (lender's reliance on opinion was not justifiable because lender was aware that the issue of authority covered by the opinion was in dispute and elected to close the transaction anyway). For a general discussion of reliance issues, *see* Fitzgibbon & Glazer, *Legal Opinions: What Opinions in Financial Transactions Say and What They Mean*, § 2.3.2, Little Brown & Company (1992); *TriBar II Report* § 1.2; *Accord* § 7.

Reliance by persons other than the opinion recipient may be a bit more problematic. The Maryland Report states:

"In order to control the risk associated with rendering an opinion, a lawyer should provide that it may be used only by the addressee and other specified persons. Parties which may desire to use the benefits of an opinion may include participants in a loan transaction and assignees of a promissory note, which parties may not be identified to the opining lawyer. There are several practical reasons for limiting the persons who may rely upon the opinion. First, the lawyer might find himself in a conflict situation with the secondary recipient. Second, the opinion might be deemed to be "re-issued" as of the date the secondary recipient acquired its interest in the transaction. Third, portions of the opinion could differ depending on the status or identity of the secondary recipient and the addressee (e.g., whether or not exempt from usury issues; whether or not accredited for security issues; whether or not qualified to do business in a particular jurisdiction). Fourth, the secondary recipient may have knowledge of a matter referred to (or not referred to) in an opinion letter which, if disclosed, would cause the lawyer to change his opinion."
Maryland Report at 720. (note omitted)."

On the other hand, subsequent transfers of the Note (including its inclusion in a mortgage loan pool for securitization purposes) may be expressly contemplated by the parties and permitted by the Loan Documents. In such circumstances, it is foreseeable that proposed transferees of the Note would request copies of the opinion in connection with due diligence activities and require the right to rely on it in connection with the transfer of the Note. Accordingly, the Committee believes that reliance by permitted transferees of the Note is customary and has no objection to including a statement to such effect in the opinion.

In transactions where it is foreseeable that the Loan will be included in a mortgage pool and subsequently securitized, it is customary to permit rating agencies to rely upon the opinion in connection with the rating of the securities. Of course, the rating agencies are not parties to the transaction or subsequent transferees of the Note. In this context, the purpose of permitting rating agencies to "rely" on the opinion is primarily to confirm that, in connection with their due diligence activities, they are entitled to base their rating in part on the opinion without an independent duty to take any action to verify the underlying facts or conclusions. *See Tribar II Report* § 1.6. However, the Committee believes that reliance on the opinion by persons who are not parties or transferees should not be implied. Accordingly, if the opinion giver agrees, the bracketed language in the Model Opinion may be included to permit rating agencies to rely on the opinion.

In addition to the persons permitted to rely on the opinion, it may also be appropriate to permit other persons or entities to receive and review copies of the opinion for certain limited purposes. The persons and entities designated in clauses (a)-(c) of the Model Opinion are customarily permitted to review copies of the opinion but not to rely on it. Some opinion recipients also request that prospective purchasers of the Note or participants in the Loan be permitted to review the opinion in connection with their due diligence activities. The Committee believes that such practice should not be

objectionable so long as the proposed sale or participation is limited to a small group of potential investors in connection with a private placement. Accordingly, if the opinion giver agrees, clause (d) may be included in the Model Opinion. Transactions which exceed that scope (e.g., a public offering or syndication) should be considered on a case by case basis.

The distinction between persons who may rely on the opinion (e.g., permitted transferees of the Note, persons or entities acting as agent or trustee in connection with a securitization and rating agencies) and persons who may receive copies of it (e.g., advisors, governmental agencies, prospective purchasers and participants) is important for several reasons. First, permitting the transferee of the Note to have the benefit of the opinion seems reasonable because such transferee succeeds to the entire interest of the opinion recipient in the Loan and is therefore in privity with the Borrower. On the other hand, participants in the Loan are not in contractual privity with the Borrower; instead, they hold undivided interests in the Loan and have a contractual relationship only with the originating lender and not with the Borrower. In such circumstances, it may be inappropriate and impractical to permit each participant to separately enforce the opinion or to take independent, and perhaps inconsistent, positions with respect to the legal issues covered thereby. Instead, issues of interpretation or enforcement should be the responsibility of the agent on behalf of all Lenders. Second, because the identity of prospective purchasers or participants may not be known at the time the opinion is issued, certain issues, facts or assumptions which may be relevant to such parties may not be foreseeable by the opinion giver. In such circumstances, imposing an expanded duty on the opinion preparers to anticipate and consider such issues seems unreasonable. Nevertheless, it may be appropriate to permit such persons to see a copy of the opinion in connection with their due diligence activities.

Finally, there may be other persons (e.g., guarantors and title companies) who are directly or indirectly involved in the transaction. If such persons become subrogated to the rights of the Lender, are they entitled to the benefit of the opinion? In most cases, such persons are compensated directly or indirectly for their role in the transaction and assume the risk of its validity and enforceability. They should make their own investigation and receive independent advice and counsel. Accordingly, it seems inappropriate to permit such persons to rely on the opinion based solely on rights obtained by subrogation unless the opinion giver expressly agrees.

In every circumstance (whether or not persons other than the opinion recipient are entitled to receive copies of the opinion or to rely on it), there should be no duty on the part of the opinion giver to revise or reissue the opinion after its effective date or to consider any legal issues arising out of subsequent transactions, irrespective of whether such issues are covered in the opinion. *TriBar II Report* § 1.2(b). The Model Opinion specifically excludes subsequent transfers of the Note, securitization transactions and other subsequent transactions from the scope of the opinion. Although transferees of the Note and rating agencies may be permitted to rely on the opinion, there should be no inference that the opinion covers any issues arising out of such excluded transactions. As noted in the Maryland Report *supra*, subsequent transactions may create many legal

issues including those involving conflicts of interest, usury, withholding tax, "doing business", compliance with regulatory and licensing requirements and other matters. Notwithstanding any statement in the opinion regarding reliance by or the distribution of copies to any person, the Committee believes that such issues should not be deemed to be covered in the opinion unless the opinion giver otherwise expressly agrees.

51. An opinion letter is usually written on a law firm's letterhead and signed in the name of the firm. It expresses the opinion of the firm, not merely that of the opinion preparers. *TriBar II Report* § 1.8; *supra* note 4.