

EXPOSURE DRAFT

**THE SOUTH CAROLINA
THIRD PARTY LEGAL OPINION REPORT
OF THE LEGAL OPINION AD HOC COMMITTEE
OF THE CORPORATE, BANKING AND SECURITIES LAW SECTION
OF THE SOUTH CAROLINA BAR**

January 2013

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TABLE OF CONTENTS

	Page
INTRODUCTION	1
ILLUSTRATIVE FORM OF [LOAN CLOSING] OPINION	2
I. GENERAL OPINION CONCEPTS AND FORMAT	22
II. OPINION DUE DILIGENCE	25
III. ASSUMPTIONS	28
IV. GENERAL CORPORATE OPINIONS	34
V. THE ENFORCEABILITY OR REMEDIES OPINION	45
VI. REAL ESTATE OPINIONS	51
VII. THE “UCC OPINION” – ARTICLE 9 SECURED TRANSACTIONS	75
VIII. NO BREACH OR DEFAULT; NO VIOLATION OF LAWS; NO APPROVALS/CONSENTS OPINIONS	86
IX. THE NO LITIGATION OPINION	89
X. ETHICAL CONSIDERATIONS IN OPINION PRACTICE	94
SELECTED BIBLIOGRAPHY	105

INTRODUCTION TO THE SOUTH CAROLINA THIRD PARTY LEGAL OPINION REPORT

A. Third-Party Opinions – In General. Lawyers are frequently asked to deliver legal opinions in a variety of business, corporate and commercial transactions to third parties who are not the lawyer’s client in the transaction. These opinions are provided by the lawyer in the form of an opinion letter delivered to the non-client third party at the closing of the transaction (referred to as a “closing” or “third-party” legal opinion). The opinion is requested as part of the recipient’s due diligence and forces the opinion giver to perform the necessary due diligence to ensure that the requisite legal formalities have been met.

B. A South Carolina Legal Opinion Report. Many state and national legal associations have adopted various opinion reports and guidelines to assist lawyers in the preparation of legal opinions. While nationally recognized treatises, reports and guidelines may be followed by practitioners in South Carolina, there is limited authority on state-specific opinion issues on which an opinion preparer can rely for guidance. Since laws vary from state to state, opinions that may be appropriate in one state may not necessarily be appropriate in this state. As a result, opinion preparers may be faced with inappropriate opinion requests (especially in multi-state transactions or by out-of-state opinion recipients), disadvantaged in transaction negotiations or unwittingly subject to additional risk. In an effort to address those concerns, the Legal Opinion Ad Hoc Committee (the “Committee”) of the Corporate, Banking and Securities Law Section (the “Section”) of the South Carolina Bar is preparing a South Carolina Third-Party Legal Opinion Report (the “Report”), the purpose of which is to (i) provide guidance to South Carolina lawyers in preparing third-party legal opinions, (ii) establish and define acceptable opinion practices, (iii) identify opinion issues specific to state law, (iv) confirm customary opinion practice, and (v) adopt certain national guidelines governing opinion practice. The Report will focus on customary practice relating to closing opinions, and will address state-specific issues and considerations.

C. Report Materials. Please note that these materials are not in final form and continue to be updated and revised by the Committee as we work on finalizing the form of the Report. As such, they are subject to further review, comment and revision. Also, given that these materials are still working drafts, please note that they contain incomplete footnotes and citations. Nevertheless, the Committee is providing the current drafts of these materials to the Section for review, and comments from Section members are welcome. Upon completion, the Report will be presented to the Section for approval. Prior to adoption, however, the Report will be submitted for public comment.

Please submit comments to the Corporate, Banking and Securities Law Section of the South Carolina Bar by April 30, 2013. Comments may be sent by email to either the Section Council Staff Contact, Tara Caine, at tcaine@scbar.org, or to the Ad Hoc Committee Chair, Jennifer Blumenthal, at jblumenthal@mcnair.net, or mailed to the South Carolina Bar, 950 Taylor Street, Columbia, South Carolina 29201, attn: Tara Caine.

ILLUSTRATIVE FORM OF [LOAN CLOSING] OPINION¹

[Closing Date]

[Name of Addressee]

Re: [Describe the [financing] transaction (the "Loan")]

Ladies and Gentlemen:

We have acted as [local]² counsel to _____, a South Carolina [corporation][limited liability company]³ (the "Borrower")⁴ [and as [____] counsel⁵ to _____, a South Carolina

¹ This sample closing opinion to a third party (in this case, a financial institution as lender/creditor) is an illustrative form of opinion for the South Carolina Third-Party Legal Opinion Report (hereinafter *Report*) drafted by the Legal Opinion Ad Hoc Committee of the Corporate, Banking and Securities Law Section of the South Carolina Bar. This illustrative opinion is provided as a form for guidance in a typical (mortgage loan/secured financing) business transaction. When rendering a third-party opinion, consider and follow the guidelines and principles set forth in the Committee on Legal Opinions, ABA Section of Business Law, "Legal Opinion Principles," 53 BUS. LAW. 831 (1998) (hereinafter *ABA Principles*), and the Committee on Legal Opinions, ABA Section of Business Law, "Guidelines for the Preparation of Closing Opinions" (including the Legal Opinion Principles), 57 BUS. LAW. 875 (2002) (hereinafter *ABA Guidelines*). Also, refer to and generally follow the TriBar Opinion Committee, "Third-Party Closing Opinions: A Report of the TriBar Opinion Committee," 53 BUS. LAW. 591 (1998) (hereinafter *1998 TriBar Report*) in preparing and negotiating legal opinions. For a comprehensive treatise, see DONALD W. GLAZER, SCOTT FITZGIBBON & STEVEN O. WEISE, *GLAZER AND FITZGIBBON ON LEGAL OPINIONS: DRAFTING, INTERPRETING AND SUPPORTING CLOSING OPINIONS IN BUSINESS TRANSACTIONS* (Aspen Law Publishers, 3d ed., & 2012 Cumulative Supp.) (hereinafter *GLAZER*). The Report of the Legal Opinion Committee of the Business Law Section of the North Carolina Bar Association, "Third-Party Legal Opinions in Business Transactions," Second Edition (2004) (hereinafter *NC Report*), reprinted at Appendix 38 of *GLAZER*, and Supplement to Report of the Legal Opinion Committee of the Business Law Section of the North Carolina Bar Association, "Third-Party Legal Opinions in Business Transactions," Second Edition (2004), reprinted at Appendix 38A of *GLAZER*, has provided material guidance and support for the Report and this opinion.

² Generally you do not need to qualify the nature of your role as counsel, as you are giving the opinion in connection with the transaction as described. However, in some instances, where your involvement is limited to local counsel or counsel solely for a particular issue, you may want to specify the nature of your role as counsel to note that your role in, and knowledge of, the transaction has been limited, and as such, the scope of the opinion may be more limited. In such instance, you may want to include a statement such as: "We are counsel to the Borrower in this transaction solely for the purpose of rendering this opinion, and we do not represent the Borrower generally." (*But see* *GLAZER* § 2.5.3.)

³ You should consider issues specific to the type of business organization. See TriBar Opinion Committee, "Third-Party Closing Opinions: Limited Liability Companies," 61 BUS. LAW. 679 (2006), for a detailed discussion on opinion considerations relative to alternative entities.

⁴ This party is your client; depending on the transaction, it might be the Borrower, Debtor, Company, Seller, etc. (The addressee is the third party recipient who is not your client.) It is understood that you are giving the opinion at the request of your client in order to close the transaction. (See South Carolina Rules of Professional Conduct, Rule 1.2.) However, you need to consider the ethical duties owed to your client when rendering opinions to third parties (such as the duty of confidentiality, conflicts of interest, consent of client to disclose information, competency in the area of law covered) and to third parties (such as truthfulness in disclosure to third parties).

⁵ Consider whether you are actually representing the guarantor or any other client-related third party in the transaction (e.g., subsidiaries or principals). If you act as counsel to multiple parties in a transaction, you should address any possible conflicts of interest and obtain any appropriate waivers, if necessary. If you are not representing any other client-related party but are asked to render opinions relating to such other parties (such as enforceability of a guaranty on behalf of a guarantor that is not your client but that is related to the borrower), revise

[corporation][limited liability company], as guarantor (the “Guarantor”)⁶], in connection with the [Loan] made by _____ as lender (the “Lender”).

DOCUMENTS REVIEWED

In connection with delivering this opinion, we have reviewed the following documents, all dated of even date herewith [unless otherwise noted]:⁷

1. The [Loan][Credit] Agreement between the Borrower and the Lender (the “Loan Agreement”);
2. The Promissory Note made by the Borrower to the Lender in the original principal amount of \$_____ (the “Note”);
3. The Mortgage and Security Agreement by the Borrower to the Lender (the “Mortgage”);
4. The Assignment of Leases and Rents made by the Borrower to the Lender (the “Assignment of Leases”);
5. The Security Agreement made by [and between] the Borrower to the Lender (the “Security Agreement”);
6. [The Guaranty executed and delivered by the Guarantor to the Lender (the “Guaranty”);] and
7. [*List any other material transaction documents*].

The Loan Agreement, Note, Mortgage, Assignment of Leases, Security Agreement, and [*list any other material borrower documents*] are collectively referred to herein as the “[Loan] Documents.” [The Guaranty and [*list any other guarantor documents*]] are referred to herein as the “Guaranty Documents.” The Loan Documents and the Guaranty Documents are collectively referred to herein as the “Transaction Documents.”]⁸

[*For personal property secured transactions subject to the UCC:*] [We have also reviewed the UCC-1 Financing Statement (the “Financing Statement”) naming the Borrower as debtor and the Lender as secured party [filed][to be filed] in the South Carolina Secretary of State’s Office (the “State Filing Office”) [and the UCC-1 Financing Statement naming the Borrower as debtor and the Lender as secured party [filed][to be filed] as a fixture filing (the “Fixture Filing,” and together with the Financing Statement, the “Financing Statements”) in the

the introductory sentence accordingly to reflect that you are not counsel to such party or to reflect the limited capacity in which you are rendering your opinion with respect to such party.

⁶ If any loan parties are individuals, limit the opinions accordingly. For example, you would not address “power” or “authorization” for an individual. Also, you should not opine as to the capacity of individuals. (*See* fn 20 *infra*.)

⁷ Describe the relevant transaction documents covered by the opinion, including the exact name of the document, the parties to the document, and date of the document (if not the same as of the date of the opinion). If you state “executed by” the parties, review the executed documents (which is required for a “due execution” opinion). The documents listed here are merely examples of documents in a typical real estate secured transaction. Other types of collateral documents (such as pledges and control agreements) are discussed in the UCC Section of the Report. Ordinarily, you do not need to include, or opine as to, all of the documents executed in the transaction, only the material transaction documents.

⁸ To the extent that there are no Guaranty Documents, all references in the opinion may be to the Loan Documents. Transaction Documents as used elsewhere in the opinion may be replaced with Loan Documents where there are no Guaranty Documents included in the opinion.

_____ County (the “County”) [RMC][Register of Deeds][Clerk of Court] Office (the “County Recording Office”).⁹

We have examined and relied upon (1) the Borrower’s Articles of [Incorporation][Organization] filed with the South Carolina Secretary of State on _____ [, as amended by _____] (the “Articles”); (2) the [Bylaws][Operating Agreement] of the Borrower [adopted as of _____] (collectively with the Articles, the “Organizational Documents”); (3) the [authorizing resolutions][unanimous written consent] of the [board of directors][shareholders] of the Borrower as of _____;¹⁰ (4) the Certificate of Existence of the Borrower issued by the South Carolina Secretary of State dated _____ (the “Certificate of Existence”);¹¹ (5) [the Certificate of Tax Compliance issued by the South Carolina Department of Revenue dated _____ (the “Tax Compliance Certificate”);]¹² and (6) [an officer’s/secretary’s certificate dated as of _____]. [We have also relied on such other documents, records, and certificates of public officials, as we have deemed necessary or advisable for the purposes of this opinion.]

[Include relevant organizational and authority documents for any guarantors, if applicable.]

As to certain matters of fact, we have relied upon statements and representations of the [officers, directors, managers, members,] and other representatives of the Borrower, [of the Guarantor] and of other public officials and agencies, which have not been independently established, verified or confirmed by us. In addition, as to certain matters of fact, we have relied upon the representations and warranties of the Borrower in the Loan Documents, [of the Guarantor in the Guaranty Documents,] and various other certificates, which have not been independently established, verified or confirmed by us.¹³

⁹ For secured transactions subject to UCC Article 9 filing requirements, designate the financing statements separate from the definition of the Transaction Documents. Financing statements are notice filings for purposes of perfection under the UCC and are not executed by the debtor (filing is “authorized” by the debtor). As such, often the lead-in paragraph to the list of reviewed documents will not be appropriate for financing statements. Also, many of the opinions on the Transaction Documents are not applicable to financing statements (*e.g.*, financing statements do create enforceable obligations).

Confirm the correct county recording office (*e.g.*, Register of Deeds, Clerk of Court, or RMC).

¹⁰ While you do not have to list all of the organizational and authority documents you have reviewed to render the opinion, you should consider identifying the corporate organizational and authority documents you specifically reviewed that are necessary to render the requested opinions. You should review the authorizing documents to determine that they are in proper form, comply with the requirements of the organizational documents and applicable statutory law, and use proper terminology. Note the requirements for meetings, voting and unanimous written consents in lieu of meetings. You will also need to confirm the proper authority of parties executing documents and requirements.

¹¹ A certificate of existence should be dated as close to closing as possible or practical. (Generally, title companies require a certificate of existence to be dated no more than 30 days prior to closing.) A certificate of existence does not address filing with State taxing authorities nor does it disclose other grounds that may exist for bringing dissolution proceedings. Therefore, absent a certificate of tax compliance, it is prudent to obtain the certificate of existence as close to closing as possible. In a business asset acquisition, the purchaser will likely insist on a certificate of tax compliance. See the “General Corporate Opinions” Section of the Report.

¹² S.C. Code Ann. § 12-54-124. See also Revenue Ruling 04-02. See the “General Corporate Opinions” Section of the Report.

¹³ See 1998 TriBar Report § 2.6 at 618. However, you cannot rely on representations to the extent that they are conclusions of law or if you have knowledge that such representations are not true. See the “Due Diligence” Section of the Report.

[Whenever the phrase "to our knowledge" is used herein, it refers to the actual, personal knowledge of the attorneys of this firm involved in the representation of the Borrower [and the Guarantor] in this transaction.]¹⁴ [For purposes of this opinion, except for the documents specifically referenced herein as being reviewed by us, we have not made an independent review of any other agreements, contracts, instruments, writs, orders, judgments, or decrees which may have been executed by or which may now be binding upon the Borrower or Guarantor or which may affect the property of the Borrower or Guarantor, nor have we undertaken to review any other files of the Borrower or Guarantor or to discuss any other matters with the Borrower or Guarantor.]¹⁵ [Further, because we have not undertaken any investigation to determine the existence of other documents or facts, unless expressly so stated herein, no inference as to any knowledge thereof should be implied from the fact of our representation of any party or otherwise.]¹⁶

COVERAGE

The opinions set forth herein are limited to matters governed by the laws of the State of South Carolina (sometimes referred to herein as the "State"), and no opinion is expressed herein as to the laws of any other jurisdiction, [including, without limitation, _____].¹⁷ [The opinions set forth herein assume that the laws of the State would govern, notwithstanding any choice of law provision to the contrary, but no opinions are given regarding or with respect to any choice of law provision.]¹⁸ All references herein to the "Code" shall mean the Code of Laws of South Carolina, 1976, as amended. All references to the "UCC" shall mean Title 36 of the Code, known

¹⁴ If you are not qualifying any opinion to your knowledge, delete this sentence. *See* 1998 TriBar Report § 2.6.1 at 618-619. For other formulations of the knowledge qualifier, *see* GLAZER § 4.4. *See also, Dean Foods Co. v. Pappathanasi*, 18 Mass L. Rep. 598 (Mass. Super. Dec. 3, 2004) (a comprehensive knowledge qualifier did not protect the firm where it was found that they had knowledge of an investigation and potential claim). You may want to name the individual attorneys involved in the representation of the Borrower in connection with the transaction.

¹⁵ Include this sentence if it is a true statement. Such qualification will not limit the opinion to the extent you have conducted certain due diligence and have actual knowledge.

¹⁶ Include this sentence if it is a true statement. Such qualification will not limit the opinion to the extent you have conducted certain due diligence or have actual knowledge. *See* opinion para. 6 and fn 36 *infra*.

¹⁷ If any of the documents select governing law other than the State of South Carolina or if the party's organizational jurisdiction is not South Carolina, you may wish to expressly exclude the laws of the relevant jurisdictions. To the extent laws of other jurisdictions may be implicated (such as business entities organized under the laws of a foreign jurisdiction or documents governed by the laws of another state), you may wish to expressly exclude such laws if you are not qualified to render such opinions. This statement may need to be qualified "except as expressly set forth herein" to the extent you agree to perform any limited search or review to render a specific opinion. (However, in such limited case, consider the ethical requirements for competency and the other state's unauthorized practice of law rules.)

In opinions other than state-specific local counsel opinions (where general or lead counsel could cover any applicable federal law), you may also need to cover federal law, to the extent applicable.

Generally, you should not rely on opinions of other counsel to render the same opinion rendered by such other counsel. Instead, the requested opinions may be split and covered by separate counsel in multiple opinion letters delivered directly to the recipient. (*See* 1998 TriBar Report § 5.2 at 638 regarding "unbundling opinions.")

For issues relating to opinions on Delaware entities, see the "General Corporate Opinions" Section of the Report.

¹⁸ Rather than giving a choice of law opinion, you can assume the laws of the State would govern, notwithstanding any choice of law provisions to the contrary. This is an assumption that may be stated for opinion purposes notwithstanding facts to the contrary. The opinion should not, however, assume that the laws of the State are the same as the laws of the foreign jurisdiction chosen in the documents. *See* ABA Guidelines § 4.9. *See also* 1998 TriBar Report § 4.6 at 635, n. 98. *See* the "Real Estate Opinions" and "The Enforceability or Remedies Opinion" Sections of the Report for discussions of choice of law issues under state law.

as the Uniform Commercial Code in effect in the State as of the date hereof [, notwithstanding any provision of the Transaction Documents to the contrary.]

ASSUMPTIONS

In rendering the opinions set forth herein, we have assumed, without independent verification, among other things:¹⁹

[List of Standard General Assumptions] [Consider if implied or necessary]

() Each natural person executing any document is legally competent to do so;²⁰

() All signatures on any of the documents reviewed by us are genuine;²¹

() All documents submitted to us as originals are authentic, all documents submitted to us as certified or photostatic copies conform to the original document, and all public records reviewed are accurate and complete;

() All documents fully state the agreement between the parties with respect thereto and have not been amended, modified or supplemented, and there are no other agreements, understandings or course of dealing by or between the parties that would modify, amend, supplement, terminate or rescind the agreements therein;

() The accuracy and completeness of all recitals, representations, warranties, descriptions of collateral, schedules and exhibits contained in the documents;

() With respect to the [Lender][*other parties*], that (a) the [Lender] is validly existing [and in good standing] under the laws of all applicable jurisdictions; (b) the Transaction Documents to which the [Lender] is a party have been duly authorized, executed and delivered

¹⁹ See the “Assumptions” Section of the Report for a more detailed discussion on express and implied assumptions. Certain assumptions are implied whether specifically stated or not. Certain assumptions are general in nature and may apply to all transactions, and certain assumptions are applicable to specific types of transactions and should be expressly stated. Include only those additional assumptions that are necessary and applicable to the transaction and opinions expressed. Do not rely on an assumption you know to be false or misleading, except in cases where it is expressly permitted and acknowledged (such as a contrary assumption for choice of law). See GLAZER § 4.3.3 for discussion of additional assumptions. The 1998 TriBar Report § 2.3(a) at 615 states that as a matter of customary practice, certain assumptions are implied and do not need to be expressly stated.

²⁰ Do not give opinions as to capacity or competency of individuals. Capacity of individuals is assumed whether such assumption is expressly stated or not. A request for an opinion as to capacity or mental status of individuals is inappropriate, even when qualified by knowledge. A closing attorney is not expected or qualified to make a determination as to the mental capacity of an individual. (If the attorney has actual, confirmed knowledge of a party’s incapacity, he or she should not proceed with the transaction.)

²¹ Do not render an opinion over the genuineness of signatures, even as to client parties. In limited circumstances, you may exclude from the assumption the signatures of your client to the extent you actually witnessed your client’s signatures on the documents and know the signatures of the parties witnessed in your presence. In such limited case, you may be able to exclude from the assumption the signatures of your client on the Transaction Documents witnessed in your presence. Otherwise, the recipient should request and rely on a notary acknowledgment if there is any concern about the signatures of the parties to the transaction documents. In any event, consider the requirements for witnessing documents under state law.

by the Lender, are within its corporate power, and are its legal, valid and binding obligations, enforceable against it; and (c) the [Lender] is in compliance with all applicable laws, rules and regulations governing the conduct of its business with respect to this transaction;

(___) [All conditions to the closing required by the Lender have been met to the satisfaction of the Lender or the time for performance has been extended or otherwise waived by the Lender;]²²

(___) The Loan is made for a commercial or business purpose and is not for any personal, family, household or other consumer purpose or subject to any consumer transaction or consumer protection laws;

(___) There is no fraud, undue influence, duress, mutual mistake of fact, illegal or criminal activity (including, without limitation, the unauthorized practice of law)²³ in connection with the execution and delivery of the Transaction Documents by any of the parties thereto or in connection with the closing of the transactions contemplated thereby;

(___) [The parties to the Transaction Documents (a) will act in good faith and in a commercially reasonable manner in the exercise of any rights or enforcement of any remedies under the Transaction Documents; (b) will not engage in any conduct in the exercise of such rights or enforcement of such remedies that would constitute unfair dealing, commercially unreasonable or unconscionable conduct or result in a breach of the peace; and (c) will comply with all requirements of applicable procedural and substantive law in exercising any rights or enforcing any remedies under the Transaction Documents;]

(___) With respect to the opinion expressed in paragraph [1], we have relied solely on the Certificate of Existence and have assumed that since the date of the issuance of the Certificate of Existence, no action has been taken to administratively dissolve the Borrower.²⁴ [*Include assumption for Guarantor organizations, if applicable.*]

²² This assumption may not need to be expressly stated, but you should not include an express confirmation on the satisfaction of closing conditions. Beware of certifications of borrower's counsel requested by the lender as to satisfaction of closing conditions and other inadvertent opinions.

²³ The unauthorized practice of law (UPL) assumption is included in opinions over multi-state transactions or transactions involving out-of-state parties to or counsel in the transaction. While such assumption may afford the opinion giver some protection as it relates to rendering the opinion to a third party, it will not protect the opinion giver from any ethical violations and disciplinary action as a result of any UPL if UPL is implicated in the closing. In South Carolina, UPL in connection with a mortgage loan closing could impact the enforceability of the remedies under the mortgage loan documents. See the "Ethical Considerations in Opinion Practice" and the "Real Estate Opinions" Sections of the Report for more detailed discussion on the ethical concerns and implications of UPL in rendering a local counsel mortgage enforceability opinion.

²⁴ See S.C. Code Ann. §33-1-280 and the South Carolina Reporters' Comments thereto. "Good standing" is not a statutorily defined term in the Code. Failure to file with the SC Department of Revenue and other grounds may exist for dissolution of which the Secretary of State has not been notified. (See Comment 3 of the South Carolina Reporters' Comments to S.C. Code Ann § 33-1-280.) See the related discussion in the "General Corporate Opinions" Section of the Report.

() [The Guarantor’s entering into the Guaranty is necessary or convenient to carry out its business and affairs and furthers the corporate purposes of the Guarantor;]²⁵

() [The Guarantor receives a tangible benefit from the Loan to the Borrower;]²⁶

[List of Certain Real Property and UCC Related Assumptions]

() [The Borrower has title to the real property and related real property interests encumbered by the Mortgage;]

() [The Borrower has sufficient rights (as described in Section 9-203 of the UCC) in each item of personal property comprising the [Collateral] in which a security interest is purported to be granted under the [Transaction Documents] and all real property and improvements and other collateral to be mortgaged, assigned, or pledged by Borrower under the Loan Documents is located in the County within the State];

() [The Lender has given “value” (as defined in Section 1-201(44) of the UCC);]

() [The names of the parties within the Transaction Documents are complete and correct, the addresses of all parties are complete and accurate, and the description of the [Property] is accurate.]

[List of Certain Property Related Assumptions for Local Counsel Opinions]

() [The Mortgage, Assignment of Leases and Financing Statements will be duly filed, indexed and recorded among the appropriate official records, with all fees, charges and taxes having been paid];²⁷

() [All legal descriptions, schedules and exhibits have been properly prepared and attached to the appropriate documents as applicable, including, without limitation, legal descriptions, derivation clauses and tax map numbers of the land, as described and set forth in the Mortgages and more particularly in each respective Exhibit A thereto, as well as other descriptions of collateral within the Loan Documents];²⁸

²⁵ S.C. Code Ann. §33-3-102(7) permits a corporation to “make contracts and guarantees,” but such authorization is in the context of actions “necessary or convenient to carry out its business and affairs.” S.C. Code Ann. §33-3-102.

²⁶ See discussion regarding subsidiary guarantors under the “General Corporate Opinions” Section of the Report.

²⁷ Include this assumption regarding filing in local counsel opinions only if you are not the South Carolina counsel supervising the recording of documents. In such cases, the ethical considerations and disciplinary cases suggest that you need to confirm that South Carolina counsel is supervising the recording of the mortgage documents. *See In re: Calhoun*, 639 S.E.2d 679 (S.C. 2007). You would still assume proper indexing and filing by the governmental filing office upon delivery for recording.

²⁸ This assumption may be appropriate in a local counsel opinion limited to enforceability of the documents as forms and other general matters of local law, where another lawyer in the State is supervising title exams, preparing legal descriptions, recording documents and supervising the closing, and where another party prepared such schedules.

(___) [All Loan Documents that will be recorded shall be or have been properly witnessed by the witnesses thereto and properly acknowledged by a valid notary of the state in which each Loan Document is executed;]²⁹

(___) [List any other express assumptions that may be necessary for the particular transaction and opinions being rendered.]

OPINION

Based on and subject to the foregoing and such other qualifications, exceptions, limitations and assumptions set forth herein, it is our opinion that:

1. [Based on the Certificate of Existence] the Borrower is validly existing as a [corporation][limited liability company] under the laws of the State as of such date.³⁰

2. The Borrower has the [corporate] [limited liability company] power to execute and deliver the Loan Documents and to consummate the transactions contemplated thereby.³¹

3. The execution, delivery and performance of the Loan Documents by the Borrower and the consummation by the Borrower of the transactions contemplated thereby have been duly authorized by the Borrower.³²

4. The Loan Documents have been duly executed and delivered by the Borrower.³³

5. The Loan Documents constitute the legal, valid and binding obligation of the Borrower, enforceable against the Borrower in accordance with their terms.³⁴

²⁹ This assumption is appropriate for local counsel opinions where the documents are executed out of state or where only a “form of documents” opinion is rendered by local counsel. Otherwise, it may be necessary to confirm that the documents appear on their face to have been properly executed, witnessed and notarized. Documents in South Carolina must be witnessed in person. *See* the discussions in “Ethical Considerations in Opinion Practice” and in the “Real Estate Opinions” Sections of the Report relating to out of state closings, the unauthorized practice of law and other ethical considerations.

³⁰ Reliance solely on the certificate of existence is generally assumed. If the opinion is being provided to an out-of-state recipient, include reference to reliance solely on the Certificate of Existence. “Good Standing” is not a statutorily defined term in the Code. (*See* fn 24 *supra*.) Limit the status opinion to valid existence. Some recipients may request that you update the date of the Certificate of Existence to or as close to the date of closing as possible. Also, do not cover foreign qualification. *See* ABA Guidelines § 4.1; *see also* 1998 TriBar Report § 6.1.6 at 646-647.

³¹ For a discussion of the corporate power opinion, *see* GLAZER Chapter Eight. Avoid using the phrase “power and authority” in this context. (*See* 1998 TriBar Report § 6.3 at 652, n. 138.) *See also* the discussion on power in the “General Corporate Opinions” Section of the Report.

³² Confirm that proper resolutions of the company authorizing the transaction and documents as contemplated have been obtained and conform to the organizational document requirements and applicable statutes. *See also* the discussion on authority in the “General Corporate Opinions” Section of the Report.

³³ This opinion is usually not difficult to render. However, a “duly delivered” opinion generally means that the opinion giver, if not present at actual delivery, has confirmed and is satisfied with the procedures for delivery of the signed documents. Otherwise, delivery should be deleted from the opinion. *See also* the discussion on delivery in the “General Corporate Opinions” Section of the Report.

6. The execution and delivery of the Loan Documents by the Borrower and consummation by the Borrower of the transactions contemplated thereby³⁵ do not (a) violate the Borrower's Organizational Documents [or (b) violate any statutory law or regulations of the State applicable to the Borrower in connection with the transaction] [or (c) to our knowledge, violate any "Court Order" to which the Borrower is named as a party] [or (d) constitute a default under any "Other Material Contracts" to which the Borrower is a party (excluding therefrom any financial covenants and similar provisions that require financial calculations and determinations).]³⁶ [*Include the relevant definitions for the specific court orders and other contracts, if applicable.*]

[*Add similar opinions for the Guarantor to the extent applicable.*]

7. The interest to be charged in connection with the Loan, as stated in the Loan Documents, is not usurious under the laws of the State [assuming that no fees, charges or other amounts will be paid directly or indirectly to the Lender or for its benefit, except as specified in the Loan Documents].³⁷

8. [Except for recording of the Mortgage in the County Recording Office, filing the Financing Statements with the appropriate Filing Office,] [filings with the [Secretary of State] with respect to the Organizational Documents,] [and such other filings, consents or approvals as are specifically contemplated by the Transaction Documents,] no consents or approvals of, and no filings with, any governmental authority of the State are necessary for the execution and delivery of the Loan Documents by the Borrower and the consummation of the transactions contemplated thereby by the Borrower.]³⁸

³⁴ The enforceability opinion is rendered under applicable state law. Confirm that the documents are governed by State law and are sufficient to constitute an enforceable contract under State law. If the documents are not governed by State law, see discussion on choice of law at fn 18 *supra*. To the extent that certain provisions may not be enforceable (or are of questionable enforceability) duly note those exceptions. See the "Enforceability or Remedies Opinion" Section of the Report.

³⁵ In this context, try to limit the opinion to consummation of the transaction rather than performance of the documents. For a discussion on consummation vs. performance, see GLAZER §§ 13.2.3, 14.4, 15.5 and 16.3.7.

³⁶ Parts (c) and (d) of this opinion should be delivered only if the due diligence necessary to properly render the opinion is justified for the transaction. This opinion, if given, should be limited to a defined set of contracts and/or court orders of which you have actual knowledge and which are defined in a referenced document or set forth on separate schedules to the opinion as the "Court Orders" and/or "Other Material Contracts." Limiting the opinion to "knowledge" may not be sufficient. See 1998 TriBar Report § 6.5 at 654-661. For defaults under other agreements, violation of court orders, and creation of other liens, see GLAZER §§ 13.2.2, 14.2 and 16.3. For formulations and definitions, see the Illustrative Form of Opinion attached as Part III to the NC Report.

³⁷ S.C. Code Ann. § 37-10-106 allows for any rate of interest to be agreed upon by parties in a written contract for credit transactions which are not otherwise subject to the consumer protection provisions of the Code (*e.g.*, business or commercial loans evidenced in writing). The assumption may be included in the list of assumptions or stated as part of the opinion. This opinion also assumes that any amounts to be charged are not deemed to be a penalty by the courts. See fn 65 *infra*.

³⁸ Filings with the Secretary of State may be necessary if amendments to charter documents are made. If a name change is made, filings in the local real estate records may be required as well. Consider what filings may be required, particularly if dealing with a regulated industry. The opinion is limited to filings and approvals of governmental entities solely for execution, delivery and closing, not future performance. The opinion should not address any filing requirements of the lender or other third parties. See GLAZER Chapter Fifteen.

[*Real Estate Mortgage and Fixture Filing Opinions*] ³⁹

9. [The Mortgage is in appropriate form for recordation in the County Recording Office.] The Mortgage is [in a form]⁴⁰ sufficient to create a valid lien on the portion of the property encumbered thereby which consists of real property interests under State law, located in the County where the Mortgage is being filed.

10. The Mortgage is in form sufficient to create a security interest in the “fixtures” [(as such term is defined in Section 9-102(a)(41) of the UCC and under State law)] that are located on the real property encumbered by the Mortgage.

11. [The Fixture Filing is in proper form for filing with the County Recording Office].⁴¹ Upon the filing of [the Mortgage] [and the Fixture Filing] in the County Recording Office, the security interests created by the Mortgage in the fixtures on the real property located in the County will be perfected under State law.

12. [No intangible tax, documentary stamp tax, mortgage, transfer or recording tax is required to be paid by the Borrower to any governmental agency of the State on account of the execution and delivery of the Mortgage or the creation of the indebtedness secured by the Mortgage in the State, except for nominal filing or recording fees.] ⁴²

[*UCC Personal Property Opinions*] ⁴³

13. The Security Agreement is in form sufficient to create a security interest in those items and types of personal property described therein to the extent a security interest in such property may be created under Article 9 of the UCC.⁴⁴

³⁹ Consider and follow the Joint ACREL Attorneys’ Opinion Committee and ABA Section of Real Property, Probate and Trust Law Committee on Legal Opinions in Real Estate Transactions, “Real Estate Opinion Letter Guidelines,” 38 REAL PROP., PROB. & TR. J., 241 (2003) (hereinafter *Real Estate Guidelines*), when rendering and receiving real estate related opinions (and in other financing transactions where applicable).

⁴⁰ In local counsel opinions limited to the form of the mortgage only, insert the following: “when duly and properly executed, witnessed by two witnesses and probated or acknowledged before a notary public duly authorized to perform notarial acts for the jurisdiction where such instrument is executed, with the official seal affixed, and with all appropriate exhibits properly attached thereto (including an appropriate legal description with the derivation and tax map number).” Otherwise, these requirements must be confirmed; and as part of your ethical considerations, the attorney disciplinary cases suggest that you must confirm the supervision of these requirements by a South Carolina licensed attorney.

⁴¹ This opinion is stated when a separate fixture financing statement is filed. Confirm that the financing statement is properly completed for a real estate fixture filing. If relying on the Mortgage being filed as a fixture filing, confirm compliance with § 9-502(c) of the UCC, and consider any local law customs or requirements. Depending on the type of collateral, some of these security interest opinions for real and personal property interests may be combined, but you need to consider the distinctions between the perfection requirements for real and personal property interests.

⁴² This opinion should only be requested and given in a local counsel opinion.

⁴³ See the Special Report by the TriBar Opinion Committee: “U.C.C. Security Interest Opinions – Revised Article 9,” 58 BUS. LAW. 1449 (2003), for consideration in rendering UCC Security Interest Opinions. For additional UCC collateral opinions, including pledged investment and control collateral, see the Illustrative Form of UCC Opinion included in Part III of the NC Report. See also the “UCC Opinion” Section of the Report.

14. The Financing Statement is in proper form for filing with the State Filing Office.⁴⁵ Upon the filing of the Financing Statement in the State Filing Office, the security interests created by the Security Agreement will be perfected in the property described in the Security Agreement to the extent that (a) such property is described in the Financing Statement and consists of the items and types of property subject to Article 9 of the UCC, and (b) a security interest in such property can be perfected by filing a financing statement in the State under the UCC (the “UCC Filing Collateral”).⁴⁶

QUALIFICATIONS

The foregoing opinions are further limited by the following assumptions, limitations and qualifications.⁴⁷

A. Enforceability of the Transaction Documents is subject to, and the rights of the parties under the Transaction Documents may be limited by, bankruptcy, insolvency, fraudulent conveyances, equitable subordination, reorganization, moratorium or other similar laws or governmental authority relating to or affecting creditor's rights or the collection of debtor's obligations generally.⁴⁸

B. Enforceability of the Transaction Documents is subject to, and the rights of the parties under the Transaction Documents may be limited by, general principles of equity, including, without limitation, concepts of materiality, reasonableness, good faith, fair dealing, the availability of specific performance or injunctive relief, regardless of whether considered in a proceeding in equity or law.⁴⁹ Enforcement of the Transaction Documents may also be subject to the discretion of the court before which any proceeding may be brought.⁵⁰

⁴⁴ See the “UCC Opinion” Section of the Report regarding creation and attachment opinions under Article 9 of the UCC.

⁴⁵ Confirm that the Financing Statement is properly completed and meets the requirements for filing under Article 9 of the UCC, including the exact name of the debtor, entity type, organization jurisdiction, organization identification number (or check box 1g “none” if not applicable) and a proper collateral description. See the “UCC Opinion” Section of the Report with respect to the form of Financing Statement.

⁴⁶ This opinion addresses central filings with the Secretary of State. It does not address local filings at the county level under § 9-501(a)(1) of the UCC (*e.g.*, as-extracted collateral, timber to be cut, and fixture filings for goods that are or are to become fixtures). The opinion preparer will need to determine if any of the collateral requires local filing. The term “Filing Collateral” is used to distinguish between the types of collateral that may be perfected by filing and other types of Article 9 collateral that may be covered in the Security Agreement but which may not be perfected by filing (*e.g.*, deposit accounts). See the “UCC Opinion” Section of the Report for other types of Article 9 perfection opinions.

⁴⁷ List only the applicable qualifications and exceptions to the opinion letter. A list of some of the possible qualifications is provided; however, the list provided is not exhaustive and may not be applicable in every transaction. The opinion should include those qualifications that are relevant to the opinion under the circumstances based on the type of transaction and the specific documents covered by the opinion letter. The insolvency and equitable principles exceptions are standard enforceability qualifications. However, if the enforceability opinion is not rendered, the enforceability exceptions are not applicable and should be excluded.

⁴⁸ The “bankruptcy exception” is discussed in the 1998 TriBar Report § 3.3.4 at 625 and in GLAZER § 9.10.

⁴⁹ The “equitable principles limitation” is discussed in the 1998 TriBar Report §§ 3.3.1 – 3.3.3 at 622-624 and in GLAZER § 9.9.

⁵⁰ As the trier of fact, the decision of the trial judge and courts are given broad discretion.

[Additional Possible Qualifications and Exceptions]⁵¹

____. We express no opinion as to any tax, insolvency, consumer, privacy, labor and employment, pension and employee benefit, anti-terrorism, criminal, anti-trust, anti-tying, unfair trade practices and competition, intellectual property, letter of credit, securities or “blue sky” laws, rules or regulations of any jurisdiction or laws, rules or regulations governing and regulating financial or lending institutions.⁵² [We express no opinion as to compliance by any parties to the transaction with respect to any fiduciary duty or any regulatory requirements applicable to the subject transactions because of the nature of their business.]⁵³

____. We express no opinion regarding the effectiveness of any provision in the Transaction Documents whereby the Borrower [or the Guarantor] waives procedural, substantive, statutory or constitutional rights.

[*Alternative:*] We express no opinion regarding the effectiveness of any provision in the Transaction Documents whereby the Borrower [or the Guarantor] waives procedural, substantive, or constitutional rights, including, without limitation: (i) the waiver of the right of statutory or equitable redemption; (ii) the waiver of or limitations on damages, including liquidated, incidental, consequential, punitive and special damages;⁵⁴ (iii) waivers of unmatured rights; (iv) the waiver of rights to notice; (v) releases or waivers of other legal or equitable rights; (vi) waivers of or limitations on rights to bring claims and counterclaims;⁵⁵ (vii) waivers of or limitations on statutes of limitations or repose;⁵⁶ (viii) the waiver of trial by jury; (ix) the waiver or other avoidance of the merger doctrine; (x) waivers or discharges of defenses; (xi) the waiver of an accounting for rent or sale proceeds; (xii) the waiver of set-off; (xiii) waivers subject to Section 9-602 of the UCC; (xiv) waiver of appraisal rights in foreclosure or otherwise and rights to a deficiency judgment when such appraisal rights are applicable.⁵⁷

____. We express no opinion as to the enforceability of any provision that states delay or omission of enforcement of rights and remedies will not constitute a waiver of such right or remedy to the extent that any such delay or omission is deemed a waiver of any right based on a course of dealing or course of performance by the parties.

⁵¹ See also the Special Report by the TriBar Opinion Committee: “The Remedies Opinion – Deciding When to Include Exceptions and Assumptions,” 59 BUS. LAW. 1483 (2004), for consideration when including additional qualifications. Include qualifications that are relevant to the transaction, documents and opinions covered.

⁵² See the ABA Principles Article II. In certain circumstances if you are rendering a special or supplemental opinion as to a specific area of law customarily deemed excluded by a closing opinion, you would limit this exception accordingly.

⁵³ Such exception may be applicable for regulated entities. Such laws include regulatory matters for which special expertise may be necessary (such as telecommunications and public utility law).

⁵⁴ See § 1-106(a) of the UCC.

⁵⁵ See *Beach Co. v. Twillman, Ltd.*, 566 S.E. 2d 863 (S.C. Ct. App. 2002).

⁵⁶ See S.C. Code Ann. § 15-3-140.

⁵⁷ Based on the strict requirements and limitations set forth in S.C. Code Ann. § 29-3-680 for a statutory waiver of appraisal rights, consider, and confirm timely and full compliance with, all of the requisite requirements of the statute. An opinion would not cover such waiver based on the notice requirements. See the “Real Estate Opinions” Section of the Report.

___ We express no opinion regarding the enforceability of any provisions relating to disclaimers, indemnities or other liability assumptions or limitations with respect to governmental entities and State agencies, third parties or one's own [gross] negligence, recklessness, or willful or unlawful misconduct.⁵⁸

___ We express no opinion regarding the enforceability of any provisions relating to (i) rights to attorneys' fees (which may be subject to the discretion of the court); (ii) [the right to cure defaults with third parties;] (iii) [confidentiality agreements;] (iv) [covenants not to compete;]⁵⁹ (v) [the consent to service of process in any particular manner;] (vi) [subrogation rights;] (vii) [submission to jurisdiction and venue;]⁶⁰ (viii) [submission to arbitration or mediation;]⁶¹ and (ix) the exercise of self-help remedies; [and (x) choice of law.]⁶²

___ We express no opinion as to any grant of a power of attorney in any Transaction Document or any provision that appoints the Lender or other parties as agent or attorney-in-fact or any provisions regarding future requirements to execute additional documentation not contemplated at the time of closing.⁶³ [We further express no opinion as to any changes made to the Transaction Documents after the documents were executed and delivered or the effect of such changes to the enforceability of those documents.⁶⁴]

___ We express no opinion as to the enforceability of any provision whereby the Lender reserves the right to charge "default interest" or a higher rate of interest after default than the interest that would otherwise accrue under the Transaction Documents, or any other charge or fee, including any yield maintenance or capital adequacy provision or any other provision whereby the Lender reserves the right to charge a tax, premium or fee, however calculated, which would be deemed a penalty.⁶⁵ Furthermore, we express no opinion as to the enforceability of any

⁵⁸ A state agency generally cannot indemnify another party. *See* South Carolina Attorney General's Opinion at 2004 S.C. AG Lexis 192 (Sept. 29, 2004). Furthermore, a party generally cannot be indemnified for its own sole or gross negligence. *See* S.C. Code Ann. § 32-2-10 with respect to hold harmless clauses in construction contracts.

⁵⁹ Assuming such covenant is contained in the documents, given the strict limitations on enforcement and fact-specific nature of the determination of enforceability, it is not practical and would be difficult to render an opinion as to the enforceability of such covenants. *See Poynter Investments, Inc. v. Century Builders of Piedmont, Inc.*, 387 S.C. 583, 694 S.E.2d 15 (2010).

⁶⁰ *See* S.C. Code Ann. § 15-7-120 Forum selection clauses are closely scrutinized by courts and must be reasonable. *See Republic Leasing Co., Inc. v. Haywood*, 329 S.C. 562 (S.C. Ct. App. 1998), *vacated on other grounds*, 335 S.C. 207 (SC 1999), for discussion on enforceability of forum selection clauses.

⁶¹ *See* S.C. Code Ann. § 15-48-10 with respect to arbitration under State law.

⁶² To the extent other jurisdictions are implicated in the transaction, exclude enforceability of choice of law provisions. *See* fn 18 *supra*.

⁶³ A power of attorney would need to comply with applicable laws for enforcement. Certain "further assurances" type language may not be enforceable.

⁶⁴ Only applicable to the extent there are blanks in the documents that are to be filled in by a third party or post-closing.

⁶⁵ A penalty provision will not be enforceable. *See Tate v. Le Master*, 99 S.E.2d 39 (S.C. 1957); *Kirkland Distrib. Co. of Columbia, S.C. v. United States*, 276 F.2d 138 (4th Cir. 1960); *South Carolina Dep't of Health and Envtl. Control v. Kennedy*, 344 S.E.2d 859 (S.C. Ct. App. 1986).

prepayment premium or fee triggered by condemnation, acceleration or events beyond a party's control.⁶⁶

____. We express no opinion as to the right of the Lender to accelerate the due date of any indebtedness without notice or other overt action by the Lender or upon the occurrence of an immaterial breach (including a material breach of a non-material provision thereof) of any of the Transaction Documents or upon any filing under any applicable bankruptcy code [or solely in the event the Lender deems itself insecure or believes that its prospects for repayment are impaired.]⁶⁷ Furthermore, we express no opinion on provisions to the effect that the acceptance by the Lender of past due installments or other performance by the Borrower [or the Guarantor] shall not be deemed a waiver of the Lender's right to accelerate the indebtedness.⁶⁸

____. We express no opinion as to the enforceability of any provision of a guaranty providing for continued liability against the estate of a deceased or incompetent guarantor or obligor to the extent of advances made on the Loan after notice of a guarantor's death or incompetency.

____. We express no opinion as to the enforceability of any provision contained in the Transaction Documents which purports to prohibit oral agreements or amendments or provisions that otherwise limit the effect of a course of dealing or performance between the parties.⁶⁹

____. We express no opinion as to any other document which may be referred to or otherwise incorporated by reference into any Transaction Document. Furthermore, we express no opinion as to the enforceability of any provision relating to the construction of the documents to the extent such documents contain provisions that may be inconsistent.⁷⁰

____. We express no opinion as to the enforceability of any provisions that relate to severability where less than all of the contract may be unenforceable, to the extent that the unenforceable portion is an essential part of the agreed exchange, or to the extent that a court or other adjudication panel will not re-write the document to exclude the unenforceable provision.⁷¹

____. We express no opinion as to whether representations can survive or be continuing.⁷²

⁶⁶ For enforceability of certain prepayment fees, see *River East Plaza, L.L.C. v. The Variable Annuity Life Ins. Co.*, 498 F.3d 719 (7th Cir. 2007). See also *In re Worldwide Wholesale Lumber, Inc.*, No. 06-01499-JW, 2007 Bankr. LEXIS 1564 (Bankr. D.S.C. Feb. 12, 2007), denying a creditor's request for a prepayment penalty.

⁶⁷ See S.C. Code Ann. § 36-1-208 requiring good faith. See also the South Carolina Reporter's Comments to § 3-109(1)(c) of the UCC.

⁶⁸ Prior to notice of acceleration, payment of any amount in default may reinstate the Loan.

⁶⁹ Agreements can be modified by course of dealing, course of performance and subsequent oral agreements (absent statute of frauds). See *Evatt v. Campbell*, 106 S.E. 2d 447 (SC 1959); see also *Sanchez v. Tilley*, 330 S.E. 2d 319 (S.C. Ct. App. 1985) and *Lee v. Thermal Engineering Corp.*, 572 S.E. 2d 298 (S.C. Ct. App. 2002).

⁷⁰ Other documents included by reference are not covered by the enforceability opinion. Often boilerplate provisions may have differing language and multiple documents may state that they control.

⁷¹ If a material provision (essential to the contract) is unenforceable, the court may not be willing to sever (or "blue pencil") the unenforceable term. See *Poynter Investments* at fn 59 *supra*.

⁷² Consider this exception for provisions that state representations are continuing and survive closing. Survival provisions are often included in an acquisition agreement to allow representations to survive closing for a limited purpose (*i.e.*, to prevent merger and to permit a claim for breach after closing). Enforceability of survival language has been the subject of debate in certain circumstances and, as such, should be excluded from the enforceability

____. We express no opinion as to whether any document is an instrument under seal.⁷³

____. We express no opinion regarding title to, the location of, or the priority of any security interest or lien in, on or against any property (whether real or personal, tangible or intangible).⁷⁴

[*Certain Real Estate Mortgage Related Exceptions*]

____. [As to matters of title to real property, it is our understanding that you are relying on the title insurance policy to be issued in connection with the Loan (the “Title Policy”) and all matters contained therein, including, without limitation, the priority of the Mortgage, and] we express no opinion as to matters of title or priority of any lien on real property.⁷⁵ With respect to the location of the land and the legal description, it is our understanding that you are relying on the Title Policy and survey] prepared in connection with the Loan, and we express no opinion with respect to the location of such land.⁷⁶

____. We express no opinion as to whether any items of personal property are incorporated in or made a part of the real estate under the Mortgage.⁷⁷ Whether any item of personal property constitutes a fixture or real property is a factual determination under certain rules of law and cannot be arbitrarily controlled by the intent of the parties.

opinion. (*See, e.g., Western Filter Corp. v. Argan, Inc.*, 540 F.3d 947 (9th Cir. 2008).) Consider also the distinctions among representations, warranties and covenants. Survival should not be confused with ongoing obligations that require affirmative covenants. A representation is made at a particular point in time. It can be reaffirmed at a future date (such as at the time of a future advance) but may not be deemed to be a continuing and ongoing obligation absent a separate covenant. A representation that is false when made can constitute a default.

⁷³ *See* S.C. Code Ann. § 15-3-520 relating to statutes of limitation. *See also Carolina Marine Handling, Inc. v. Lasch*, 609 S.E. 2d 548 (S.C. Ct. App. 2005) for requirements for documents executed under seal.

⁷⁴ Do not give opinions to third parties as to title to real property, as that is more appropriately covered by title insurance (opinions are not a substitute for insurance and law firms are not insurance companies), and do not give opinions as to title to personal property, as it is impossible to confirm title to personalty because title to personal property does not have to be documented. Also, do not give opinions as to priority of liens or security interests. It is practically impossible to cover all possible qualifications and exceptions necessary for a priority opinion. Due to the limited protection afforded by a properly qualified “Filing Priority Opinion” (and the ability of the recipient to make the same determination by reviewing the UCC search), even such limited priority opinions are not advised. *See* Special Report by the TriBar Opinion Committee: “U.C.C. Security Interest Opinions – Revised Article 9,” 58 BUS. LAW. 1449, 1478-1479 (2003), §§5.2(a) and (b), n. 160-166. *See also* GLAZER § 12.1 n. 4; §12.8 for a more detailed discussion on priority opinions; and GLAZER § 12.9 noting traps for the unwary even in carefully prepared “filing priority” opinions relying only on search reports. Over time, even filing priority opinions have become increasingly rare. Be careful to avoid inadvertent priority opinions.

⁷⁵ Do not give opinions as to the status of title to real property to third parties. Real estate title and mortgage liens are covered by title insurance. A lawyer should not be put in the position of insuring title by virtue of an opinion. *See* the discussion in the “Real Estate Opinions” Section of the Report.

⁷⁶ Location of property is beyond the professional ability of a lawyer and scope of an opinion.

⁷⁷ Determination of whether personal property is a fixture and deemed part of the real estate is a matter of law and based on the nature and facts of the specific property. It is a difficult analysis and determination is subject to the discretion of the court. Merely stating personal property is part of the mortgaged real property does not make such property a fixture (however, intent is a factor).

____. We express no opinion as to the creation or validity of any lien against after-acquired real property.⁷⁸

____. [We express no opinion as to any future advances in excess of the maximum principal amount stated in the Mortgage, plus interest thereon, attorneys' fees and court costs, as provided in Section 29-3-50 of the Code, [and the indebtedness secured by the Mortgage may be limited to such stated amount,] notwithstanding any provision to the contrary.⁷⁹]

____. [With respect to the Mortgage, we express no opinion as to the effect of any failure to include that the interest on the secured indebtedness may be deferred, accrued or capitalized.⁸⁰]

____. In the State, mortgaged real property may be sold only pursuant to judicial foreclosure proceedings.⁸¹ Further, the right to possession is by statute vested in the mortgagor until the completion of the foreclosure sale.⁸² Therefore, any provisions concerning a secured party's rights to enter into possession of, operate, control or sell real property, either directly or through a receiver not appointed by a court and without the institution of judicial foreclosure proceedings, will be unenforceable. Rights of a mortgagee to enter into possession of the real property, to take control of and operate or sell real property, either directly or through a receiver, without benefit of judicial proceeding are not recognized in the State. A mortgagee may obtain the services of a receiver to manage such property only by court appointment of the receiver. In the State, the appointment of a receiver is generally discretionary with the court.⁸³ Therefore, we express no opinion as to the enforceability of the remedies set forth in the Mortgage, Assignment of Leases or any other Loan Documents which are contrary to the provisions of the Code or the statutory requirements for appointment of a receiver, the collection of rents, and judicial foreclosure under State law. We express no opinion as to whether or not the Lender may be deemed a mortgagee-in-possession under certain circumstances.

____. Notwithstanding anything to the contrary in the Loan Documents, the Lender may be forced to initiate legal proceedings to effectuate its remedies. In addition, all remedies may be limited or modified by the doctrine of election of remedies.

⁷⁸ To include additional real property under the Mortgage, a new mortgage must be granted by the mortgagor or the mortgage must be properly amended to include the additional property for valid consideration and duly recorded in the County Recording Office, and any provision in the Mortgage to the contrary is unenforceable.

⁷⁹ This exception may be appropriate in an opinion rendered to an out-of-state recipient. Make certain an amount is expressly stated (and not simply by reference to a note or another document) if future advances are covered.

⁸⁰ Include only if the applicable phrase is not stated in the Mortgage. *See* S.C. Code Ann. § 29-3-50.

⁸¹ Non-judicial foreclosure of a real estate mortgage lien is not recognized in the State (except as expressly permitted by statute for certain timeshare interests).

⁸² The Act of 1791, now codified as S.C. Code Ann. § 29-3-10, provides that the right of possession remains in the property owner granting the mortgage and not the mortgage holder, as follows:

No mortgagee shall be entitled to maintain any possessory action for the real estate mortgage, even after the time allotted for the payment of the money secured by the mortgage has elapsed, but the mortgagor shall be deemed the owner of the land and the mortgagee as owner of the money lent or due, and the mortgagee shall be entitled to recover satisfaction for such money out of the land by foreclosure and sale according to law.

S.C. Code Ann. § 29-3-10.

⁸³ *See generally* S.C. Code Ann. § 15-65-10 et seq. *But see also* S.C. Code Ann. § 6-17-200.

____. We express no opinion as to whether the Assignment of Leases or any assignment of leases and rents contained in the Mortgage which permits the Borrower to collect rents and profits from the land described therein until the occurrence of an event of default is a present and absolute assignment.⁸⁴

____. Rights to condemnation proceeds and notices of condemnation proceedings are governed by the South Carolina Eminent Domain Procedure Act,⁸⁵ and we express no opinion as to any provision contrary to such laws.

____. We express no opinion as to any provision in the Mortgage or any other document that requires any party to purchase casualty insurance on property in an amount in excess of the replacement cost of the buildings and appurtenances on the land.⁸⁶ [Furthermore, we have not examined, and express no opinion as to the assignability of, policies of insurance required by the Mortgage.]

____. We express no opinion as to the condition or previous, present or future use of any property. Furthermore, we express no opinion as to the effect of or compliance with any federal, state or local law, rule or regulation relating to environment, health and safety, building and construction, [archaeology,] [historic preservation,] land use, land sales, [landlord-tenant relationships,] [horizontal property regimes,] [vacation time sharing,] [fair housing,] [property management,] [loan and mortgage brokers,] subdivision and zoning.⁸⁷

[*Certain UCC Specific Qualifications*]

____. We express no opinion as to the perfection of any security interest in or against any property, except as specifically set forth in opinion paragraph(s) ____ above with respect to perfection of the UCC Financing Collateral by recording the Mortgage and Fixture Filing in the County Recording Office and filing the Financing Statement in the State Filing Office. Without limiting the foregoing, we express no opinion as to any security interest in any collateral (a) which is perfected upon attachment pursuant to Section 9-309 of the UCC; [(b) which is perfected by possession or delivery under Section 9-313 of the UCC;] [(c) which is perfected by control under Section 9-314 of the UCC;] [(d) which requires filing in the jurisdiction of [the debtor's location] [the location of the goods as provided in Section 9-301 of the UCC] for perfection;] or (d) which is not subject to Article 9 of the UCC.⁸⁸ [*Optional Additional Language:*] Without limiting the foregoing, we express no opinion as to the perfection of [or

⁸⁴ Under § 29-3-100 of the Code, any assignment that permits an assignor to collect rents and profits is enforceable only as a collateral assignment and such enforcement is subject to S.C. Code Ann. § 29-3-100(C).

⁸⁵ See S.C. Code Ann. § 28-2-10 *et seq.*

⁸⁶ See S.C. Code Ann. § 29-3-70.

⁸⁷ The recipient should rely on the title insurance policy and any environmental site assessment, building permit, and/or zoning letter obtained in connection with the transaction. Do not render zoning opinions (a zoning endorsement to the title policy may be obtained if necessary), and do not simply rely on a zoning letter to render such opinion. See the Real Estate Guidelines §§ 4.3.a and 1.5.b. See also the "Real Estate Opinions" Section of the Report.

⁸⁸ The security interest opinion is limited to Article 9 collateral.

Delete references to specific types of collateral if those types of collateral are expressly covered in the opinion (*e.g.*, if giving a perfection by control opinion). See the "UCC Opinions" Section of the Report for opinions as to UCC "non-filing" collateral.

creation of] any security interest in collateral consisting of:⁸⁹ (i) [trademarks, service marks, copyrights, patents or other intellectual property;]⁹⁰ (ii) [timber, oil, gas, minerals or other natural resources;]⁹¹ (iii) [consumer goods;] (iv) [vehicles, airplanes, boats, vessels, or goods that are subject to a certificate of title;]⁹² (v) [money, cash or cash equivalents;] (vi) [tax refunds;] (vii) [insurance or condemnation proceeds;] (viii) [instruments;] (ix) [letter-of-credit rights;] (x) [electronic] [chattel paper;]⁹³ (xi) [documents or goods covered by documents;] (xii) [commodity accounts and contracts;] [securities (certificated or uncertificated);] [securities accounts or security entitlements;]⁹⁴ (xiii) [commercial tort claims;]⁹⁵ (xiv) [deposit accounts;]⁹⁶ (xv) [equipment or goods that do not constitute fixtures;]⁹⁷ (xvi) [goods in possession of a bailee;] or (xvii) [proceeds to the extent that under certain circumstances described in Sections 9-315 and 9-322 of the UCC, the rights of a secured party to enforce a perfected security interest in proceeds of collateral may be limited.]⁹⁸ [A security interest may be subject to competing interests of others, and under certain circumstances interests of others may take free of a security interest pursuant to the UCC.]

____. [With respect to the Financing Statements, we note that: (i) the effectiveness of a financing statement under the UCC terminates five years after the filing unless a continuation statement is filed prior to such termination in accordance with Section 9-515 of the UCC, and (ii) Sections 9-507(c) and 9-508(b) of the UCC provide that if the debtor so changes its name, identity or corporate structure or a new debtor's name is so different that a filed financing statement becomes seriously misleading under Section 9-506 of the UCC, the filing is not effective to perfect a security interest in collateral acquired by the debtor more than four months after the change unless an appropriate amendment under Section 9-507(c)(2) of the UCC or a new initial financing statement under Section 9-508(b)(2) of the UCC, as the case may be, is filed before the expiration of that period. For purposes of this opinion, we have assumed that the

⁸⁹ Do not include types of collateral to the extent expressly covered by the opinion or to the extent not included in the loan documents. Many of the types of collateral listed here may be covered in the "UCC Filing Collateral" opinion being subject to permissive filing under § 9-312(a) of the UCC (*e.g.*, chattel paper, negotiable documents, instruments and investment property); however, they may be subject to other provisions which you may need to consider in rendering the opinion. Many of the exceptions are based on priority issues and may not be necessary for "filing only" perfection opinions. However, it may avoid any concerns with the manner of perfection.

⁹⁰ Security interests in copyrights are perfected under federal law by filing with the US Copyright Office, while security interest in patents and trademarks can be perfected by filing a financing statement at the state level under the UCC. Absolute transfers of patents and trademarks by assignment are filed with the US Patent and Trademark Office, but such federal filings should not be confused with UCC perfection filings.

⁹¹ See §§ 9-301(3) and (4) of the UCC for governing law and §§ 9-501(a)(1)(A) and 9-502(b) of the UCC for local filing requirements.

⁹² See § 9-303 of the UCC for governing law and § 9-311(2) of the UCC regarding perfection pursuant to state statutes for certificate of title collateral (Chapter 19 of Title 56 of the Code with respect to motor vehicles; and Chapter 23 of Title 50 of the Code with respect to watercraft and outboard motors). However, note the distinction in § 9-316 of the UCC when such collateral is held as inventory by a seller of such goods.

⁹³ See §§ 9-105 and 9-208 of the UCC regarding control of electronic chattel paper.

⁹⁴ All of these types of collateral are "investment property" under § 9-102(a)(49) of the UCC and *may* be perfected by filing under § 9-312(a) of the UCC. However, there are other considerations for certain collateral subject to permissible filing for perfection.

⁹⁵ Commercial tort claims must be specifically identified as provided in § 9-108(e)(1) of the UCC.

⁹⁶ See § 9-304 of the UCC for governing law and §§ 9-104 and 9-208 of the UCC re: control of deposit accounts.

⁹⁷ Include this exception only if the security interest opinion is limited to fixtures in the State.

⁹⁸ You may want to limit proceeds to "identifiable" proceeds.

Borrower will remain the debtor and will not change its name, identity, jurisdiction of business organization or corporate structure during the term of the Loan and that the collateral will remain subject to the jurisdiction of the State.]⁹⁹

____. [With respect to the organizational identification number on the Financing Statement, we express no opinion as to the requirements of another jurisdiction for an organizational identification number of a debtor or the accuracy of any such number shown thereon.]¹⁰⁰

____. [We express no opinion as to any provision which purports (i) to create, with no further action on the part of the Borrower, a lien arising in the future in favor of the Lender attaching to assets in which no security interest is granted by the Loan Documents, or (ii) to limit the rights of third parties who obtain legitimate liens on such assets.]

____. Contrary to the provisions in the Transaction Documents regarding self-help remedies of the Lender, a secured party, upon default, has the right to proceed without judicial process to retake possession of secured personal property only if it can be done without breach of the peace in compliance with the requirements and remedies set forth under the UCC.

____. We express no opinion as to the negotiability of the Note or other instrument based on the limitations set forth in Sections 3-104(a) and 3-106 of the UCC.

____. The enforceability of the Transaction Documents may be limited by the rights of third parties to the extent that the consent of such third parties is necessary for the valid transfer of any collateral as security. Furthermore, we express no opinion as to any assignment of any lease, contract, warranty, permit or other document, including, without limitation, the assignment of any governmental permits, authorizations or approvals.¹⁰¹

____. We express no opinion as to the enforceability of provisions restricting assignments pursuant to the limitations and restrictions contained in Sections 9-406 through 9-409 of the UCC.¹⁰²

[*Generic Qualification/Miscellaneous*]

[Certain other provisions may be unenforceable, but such other provisions should not render the Transaction Documents invalid as a whole or preclude, subject to the economic consequences of

⁹⁹ As this qualification speaks to future requirements, which are not covered (the opinion speaks as of its date), it may not be necessary. However, you may want to include it if there are any requirements for bring-down filing perfection opinions or concerns about the responsibilities for maintaining perfection in the documents.

¹⁰⁰ This exception is necessary if the debtor is organized under the laws of another state and is filing locally. The box in 1g of the financing statement asking for the organizational identification number must be checked "none" for a debtor organized in the State, as the State does not issue an organizational number (or for entities organized in any other jurisdiction that does not issue an organization identification number). You do not use tax identification numbers.

¹⁰¹ Certain governmental permits and licenses may not be transferable (*e.g.*, liquor licenses).

¹⁰² The anti-anti-assignment provisions of the UCC (§§ 9-406 through 9-409) generally restrict the enforcement of prohibitions against assignments; however, not all payment rights are subject to the UCC provisions.

any procedural delay which may result from such unenforceable provisions, (i) enforcement of the obligation to repay the principal and interest on the Loan through judicial means and (ii) judicial foreclosure of the Mortgage.] *[Alternative:]* [The enforceability of the Transaction Documents may be further limited in that certain other provisions may not be enforceable in accordance with their terms, but the inclusion of those other provisions, subject to the other qualifications and exceptions stated herein, should not materially interfere with the practical realization of the principal security intended to be provided thereby, except for the economic consequences of any procedural delay which may result from such unenforceable provisions and applicable law.]¹⁰³

The legal opinions expressed herein are an expression of professional judgment and not a guaranty of any result.

This legal opinion is delivered to you and is solely for your use in connection with the Loan.¹⁰⁴ Without our prior written consent, this opinion may not be used or relied upon by any other person, firm or entity or quoted for any other purpose.¹⁰⁵ This opinion is given as of the date hereof based upon existing facts and law and is subject to changes therein. We are under no obligation, and do not undertake any obligation to update or revise the opinions set forth herein for any reason including, without limitation, facts or laws subsequently becoming known to us which cause such opinions to be inaccurate or incomplete.¹⁰⁶

[Firm Name]¹⁰⁷

¹⁰³ Such qualification is typically included in complex leasing and financing transactions and real estate mortgage opinions. The first option is preferable in mortgage loan transactions. See discussion at GLAZER § 9.11 for a discussion on the “Practical Realization” or “generic qualification” and alternative formulations. See also 1998 TriBar Report § 3.4 at 626-627. See also the “Real Estate Opinions” Section of the Report.

¹⁰⁴ See the “General Opinion Concepts and Format” Section of the Report for discussion on reliance and additional language which may be considered in limited circumstances where reliance by certain assignees could be permitted if required and appropriate for the transaction.

¹⁰⁵ See the “General Opinion Concepts and Format” Section of the Report for limited exceptions where copies could be provided to certain governmental or regulatory authorities or rating agencies for limited purposes associated with the transaction and necessary for the parties to the transaction.

¹⁰⁶ The opinion speaks only as of its date.

¹⁰⁷ See ABA Committee on Legal Opinions, “Law Office Opinion Practices,” 60 BUS. LAW. 327 (2004). Although the opinion can be signed by the individual attorney in his or her capacity as a member of the firm, opinions are typically signed in the name of the firm, except for opinions of inside counsel. Opinions of inside counsel are signed in the name of the individual attorney and not in his or her capacity as an employee of the company.

I. GENERAL OPINION CONCEPTS AND FORMAT

A. DATE

A third-party closing opinion is delivered at the closing of a transaction and is dated as of the closing date. The opinion letter is given only as of its date and the giver undertakes no obligation to update the opinions contained in the letter.¹ In the closing paragraphs, the opinion giver usually confirms that the opinion is given as of its date:

This opinion is given as of the date hereof based upon existing facts and law and is subject to changes therein. We are under no obligation, and do not undertake any obligation to update or revise the opinions set forth herein for any reason including, without limitation, facts or laws subsequently becoming known to us which cause such opinions to be inaccurate or incomplete.

B. ADDRESSEE; RELIANCE

1. Addressee. The addressee is the opinion recipient.² The recipient wants to know that the other party can legally enter into the transaction and that such other party's obligations under the transaction documents are enforceable against such other party. The recipient has a legitimate interest in confirming that the other party is a validly existing entity, that such other party has the power to enter into the transaction, and that such other party has duly authorized, executed and delivered the transaction documents. The recipient is usually a party to the transaction.³ Only parties to, or involved in, the transaction who have a legitimate interest in the opinion should be permitted to rely on it. The opinion giver should be careful not to expand the scope of parties permitted to rely on its opinion.⁴

2. Opinion Recipient Reliance on Opinion Letters. A lawyer owes a duty of care⁵ to non-client addressees of a third party opinion letter, and any other non-client who is invited by the lawyer⁶ or (with the lawyer's acquiescence) is invited by the lawyer's client to rely on the opinion letter or whom could be expected to so rely, provided, however, that the non-client relies

¹ See 1998 TriBar Report § 1.2(b).

² See, generally, DONALD W. GLAZER, SCOTT FITZGIBBON & STEVEN O. WEISE, GLAZER AND FITZGIBBON ON LEGAL OPINIONS: DRAFTING, INTERPRETING AND SUPPORTING CLOSING OPINIONS IN BUSINESS TRANSACTIONS (3d ed. & 2009 Supp.) [hereinafter GLAZER] § 2.3.

³ See GLAZER § 2.3.1, n.3 at 63-64.

⁴ See GLAZER § 2.3.2, *Liability to Addressees and Others*. See also RESTATEMENT OF LAW GOVERNING LAWYERS § 51, Comment e.

⁵ The opinion recipient's "right to rely" means that a professional duty is owed by the third-party opinion giver to the opinion recipient. As a result, in most jurisdictions, if an opinion is negligently given and results in damage to the opinion recipient, the opinion recipient has a claim against the opinion giver. See TriBar Opinion Committee, Opinions in the Bankruptcy Context: Rating Agency, Structured Financing, and Chapter 11 Transactions, 46 BUS. LAW. 717, 735 & nn. 66-68 (1991). See also 1998 TriBar § 1.6 at 604.

⁶ On occasion, a closing opinion expressly authorizes persons to whom it is not addressed (for example, assignees of notes) to rely on it. Those persons are permitted to rely on the closing opinion to the same extent as – but to no greater extent than – the addressee. See ABA Guidelines § 1.7 at 876-877.

on the opinion and such reliance is reasonable.⁷ The recipient of an opinion letter is entitled (except in a few jurisdictions) to rely on the opinions expressed without taking any action to verify those opinions, however the opinion recipient has no right to rely on an opinion if reliance is unreasonable under the circumstances or the opinion is known by the opinion recipient to be false.⁸

3. Reliance Paragraph. Opinion letters are not intended to be general advice regarding the subject matter of the opinions contained therein. An opinion letter is intended to relate to a specific business transaction and the opinion preparer should exercise caution in preparing the reliance paragraph so unintended opinion recipients are prevented from relying on the opinion and asserting claims based on such reliance and so intended recipients are not relying on the opinion letter for purposes beyond the scope of the letter. The closing paragraph usually expressly states that the opinion is rendered solely for the benefit of the named addressee in connection with the transaction and may not be relied upon by any other person or for any other purpose. An example of such paragraph follows:

This legal opinion is delivered to you and is solely for your use in connection with the [transaction]. Without our prior written consent, this opinion may not be used or relied upon by any other person, firm or entity or quoted for any other purpose

4. Expanding the Scope. The reliance paragraph of an opinion letter can be a trap for the unwary. Many lenders and lender’s counsel request the broadest possible list of persons be permitted to rely on an opinion letter. Obviously the greater number of persons entitled to rely on the opinion letter, the greater the potential for liability by the opinion preparer.

a. Assignees. Recipients will occasionally request the opinion giver to extend reliance to its successors and assigns, and, in cases of loan participations or note sales, to future participants and purchasers.⁹ The following reliance language has been adopted in some jurisdictions (including North Carolina) and is recommended if the opinion recipient insists upon reliance for its future successors and assigns:

At your request, we hereby consent to reliance hereon by any future assignee of your interest in the loans under the Credit Agreement pursuant to an assignment that is made and consented to in accordance with the express provisions of Section [] of the Credit Agreement, on the condition and understanding that (i) this letter speaks only as of the date hereof, (ii) we have no responsibility or obligation to update this letter, to consider its applicability or correctness to other than its addressee(s), or to take into account changes in law, facts or any other developments of which we may later become aware, and (iii) any such reliance by a future assignee must be actual and reasonable under the circumstances existing at

⁷ See discussion at GLAZER § 2.3.2 for a discussion on “Liability to Addressees and Others”; RESTATEMENT OF LAW GOVERNING LAWYERS § 51, Comment e.

⁸ See 1998 TriBar § 1.6 at 604.

⁹ Recipient’s counsel, however, is not an appropriate reliance party. For a more detailed discussion on reliance parties, see GLAZER § 2.3.1, n. 3 at 64, and at 66-67.

the time of assignment, including any changes in law, facts or any other developments known to or reasonably knowable by the assignee at such time.¹⁰

The opinion giver may want to limit the time period in which any such successors and assigns reliance may occur (*e.g.*, six to twelve months from the date of the opinion) in an effort to help limit its exposure.

b. Copies. Certain parties, such as governmental regulators, recipient's counsel, prospective assignees and other parties should not be permitted to rely on the opinion for any purpose. However, such parties may have an interest in knowing that the recipient performed its due diligence and obtained a legal opinion in connection with the transaction. In lieu of reliance for certain parties, the opinion giver may consider allowing copies to be provided in limited circumstances. The following alternative language may be included in such case:

provided, however, that copies of this opinion letter may be provided (a) to any rating agency rating the [Notes], (b) by court or governmental order pursuant to judicial process, (c) to bank examiners, auditors and other regulatory authorities having jurisdiction over you as required by law, and (d) to prospective successors and assignees of your interests in the Transaction Documents.

C. SIGNATURE

Although the opinion can be signed by the individual attorney in his or her capacity as a member of the firm, opinions are typically signed in the name of the firm,¹¹ except for opinions of inside counsel. Opinions of inside counsel are signed in the name of the individual attorney and not in his or her capacity as an employee of the company.¹²

¹⁰ See GLAZER § 2.3.1, n.3 at 64. See also Supplement to Report of the Legal Opinion Committee of the Business Law Section of the North Carolina Bar Association, § 2.2, GLAZER App. 38A, at 38A:6-10.

¹¹ See GLAZER § 2.9 at 99-102 (*Who Should Sign and in What Name?*). See also ABA Committee on Legal Opinions, "Law Office Opinion Practices," 60 BUS. LAW. 327 (2004).

¹² See ABA Section of Business Law Committee on Legal Opinions "Closing Opinions of Inside Counsel," 58 BUS. LAW. 1127 (2003).

II. OPINION DUE DILIGENCE

An opinion preparer must perform certain due diligence necessary to render a legal opinion, from reviewing corporate records and organizational documents for corporate power, valid existence and duly authorized opinions, to reviewing the subject transaction documents for enforceability under applicable law for the remedies opinion.¹ One purpose of a closing opinion for the opinion recipient is to know that the customary corporate due diligence has been done.²

A. **Establishing the Facts.** Since the preparation of a legal opinion requires the opinion preparer to apply the law to a set of facts involving specific parties in an actual transaction, the opinion preparer must first establish the factual basis to support the opinion.³ The opinion preparer will need to (i) identify the facts needed to support the opinions being rendered, (ii) obtain (or assume, if appropriate) the necessary factual information and (iii) apply the law to the facts. The factual information may be obtained from the opinion preparer's actual knowledge, representations in the documents, appropriate officers' certificates, certificates of public officials, or other appropriate third party sources.⁴ The opinion preparer may also rely on certain factual assumptions.⁵

B. **Reliance by the Opinion Preparer.** Since lawyers are not all-knowing, an opinion preparer usually will need to supplement his or her actual, personal knowledge of the facts by establishing the factual basis for an opinion in other ways, such as relying on factual information provided by others and assuming that certain facts are true (provided the opinion preparer does not have actual knowledge that the assumptions are untrue).⁶ Opinion preparers may rely on factual information from appropriate third party sources, such as the corporate officers who have responsibility for the information being provided.⁷

1. **Officer's Certificates.** Opinion preparers typically draft certificates containing the factual information they need and have appropriate officers execute them. Certificates are made as representations by an officer of the company in the officer's individual capacity, not as representations made by the company and signed by an officer on the company's behalf.⁸

2. **Certificates of Public Officials.** Certain factual information is confirmed by certificates issued by government officials on standard governmental forms, such as certificates of existence from the applicable secretary of state.⁹

¹ Due diligence requirements for specific types of opinions are set forth in the applicable sections of this Report.

² See generally GLAZER §1.3.1 and note 5 at 12. See also 1998 TriBar Report, §2.6 at 618.

³ See generally GLAZER §4.1. See also 1998 TriBar Report, §2.1 at 608-610.

⁴ See generally GLAZER §4.2. See also 1998 TriBar Report, §2.2 at 610-615.

⁵ See generally GLAZER §4.3. See also 1998 TriBar Report, §2.3 at 615-616.

⁶ See GLAZER §4.3.4. However, in certain circumstances, the parties may expressly agree to assumptions that are untrue, such as an assumption with respect to choice of law.

⁷ See GLAZER §4.2.1 at 121, and §4.2.3.1 at 130-132 and note 34.

⁸ See GLAZER §4.2.3.8 at 146.

⁹ See GLAZER §4.2.1 at 120 and note 3.

3. **Document Representations.** Opinion preparers may also rely on factual representations contained in the transaction documents covered by the opinion, provided such reliance is limited to statements of fact and does not extend to any conclusions of law. If relying on representations contained in the transaction documents, the opinion preparers should perform the same due diligence review of the representations with the appropriate company officers as they would have done if those officers were executing separate opinion certificates.¹⁰

4. **Oral Statements.** If necessary, opinion preparers may rely on information provided orally. However, in such cases, the opinion preparers should provide a written memorandum or notes in the file evidencing their conversations.¹¹

C. **Scope of Due Diligence.** Opinion preparers do not act as auditors in rendering closing opinions¹² and are not expected to investigate beyond the stated inquiry to confirm whether the facts as represented to them are true or not.

1. **Recipient's Diligence.** An opinion recipient has due diligence obligations as well. It should conduct its own investigation of the facts before closing the transaction and should not rely on a closing opinion as a substitute for its due diligence investigation and its obligation to its client.¹³ Absent special circumstances where recipient's counsel is rendering a closing opinion and needs to rely on certain opinions of the opinion giver, recipient's counsel is not an appropriate reliance party. Recipient's counsel is unable to avoid professional liability to its client by relying upon the closing opinion.

2. **Local Counsel Opinions.** For local counsel opinions in large multistate transactions, a factual investigation limited to the document review may be warranted given the limited role and involvement of local counsel in the transaction.¹⁴

3. **Lawyer Group.** In most transactions in which a law firm is delivering a closing opinion, a group of several lawyers takes responsibility for preparing the opinion. If any of those lawyers has actual knowledge that any of the information is untrue or that reliance is unwarranted, that information may not be used as a basis for an opinion.¹⁵ However, if the lawyers working on an opinion are not aware of contrary information but another lawyer in the firm is, the knowledge of that other lawyer does not preclude reliance by the opinion preparers.¹⁶ On the other hand, if the opinion preparers know that another lawyer in the firm has information about the client that they need to support an opinion, they must consult with that lawyer.¹⁷

¹⁰ See GLAZER §4.2.1 at 120-121.

¹¹ See GLAZER §4.2.3.7 at 145--146 and note 57.

¹² See GLAZER §4.2.3 at 129-130 and note 30.

¹³ See GLAZER §1.3.1 at 9-12 and §4.2.3 at 130.

¹⁴ See GLAZER §4.2.2 at 127-128.

¹⁵ See GLAZER § §4.2.3.2 and 4.2.3.3 at 134-141.

¹⁶ See GLAZER § 4.2.3.3 at 138-139 and note 40.

¹⁷ See GLAZER §4.2.3.3 at 140-141, and ABA Legal Opinion Principles §III.B.

4. **Knowledge.** Often opinion preparers will limit certain opinions (such as the “no breach or default” opinion) to their knowledge. Opinion preparers are still expected to perform the customary due diligence to render those opinions. However, opinion preparers may define in the opinion the meaning of “knowledge” and limit knowledge to the actual knowledge of a defined lawyer group, without further investigation.¹⁸

¹⁸ See 1998 TriBar Report, §2.6.1 at 618-619.

III. ASSUMPTIONS

Assumptions as to factual matters can simplify opinion forms, reduce the time and cost of preparation of opinions, and allow opinions to be rendered that, but for the assumptions, could not be given.¹ Assumptions may be express and set forth in the opinion itself, or maybe implied and not expressly referenced in the opinion.

1. Implied Assumptions.

Implied assumptions are assumptions applicable to transactions generally, irrespective of the specific type of transaction or the nature of the parties; they are implied as a matter of course and need not be expressly stated in the opinion.² Common examples of such implied assumptions include an assumption that copies of documents examined conform to the original documents, that the signatures on documents examined are genuine, that individuals executing the documents have the legal capacity to do so, that documents examined are authentic, that other parties to the transaction have the necessary power to enter into the transaction, and that the documents are binding on those other parties.³

The incorporation of implied assumptions as a matter of course into all opinions arises from a common understanding between opinion givers and opinion recipients (or their counsel).⁴ This common understanding as to the incorporation of implied assumptions reflects the customary practice of lawyers who regularly give and receive third-party legal opinions,⁵ and is commonly referred to simply as "customary practice."⁶ The concept of customary practice has been expressly recognized by the authors of most leading opinion reports and treatises as part of the law of opinions and the law of lawyers,⁷ and has been adopted by many business and real estate law sections of various state bars,⁸ including the Corporate, Banking and Securities Law Section of the South Carolina Bar.⁹

¹ TriBar Opinion Committee, "Third-Party Closing Opinions: A Report of the TriBar Opinion Committee," 53 BUS. LAW. 591 (1998) (hereinafter *1998 TriBar Report*) § 2.3 (b).

² DONALD W. GLAZER, SCOTT FITZGIBBON & STEVEN O. WEISE, *GLAZER AND FITZGIBBON ON LEGAL OPINIONS: DRAFTING, INTERPRETING AND SUPPORTING CLOSING OPINIONS IN BUSINESS TRANSACTIONS* (Aspen Law Publishers, 3d ed., & 2012 Cumulative Supp.) (hereinafter *GLAZER*) § 4.3.3; 1998 TriBar Report § 2.3 (a); Committee on Legal Opinions, ABA Section of Business Law, "Legal Opinion Principles," 53 BUS. LAW. 831, 833 (1998) (hereinafter *ABA Principles*).

³ *GLAZER* § 4.3.3; 1998 TriBar Report § 2.3 (a); *ABA Principles* at 833.

⁴ Statement on the Role of Customary Practice in the Preparation and Understanding of Third-Party Legal Opinions, 63 BUS. LAW. 1277 (2008) (hereinafter *Role of Customary Practice*); Restatement (Third) of the Law Governing Lawyers; 63 BUS. LAW. 1277.

⁵ *ABA Principles* at 832.

⁶ The concept of customary practice also includes understood limitations on the scope of opinions, how words and phrases used in the opinions should be understood, and the factual and legal due diligence expected to have been performed in connection with the rendering of the opinion. *Id.*

⁷ *Id.*

⁸ *Role of Customary Practice*, at 1278-79 (2008); Restatement (Third) of the Law Governing Lawyers.

⁹ *See Role of Customary Practice*; Restatement (Third) of the Law Governing Lawyers.

Set forth below is a list¹⁰ of assumptions generally accepted as incorporated by customary practices into opinions.¹¹ As noted, each of these assumptions is incorporated into South Carolina opinions, whether or not expressly stated:

- Natural persons who were involved on behalf of the client have the necessary legal capacity to execute the documents;
- The client has the necessary title and rights to the property involved in the transaction;
- The transaction documents are enforceable against the other parties to the transaction and those other parties have taken all the steps necessary to make the documents so enforceable;
- The documents reviewed by the opinion giver are accurate and complete and authentic, all copies reviewed conform to the originals, and all signatures on such documents are genuine;
- Documents obtained from public authorities are authentic, and the relevant public records are accurate and complete;
- There has been in the transaction no mutual mistake of fact or misunderstanding, fraud, duress, or undue influence;
- The parties have acted in good faith, and the opinion recipient has acted in good faith and without notice of any defense against enforcement of the transaction documents, or of adverse claims to the property or security interest created or transferred as part of the transaction;
- There are no outside agreements or understandings between the parties, and no usage of trade or course of prior dealing among the parties that would define, supplement, or qualify the terms of the transaction documents;
- All relevant legal authorities are generally available in a format that makes legal research reasonably feasible;
- All other agreements (other than the transaction documents subject to the opinion) and court orders would be enforced as written;

¹⁰ This list is not exclusive.

¹¹ Most of these assumption are set forth in “Third-Party Legal Opinion Report, Including the Legal Opinion Accord, of the Section of Business Law, American Bar Association,” 47 BUS. LAW. 167 (1991) (hereinafter *Accord*) § 4. The Accord, however, also includes as an implied assumption that the constitutionality or validity of any relevant statute, rule, regulation or actions is not in issue, absent a reported decision addressing is unconstitutionality or invalidity. This assumption is not generally viewed as assumed as part of customary practice, on the grounds that it is inconsistent with the duty of opinion prepares to make their own independent professional judgment as to the constitutionality of or validity of specific legal authority. 1998 TriBar Report § 1.2 (1998); GLAZER § 4.3.3 n. 1. Thus, should an opinion giver wish to rely on this assumption, it should be expressly stated.

- The client will not take or fail to take any action under the transaction documents that would result in a violation of law or constitute a breach or default under any agreement or court order;
- The client will obtain all necessary permits and governmental approvals required for subsequent consummation of the transaction and performance of its obligations under the relevant documents;
- All parties to the transaction will act in accordance with the transaction documents and refrain from taking action forbidden by the transaction documents;
- The corporate directors or others approving the transactions subject to the opinion did not violate their fiduciary duties in giving such approval;¹² and
- Any interested corporate transactions are fair to the corporation and its shareholders.¹³

Even though the assumptions set forth above as implied are deemed incorporated into all opinions, common practice is to expressly set forth some of these assumptions in the opinion.¹⁴ Typically the assumptions relating to the capacity of persons, the title of the client to the properties being transferred encumbered, the authenticity of documents and genuineness signatures, and the enforceability of the transaction documents against parties other than the client are expressly set forth, notwithstanding the deemed incorporation of those assumptions into all opinions.

Restraint should be exercised, however, in expressly stating these implied assumptions; otherwise, the opinion may become needlessly long, and express assumptions that may be particularly relevant to the specific opinion being delivered may be obscured.

2. Limitations on Reliance on Implied Assumptions.

There are limitations on the permissible reliance on implied factual assumptions. An opinion giver may not, for example, rely on an implied assumption known to be untrue,¹⁵ which is unreliable,¹⁶ or if such reliance is unreasonable under the

¹² 1998 TriBar Report §6.4.

¹³ *Id.*

¹⁴ Compare Washington State Bar Association, The Report on Third-Party Legal Opinion Practice in the State of Washington (1999), which proposes that the opinion giver expressly incorporate the assumptions in the Accord with the following Language: “For purposes of this opinion letter, we have relied, without investigation, on the assumptions contained in Section 4 of the Legal Opinion Accord of the ABA Section of Business Law (1991).” This approach is not the general practice and is not adopted by this Report.

¹⁵ GLAZER §4.3.4, p. 155.

¹⁶ 1998 TriBar Report § 2.3 (c).

circumstances,¹⁷ such as where the opinion giver has knowledge inconsistent with the assumption or reason to believe that the assumption is not accurate.¹⁸

An opinion giver also may not rely upon an implied assumption that directly or effectively states one of the legal conclusions expressed in the opinion¹⁹ or upon an implied assumption that addresses a specific issue that is directly addressed by the opinion.²⁰

3. Express Assumptions.

Opinion givers may, with the consent of the opinion recipients,²¹ rely in certain circumstances on factual assumptions that are not of general applicability. These assumptions that are not of general applicability must be expressly stated in the opinion.²²

Reliance on these express assumptions is appropriate if the facts assumed are not readily available or are available only at a substantial expense, where the facts relate to the recipient of the opinion, or where the cost of determining the facts would exceed any benefit from such a determination.²³

Reliance on express assumptions is also appropriate where the role of the opinion giver has been limited. For example, an opinion giver serving as local counsel may wish to assume for purposes of the opinion that certain documents have been or will be filed.²⁴

By making an express assumption, the opinion giver puts the opinion recipient on notice that the facts in question have not been determined, and shifts the burden of verification of the facts, or the resulting risk from non-verification, to the opinion recipient.²⁵

4. Limitations on Reliance on Express Assumptions.

Extensive factual assumptions that render an opinion meaningless or merely hypothetical are not appropriate.²⁶ Likewise, an opinion giver may not rely on express assumptions that render the opinion misleading,²⁷ or rely on assumptions known to the opinion giver to be false. There are additional limitations on reliance on factual

¹⁷ 1998 TriBar Report §§ 2.3 (b) & 2.14.

¹⁸ Accord §§ 4.6 & 5.1.

¹⁹ Accord § 4; GLAZER § 4.33 n. 10.

²⁰ Accord § 4.6.

²¹ The opinion giver should consult with the counsel to the recipient as to proposed stated assumptions to be incorporated into the opinion.

²² 1998 TriBar Report § 2.3 (c).

²³ 1998 TriBar Report § 2.3 (b).

²⁴ 1998 TriBar Report § 2.3 (b).

²⁵ 1998 TriBar Report § 2.3 (c).

²⁶ GLAZER § 4.3.1.

²⁷ 1998 TriBar Report § 2.3 (c).

assumptions in connection with opinions relating to tax matters. Circular 230,²⁸ issued by the Internal Revenue Service, limits the ability of the giver of an opinion relating to certain tax matters to rely upon factual assumptions without conducting an independent investigation. Opinions on tax matters and Circular 230 are beyond the scope of this Report.

There are limited situations in which express assumptions contrary to fact are appropriate and useful. As is discussed more fully in the choice of law section of this Report, where a document is governed by law other than that of the opinion giver's jurisdiction, the opinion recipient may nevertheless seek or accept an opinion that the document is enforceable under the law of the jurisdiction of the opinion giver, notwithstanding the document's choice of law provision to the contrary.²⁹ In addition, assumptions contrary to fact are frequently made in the context of UCC and real estate opinions, to the effect that the documents creating and perfecting lien for transfers of property have been properly filed in the respective filing offices.

5. Presumption of Regularity and Continuity.

In addition to express and implied assumptions, an opinion giver may rely upon a presumption of regularity and continuity.³⁰ This presumption allows the opinion giver to presume that the client has acted with proper corporate formality or other formality applicable to other types of entities. The presumption arises from court holdings that proper corporate governance procedures are presumed to have been followed, absent evidence to the contrary.³¹ The presumption of regularity and continuity is implied in all South Carolina opinions.

For example, an opinion giver delivering an opinion that a transaction has been authorized by all necessary corporate action would be required to review the articles of incorporation and bylaws, and the related authorizing resolution. Under the presumption of regularity, however, it would not be necessary to review the client's minute book. The opinion giver would be entitled to presume that the directors approving the transaction had been properly elected at a shareholders' meeting duly noticed and called, and at which a quorum was present.³² An opinion giver may also be entitled to presume the regularity of actions taken during a period as to which the relevant corporate or client

²⁸ Regulations Governing the Practice of Attorneys, Certified Public Accountants, Enrolled Agents, Enrolled Actuaries and Appraisers before the Internal Revenue Service. 34 CFR Part 10, published as Circular 230 (Rev. 6-2005).

²⁹ GLAZER §4.3.6, p. 160.

³⁰ 1998 TriBar Report § 2.4.

³¹ *Id.*

³² Legal Opinion Standards Committee of the Florida Bar Business Law Section and the Legal Opinions Committee of the Real Property, Probate and Trust Law Section of the Florida Bar, Report on Standards for Third-Party Legal Opinion to Florida Counsel.

records are missing or incomplete, but as to which the records that are available reflect that the actions in question were taken.³³

The presumption may also be relied upon where corporate records do not adequately document that a quorum was present for corporate action, that the requisite majority of votes was obtained, that proper notices of corporate meetings were given, or that appropriate waivers of notice were obtained.³⁴

An opinion giver should not rely on an implied presumption of regularity and continuity if the possible procedural or documentation deficiency at issue is significant in the context of the current transaction; in that event, reliance on the presumption should be expressly stated.³⁵ An assumed presumption of regularity should also not be relied upon where the result would be a misleading opinion.³⁶ An express statement of reliance upon the presumption of regularity gives the recipient notice that the opinion giver is not taking responsibility for the determination of whether the presumed action took place, and shifts the related risk to the opinion recipient.³⁷

If it is necessary or desirable to disclose reliance on the presumption, that disclosure should be specific. The following is sample wording for disclosure of such reliance:

With respect to our opinion in paragraph___ above, our investigation has revealed that certain corporate records relating to___ were missing or incomplete. As a result, we have relied upon the presumption of regularity and continuity to the extent necessary to enable us to render the opinion set forth in that paragraph.³⁸

³³ Committee on Legal Opinions, ABA Section of Business Law, “Guidelines for the Preparation of Closing Opinions” (including Legal Opinion Principles), 57 BUS. LAW. 875 (2002) (hereinafter *ABA Guidelines*); 1998 TriBar Report § 2.4.

³⁴ GLAZER § 4.3.5, p. 158.

³⁵ ABA Guidelines §3.3 (2002); 1998 TriBar Report § 2.4; GLAZER § 4.3.5, pp. 158-159. Among the considerations in determining whether to expressly state a reliance upon the presumption of regularity are the circumstances of the missing corporate records, the general diligence of the company in observing corporate formalities, the nature and significance of the procedural issue in question, how long ago the required action was to have been taken, and whether subsequent corporate records support or contradict the presumption that the action had been taken. GLAZER § 4.3.4, p 159.

³⁶ GLAZER § 4.2.5, p. 159.

³⁷ GLAZER § 4.3.5, p. 159.

³⁸ For other examples of specific disclosure of reliance upon the presumption of regularity and continuity, see Legal Opinion Committee of the Corporate and Banking Law Section of the State Bar of Georgia, Report on Legal Opinions to Third Parties and Corporate Transactions (1992) §209; Business Law Section of the Pennsylvania Bar Association, Pennsylvania Model Closing Opinion Letter (Annotated) at 108.

IV. GENERAL CORPORATE OPINIONS

An opinion with respect to various matters relating to a corporate entity that is party to a transaction may be requested by a lender, credit provider, seller, buyer, or rating agency. These opinions may include, among other things, matters relating to the nature and existence of the entity, the power of the entity to enter into and consummate the transaction, and whether the operative documents have been duly executed and delivered. While certain opinion requests may not be appropriate or cost-justified in a transaction, the corporate status opinion is generally appropriate and typically given.

The discussion below focuses primarily on corporations incorporated under and governed by the South Carolina Business Corporation Act of 1988, as amended.¹ However, a discussion of the specific issues and considerations implicated by the professional corporation, business trust, statutory close corporation statutes, and regulated industries, as well as other subsets of the corporate law of South Carolina, is beyond the scope of this Report.

A. THE CORPORATE STATUS OPINION. The corporate status opinion covers the opinion that the company is a corporation and is validly existing.²

1. **Opinion Formulation.** An acceptable formulation for the status opinion is as follows:

The [corporation] is validly existing as a corporation under the laws of the State of South Carolina as of _____ [based on the Certificate of Existence dated such date].

2. **Meaning.** The opinion that a company is a corporation means that, at the time of the company's filing its articles of incorporation, its incorporators complied with the requirements of the applicable incorporation statutes in effect in South Carolina at the time of the incorporation.³ While the incorporation opinion looks to the past, the existence opinion validates the corporation's present existence.⁴ An opinion that a corporation "is validly existing as a corporation" under the laws of the State means that as of the date of the issuance by the South Carolina Secretary of State of a Certificate of Existence for the corporation, nothing has occurred to cause the company's existence to terminate, such as a merger in which it was not a survivor, an administrative revocation of its articles, or even a voluntary dissolution.⁵

3. **Due Diligence.** The Certificate of Existence, which is obtained from the Secretary of State and "may be relied upon as conclusive evidence that the...corporation is in existence," provides that the corporation "is duly incorporated under the law" of South Carolina,

¹ S.C. Code Ann. Title 33, Chapters 1 through 20 (referred to herein as the "Corporate Code").

² For a detailed discussion of the corporate status opinion, see GLAZER Chapter Six. See, also, 1998 TriBar Report § 6.1 at 641-647.

³ Currently, the Corporate Code. See, e.g., Chapter 2 of the Corporate Code and S.C. Code Ann. § 33-2-102 (articles of incorporation requirements).

⁴ See 1998 TriBar Report § 6.1.3 at 643.

⁵ For a general discussion of the "validly existing" opinion, see GLAZER § 6.5. See, also, 1998 TriBar Report § 6.1.3 at 643-645.

the date of its incorporation, and the period of duration, if less than perpetual.⁶ Therefore, the limited opinion that a company “is a corporation in existence” can be given solely in reliance on a Certificate of Existence as of the date of the Certificate. The Certificate of Existence can be relied upon regardless of when the corporation was formed and without a review of the corporate records, because the Certificate is “conclusive evidence” as to corporate existence.⁷ It is important, however, to note that Certificates of Existence are limited in what they disclose.⁸ Since this opinion is given solely in reliance on the Certificate of Existence as of the date of the Certificate, the opinion should include a reference to the Certificate of Existence or qualified as follows:

With respect to the opinion that the company is validly existing as a corporation, we have relied solely on the Certificate of Existence and have assumed that since the date of the issuance of the Certificate of Existence, the Secretary of State has not administratively dissolved the [corporation] and no other action has been taken to dissolve the [corporation].

It is important to include the date of the Certificate to make it clear to the recipient that the opinion as to company status is given as of the date of the Certificate of Existence. This makes it clear that the opinion does not address any period after the date of the Certificate. In the absence of a reference to the date of a Certificate, the opinion will speak as of the date of the opinion letter, which could create a gap between the date of the Certificate and the date of the opinion. Because of the limited protection provided by a Certificate of Existence, not limiting the opinion to the date of the Certificate of Existence could cause the opinion to be inaccurate.

An opinion recipient should not attempt to require an opinion giver to not include in the opinion the caveat that the “in existence” opinion was rendered in reliance on a Certificate of Existence

⁶ S.C. Code Ann. § 33-1-280(b).

⁷ S.C. Code Ann. § 33-1-280(c).

⁸ The South Carolina Reporters Comments to S.C. Code Ann. § 33-1-280 state, in part:

The granting of the certificate of existence gives very limited protection. It only assures that the corporation has not been dissolved and that the Secretary of State has not brought an action to administratively dissolve the company. It does not warn the lawyer that the company may be dissolved the very next day because it has failed to file a tax return. Nor does it disclose that other grounds may then exist which give the Secretary of State the right to begin dissolution proceedings.

If the Tax Commission has notified a corporation that it has failed to file a required tax return and the corporation does not file within sixty days of this notice, the Tax Commission will then so advise the Secretary of State and he will immediately dissolve the company (see Sections 33-14-210(c) and 33-15-210(c)). However, the Secretary of State will have no knowledge of this delinquency notice while it is pending and will issue a certificate of existence (good standing) even though the company is in the process of being dissolved for failure to file a tax return. Most administrative dissolutions will occur in this manner.

The only way that the lawyer can be certain that the company is not about to be dissolved for failure to file a tax return is to obtain a separate certificate of compliance from the Tax Commission. In most situations it will be necessary to obtain this certificate.

There may be other existing grounds for the Secretary of State to administratively dissolve the company. They, likewise, will not be disclosed by the certificate.

Accordingly, a practitioner should consider asking whether the party requesting the opinion would also like for the practitioner to have his client obtain a Certificate of Tax Compliance.

dated a certain date, as described above. However, an opinion recipient may request that the Certificate be obtained close to the closing date.

a. **No “Good Standing” Definition.** It is important to note that an opinion that a company “is in existence” does not mean that the company is “in good standing.” An opinion that the company is in existence only addresses the status of the company under the Corporate Code and does not address the company’s status for tax or any other purposes. In addition, an existence opinion does not address whether the company has been properly operated as a corporation, such as the observance of corporate formalities, and does not address whether the “corporate veil” of the company for limited liability purposes would be respected or whether the South Carolina Secretary of State has initiated proceedings to revoke the company’s articles of incorporation.

The good standing certificate that was formerly issued by the South Carolina Secretary of State has been replaced by the Certificate of Existence authorized by and described in the Corporate Code.⁹ Accordingly, opinion providers should not use the phrase “in good standing” when opining on South Carolina corporations since it is not a statutorily defined term (as it is some other jurisdictions). The phrase “in good standing” in the company status opinion should not be requested or used with respect to South Carolina corporations because it no longer has a precise or relevant meaning under South Carolina law. However, if such term is used, it is limited to mean that the corporation is in existence as of the date stated in the opinion (usually by reference to the date of the Certificate of Existence).

b. **Tax Compliance.** Frequently, a party to a transaction will request greater assurance regarding another party’s tax status in South Carolina.¹⁰ In this instance, a Certificate of Tax Compliance can be obtained from the South Carolina Department of Revenue by completing and submitting a Certificate of Tax Compliance Request Form.¹¹ The Certificate of Tax Compliance should be acceptable in such a transaction in lieu of any opinion regarding compliance and no such tax compliance opinion should be requested or provided. It is very important to obtain a Certificate of Tax Compliance in connection with “the transfer of a majority of the assets of a business” or certain tax liens could arise on the transferred assets in the hands of the transferee.¹²

⁹ S.C. Code Ann. § 33-1-280.

¹⁰ A Certificate of Tax Compliance does not speak to a company’s federal tax status, and provides no support to an attorney asked to opine over federal tax status. Further, opinions over federal tax matters are governed by specific US Treasury regulations and should only be delivered by lawyers conversant in the subject matter and regulations.

¹¹ The entity needs to obtain the tax compliance certificate or appoint and authorize its attorney or agent to obtain it on its behalf.

¹² S.C. Code Ann. § 12-54-124. Revenue Ruling 04-02 gives the transferee an additional means of protecting itself. The transferee can obtain from the transferor a “Transferor Affidavit”. The purpose of this affidavit is to protect from a tax lien under Section 12-54-124: (a) the transferee who is not receiving business assets, or (b) the transferee in the situation where the transferor is not transferring a majority of the assets of a business in the present or other related transfers. The “Transferor Affidavit” is valid for a period of 30 days from the signing by the transferor. If the Transferor Affidavit is obtained by the transferee and a transfer takes place within 30 days, then the Department of Revenue will not assert a lien under Section 12-54-124 against the transferee, though it will pursue the transferor.

3. **Duly Organized.** The “duly organized” opinion looks beyond the incorporation date to cover the entire incorporation process (adoption of bylaws, election of directors and officers) and requires far more due diligence to render than the “incorporation” opinion.¹³ An opinion that a corporation “is duly organized” should not usually be requested or given as part of the corporate status opinion. Unless the opinion giver recently participated in the organization of the corporation, the necessary due diligence and likely insufficient corporate records available would likely render the cost to deliver such an opinion prohibitive. An opinion that a corporation “is duly organized” under the laws of South Carolina means that the company has, after incorporation, complied with the statutory requirements for organization in effect at the time of organization. For example, for a corporation to be duly organized under current South Carolina law, an organizational meeting must be held, directors must be elected (unless they are named in the articles of incorporation), bylaws must be adopted, and officers must be appointed.¹⁴ If and to the extent a duly organized opinion is appropriate under the circumstances, the opinion giver should, at a minimum, review the company's minute book and ledger to confirm that action was taken to organize the corporation in compliance with the statute in effect at the time of organization prior to rendering such an opinion.

4. **Delaware and Other Jurisdictions’ Corporations.** Lawyers not admitted to practice in Delaware may sometimes be willing to opine on routine matters of Delaware corporation law, such as the status of a Delaware corporation. This practice may be acceptable so long as the opinion giver has sufficient knowledge of Delaware corporation law to be deemed competent to render the opinion.¹⁵ It is the responsibility of the opinion giver to determine whether the opinion giver is able to render the particular Delaware law opinion, on a case by case basis. A similar analysis would apply to entities formed under the laws of other states.¹⁶ If rendered, such opinion should be carefully limited to the current applicable corporate statutes. It is generally recommended that South Carolina counsel engage Delaware corporate counsel to render such opinions if necessary.

5. **Limited Liability Companies.** Since the passage of the Uniform Limited Liability Company Act in 1996 (the “LLC Act”), limited liability companies (“LLCs”) have increasingly become the business entity of choice in South Carolina. One of the primary reasons for LLCs’ popularity is that generally LLCs provide limited liability (historically a corporate characteristic), flow-through tax treatment (historically a partnership characteristic), and flexibility as to membership. Although the adoption of the LLC Act has been beneficial to clients because of the versatility of the LLC structure, providing opinions regarding LLCs can be challenging.¹⁷ Also, certain opinions rendered for a corporation are simply not applicable to an LLC (*e.g.*, an opinion that shares are fully paid and nonassessable), and the opinion preparer

¹³ See 1998 TriBar Report § 6.1.2 at 643.

¹⁴ Although the issuance of shares is commonly done at the organizational meeting, it is not required in order for a corporation to be duly organized. See S.C. Code Ann. § 33-2-105 and the South Carolina Reporter’s Comments thereto.

¹⁵ See Rule 407 SCACR, Rule 1.1 of the Rules of Professional Conduct regarding competency.

¹⁶ For additional discussion of opinions over Delaware entities, see “Supplement to Report of the Legal Opinion Committee” of the Business Law Section of the North Carolina Bar Association, § 6.0.g, reprinted in GLAZER at 38A:10-38A:12.

¹⁷ For a more detailed discussion of opinions and opinion issues concerning LLCs, see “Third Party Opinions: Limited Liability Companies,” TriBar Opinion Committee, 61 BUS. LAW. 679 (February 2006).

must be cognizant of the distinctions in order to avoid using improper terminology and giving erroneous opinions.¹⁸

B. POWER OPINION. The opinion that a company has the corporate power to execute, deliver and perform the documents that are the subject of the opinion means that the company has the corporate ability to do so and that the actions are not prohibited under the company's articles of incorporation, bylaws or applicable corporation laws.¹⁹ The opinion is limited to the company's corporate power.²⁰ Generally, the term "authority" should not also be used as it has traditionally been thought to mean the same thing as power. Using only "corporate power" avoids the argument that the inclusion of "authority" means something broader. Also, the power opinion should not use terms such as "full power," as such terms are not meaningful within the statutory framework. If the power opinion states "full power and authority," it is deemed limited to the company's corporate power.

1. **Scope of Opinion.** This opinion addresses only the legal power of the company to take action under applicable corporation law and the company's articles of incorporation and bylaws. It does not address whether the action violates statutes other than the applicable corporation law, whether the action breaches agreements of the company or licenses and permits of the company, whether the action breaches duties that may be owed to others or any other matters other than whether the company has the corporate power to take the particular action under applicable corporation law and the company's articles of incorporation or bylaws.

2. **Power to Operate.** The corporate power opinion is sometimes requested to be expanded to cover the power of the company to operate its business (e.g., "the Company has the corporate power to operate its business as currently conducted"). Absent a legally effective restriction in its organizational documents, a corporation is permitted under the Corporate Code to engage in any lawful activity.²¹ Therefore, the opinion that the company has the corporate power to operate its business as currently conducted is not necessary and such an opinion should not usually be requested or rendered. In addition, this opinion does not address whether the business is lawfully operated. Accordingly, matters such as, among other things, whether the company has the necessary governmental permits, licenses, approvals or related matters or has complied with all applicable laws are beyond the scope of this opinion.

3. **Due Diligence.** As part of its ordinary due diligence prior to delivering the corporate power opinion, the opinion giver should review the company's current and complete articles of incorporation, bylaws and other applicable organizational documents, review the relevant sections of the Corporate Code, and review the transaction documents that are the subject of the opinion to confirm that the acts are within its corporate powers.

¹⁸ For a more detailed discussion of opinions and opinion issues concerning LLC interests, see [Supplemental TriBar LLC Opinion Report: Opinions on LLC Membership Interests (submitted to Business Lawyer for publication) located at <http://apps.americanbar.org/buslaw/tribar/materials/20110310000000.pdf>.]

¹⁹ For a more detailed discussion of the corporate power opinion, see GLAZER Chapter Eight. See also 1998 TriBar Report § 6.3 at 652-653.

²⁰ See S.C. Code Ann. § 33-3-101 (general corporate purposes) and § 33-3-102 (general corporate powers). See also S.C. Code Ann. § 33-3-104 (challenging *ultra vires* acts).

²¹ S.C. Code Ann. § 33-3-101(a).

C. AUTHORIZATION, EXECUTION AND DELIVERY. The opinion that the applicable transaction documents have been duly authorized, executed and delivered by the company means that person or persons with authority to bind the company have signed such documents and delivered them such that the documents are binding on the company.²² This opinion does not address the enforceability of the documents (but it is sometimes included with the enforceability opinion).

1. **Authorization.** The actions of a corporation are usually authorized pursuant to a resolution of the board of directors. Authorization of a person to execute documents on behalf of a corporation is usually provided in such a resolution, although proper authorization may be provided in the bylaws. A Board of Directors may adopt a general resolution granting authority to a particular person or persons (by name or *ex officio*) to approve and execute agreements or certain types of agreements on behalf of a company without the necessity for any further Board approval. Frequently, however, depending on the nature of the transaction and the content of the requested opinion, specific Board resolutions may be in order. Any such resolutions should authorize the transaction addressed by the documents and authorize the appropriate persons (by name or *ex officio*) to execute and deliver the documents. Usually, these resolutions should provide some latitude to the authorized persons to negotiate certain changes to the documents without requiring any further Board approval. The adoption of any Board or shareholder resolutions needs to comply with applicable corporate law and with the articles and bylaws of the company. The opinion giver needs to be comfortable that the pertinent resolutions are accurate, complete, were properly adopted, and remain in full force and effect.²³ Absent knowledge to the contrary, the opinion giver may rely on a corporate secretary's certificate as to the authorizing resolutions.

2. **Execution.** As discussed above, the opinion giver needs to confirm that the person executing the documents has the authority to do so. When execution of documents is not observed firsthand, the opinion giver needs to be comfortable under the circumstances that the documents were properly executed by an authorized officer,²⁴ whether through an incumbency certificate setting forth the authorized officer's name and a certified copy of their signature, or through other reasonable means.

3. **Delivery.** Delivery usually can be made by the person who is authorized to execute the documents, but the resolutions or minutes should be drafted so as to specifically authorize and direct delivery along with execution. This opinion is usually not difficult if the opinion giver is present for the delivery. If the opinion giver is not present, the opinion giver needs to become comfortable under the circumstances that the documents were properly delivered by an authorized officer.²⁵

4. **Due Diligence.** In addition to reviewing the organizational and governing documents of the company and performing the due diligence for the corporate status and power opinions, the opinion giver will need to confirm that the specific actions of the corporation have

²² For a more detailed discussion of the due execution opinion, *see* GLAZER §§ 9.2–9.5. *See also* 1998 TriBar Report § 6.4 at 653-654.

²³ For a more detailed discussion on authorization, *see* GLAZER § 9.3. *See also* 1998 TriBar Report § 6.4 at 653-654.

²⁴ For a more detailed discussion on execution, *see* GLAZER § 9.4.

²⁵ For a more detailed discussion on delivery, *see* GLAZER § 9.5.

been approved by the necessary act (*e.g.*, shareholder or board approval at a duly called meeting or by unanimous written consent, as may be required by law and the organization's governing documents) and the appropriate individuals authorized to execute and deliver the documents have done so. The opinion giver should review a current and complete copy of any applicable shareholder, director or committee resolutions or minutes of meetings and incumbency certificate as to the persons acting on behalf of the company to determine that the acts were approved and parties authorized to sign and review the executed documents to determine that they were properly executed and delivered.

D. FOREIGN CORPORATIONS TRANSACTING BUSINESS IN THE STATE. An opinion may be requested for a corporation organized under a jurisdiction other South Carolina that it is "authorized to transact business in the State of South Carolina." Such opinion means that the foreign corporation has complied with the requirements set forth in Chapter 15 of the Corporate Code for a foreign corporation to transact business in South Carolina. The opinion assumes, however, that the corporation is duly incorporated and validly existing in its jurisdiction of incorporation (unless the opinion giver is also competent to render the corporate status opinion). The phrase "qualified to do business in South Carolina" should not be requested or provided in South Carolina because it has no statutorily defined meaning under South Carolina law.²⁶

1. **Certificate of Authorization.** A Certificate of Authorization for a foreign corporation may be obtained from the South Carolina Secretary of State pursuant to Section 33-1-280 of the Corporate Code. Such statute states that such certificate of authorization "may be relied upon as conclusive evidence that the . . . foreign corporation is authorized to transact business in this State."²⁷ Therefore, if any opinion is given that a foreign corporation is authorized to transact business in South Carolina, it is rendered solely in reliance on a Certificate of Authorization as of the date of such certificate. The certificate can be relied upon without any further due diligence. Since this opinion is given solely in reliance on the Certificate of Authorization, while not required, the opinion may state the opinion giver's reliance on the Certificate of Authorization as of its date (and the opinion recipient should not ask the opinion giver to delete any such statement of reliance). Given that the opinion is limited solely to reliance on the certificate, the necessity of such opinion, however, is questionable, and the opinion recipient should consider withdrawing the request for the opinion if the opinion giver provides a current Certificate of Authorization.

2. **South Carolina Company Transacting Business in Other States.** With respect to South Carolina companies that do business in other states, it is inappropriate for an opinion recipient to request a comprehensive foreign authorization or qualification opinion from the opinion giver (*e.g.*, "qualified to transact business in all jurisdictions where required by such other jurisdictions' laws to qualify").²⁸ Instead, certificates from the proper public officials should be obtained relating to foreign qualifications or authorizations. Because an opinion giver can rely solely on such certificates, an opinion would be duplicative, and accordingly, should not

²⁶ For a detailed discussion on foreign qualification, *see* GLAZER Chapter Seven. *See also* 1998 TriBar Report § 6.1.6 at 646-647.

²⁷ S.C. Code Ann. § 33-1-280(c) (N.B.: The corresponding LLC provision is S.C. Code Ann. § 33-44-208(d)).

²⁸ *See*, The Committee on Legal Opinions, Guidelines for the Preparation of Closing Opinions, 57 BUS. LAW. 875, at 879 (February 2002) (hereinafter *ABA Guidelines*), § 4.1.

normally be requested.²⁹ Additionally, it is cost-prohibitive and likely impracticable for the opinion giver to determine whether this opinion is true as requested; this opinion also implicitly calls for the South Carolina attorney to opine as to the laws of other states, which could have unauthorized practice of law implications. A similar approach should be taken with respect to any opinion requests relating to a South Carolina company being in "good standing" in all other jurisdictions.³⁰

E. OPINIONS ON ISSUANCE OF SHARES.³¹ The opinions relating to the shares of a company are generally limited to the opinion that the company's shares being issued in connection with the transaction have been "duly authorized and validly issued and are fully paid and nonassessable."³² The "shares" being addressed in any such opinion need to be carefully defined in the opinion letter to limit the shares to those covered by the transaction. To the extent such opinion opines as to compliance with law, it is only opining as to the Corporate Code and not any other statutes; the opinion does not address compliance with federal or state securities laws.³³ If they are addressed in an opinion, federal and state securities laws will be separately addressed in an opinion specific to such laws.

Providing a capitalization opinion will likely impose a heavy due diligence burden on the practitioner providing the opinion, particularly because in South Carolina many corporations will have lost, inadequate, incomplete or potentially inaccurate records. Frequently, the cost of this opinion, along with the number of assumptions and exceptions that will be required to provide it, far outweighs the value of receiving it. Counsel should ensure that clients understand the cost/reward analysis for such an opinion before it is requested or provided. It is inappropriate to attempt to force an opinion giver to not include appropriate assumptions, exceptions and related matters for known or unknown problems with a company's capitalization. The proper use of the capitalization opinion, as with all other opinions, is not as a mechanism to shift risk to the opinion giver.

1. **Duly Authorized.** The opinion that the shares that are the subject of the opinion have been "duly authorized" means that the shares have been properly created under the Corporate Code and the company's articles of incorporation,³⁴ or, if the shares were created subsequent to the company's incorporation, that the authorizing resolution and any necessary amendments to the articles of incorporation were properly authorized.

2. **Validly Issued.** The opinion that shares have been "validly issued" means that the company through its appropriate governing body took all necessary action to issue shares in

²⁹ *Id.*

³⁰ The term "good standing" does not have a generally accepted meaning, and therefore, in each jurisdiction the language utilized by the particular jurisdiction should be utilized in the unlikely event an opinion is required.

³¹ It should be noted that these opinions are given with increasing rarity and opinion givers should not give opinions over the issuance of shares unless the specific circumstances call for it and the opinion giver is sufficiently knowledgeable in corporate and securities law to deliver the necessary opinions. A typical real estate lending transaction should not require opinions over the issuance of shares.

³² For a detailed discussion of the corporate stock opinions (in a primary offering), see GLAZER Chapter Ten. See also 1998 TriBar Report § 6.2 at 648-652.

³³ See GLAZER § 10.2.1.

³⁴ For a detailed discussion of the "duly authorized" opinion, see GLAZER §§ 10.3 –10.4. See also 1998 TriBar Report § 6.2.1 at 648-649.

accordance with its articles and bylaws and the Corporate Code, that the shares were issued in compliance therewith and the authorizing resolutions, and that no other action has been taken to cause the shares to no longer be validly issued.³⁵ This opinion is silent as to whether the issuance of the shares would constitute a breach or default of any other agreements to which the company is a party.

3. **Fully Paid and Nonassessable.** The opinion that the shares are “fully paid and nonassessable” means that the company has received the legally required consideration for the shares³⁶ and that such consideration complies with the requirements, if any, of the company's articles of incorporation or bylaws. The opinion is limited as to whether the consideration was legally adequate when received and does not address matters such as whether the consideration received was fair to the corporation, whether the consideration received was appropriate, whether the directors complied with their duties in issuing the shares, or other similar matters. In addition, the fully paid and nonassessable opinion does not address whether the corporation is adequately capitalized, whether it is possible to hold the shareholders liable through veil piercing or other theories or other type matters.³⁷

4. **Authorized and Outstanding Shares.** The “authorized” shares is merely the number of shares of each class set forth in the corporation’s articles of incorporation as being “authorized,” and the “outstanding” shares is the number of shares that are held by shareholders.³⁸ For “authorized” shares, since the opinion giver is entitled to rely on the number and class of shares stated in the articles of incorporation,³⁹ such opinion does not offer anything more than the information provided in the articles. As such, the opinion recipient should rely on a copy of the articles in lieu of requesting such opinion. The due diligence necessary to give an “outstanding” opinion is frequently an unjustified expense and will often need to be limited by various assumptions and exceptions. Consequently, the opinion recipient should instead rely on representations and warranties from the company or a certificate from the transfer agent or corporate secretary and its own due diligence.

5. **Due Diligence.** In addition to the due diligence for the other corporate opinions, in order to render the stock opinions, the opinion giver should consider reviewing, among other things:⁴⁰

- a. A current and complete copy of the company's articles of incorporation, verifying classes of shares and number of shares authorized for each class;

³⁵ For a detailed discussion of the “validly issued” opinion, *see* GLAZER §§ 10.5–10.6. *See also* 1998 TriBar Report § 6.2.2 at 649-650.

³⁶ S.C. Code Ann. § 33-6-210(d).

³⁷ For a detailed discussion of the “fully paid and nonassessable” opinions, *see* GLAZER §§ 10.7–10.9; and *see* 1998 TriBar Report §§ 6.2.3 and 6.2.4.

³⁸ *See* S.C. Code Ann. §§ 33-6-101 – 33-6-103.

³⁹ If the articles of incorporation have been amended, then, unless properly qualified, the opinion also confirms that proper amendment procedures were followed. The due diligence to render such opinion may not be cost justified.

⁴⁰ For a more detailed listing of the due diligence necessary for each component of the stock opinion, *see* REPORT OF THE LEGAL OPINION COMMITTEE OF THE BUSINESS LAW SECTION OF THE NORTH CAROLINA BAR ASSOCIATION, “THIRD-PARTY LEGAL OPINIONS IN BUSINESS TRANSACTIONS,” SECOND EDITION (March 30, 2004, revised August 16, 2004), § 9.0, reprinted in GLAZER at App. 38:75-38:77.

- b. Stock ledger records, verifying the number of shares of each class issued and the number of shares of each class acquired by the corporation, if any;
- c. A current and complete copy of bylaws, verifying the process for approval of share creation, and verifying requirements for share attributes;
- d. A current and complete copy of all authorizing resolutions as required by the Corporate Code and corporate governing documents, verifying approval of share creation, share issuance and share attributes; and
- e. A current and complete copy of preincorporation subscription agreements, if applicable.

F. GUARANTORS. At times, particularly in lending transactions, an attorney will be requested to provide an opinion with respect to certain matters regarding a guarantor or guarantors. Simply because an attorney provides an opinion with respect to a guarantor does not mean that the attorney represents the guarantor. In this regard, an attorney needs to be careful that the attorney does not affirmatively state in the opinion letter that the attorney represents the guarantor when the attorney in fact does not. If the attorney is not representing any other client-related party but is asked to render opinions relating to such other parties (such as enforceability of a guaranty on behalf of a guarantor related to the borrower but not the attorney's client), the attorney should draft the introductory opinion accordingly to reflect that the attorney is not counsel to such party. Of course, the attorney needs to be comfortable with whatever opinions the attorney is providing regarding the non-client. With corporate or other entity guarantors, the attorney should examine whether the laws of the State and the guarantor's corporate purposes permit or authorize the guaranty in question⁴¹; where the guarantor does not derive a benefit from the obligation being guaranteed, the guaranty could be considered *ultra vires* and thus unenforceable⁴² (while the Corporate Code does restrict the class of persons who can challenge a corporate act as being *ultra vires*, this class does include shareholders, so a guaranty that is authorized only by a corporation's directors is vulnerable to challenge).⁴³ If the opinion giver is concerned about issues of authority, they can either (i) have the shareholders approve the guaranty, thus effectively limiting the class of persons empowered to challenge the guaranty, or (ii) assume the necessariness and convenience of the guaranty in the context of the guarantor entity's business. If the attorney acts as counsel to multiple parties in a transaction, including guarantors, the attorney should address any possible conflicts of interest and obtain any appropriate waivers, if necessary.

An opinion prepared may take an exception regarding subsidiary guarantors:

In particular, we express no opinion as to whether a subsidiary may guarantee or otherwise become liable for, or pledge its assets to secure, indebtedness incurred by its parent or another subsidiary of its parent, except to the extent such

⁴¹ S.C. Code Ann. §33-3-102(7) permits a corporation to "make contracts and guarantees," but such authorization is in the context of actions "necessary or convenient to carry out its business and affairs." S.C. Code Ann. §33-3-102.

⁴² See discussion at GLAZER § 8.3.2 and for an illustrative qualification in the case of a subsidiary guarantying the obligation of a parent, see GLAZER § 8.3.2, fn 18.

⁴³ S.C. Code Ann. § 33-3-104.

subsidiary may be determined to have received a benefit from the incurrence of such indebtedness by its parent or such other subsidiary, or as to whether such benefit may be measured other than by the extent to which the proceeds of the indebtedness incurred by the parent or such other subsidiary are directly or indirectly made available to such subsidiary for its corporate, company or partnership purpose. We express no opinion as to the solvency, adequacy of capital or ability to pay indebtedness of any of the Credit Parties.

V. THE ENFORCEABILITY OR REMEDIES OPINION

A. MEANING

The enforceability opinion (sometimes referred to as the remedies opinion)¹ covers the formation of a contract between the parties. It means that the legal requirements necessary to form a contract have been met, and as a result, a valid contract has been formed between the parties, the provisions of which will be enforced by the courts as drafted and under the circumstances.²

The enforceability opinion really subsumes the basic corporate opinions (existence and power) and authorization, execution and delivery, as without validly existing parties, with the power to enter into the transaction, that have duly authorized, executed and delivered the agreement, a contract could not have been formed between them.³

1. **Formulation.** A typical formulation of the enforceability opinion may read:

The Transaction Documents constitute legal, valid and binding obligations of the Company, enforceable against the Company in accordance with their terms.

2. **Terms and Phrases.** The phrase “legal, valid and binding” and the phrase “enforceable against the Company” are commonly seen together, but they really mean the same thing. Also, each of the terms in the phrase “legal, valid and binding” really mean the same thing. Therefore, any opinion that states that an agreement is either a “legal” or a “valid” or a “binding” obligation or that states that the agreement is “enforceable against” or “binding on” the Company means the same as the formulation stated above.⁴

3. **Every Provision vs. Material Terms.** While there is some debate as to whether the enforceability opinion covers each and every undertaking under the document or only the material terms of the agreement, the predominant view and position in the State as of the date of this Report is that each and every provision is covered,⁵ subject to the assumptions and exceptions contained in the opinion letter.

B. DUE DILIGENCE

The opinion preparer must review the covered documents to determine whether the provisions of the documents as drafted are sufficient to constitute enforceable agreements under state law and take exception for provisions that may not be enforceable or are of questionable enforceability.⁶

¹ See GLAZER § 9.1.1 at 253.

² See 1998 TriBar Report § 3.1 at 620. See GLAZER § 9.8.2. For a more detailed discussion on the enforceability opinion, see generally GLAZER Chapter Nine.

³ See GLAZER § 9.8.1.

⁴ See GLAZER § 9.6. See also 1998 TriBar Report § 3.1 at 619-620.

⁵ See 1998 TriBar Report § 3.1 at 621. For a more detailed discussion on the undertakings covered by the remedies opinion, see GLAZER § 9.7, “Does the Opinion Cover Every Undertaking of the Company in the Agreement?”

⁶ See 1998 TriBar Report § 3.2 at 622.

To the extent that certain provisions in the documents may not be enforceable (or are of questionable enforceability), specific exceptions should be taken.

C. CHOICE OF LAW; GOVERNING LAW CLAUSE

Since the enforceability opinion is rendered under state law, the first provision to check in the document is the governing law section to confirm that the document is governed by South Carolina law. If the documents are not governed by South Carolina law, the opinion preparer will not be able to render the enforceability opinion without making an express assumption that the laws of the State of South Carolina law govern, notwithstanding any choice of law provision to the contrary,⁷ unless the opinion giver is competent to render opinions under the foreign jurisdiction.⁸

The enforceability and other opinions are given based on the stated law covered by the opinion. Therefore, the opinion giver should provide an express qualification that choice-of-law is not covered by the opinion if the chosen-law provision is different from the covered law. If the chosen law and covered law are the same, a separate choice-of-law opinion is not necessary since the remedies opinion covers contractual governing law provisions.⁹

1. Choice of Law Provisions; A Matter of Public Policy. Generally, a South Carolina court will honor a choice of law provision contained in a contract unless to give effect to the provision would result in an agreement that is violative of public policy in South Carolina.¹⁰ However, the law on the interpretation and enforceability of contractual selection of governing law in the State is limited. Therefore, it is difficult for an opinion giver to address the choice-of-law analysis in the opinion. If it is covered, it may be addressed as an explanation in the qualification section, and certain assumptions are necessary, such as an assumption that the chosen law does not violate the public policy of the State.¹¹

The choice of law analysis can be problematic for the opinion giver. First, the opinion giver will not know the law of the foreign jurisdiction and is likely not in a position to determine what is or is not contrary to the fundamental public policy of the state.¹² Therefore, local

⁷ See GLAZER § 9.12, “Choice of Law: The Interaction Between the Coverage Limitation and the Governing Law Clause.” Rather than giving a choice of law opinion, you can assume the laws of the State would govern, notwithstanding any choice of law provisions to the contrary. This is an assumption that may be stated for opinion purposes notwithstanding facts to the contrary. You should not, however, assume that the laws of the State are the same as the laws of the foreign jurisdiction chosen in the documents. See ABA Guidelines § 4.9. See also 1998 TriBar Report § 4.6 at 635, n. 98.

⁸ Consider the ethical requirements for competency and the other state’s unauthorized practice of law rules.

⁹ See 1998 TriBar Report § 4.4 at 634. See also generally 1998 TriBar Report §§ 4.4-4.6 at 634-636.

¹⁰ See *Associated Spring Corp. v. Roy F. Wilson & Avnet, Inc.*, 410 F. Supp. 967 (D.S.C. 1976); *Standard Register Co. v. Kerrigan*, 119 S.E.2d 533 (S.C. 1961).

¹¹ The assumption with respect to public policy in this case is acceptable, notwithstanding the general rule that exceptions should not be taken for matters of public policy in general. See ABA Guidelines § 4.8 and n. 20 at 881.

¹² See GLAZER §9.12.3 at 351 for a lengthy discussion concerning the perils of ascertaining what is or is not public policy.

conflicts of laws considerations may abrogate a contractual choice-of-law provision.¹³ Leading opinion practice authorities have in fact disagreed on whether the choice of law opinion could be given in certain circumstances based on public policy concerns.¹⁴ The state of the formation of the contract is also a factual question. Even if the law of the chosen state violates the fundamental policy of the state whose law is the subject matter of the opinion, it still may be possible for the law of the chosen state to be the governing law of the transaction. With closings increasingly occurring in multiple locations at once and with no physical meeting of the parties to execute documents, it may be that there is no one particular state that could be said with certainty to be the state of formation of the contract.

In the absence of a choice-of-law provision, South Carolina follows the traditional choice of law rules, and the governing law is the “lex loci contractus”—the place where the contract is made.¹⁵ If performance is at issue, the law of the place of performance governs.¹⁶

2. UCC; Real Estate. Certain choice-of-law rules also fall outside of the general ambit of the common law rule of enforcement. For example, certain provisions of the UCC condition choices of law and in some cases prescribe them, potentially to the contradiction of contractual provisions.¹⁷ Additionally, the law of the location of the real property governs conveyance documents, and corporate entities may still be subject to local law for other matters. For any contract relating to or secured by an interest in real estate, the laws of the State would govern the enforcement and validity thereof, notwithstanding any contractual provision designating the laws of another jurisdiction.¹⁸ With respect to personal property, the UCC governing law provisions will control, and the analysis will be different.¹⁹

3. Governing Law Assumption. Typically, an opinion over the enforceability of contractual choice-of-law provision that differs from the opining jurisdiction is circumvented by an assumption that the law of the state of the opinion giver governs the subject matter of the opinion, notwithstanding any choice-of-law provision to the contrary.²⁰ A choice of law opinion based on an assumption that the laws of the chosen jurisdiction and the opining jurisdiction are the same should not be rendered due to the “imprecision inherent in that assumption.”²¹

¹³See *Stonhard v. Carolina Flooring Spec., Inc.*, 366 S.C. 156, 621 S.E.2d 352 (2005). See also, *Feeney v. Dell Computer*, 454 Mass. 192 (2009) (Massachusetts court invalidated an arbitration provision in a contract purportedly governed by Texas law because to do so would be contrary to fundamental public policy of Massachusetts).

¹⁴ See, generally, Donald W. Glazer, “Some Thoughts on Choice of Law Opinions,” Jerome A. Grossman and Steven O. Weise, “California Replies,” and Donald W. Glazer, “A Brief Reply from Don” under “Recent Developments,” 9 ABA Section of Business Law, Committee on Legal Opinions, Legal Opinion Newsletter 3 (April 2010) at 14-19.

¹⁵ See *Lister v. NationsBank of Delaware*, 329 S.C. 133 (Ct. App. 1998); *Livingston v. Atlantic Coast Line R.R.*, 176 S.C. 385 (1935).

¹⁶ See *Witt v. American Trucking Ass’n, Inc.*, 860 F. Supp. 295 (D.S.C. 1994).

¹⁷ S.C. Code Ann. § 36-1-105.

¹⁸ If a mortgage contains a bifurcated choice of law provision, the opinion should assume that a mortgage is governed by the laws of the State. See discussion on choice of law in mortgage instruments in the “Real Estate Opinions” Section of the Report.

¹⁹ See *Lister* at 148 (discussion of Choice of Law and distinguishing contracts governed by the UCC).

²⁰ See GLAZER § 9.12.3 at 347. See also 1998 TriBar Report § 4.6 at 635.

²¹ 1998 TriBar Report § 4.6 note 98 at 635.

Where the transaction documents select the law of a foreign jurisdiction, the scope of the opinion should be limited as follows:

The opinions set forth herein are limited to matters governed by the laws of the State of South Carolina, and no opinion is expressed herein as to the laws of any other jurisdiction, [including, without limitation, _____].

Note that a choice of law opinion does not cover enforceability under the chosen law; for the opinion giver to opine on the law of the state of choice, the opinion preparer will need to know the law of that state in order to be competent to render the opinion.²² Where a choice of law opinion cannot be given, the alternatives are to assume that the chosen-law provisions are enforceable or assume that the laws of the State govern. The latter assumption, however, will require the opinion giver to review the transaction documents for enforcement under South Carolina law, which analysis can pose difficulties as well.²³ In such case, the scope of the opinion with respect to the covered law would include the following assumption:

The opinions set forth herein assume that the laws of the State of South Carolina would govern, notwithstanding any choice of law provision to the contrary, but no opinions are given regarding or with respect to any choice of law provision.²⁴

D. QUALIFICATIONS

Opinion letters contain various qualifications and exceptions to the enforceability opinion (as well as to certain other opinions contained in the letter), to the extent that certain provisions in the agreement may not be enforceable either under applicable law or in certain circumstances, upon a breach or otherwise (e.g., whether a court would enforce a choice of law provision).²⁵ The illustrative form opinion contains a non-exhaustive list of possible qualifications. The opinion preparer should include only those qualifications that are relevant to the opinion under the circumstances based on the type of transaction and the specific opinions covered by the opinion letter.

The enforceability opinion is subject to certain qualifications, exceptions and limitations.²⁶ Two standard qualifications are the bankruptcy exception and equitable principles limitation.²⁷ Other exceptions should be specific to the transaction, documents and opinions covered in the opinion

²² See Rule 1.1 regarding competency.

²³ The opinion giver will need to address references to foreign statutes, for example, and make certain that the documents comply with the laws of the State or take appropriate exceptions.

²⁴ Assuming that the laws of the chosen state and the laws of the state covered by the opinion are the same, however, is not an appropriate alternative. See *supra* note 7.

²⁵ See 1998 TriBar Report § 3.1 at 620, and n. 66.

²⁶ List only the applicable qualifications and exceptions to the enforceability opinion in the opinion letter. A list of some of the possible qualifications is provided in the Illustrative Form of Opinion; however, the list provided is not exhaustive and may not be applicable in every transaction. The opinion letter should include those qualifications that are relevant to the enforceability opinion under the circumstances based on the type of transaction and the specific documents covered by the opinion letter. The insolvency and equitable principles exceptions are standard enforceability qualifications. However, if the enforceability opinion is not rendered, the exceptions to enforceability are not applicable and should be excluded

²⁷ See 1998 TriBar Report § 3.3 at 622-625.

letter, and in some cases, a generic qualification may be included in addition to the other stated exceptions and qualifications.

1. Bankruptcy Exception. The bankruptcy exception, which excludes the effect of bankruptcy laws on the enforcement of remedies,²⁸ may read as follows:

Enforceability of the Transaction Documents is subject to, and the rights of the parties under the Transaction Documents may be limited by, bankruptcy, insolvency, fraudulent conveyances, equitable subordination, reorganization, moratorium or other [similar] laws or governmental authority relating to or affecting creditor's rights or the collection of debtor's obligations generally.²⁹

2. Equitable Principles Limitation. The equitable principles limitation acknowledges that courts may apply principles of equity to hold otherwise enforceable provisions to be unenforceable under the circumstances.³⁰ While the limitation may take many forms and may be as simple as “except as may be limited by general principles of equity,”³¹ the limitation provided in the Illustrative Form of Opinion reads as follows:

Enforceability of the Transaction Documents is subject to, and the rights of the parties under the Transaction Documents may be limited by, general principles of equity, including, without limitation, concepts of materiality, reasonableness, good faith, fair dealing, the availability of specific performance or injunctive relief, regardless of whether considered in a proceeding in equity or law.³²

3. Specific Exceptions. In addition to the standard qualifications, the opinion should include any specific exceptions under contract law and other areas of law that may impact the documents as well as state-specific issues.³³ Other qualifications and exceptions are appropriate depending on the nature of the transaction. (For example, the illustrative form opinion contains a number of specific exceptions for opinions relating to the UCC and for real estate mortgage opinions.)

4. Generic Qualification. In some instances (such as in real estate mortgage opinions), a “generic” qualification (or “practical realization” limitation or opinion) may be included.³⁴ However, a broad “practical realization” opinion given as reassurance over the expressly stated exceptions is inappropriate.³⁵ Any “generic” qualification or “practical

²⁸ See 1998 TriBar Report § 3.3.1 at 622, n. 72.

²⁹ The “bankruptcy exception” is discussed in the 1998 TriBar Report § 3.3.4 at 625 and in GLAZER § 9.10.

³⁰ See 1998 TriBar Report § 3.3.4 at 625.

³¹ See 1998 TriBar Report § 3.3.1 at 623, n. 74.

³² The “equitable principles limitation” is discussed in the 1998 TriBar Report §§ 3.3.1 – 3.3.3 at 622-624 and in GLAZER § 9.9.

³³ See 1998 TriBar Report § 3.5 at 627-631. See also the Special Report by the TriBar Opinion Committee: “The Remedies Opinion – Deciding When to Include Exceptions and Assumptions,” 59 BUS. LAW. 1483 (2004).

³⁴ For a discussion regarding the generic qualification or “practical realization” opinion, see Chapter D of the Real Estate Opinions Section of this Report. See, also, GLAZER § 9.11, “Generic Qualification and Practical Realization Opinions.” See, also, 1998 TriBar Report § 3.4 at 626-627.

³⁵ See 1998 TriBar Report § 3.4.2 at 627.

realization” opinion, if provided, should be in addition to, and at the end of, any other expressly stated exceptions and should not be stated as an affirmative assurance over the other qualifications.³⁶

³⁶ See formulations for the generic qualification contained at the end of the qualifications in the Illustrative Form of Opinion to this Report.

VI. REAL ESTATE OPINIONS

With respect to all real estate related opinions, this Report adopts the ACREL/ABA Real Estate Opinion Letter Guidelines.¹ Counsel rendering and requesting legal opinions in real estate financing and related transactions should adhere to those guidelines.

A. MORTGAGE OPINIONS

For loans secured by real property, an opinion regarding the form of instrument necessary to create a lien on such property is often requested by the lender. Other matters that may be addressed in the real estate mortgage opinion include the validity of an assignment of leases, rents and profits and the creation and perfection of a security interest in fixtures. This section will discuss some of the common elements of a real estate mortgage opinion.

1. Creation of Mortgage Liens

Under South Carolina law, a mortgage instrument creates a lien on real estate.² A lender will typically require an opinion that the mortgage instrument is sufficient to create a valid mortgage lien upon the real property described therein. Therefore, the mortgage instrument must be evaluated to ensure that it is sufficient to create a mortgage lien upon filing under State law. At a minimum, the mortgage must contain a description of the secured debt, a granting clause, the mortgagee's address, the signature of the mortgagor under seal, two witnesses, a proper acknowledgment, and a sufficient property description, including a derivation clause.³ A tax map sequence ("TMS") number for each parcel is also generally included on the legal description, as it may be required by local recording offices. Although South Carolina is a mortgage lien state, traditional forms of mortgage in the State typically include a habendum and a defeasance clause after the habendum; however, the absence of such clauses should not affect the validity of the mortgage lien.⁴

2. Requirements and Effect of Recording

The mortgage must be recorded in order to be effective against subsequent creditors or purchasers for valuable consideration without notice.⁵ Unless the opinion preparer is recording or supervising the recording of the mortgage, the opinion letter will assume that the mortgage has been duly recorded in the local recording office where the real property described in the mortgage instrument is located.⁶ If the mortgage is not in proper form for recording, lender's counsel should be advised to make the necessary corrections. Borrower's counsel is not responsible for advising the mortgagee of all defects in the mortgage (*e.g.*, an invalid waiver of

¹ Joint ACREL Attorneys' Opinion Committee and ABA Section of Real Property, Probate and Trust Law Committee on Legal Opinions in Real Estate Transactions, "Real Estate Opinion Letter Guidelines," 38 Real Prop., Prob. & Tr. J., 241 (2003).

² S.C. Code Ann. § 29-3-10.

³ See discussion *infra* at § A.2 for specific requirements for recordable form.

⁴ See *Bredenberg v. Landrum*, 32 S.C. 215, 10 S.E. 956 (1890).

⁵ S.C. Code Ann. § 30-7-10. South Carolina is a "race-notice" state. [Note that the recording act is limited and the mortgagee may not have priority.]

⁶ See discussion *infra* Part G re: UPL issues.

appraisal rights). However, if the mortgage is not in recordable form and not sufficient to create a lien, then borrower's counsel will not be able to render the customary opinions.

a. **Execution, Witnesses, and Acknowledgment.** The mortgage (and any other instrument to be recorded) should be examined to confirm that it has been duly executed and the execution thereof witnessed by two credible individuals and properly acknowledged or probated.⁷ For due execution, the opinion preparer will need to review the applicable governing documents and any authorizing resolutions and officer's certificates of the mortgagor. The acknowledgment may be in any one of the forms prescribed by statute.⁸ The probate form⁹ was the form widely utilized in South Carolina for years. However, the statutory acknowledgment form¹⁰ is becoming more common. While some local recording offices used to favor the probate or statutory acknowledgment form, the forms of acknowledgment under the Uniform Recognition of Acknowledgements Act are commonly used and accepted.¹¹

b. **Instrument under Seal.** Instruments of conveyance must be executed under seal.¹² While there is no specific requirement for how the seal is evidenced on the conveyance document, as a matter of general practice counsel should review the mortgage instrument for language in three places indicating that it is an instrument under seal. First, the "in witness whereof" line (or similar concluding sentence prior to the signature) should include language that the mortgagor set its, his, or her hand and seal on a particular date. Further, "signed, sealed and delivered in the presence of" language should appear prior to the witness signature lines, and the designation "L.S." or "(Seal)" should be included adjacent to the signature line of the mortgagor. However, a corporate seal is not required to be affixed, and it is not necessary for a corporate secretary to attest the signature (unless required by the company's organizational documents). Based on old case law, the foregoing rules likely apply to a mortgage, as well as a deed of conveyance.¹³

c. **Legal description, derivation, and mortgagee's address.** The mortgage, any assignment of leases, rents and profits, and any separate UCC fixture filing to be recorded at

⁷ S.C. Code Ann. §§ 27-7-10 (witnesses) and 30-5-30 (prerequisites for recording).

⁸ S.C. Code Ann. § 30-5-30. If the acknowledgment is executed out of state, the notary's seal should also be affixed.

⁹ S.C. Code Ann. § 30-5-30(A)(1) provides for the affidavit of a subscribing witness.

¹⁰ S.C. Code Ann. § 30-5-30(B) and (C).

¹¹ S.C. Code Ann. § 26-3-10 *et seq.* Such forms are permitted as an approved method for acknowledgements pursuant to S.C. Code Ann. § 30-5-30(A)(2).

¹² See *Arthur v. Screven*, 39 SCL 77, 17 S.E. 640 (1893). See also S.C. Code Ann. § 27-7-10 (form of conveyance for a deed).

¹³ The necessity for the language is derived from case law in South Carolina that requires the seal on a deed for it to be valid. *Cline v. Black*, 14 SCL 431 (1828); *Jones v. Crawford*, 26 SCL 373 (1841); *Arthur V. Screven*, 39 SCL 77, 17 S.E. 640 (1893). While S.C. Code Ann. § 27-7-30 provides that when it appears from the attestation clause or from other parts of a written instrument that the parties intended for the instrument to be a sealed instrument, such instrument should be construed as such and thus have the effect of a sealed instrument even if no seal is attached, the Court of Appeals held in *Carolina Marine Handling, Inc. v. Lasch*, 609 SE 2d 548, 363 SC 169 (S.C. Ct. App. 2005) that providing only "IN WITNESS WHEREOF, the parties have hereunto set their hands and seals," without further indication of an intent to create a sealed instrument, is insufficient to create a sealed instrument for a contract under S.C. Code § 19-1-160. Therefore, if the parties intend to execute an instrument under seal, it is recommended (but not required) that the reference to seal should appear in all three places described above to avoid doubt. For a discussion of the validity of a lease not under seal, see *Lyon v. Sinclair Refining Co. et al.*, 189 S.C. 136, 200 S.E. 78 (1938).

the county level must include a legal description of the real property encumbered. A legal description may refer to and incorporate by reference a plat that is recorded and indexed.¹⁴ The legal description on the mortgage should be reviewed to confirm that the property description includes a proper derivation clause as required by statute.¹⁵ If more than one parcel is mortgaged, each parcel, if acquired separately, needs an appropriate derivation stated.¹⁶ An opinion, however, does not cover the accuracy of the legal description or other title matters. It is reviewed only for the purpose of determining that the requirements for recording have been met. The opinion preparer may confirm that the instrument contains the necessary provisions sufficient for recording (*i.e.*, that the document is in recordable form) without passing on matters of title. The mortgagee's mailing address must also be stated.¹⁷ The address for the mortgagee may be stated in the body of the mortgage instrument or may be included on the page with the legal description. The inclusion of the derivation clause and address of the mortgagee must be verified in order to give the opinion that the instrument is in recordable form.

d. **TMS Number.** While not a statutory requirement, the TMS number(s) should also be provided on the legal description because inclusion is often required or favored by the various local county recording offices.

3. **Future Advances; Statement of Maximum Indebtedness**

In addition to securing existing indebtedness, a mortgage may be given to secure future advances; provided, however, the amount of the indebtedness secured by the mortgage will be limited to the maximum principal amount stated therein, plus interest, court costs and attorney's fees.¹⁸ If the mortgage fails to state a maximum principal amount secured thereby, the priority of the mortgage may not be protected as to the rights of subsequent creditors.¹⁹ To secure future advances, the mortgage should include a specific reference to the intent of the mortgagor to secure any future advances made by the mortgagee. Typically this indication is in the paragraph describing the amount of debt being secured by the mortgage. In the event future advances are contemplated under the mortgage, the mortgage must state the maximum amount of existing indebtedness and future advances that may be outstanding at any one time. While contingent obligations likely may not constitute future advances by the lender/mortgagee, it is common for practitioners to state an amount for future advances that is twice the principal amount of the original secured debt (often by reference to the note or other instrument evidencing the amount of the original debt, provided the amount of such debt is expressly stated) as the maximum amount of secured indebtedness or state an express dollar amount. The South Carolina future

¹⁴ S.C. Code Ann. § 30-5-250. As a practical matter, the mortgaged property must consist of one or more complete, legally subdivided parcels.

¹⁵ S.C. Code Ann. § 30-5-35.

¹⁶ 1975-76 Op. Atty Gen, No. 4385, p. 221.

¹⁷ *Id.*

¹⁸ S.C. Code Ann. § 29-3-50(A) provides that the "total amount of existing indebtedness and future advances outstanding at any one time may not exceed the maximum principal amount stated therein, plus interest thereon, attorney's fees and court costs."

¹⁹ S.C. Code Ann. § 29-3-50(A) provides that "the lien of a person who has furnished labor, services, or material in connection with the construction of improvements to real property is superior to the lien of a recorded mortgage as to disbursements made after filing of the notice of the mechanic's lien required by Section 29-5-90 and service of the notice on all prior recorded mortgage holders."

advances statute makes no distinction in terms of priority as to whether such advances are obligatory or discretionary. In addition, to secure advances by the mortgagee for the payment of taxes, insurance premiums, public assessments and repairs, the mortgage must contain provisions authorizing such advances.²⁰ The mortgage typically includes a statement that interest or discount may be deferred, accrued or capitalized.²¹ If future advances are contemplated, the opinion preparer should review the mortgage to confirm whether a proper future advance clause with a maximum stated principal amount exists. However, an opinion that all future advances have the same priority as the original mortgage advance is not typically requested or given.

4. **Maturity Date of the Lien**

A mortgage does not need to state a maturity date for the mortgage lien or secured indebtedness in order to create a lien; however, if the maturity date of the lien is stated in the mortgage, the lien created by such mortgage will lapse twenty years after the stated maturity date.²² If a maturity date of the lien is not stated in the mortgage, the lien created by such mortgage will lapse twenty years from the date of the mortgage, unless a written acknowledgment of the debt or record of some payment on account is recorded upon the record of such mortgage before the expiration of such twenty year period, in which case the lien shall expire twenty years from the recorded acknowledgement or record of that payment on account.²³ An amendment to the mortgage is required where (i) the mortgage does not state a maturity date and the maturity date is extended beyond twenty years from the date of the mortgage, or (ii) the mortgage states a maturity date and the maturity date is later extended beyond twenty years from the stated maturity date. Therefore, a qualification to the opinion may need to be taken where the maturity date is not stated and there are any concerns regarding the lapse of the mortgage.

5. **Assignment of Leases and Leasehold Interests**

a. **Assignment of Leases and Rents.** A valid collateral assignment of leases, rents, and profits may be contained in the mortgage or in a separate written instrument.²⁴ Upon review of the assignment, counsel may render an opinion that the mortgage or other assignment instrument is sufficient to validly assign the rents and profits in favor of the lender; provided, however, the opinion may need to be qualified as to enforceability to the extent the mortgage or assignment states that it constitutes a present and absolute assignment.²⁵ Relying on

²⁰ S.C. Code Ann. § 29-3-40 (priority of certain advancements by mortgagee).

²¹ S.C. Code Ann. § 29-3-50(A) does not require “that the mortgage state as part of the maximum principal the amount of any deferred, accrued, or capitalized interest or discount of any nature or kind, whether the rate of interest or discount is fixed or variable pursuant to an alternative mortgage loan transaction as defined in Section 37-1-301(5), and the lien of the mortgage as to all that interest or discount shall have the same priority as the principal; provided, however, that the recorded mortgage discloses that interest or discount will be deferred, accrued, or capitalized.” This phrase permits such amounts to be added to the indebtedness secured by the mortgage without inclusion in the future advances cap.

²² S.C. Code Ann. § 29-1-10 provides that a mortgage should not constitute a lien upon any real estate after the lapse of twenty years from the date of the maturity of the lien, and if the mortgage instrument has no stated maturity, then the twenty year period began on the date of that mortgage.

²³ *Id.*

²⁴ S.C. Code Ann. § 29-3-100.

²⁵ See S.C. Code Ann. § 29-3-100(A)(3) definition of “collateral assignment” (where assignor retains rights to collect or to apply rents after assignment and prior to a default, the assignment is a collateral assignment).

the authority provided by a specific provision included in the statute pertaining to the validity of certain assignments of rents, issues, or profits, the opinion may also provide that upon due recordation, the assignment is sufficient to perfect the interest in leases, rents and profits granted therein.²⁶

If the assignment of leases, rents, and profits is a separate document, it also needs to be in recordable form and recorded in the applicable county land records. Unless the opinion giver is recording or supervising the recording of the assignment, the opinion will need to include an assumption that the assignment will be duly recorded. (An assumption is implied that the recording office will properly index the recorded documents.)

b. **Leasehold Mortgage.** A mortgage may create a lien on a leasehold estate.²⁷ The leasehold mortgage should be evaluated based on the same criteria as a mortgage of a fee interest, but the reference to the mortgaged property should refer to the mortgagor's leasehold interest in the property, as evidenced by that certain lease, by a proper legal description. The lease (or a short form of the lease) must also be recorded.²⁸ The opinion preparer should also check any representations and warranties regarding the mortgagor's title and interest in and to the property and confirm the lessor's consent to the lien as the fee owner.

6. **Waiver of Appraisal Rights; "Anti-deficiency" Statute**

The real estate foreclosure laws of South Carolina afford a defendant against whom a personal judgment may be taken on a commercial real estate secured transaction (such as the borrower, mortgagor and guarantors) the right to cause an appraisal of mortgaged property to be conducted in order to reduce any deficiency that may have resulted from a foreclosure action.²⁹ Such appraisal rights may be waived as provided by statute (except with respect to property constituting a dwelling place or in connection with a consumer credit transaction); however, any such waiver of appraisal rights will be invalid unless the following two-part test is satisfied: (1) written notice of the requirement of such waiver is given to the debtors, makers, borrowers, and/or guarantors before the transaction, and (2) a waiver is signed by the debtors, makers, borrowers, and/or guarantors during the transaction.³⁰ The waiver must be substantially the same

²⁶ S.C. Code Ann. § 29-3-100(B). "The recording of a written document containing an assignment of leases, rents, issues or profits arising from real property is valid and enforceable from the time of recording to pass the interested granted, pledged, assigned or transferred as against the assignor, and is perfected from the time of recording against subsequent assignees, lien creditors, and purchasers for a valuable consideration from the assignor."

²⁷ S.C. Code Ann. § 30-5-130.

²⁸ S.C. Code Ann. § 30-7-10. The statute requires that all instruments conveying an interest in real property, including "all leases or contracts in writing made between landlord and tenant for a longer period than twelve months" must be recorded "so as to affect the rights of subsequent creditors . . . or purchasers for valuable consideration without notice . . ." Since the statute does not specifically reference a "memorandum" of lease, a "short form" lease is often recorded in lieu of the lease or memorandum thereof. However, many still use a "memorandum of lease" form, provided it contains all of the essential lease terms.

²⁹ S.C. Code Ann. § 29-3-680(A).

³⁰ S.C. Code Ann. § 29-3-680(B). Since the statute does not define "transaction," it is not clear if "before the transaction" means before the parties are committed to the financing (e.g., the notice would need to be in the term sheet or commitment letter) or at any time before the closing of the transaction. *See infra* fn 32.

as the following form and must be on a page containing the signature of the person purporting to waive such rights:³¹

Waiver of Appraisal Rights. The laws of South Carolina provide that in any real estate foreclosure proceeding a defendant against whom a personal judgment is taken or asked may within thirty days after the sale of the mortgaged property apply to the court for an order of appraisal. The statutory appraisal value as approved by the court would be substituted for the high bid and may decrease the amount of any deficiency owing in connection with the transaction. THE UNDERSIGNED HEREBY WAIVES AND RELINQUISHES THE STATUTORY APPRAISAL RIGHTS WHICH MEANS THE HIGH BID AT THE JUDICIAL FORECLOSURE SALE WILL BE APPLIED TO THE DEBT REGARDLESS OF ANY APPRAISED VALUE OF THE MORTGAGED PROPERTY.

While it may not be difficult to verify that a proper form of waiver has been signed by the applicable parties during the transaction by reviewing the signature page to the mortgage (or other loan document, including any applicable guaranty) or a stand-alone waiver signed at closing, it may be more difficult to determine if the first part of the test has been satisfied (*i.e.*, whether or not written notice of the requirement of such waiver was given to the borrowers and/or guarantors before the transaction). The waiver of appraisal rights may be an important consideration to the lender; however, the opinion preparer, while often attuned to such requirements, should not opine as to the enforceability of such waiver given the limitations and requirements of the statute.³²

7. Judicial Foreclosure Remedy

An out-of-state lender may request an opinion from local counsel regarding the lien foreclosure process in the state. Except in the case of certain timeshare mortgage liens, South Carolina follows a judicial foreclosure procedure to foreclose liens on real property.³³ Any opinion as to the mortgage foreclosure remedies is limited to judicial foreclosure.³⁴

a. **No “One Action Rule.”** Occasionally, in a local counsel opinion, with an out-of-state lender, the opinion preparer may be asked for an opinion to the effect that the State

³¹ *Id.* (specifying that the waiver may be in any document relating to the transaction as long as it is on a page containing the signature of the person making the waiver and the capitalized sentence must be underlined, in capital letters, or disclosed in another prominent manner). The waiver should follow the exact wording as prescribed by the statute.

³² Due to the likelihood of strict construction of the statute and the uncertainty involved in how a court may ultimately construe “*before* the transaction” and “*during* the transaction,” it may not be possible to conclude that the statutory requirements have been met. Therefore, the opinion should include an exception for any waiver of appraisal rights.

³³ With respect to timeshare mortgage liens, see discussion *infra* Part F. 2 (a nonjudicial foreclosure process is available for certain timeshare interests by statute).

³⁴ Except in limited circumstances with respect to certain timeshare loan transactions, any references in the mortgage to “power of sale” and other non-judicial foreclosure remedies should be deleted (or appropriate qualifications must be taken). Notwithstanding anything to the contrary in the mortgage, the lender may be forced to initiate legal proceedings to effectuate its remedies.

does not have a so called “one action rule.”³⁵ The lender may want to know that it can pursue its remedies against any and all of its collateral without having to exhaust its remedies under the mortgage. While such “one action rule” is not applicable in the State, the analysis for an opinion is more complex. Although no “one action” rule statute has been enacted in the State, there are other considerations that bear mention in the opinion, such as (i) the appraisal rights statute and the effect on rights to a deficiency judgment, (ii) whether the loan is non-recourse, and (iii) the doctrine of election of remedies to prevent double recovery. Where a lender holds security interests and liens on both real and personal property located in the State to secure recourse debt of a debtor, upon a default by the debtor, such lienholder is not required to elect to pursue its remedies against either the mortgaged real property or the secured personal property or to exhaust its remedies against any of its collateral before otherwise proceeding to enforce its remedies against such debtor on its recourse obligations. In no event, however, may a lienholder be entitled to double recovery, and such lienholder could be required at some point to elect its remedy to prevent any possible double recovery.³⁶

c. **Rights to a Receiver.** Mortgaged real property may be sold only pursuant to judicial foreclosure proceedings. Therefore, any provisions concerning a secured party’s rights to enter into possession of, operate, control, or sell real property, either directly or through a receiver not appointed by a court and without the institution of judicial foreclosure proceedings, will be unenforceable. Rights of a mortgagee to enter into possession of the real property, to take control of and operate or sell real property, either directly or through a receiver, without benefit of judicial proceeding, are also not recognized. A mortgagee may obtain the services of a receiver to manage such property only by court appointment of the receiver. The appointment of a receiver is generally discretionary with the court. Therefore, no opinion is given as to the enforceability of the remedies set forth in the mortgage which are contrary to the statutory requirements for appointment of a receiver, the collection of rents, and judicial foreclosure under State law.

d. **Personal Property.** Contrary to any provisions in the mortgage regarding self-help remedies of the mortgagee with respect to real property, where the mortgage also secures personal property, a secured party, upon default, has the right to proceed without judicial process to retake possession of secured personal property only if it can be done without breach of the peace in compliance with the requirements and remedies set forth under the UCC.³⁷ However, where the instrument covers both personal and real property, a secured party may proceed against both the personal and the real property in the same action in accordance with the judicial foreclosure remedies for real property, in which case the enforcement provisions of the UCC do not apply.³⁸

³⁵ Several states, such as California, Nevada and Utah, have enacted statutes that limit recovery on any debt secured by a mortgage on real property to one action on the mortgage.

³⁶ If the lender insists on an opinion, the better approach may be to include an explanation of the judicial process as part of the judicial foreclosure remedies qualification. In any event, the analysis would need to be limited to commercial recourse loans.

³⁷ See S.C. Code Ann. § 36-9-609, and Part 6 of Article 9 of the UCC in general. However, such provisions are limited solely to secured personal property and are not related to any real property interests.

³⁸ S.C. Code Ann. § 36-9-604(a)(2).

e. **Customary Remedies.** An out-of-state lender may also ask the opinion preparer to opine that the mortgage contains remedies customarily available (or all available remedies) under State law. Such request is inappropriate, and such opinion should not be requested or given.³⁹ It is not the mortgagor's counsel's responsibility to advise the lender with respect to all of its rights and remedies, and it would be impractical (if not impossible) to advise the lender of all possible rights and remedies available. At most, the opinion preparer can review the mortgage to confirm that it contains adequate provisions to enable the mortgagee to accelerate the indebtedness upon a default and foreclose on the lien through judicial means. Once confirmed, the opinion preparer may be able to state that the mortgage contains the provisions necessary to enable the mortgagee, following a default by the mortgagor under the mortgage, to exercise its remedies to accelerate the secured debt and foreclose the lien against the real property by means of judicial foreclosure under State law. However, such opinions would need to be appropriately qualified with respect to declaring defaults, the acceleration of debt and foreclosure under State law.⁴⁰

8. **Fixtures; Fixture Filing**

The mortgage may cover certain property constituting "fixtures" as such term is defined in Section 9-102(a)(41) of the UCC. If fixtures are covered, the mortgage opinion may also address the sufficiency of the security interest in fixtures granted by the mortgage and the perfection of that security interest by virtue of the recordation of the mortgage.⁴¹ A security interest in fixtures may also be perfected by the filing in the local recording office of a separate UCC fixture filing.⁴² If a financing statement is not filed as a fixture filing, a security interest in a fixture may also be perfected by filing a financing statement with the secretary of state's office in the appropriate jurisdiction.⁴³ If the opinion preparer is not knowledgeable in the area of UCC secured transactions, the opinion preparer should consult with UCC counsel prior to rendering any opinions relating to the creation and perfection of such security interests. As with real property liens, no opinion as to title and priority are given with respect to personal property. Counsel will need to review the list of the items included in the definition of collateral and qualify the opinion as necessary with respect to any items of personal property. Furthermore, if the mortgage contains a statement to the effect that any items of personal property are deemed incorporated in or made a part of the real estate under the mortgage, the opinion should include an appropriate qualification.⁴⁴ Whether any item of personal property constitutes a fixture or real

³⁹ See ACREL/ABA Real Estate Opinion Letter Guidelines § 1.1.b.

⁴⁰ See Illustrative Form of Opinion "Real Estate Mortgage Related Exceptions."

⁴¹ Recording the mortgage is effective as a financing statement filed as a fixture filing to perfect a security interest in fixtures on the mortgaged real property provided the mortgage meets the requirements of a "fixture filing" under S.C. Code Ann. § 36-9-502(c). A mortgage filed as a fixture filing is effective for the term of the mortgage. Local filing offices may not be required to index mortgages filed as a fixture filing separately.

⁴² S.C. Code Ann. § 36-9-501(a)(2) provides that a security interest in fixtures may be perfected by filing in the Office of the Secretary of State. However, to constitute a "fixture filing" under S.C. Code Ann. § 36-9-102(a)(40) which is entitled to the special priority rules for "fixture filings" pursuant to S.C. Code Ann. § 36-9-334, a fixture filing must be filed in the office designated for recording a mortgage on the related real property as provided in S.C. Code Ann. § 36-9-501(a)(1).

⁴³ S.C. Code Ann. § 36-9-501(a)(2). *But, see* S.C. Code Ann. § 36-9-334 with respect to priority and competing interests in fixtures.

⁴⁴ See Illustrative Form of Opinion qualification: "We express no opinion as to whether any items of personal property are incorporated in or made a part of the real estate under the Mortgage."

property is a factual determination under rules of State law. Determination of whether personal property is a fixture and deemed part of the real estate is a matter of law and is based on the nature and facts of the specific property. It can be a difficult analysis, and its determination is subject to the discretion of the court. Merely stating personal property is part of the mortgaged real property does not make such property a fixture. While intent is a factor, the determination cannot be arbitrarily decided by the parties.

9. **After-Acquired Property**

Some mortgages purport to cover after-acquired real property. After-acquired ownership interests in the same described land (but only to the extent the granting language of the mortgage purports to cover such after acquired interests) will be subject to the mortgage lien; however, any other after-acquired real property is not effectively encumbered by the mortgage unless an amendment to the mortgage describing and subjecting such additional property to the lien of the mortgage is executed and recorded, except in the case of after-acquired property of a gas or electric utility or electric cooperative subject to a recorded mortgage instrument and notice filed pursuant to the terms of Section 29-3-80 of the Code (upon the filing of such notice in every county in which the utility intends to claim the benefit of this statute, referencing the book and page number of the mortgage instrument, no further document is necessary to create or give notice of the lien upon the real property interest thereafter acquired by the utility). Therefore, an exception should be taken in the opinion with respect to after-acquired real property.

10. **Casualty Insurance**

In reviewing the mortgage, the opinion preparer should determine if there is a need for the qualification with respect to limitations on casualty insurance.⁴⁵

11. **Construction Mortgage**

If a mortgage is given to secure an obligation for the construction of improvements on the land (including any mortgage to refinance a construction loan), the mortgage should state that it is a “construction mortgage” within the meaning of Section 9-334(h) of the UCC in order to protect the priority of certain security interests in fixtures.

12. **Due on Sale Clauses**

Due on sale clauses in mortgages for commercial loans are generally enforceable under State law.

B. TITLE MATTERS, PRIORITY AND TITLE INSURANCE

Third party closing opinions do not address matters of title to real property, conveyancing issues, or the priority of the lien of the mortgage.⁴⁶ The opinion generally only covers the following

⁴⁵ S.C. Code Ann. § 29-3-70 provides that a mortgagee doing business in this State may not require as a condition or term of the mortgage that the mortgagor purchase casualty insurance on the property subject to the mortgage in an amount in excess of the replacement cost of the buildings or appurtenances on the mortgaged premises.

issues dealing with the mortgage: (i) the mortgage has been duly authorized, executed and delivered, (ii) it is in a form sufficient for recording in the local real estate recording office, (iii) it is in a form sufficient to create a lien against the real property upon recordation, and (iv) it is enforceable as a contract between the parties *inter se*. Title and the priority of the lien created by the mortgage are matters customarily dealt with solely by title insurance through the issuance of a loan policy to the lender.⁴⁷ Title insurance is issued after a careful examination of copies of the public records, but even the most thorough search cannot absolutely assure that no title hazards are present, despite the knowledge and experience of professional title examiners.⁴⁸ In addition to matters shown by public records, other title problems may exist that cannot be disclosed in a search such as forged deeds, releases or wills, instruments executed under invalid or expired power of attorney, undisclosed or missing heirs, mistakes in recording or indexing legal documents, deeds by minors, deeds by persons of unsound mind, fraud, or liens for unpaid estate, inheritance, income or gift taxes. By opining on the validity and priority of the lien created by the mortgage, opinion preparers place themselves in the position of insuring title – a role better left to the title insurance industry and one not appropriate for a law firm. A law firm should not be put in the position of insuring title by virtue of an opinion.

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, where title insurance is being obtained, a reference to the title insurance policy (or title commitment) is often included in the exceptions to an opinion to confirm that the lender is relying on the title policy for assurance with respect to such matters and the opinion preparers have no duty to independently verify such matters.⁴⁹

A qualification along the lines of the following is recommended for inclusion in the opinion letter:

We express no opinion with respect to (i) the title to or the rights or interests of the [borrower] in the [collateral,] (ii) the accuracy of the legal description of the real property, or (iii) the priority of any liens thereon or security interests therein. [We understand that, with respect to the title to the [real property] and the priority of the lien of the mortgage, you will be relying upon the title insurance policy

⁴⁶ See ACREL/ABA Real Estate Opinion Letter Guidelines § 4.0.c.

⁴⁷ See 1998 Mortgage Loan Opinion Report of 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, endnote 15.

⁴⁸ Title and priority opinions should not be given to third parties. However, although rare, properly qualified title reports have been given to clients (not third parties) in certain instances, such as in residential real estate transactions, but are not advised in commercial transactions or where title insurance is obtained. (Title certifications given to title insurance companies for which an attorney is acting as agent for the purpose of issuing a title binder are also not deemed third-party opinions and are outside the scope of this Report. In such case, the attorney has a direct agency relationship with the title company.)

⁴⁹ See 1998 TriBar Report § 2.6 at 618.

issued to you by [title company] bearing commitment/policy no. _____ and dated as of the closing date.]

C. CHOICE OF LAW

The creation, effectiveness and enforcement of a mortgage lien on real property in the State will be governed by the laws of the State. Any foreclosure action on the mortgage will be brought in the county where the real property is located, and any provision to the contrary will be unenforceable.

In a multi-state transaction or with an out-of-state lender, sometimes a mortgage may contain a bifurcated choice of law provision (*e.g.*, the laws of another state govern the contractual provisions of the mortgage that are unrelated to the creation and enforcement of the lien against the land). However, the opinion should assume that the laws of the State govern the mortgage, notwithstanding such choice of law provision.⁵⁰

D. PRACTICAL REALIZATION OR GENERIC QUALIFICATION

Opinions in financing transactions secured by real estate will often include a generic qualification, commonly referred to as the “practical realization” qualification.⁵¹ This qualification is generally viewed as a substitute for many of the specific qualifications otherwise required to address the numerous remedial provisions of questionable enforceability in the typical mortgage instrument. Nevertheless, the generic qualification is in addition to the other stated qualifications, and does not limit or qualify them.⁵²

Although frequently used in real estate transactions, the generic qualification is less common in financing transactions secured by personal property, or other non-real estate transactions.⁵³ Another difference in practice between real estate and non-real estate transactions is that, in real estate transactions, the generic exception is frequently stated to apply to all of the loan documents, and not just the security documents. In non-real estate transactions, the applicability of the generic exception is more likely to be limited to the security documents.

There are several common variations on the generic qualification. One version is as follows:

In addition, certain remedies, waivers and other provisions of the transaction documents might not be enforceable; however, such unenforceability does not render the transaction documents invalid as a whole or substantially interfere with

⁵⁰ There is no published opinion in the State directly addressing a bifurcated choice of law provision in a mortgage. Given the court’s general views with respect to the protection of the State’s interest in its real property, among other things, a court could determine that all matters contained in the mortgage are governed by the laws of the State as a matter of public policy.

⁵¹ See GLAZER § 9.11 for a discussion on “Practical Realization” or the “generic qualification” and alternative formulations. See also 1998 TriBar Report § 3.4 at 626-627. Such qualification is typically included only in complex leasing and financing transactions and real estate mortgage opinions.

⁵² See ACREL/ABA Real Estate Opinion Letter Guidelines § 4.0.

⁵³ The generic qualification is, however, also sometimes used in certain complex leasing and complex, non-real estate financing transactions.

the practical realization of the principal benefits (and/or security) purported to be provided by the transaction documents.

Another version, sometimes referred to as the “ABA/ACREL qualification,”⁵⁴ refers specifically to the rights of the opinion recipient to enforce the borrower’s payment obligations and foreclose as a result of the borrower’s failure to pay principal or interest:

In addition, certain remedies, waivers and other provisions of the transaction documents might not be enforceable; nevertheless, such unenforceability will not render the transaction documents invalid as a whole or preclude (i) the judicial enforcement of the obligation of the client to repay the principal, together with interest thereon (to the extent not deemed a penalty), as provided in the transaction documents/note, (ii) the acceleration of the obligation of the client to repay such principal, together with such interest, upon a material default by the Client in the payment of such principal or interest, and (iii) the foreclosure in accordance with applicable law of the lien on and security interest in the collateral created by the security documents upon maturity or upon the acceleration pursuant to (ii) above.

A third version, frequently referred to as the “material breach” qualification, or the “ABA/ACREL Plus” qualification, adds language (indicated in italics below) referring to the rights of the opinion recipient to enforce the borrower’s payment obligations and foreclose as a result of any material default, not just default in the payment of principal or interest:

In addition, certain remedies, waivers and other provisions of the transaction documents might not be enforceable; nevertheless, such unenforceability will not render the transaction documents invalid as a whole or preclude (i) the judicial enforcement of the obligation of the client to repay the principal, together with interest thereon (to the extent not deemed a penalty), as provided in the transaction documents/note, (ii) the acceleration of the obligation of the client to repay such principal, together with such interest, upon a material default by the Client in the payment of such principal or interest *or upon a material default in any other material provision of the transaction documents*, and (iii) the foreclosure in accordance with applicable law of the lien on and security interest in the collateral created by the security documents upon maturity or upon the acceleration pursuant to (ii) above.

Recipients of opinions with a generic exception will sometimes request additional assurance to the effect that, notwithstanding the generic exception, the documents provide the opinion recipient with “legally adequate remedies for the realization of the principal benefits intended to be provided” by the documents, or that the lender will achieve “the practical realization of the benefits intended to be conferred” by the documents. There is general agreement that such an additional assurance provision should not be requested or given.⁵⁵

⁵⁴ This version is referred to as the ABA/ACREL qualification because it was set forth in American College of Real Estate Lawyers, Statement of Policy on Mortgage Loan Enforceability Opinions (December 1991).

⁵⁵ See discussion GLAZER § 9.11

E. MISCELLANEOUS MATTERS AND INAPPROPRIATE OPINION REQUESTS

1. Mortgage Taxes

In a multi-state transaction, a lender may request an opinion as to any mortgage or transfer taxes due as a result of the execution and recordation of the mortgage instrument in the state.⁵⁶ Other than nominal statutory recording fees, there is no “mortgage tax” imposed in the State. Such opinion should not be required when the lender or its counsel is located in the State.

2. Foreign Qualification of Lender

An out-of-state lender may also request an opinion that the lender does not need to qualify to do business in the State as a result of the loan transaction or as to the lender’s tax liability as a result of the lender’s mortgage loan transaction. However, an opinion request with respect to a lender’s tax liability or as to whether the lender must be qualified to transact business in the State is not appropriate for borrower’s counsel to render.⁵⁷ In the State, a foreign corporation may not transact business until it obtains a certificate of authority from the Secretary of State.⁵⁸ However, due to the way the foreign corporation statute defines actions requiring a certificate of authority from the Secretary of State (by exception rather than rule),⁵⁹ whether a foreign corporation is required to obtain a certificate of authority to transact business in the State is a factual determination that often can be difficult to make. For example, the list of permitted activities indicates that the mere creation or acquisition of indebtedness, mortgages and security interests in real or personal property does not constitute transacting business in the State within the meaning of the statute.⁶⁰ If a foreign corporate lender is only conducting the activities expressly permitted by the statute, the lender is not required to obtain a certificate of authority. However, the factual question becomes whether the lender has employees or an office within the State or conducts other types of business within the State that are not expressly permitted by the statute, thus requiring that the lender obtain a certificate of authority from the Secretary of State.⁶¹ That factual question is a determination for the lender and its counsel to make as a business and legal decision, not for a borrower’s counsel to make on a case by case basis. If a foreign corporation is deemed to be transacting business requiring it to be authorized in the State but it fails to do so, the corporation cannot bring an action in the State until it obtains a certificate of authority, and it may be subject to monetary penalties as prescribed by statute.⁶²

⁵⁶ See Illustrative Form of Opinion opinion paragraph 12 at p. 9.

⁵⁷ See ACREL/ABA Real Estate Opinion Letter Guidelines § 4.1.a.

⁵⁸ S.C. Code Ann. § 33-15-101(a).

⁵⁹ See S.C. Code Ann. § 33-15-101(b) (sets forth a list of 13 activities that do not constitute transacting business within the meaning of § 33-15-101(a). However, such list is not exhaustive. See S.C. Code § 33-15-101(c).

⁶⁰ S.C. Code Ann. § 33-15-101(b)(7).

⁶¹ See S.C. Code Ann. § 33-15-101(b)(7) (2006), as amended (S.C. rep. cmt. 4).

⁶² S.C. Code Ann. § 33-15-102.

3. Land Use, Zoning, and Environmental Matters

Third-party closing opinions should not address land use, zoning, and environmental matters.⁶³ These matters typically involve complex procedural and factual confirmations, and opinions regarding such matters may expose the opinion giver to risks not justified by the benefits of the opinion or the fees charged.⁶⁴ Rather, such matters should be addressed during the intended recipient's due diligence process. Recipients (whether a lender, purchaser or other party in a transaction) have far more appropriate sources upon which to rely (such as public official letters or certificates, environmental reports and title insurance coverage) than a borrower's or seller's counsel legal opinion.

In the case of zoning matters, a governmental zoning letter is normally sufficient to obtain a zoning endorsement to the title policy. A zoning opinion, however, is not an appropriate alternative.⁶⁵ Even a limited opinion that relies solely on a zoning letter from the zoning public official in the city or county in which the property is located is not a satisfactory alternative approach,⁶⁶ and it does not offer the recipient anything more than it would obtain from the zoning letter.⁶⁷

Under special circumstances, where a particular issue is material to the transaction, if such opinions of law relating to real estate matters are requested and counsel is willing to render them, such opinions should be limited to specific issues of law based on particular facts of material importance to the transaction and should be rendered only if the benefit to the recipient justifies the cost to render the opinions. Such opinions may only be rendered if counsel is competent and knowledgeable in the specific areas of law. If counsel is willing to render such

⁶³ ACREL/ABA Real Estate Opinion Letter Guidelines § 4.3.a (*Land Use and Environmental Opinions*).

⁶⁴ See, e.g., *Santo Nostrand, LLC v. Cozen O'Connor*, No. 602415/08 (N.Y. Sup. Ct. July 14, 2009), denying a motion to dismiss a developer's malpractice claim against a law firm arising from a zoning opinion. Although the opinion correctly identified the then-current zoning, it failed to note pending proceedings to change the zoning in a manner that would impair the contemplated development of the property. The zoning change was approved five months after delivery of the opinion. The court allowed the negligence claim against the law firm to proceed, despite scope limitations in the opinion, including provisions that the opinion spoke only as of its date, and that the law firm had no obligation to inform the recipient of subsequent changes in law.

⁶⁵ Often lenders will require a zoning endorsement to the title policy, and a request for an additional zoning opinion is inappropriate. Occasionally, due to the cost associated with a zoning endorsement (as a result of the associated risk to the title insurance company), lenders may accept a zoning opinion in lieu of the endorsement. The client should be advised of the cost associated with the necessary due diligence to render a zoning opinion and the associated risk (a reason why the insurance company, the appropriate party to bear the risk, charges the excess fee for such endorsement), and such opinion should not be requested or rendered in a third-party closing opinion.

It is noted that under a few federal loan programs, certain regulations may still require antiquated forms of opinion, including requests for zoning opinions. If counsel is unable to convince the governmental agency recipient to accept a zoning letter, endorsement or other evidence of zoning from governmental sources, counsel should consult with special counsel knowledgeable with zoning opinion issues and advise the client of the cost associated with rendering such opinions.

⁶⁶ Reliance on a zoning letter is not justified because zoning classification is a matter of law. The zoning ordinance and the official records and maps must be consulted, among other things, to determine the zoning classification. See, *Carolina Chloride, Inc. v. Richland County*, 394 S.C. 154, 714 S.E.2d 869 (2011) (the public has no right to rely on a statement of a zoning official or county staff member for determination of zoning classification because such classification is a matter of law). See also *Quail Hill, LLC v. County of Richland*, 387 S.C. 223, 692 S.E.2d 499 (2010).

⁶⁷ ACREL/ABA Real Estate Opinion Letter Guidelines § 1.5.b ("*Conduit*" opinions).

special opinions (after consultation with, and the consent of, its client), such opinions are typically delivered in a separate or supplemental opinion of counsel.

4. **Name Change Filing Requirements**

Corporations and other entities that own real property in South Carolina are required upon change of name, whether by amended articles, merger, conversion, domestication or reorganization, to file a notice of name change in the office of the register of deeds (or clerk of court if there is no register of deeds) of the county(ies) in which their real property is located.⁶⁸ The notice of name change is to provide record notice to subsequent purchasers of real estate and can be accomplished by filing (1) an affidavit executed in accordance with S.C. Code Ann. § 33-1-200; (2) a certified copy of the amended articles, articles of merger, articles of conversion, articles of domestication, or articles of share exchange accompanied by a description of the real property; or (3) a duly recorded deed of conveyance to the newly-named surviving, acquiring, domesticating, converting, or reorganizing corporation or other entity.

There is a similar requirement in the Uniform Limited Partnership Act for limited partnerships and foreign limited partnerships that own real property in South Carolina to file an affidavit in the county grantor and grantee index of deeds that contains the name of the partnership, the location where the partnership's certificate of limited partnership is filed, and the name or names of the general partners who have the authority in matters relating to the real property to sign necessary documents on behalf of the partnership.⁶⁹

5. **Opinions Regarding Certain Federal, State and Local Law**

Opinion preparers are responsible only for areas of law customarily understood to be covered by the opinion. In South Carolina, as a matter of customary practice, the term "law" when used in the opinion means the published judicial decisions in the State and the statutes and regulations enacted at the state level and, if applicable, at the federal level.⁷⁰ Except for any local filing requirements for the mortgage and other security instruments, local law is not

⁶⁸ For filing requirements of corporations or foreign corporations see S.C. Code Ann. § 33-4-104; merger and conversion of partnership or limited partnership into business corporation, see S.C. Code Ann. § 33-11-110; merger and conversion of business corporation to limited liability company, see S.C. Code Ann. § 33-11-112; filing requirements for domestic or foreign nonprofit corporations see S.C. Code Ann. § 33-31-404 (1976), as amended; merger of partnership into one or more partnerships, foreign partnerships, corporations, foreign corporations, limited liability companies, foreign limited liability companies, limited partnerships, or foreign limited partnerships, see S.C. Code Ann. § 33-41-1310; merger of limited partnership into one or more partnerships, foreign partnerships, corporations, foreign corporations, limited liability companies, foreign limited liability companies, limited partnerships, or foreign limited partnerships, see S.C. Code Ann. § 33-42-2110; merger and conversion of partnership or limited partnership to limited liability company, see S.C. Code Ann. § 33-44-903; merger and conversion of limited partnership to corporation, see S.C. Code Ann. § 33-44-909; merger and conversion of partnership or limited partnership to limited partnership see S.C. Code Ann. § 33-44-911 (1976), as amended; and merger and conversion of partnership or limited partnership to partnership, see S.C. Code Ann. § 33-44-913.

⁶⁹ See S.C. Code Ann. § 33-42-300 regarding the affidavit of general partners' authority.

⁷⁰ See 1998 TriBar § 1.9(n) at 607. *But see* also ACREL/ABA Real Estate Opinion Letter Guidelines § 1.2.a. In a local counsel opinion, the opinion preparer should not be expected to cover federal law, as federal law should already be addressed in other opinions of counsel.

covered.⁷¹ Whether expressly stated or not, the law covered by the opinion does not include any laws regulating, governing or relating to tax, insolvency, securities, environmental matters, consumer protection, privacy, fair housing, health and safety, antitrust, fair trade practices, building and construction, archaeology, historic preservation, land sales, property management, brokerage, condominiums, timeshares, landlord-tenant relationships, zoning, land use, intellectual property, letters of credit and anti-terrorism. It also does not include any laws governing and regulating financial or lending institutions or other regulated industries.

F. HORIZONTAL PROPERTY REGIMES, TIMESHARES, RESORT MATTERS

South Carolina's coastal property attracts a lot of resort development. Counsel called upon to render real estate opinions with respect to property developed under a horizontal property regime or as a timeshare should be knowledgeable with the laws in this area. The following is a brief discussion of the relevant acts.

1. Horizontal Property Regimes

Condominium ownership is a form of property ownership where there is individual ownership of a particular unit or apartment in a building (or if not in a building in a separately delineated place whether open or enclosed) and the common right to a share, with other co-owners, in the general and limited common elements of the property. Because a condominium is a creature of statute, strict compliance with the Horizontal Property Act (for purposes of this paragraph, the "Act")⁷² is required to create a horizontal property regime.⁷³ A horizontal property regime is established through the recordation of a master deed or lease submitting the property to a horizontal property regime pursuant to the Act. The master deed must contain a list of particulars set out in S.C. Code Ann. § 27-31-100, and must be filed in the Office of the Register of Deeds together with (a) an as-built plat, sealed and signed by a registered land surveyor licensed to practice in South Carolina, (b) a plot plan, (c) building plans certified to by an engineer or architect authorized and licensed to practice in South Carolina, (d) building elevations, and (e) a table of statutory values and percentage membership interest. Due to the specialized knowledge involved in rendering an opinion regarding the legality of a condominium regime, such an opinion should be rendered as a special supplemental opinion where such opinion is fundamental to the transaction and only by competent counsel knowledgeable and familiar with the Act.

2. Vacation Time Sharing Plans

Vacation Time Sharing Plans, more commonly referred to as "timeshares," are a form of property ownership where the purchaser receives an ownership interest in real property and the right to use accommodations or facilities or both, for a period or periods of time during a given year, but not necessarily for consecutive years, but which extends for a period of more than one year. A vacation time sharing ownership plan may be created in a condominium established on a

⁷¹ See 1998 TriBar § 1.9(n) at 607.

⁷² S.C. Code Ann. §§ 27-31-10 *et seq.*

⁷³ *Harrington v. Blackston*, 319 S.C. 1, 459 S.E.2d 309 (S.C. App 1995) (rehearing denied, vacated 322 S.C. 470, 473 S.E.2d 47).

term for years or leasehold interest having an original duration of thirty years or longer. Like condominiums, timeshares are statutory in nature and strict adherence to the Vacation Time Sharing Plan Act (for purposes of this paragraph, the “Act”)⁷⁴ is required in their creation and regulation. A vacation time sharing plan for sale or offered for sale in South Carolina must be registered with the South Carolina Real Estate Commission (the “Commission”) and may not be sold until the registration package, including a public offering statement and timeshare sales contract meeting the requirements of the Act, is approved by the Commission. Due to the specialized knowledge involved in rendering an opinion regarding the legality of the creation and sale of a timeshare and liens thereon, such an opinion should be rendered only by counsel competent and knowledgeable in the area. Otherwise, the matter should be referred to an attorney familiar with the Act and opinion issues relating thereto. In addition, it should be noted that although timeshares are interests in real property, due to the nature of timeshare interests, mortgage liens and assessment liens against timeshare property may be foreclosed by nonjudicial foreclosure procedures provided the notice provisions and statutory requirements for such nonjudicial foreclosure pursuant to the Timeshare Lien Foreclosure Act are met.⁷⁵

3. **Oceanfront Property**

Transactions involving the sale of oceanfront property or coastal land require an understanding of South Carolina’s Coastal Tidelands and Wetlands Act⁷⁶ and specifically the provisions known as the Beachfront Management Act⁷⁷ (for purposes of this subparagraph 3, referred to as the “Act”). The Act requires the South Carolina Department of Health and Environmental Control’s Office of Ocean and Coastal Resource Management (OCRM) to establish and regulate certain jurisdictional lines (referred to in the Act as “baselines” and “setback lines”) affecting the property. No structure may be constructed seaward of the setback line without a permit issued by OCRM. Because the Acts may restrict a purchaser's right to build, repair or rebuild structures on the property, a seller of oceanfront or coastal property is required by Section 48-39-330 of the Act to disclose in the contract of sale and in the deed of transfer that the property is subject to statutory regulation by OCRM.⁷⁸ Commonly known as the “Oceanfront Property Disclosure Notice,” the disclosure must contain “language reasonably calculated to call attention to the existence of baselines, setback lines, jurisdiction lines, and the seaward corners of all habitable structures and the local erosion rate.”⁷⁹ Real estate opinions do not typically cover compliance of any contract subject to the Act. Due to the specialized knowledge involved in rendering any opinion regarding compliance with the Act, any such opinion, if necessary and appropriate under special circumstances, should be rendered only by competent counsel knowledgeable and familiar with the Act and its requirements.

⁷⁴ S.C. Code Ann. §§ 27-32-10 *et seq.*

⁷⁵ S.C. Code Ann. §§ 27-32-300 *et seq.*

⁷⁶ S.C. Code Ann. §48-39-10 *et seq.*

⁷⁷ S.C. Code Ann. §§48-39-250 through 48-39-360

⁷⁸ S.C. Code Ann. § 48-39-330 is regulatory in nature. Failure of a contract of sale or deed of conveyance to contain the required Oceanfront Property Disclosure Statement does not affect the legality of such document or instrument.

⁷⁹ S.C. Code Ann. § 48-39-330

G. UNAUTHORIZED PRACTICE OF LAW IMPLICATIONS IN REAL ESTATE TRANSACTIONS

While not directly addressed in a closing opinion, the ethical considerations relating to the unauthorized practice of law (sometimes referred to herein as “UPL”) should be considered prior to rendering any third party closing opinions, especially when called upon to render local counsel real estate opinions where you may not be involved in all aspects of the real estate portion of the closing. In addition, while UPL issues are not typically covered in an opinion, there may be circumstances in which an express assumption regarding UPL should be stated.⁸⁰ This discussion is limited to UPL in the context of real estate closings and related opinions. UPL as it relates to other areas of law (such as corporate transactions and UCC secured transactions) is beyond the scope of this Report.

The Supreme Court of South Carolina (the “Supreme Court” or “Court”) is given the authority to regulate the practice of law in the State of South Carolina by the South Carolina Constitution.⁸¹ The Supreme Court determines all unauthorized practice of law questions in its original jurisdiction.⁸² To date, the Supreme Court has not adopted a specific rule defining the “practice of law” and instead has indicated that the practice of law turns on the facts of each specific case.⁸³

While the Supreme Court’s opinions with respect to UPL violations in connection with real estate matters have focused on cases involving residential real estate closings, it is important to note that commercial real estate transactions are likely subject to many of the same rulings.⁸⁴ Therefore, this section will address some of the possible implications of UPL in connection with rendering legal opinions in mortgage loan transactions.

1. Activities Requiring Attorney Supervision

The UPL decisions rendered by the Supreme Court in *State v. Buyers Service Co.*, 292 S.C. 426, 357 S.E.3d 15 (1987) and *Doe v. McMaster*, 355 S.C. 306, 585 S.E.2d 773 (2003) provide a detailed analysis of what the Supreme Court believes to be the “practice of law” (and conversely the “unauthorized practice of law”) in the context of purchase transactions and refinance transactions, respectively, involving South Carolina real property. In *Buyers Service*

⁸⁰ See *infra* fn 95.

⁸¹ See S.C. Const. art. V, § 4.

⁸² See *In re Unauthorized Practice of Law Rules*, 309 S.C. 304, 307, 422 S.E.2d 123, 125 (1992).

⁸³ See *In re Unauthorized Practice of Law Rules*, 309 S.C. at 305, 422 S.E.2d at 124.

⁸⁴ See Memorandum to Members of the South Carolina Bar from Chief Justice Jean Hofer Toal re: Guidelines for Attorneys Conducting Residential Real Estate Closings (September 23, 2009), endorsing certain “best practices” for residential real estate closings, wherein it states:

The Task Force, upon reconvening, unanimously agreed that the suggested guidelines should be explicitly limited to residential real estate closings because it appears, from the majority of opinions issued by this Court regarding closings, that it is residential closings that are overwhelmingly the professional concern. However, the Task Force noted that commercial real estate transactions are extremely important and it remains steadfast in its unanimous belief that *State v. Buyers Service Co., Inc.*, 292 S.C. 426, 357 S.E.2d 15 (1987), remains highly relevant and of great importance to all real estate transactions, whether residential or commercial, in this state.

N.B.: *Buyers Service* does not address disbursement. See discussion at fn 86 *infra*.

and *McMaster*, the Supreme Court focused on the following four activities typically undertaken in a real estate transaction: (i) title searches, (ii) preparing loan documents, (iii) conducting closings, and (iv) recording real estate and lien instruments. Once the Court determined these four activities to be the “practice of law”, a licensed South Carolina attorney is required to conduct or actively supervise each of these aspects of such transactions.⁸⁵ The Court subsequently added disbursement of funds from the closing to the foregoing list of activities.⁸⁶

If a licensed South Carolina attorney has accepted responsibility to act as the closing attorney, *McMaster* requires that the attorney supervise all four aspects of the closing process referenced above, but what constitutes “supervision” is not entirely clear. However, with respect to the preparation of documents, the Court in *McMaster* did explain what would be an acceptable level of supervision by indicating that lenders may be involved in the preparation of the loan documents as long as an independent attorney specifically reviews completed documents for compliance with applicable law and corrects them, if needed, to ensure compliance of such documents under South Carolina law.⁸⁷ Based upon the foregoing, in all real estate transactions, including any transaction where a mortgage is placed of record, an independent South Carolina licensed attorney must participate in the transaction to supervise the real estate transaction.

2. **“Physical Presence” Requirement**

The concern exists that the Supreme Court may be imposing a “physical presence” requirement in its UPL decisions. In *In re Lester*, 353 S.C. 246, 248, 578 S.E.2d 7, 8 (2003), the Court held that it was improper for a paralegal to meet with the borrowers, have the borrowers execute documents, and otherwise conduct the closing without an attorney being present. However, in *McMaster*, the Court did not go so far as to state that the attorney had to be physically present at the closing with his client to properly supervise the closing. Nevertheless, “supervision” does seem to require active participation in conducting the actual closing. At minimum, the South Carolina attorney should consider sending a letter of instructions to constitute supervision of the execution of the documents. If a licensed South Carolina attorney is actively involved in conducting and supervising a real estate closing, then UPL should not be

⁸⁵ Although not directly applicable to commercial transactions, it is worth noting that in South Carolina whenever the primary purpose of a loan secured in whole or in part by a lien on real estate is for a personal, family, or household purpose, S.C. Code Ann. § 37-10-102(a) (the “Attorney Preference Statute”) requires that the creditor ascertain prior to closing the preference of the borrower as to legal counsel employed to represent such borrower in all matters of the transaction relating to the closing. The Attorney Preference Statute may be interpreted by the Court in such a way as to require the attorney responsible for the closing, even if not selected by the borrower, to represent the borrower in the transaction. This is based on the fact that one of the unstated goals of the Court in its real estate UPL rulings could well be to provide all borrowers with some ability to communicate with an attorney during the closing process. The Attorney Preference Statute cannot be waived; however, under limited circumstances in timeshare closings, the Attorney Preference Statute may be waived pursuant to S.C. Code Ann. § 27-32-410(B).

⁸⁶ See *Doe Law Firm v. Richardson*, 371 S.C. 14, 636 S.E.2d 866 (2006). While it is unclear whether the requirement for attorney supervised disbursement extends to commercial transactions, it is the Committee’s belief that such requirement should be limited to residential transactions and should not be extended to commercial transactions, especially in multi-state transactions where South Carolina is only one of several jurisdictions involved. It would be impractical, if not impossible, for a South Carolina attorney to be expected to supervise disbursement in such multi-state transactions. Until the issue is decided by a reported decision of our courts, however, counsel should consider supervision of disbursements by at least reviewing a closing statement and getting some confirmation that funds were disbursed in accordance therewith.

⁸⁷ *McMaster* at 314, 585 S.E.2d at 777.

implicated, since UPL involves activities that are not supervised or conducted by an appropriately licensed attorney.⁸⁸

3. **Impact of UPL on Enforcement of Documents and Opinion Implications**

The Supreme Court ruled in *Linder v. Ins. Claims Consultants, Inc.*, 348 S.C. 477, 496, 560 S.E.2d 612, 622-23 (2002), a UPL case involving insurance adjusters, that there is no private right of action for UPL violations. Therefore, the adjuster's contract would not be voided. However, the Court found that the fees attributable to matters constituting UPL would not be collectible. This holding would make UPL an economic deterrent to some extent in the Court's original jurisdiction. In *Hambrick v. GMAC Mortgage Corp.*, 370 S.C. 118, 124, 634 S.E.2d 5, 8 (Ct. App. 2006), the Court of Appeals upheld dismissal of an action that sought money damages from a lender that charged legal fees for services actually performed by the lender without attorney participation. This decision was based on *Linder* and reaffirmed that there is no private right of action for UPL. However, in *Franklin v. Chavis*, 371 S.C. 527, 640 S.E. 2d 873 (2007), a case involving a will contest commenced in the original jurisdiction of the Supreme Court as a UPL matter, not only did the Court find that a lay person who assisted with the preparation of a will using an electronic form was engaged in UPL, the Court ruled that the non-lawyer respondent was not entitled to receive any fees as the personal representative of the estate and had to disgorge any fees received.⁸⁹

In 2005, an unreported order of a master-in-equity raised some concerns that UPL could have an impact on the enforceability of loan documents.⁹⁰ In such order, the master-in-equity stated that a mortgage was unenforceable because the lender did not utilize a South Carolina attorney in connection with the mortgage transaction. As a result, some opinion preparers struggled with opinion qualifications relating to the enforceability of mortgage documents where there was any question regarding possible UPL in the closing (or underlying closing, such as in securitized loan transactions involving residential mortgage and consumer loans), but the majority took the view that UPL, while an ethical issue, did not impact the enforceability of an otherwise valid contract. However, in 2010, the South Carolina Court of Appeals in *Wachovia Bank, N.A., v. Ann T. Coffey*, 389 S.C. 68, 698 S.E. 2d 244 (Ct. App. 2010) affirmed a master-in-equity's grant of a defendant's summary judgment motion on a foreclosure action due to the plaintiff's UPL. In the *Coffey* case, the Court of Appeals held that the lender was barred from seeking its remedies (both equitable relief and legal causes of action) in the courts as a result of its "unclean hands" stemming from the unauthorized practice of law in the loan closing.⁹¹

⁸⁸ See Rule 407 SCACR, Rule 5.5 of the Rules of Professional Conduct and the comments thereto. See, however, S.C. Ethics Adv. Op. 05-16; and S.C. Ethics Adv. Op. 06-11 (a lawyer may conduct real estate closings by mail under certain circumstances, provided the attorney conducts such closing in accordance with the Rules, without being in violation of the Rule). [Note, however, that the Ethics Advisory Committee does not address questions pertaining to the unauthorized practice of law, and ethics advisory opinions do not constitute the law of the State.]

⁸⁹ *Franklin* at 534, 640 S.E.2d at 877.

⁹⁰ "Final Order Dismissing Action" of *Ohio Savings Bank v. Frierson*, No. 2005-CP-43-0015, Third Judicial Circuit, Sumter County, South Carolina (July 14, 2005) involving a mobile home foreclosure.

⁹¹ While the court had other grounds to rule in favor of the defendant (the mortgage was not executed by the plaintiff, the proper party in interest), the court chose to bar the mortgagee from seeking its remedies on the basis of its underlying UPL. The court carefully noted in footnote [3] that it does not regulate the practice of law, which is reserved to the Supreme Court, but rather addressed the plaintiff's UPL as it related to its action against the defendant.

The Supreme Court accepted Writ of Certiorari and the *Coffey* case was heard on October 31, 2012. The court's decision is pending at the time of this writing.

In *Matrix Financial Services Corporation v. Frazer* 2010 WL 3219472 (S Ct. 2010), the South Carolina Supreme Court cited the *Coffey* case with favor and refused to recognize equitable subrogation due to UPL in connection with the closing. The 2010 decision was later replaced with 2011 WL 3452078 (S. Ct. 2011).

The Matrix Court further noted that the transaction out of which the refinancing mortgage arose had been closed without the required supervision of a South Carolina attorney, in violation of the requirements of *Doe v. McMaster*⁹² and *State v. Buyers Serv. Co.*⁹³ The Court stated that a mortgage lender that has not complied with the attorney involvement mandates of *Doe* and *Buyers Serv. Co.* has engaged in the unauthorized practice of law, and as a result of may not enjoy the benefit of equitable remedies.⁹⁴ As a result, according to the Court, the lender in *Matrix* would have been denied equitable subrogation, even if that remedy had been otherwise available on the facts presented.⁹⁵

The cited opinion in *Matrix* replaced an earlier opinion⁹⁶ which was withdrawn. That earlier opinion likewise denied equitable relief to the lender, but relied on the unclean hands doctrine, with lender's the "unclean hands" arising from its unauthorized practice of law. The revised *Matrix* opinion expressly declined to rely on the unclean hands doctrine, instead adopting a more straightforward rule that a lender that had engaged in the unauthorized practice of law would be denied equitable relief in the courts.

Although the Court's revised *Matrix* opinion, by not relying on the unclean hand doctrine, avoids the problem identified by the dissent in the original opinion, its revised pronouncement that a lender that has engaged in the unauthorized practice of law is barred from equitable relief generally results in a rule of broader applicability, in that the revised rule avoids the general limitations on the application of the unclean hands doctrine. For example, as noted in the dissent in the withdrawn *Matrix* opinion, the defense of unclean hands may as a general rule only be asserted by the parties to the transaction.⁹⁷ Under the revised rule announced in *Matrix*, however, third parties (such as the judgment creditor in *Matrix*) may raise a lender's unauthorized practice of law as a defense to equitable relief sought by that lender. Likewise, the application of the defense of unclean hands doctrine generally requires that the party seeking to

⁹² 355 S.C. 306, 585 S.E.2d 773 (1987).

⁹³ 292 S.C. 426, 357 S.E.2d 15 (1987).

⁹⁴ 394 S.C. at 140, 714 S.E.2d at 535. The opinion in *Matrix* does not address the availability of legal remedies to a lender that has engaged in the unauthorized practice of law. The opinion, does, however, cite with approval the decision of the Court of Appeals in *Wachovia v. Coffey*, 389 S.C. 68, 698 S.E.2d 244 (Ct. App. 2010) , *cert granted*, May 25, 2012, which did hold that such a lender's legal remedies are barred as well.

⁹⁵ *Id.* at 138, 714 S.E.2d at 534. The foregoing discussion and the balance of the discussion in this Section 3 is taken from the chapter entitled Multi-State Practice and Ethics by Mark S. Sharpe in the S.C. Bar Publication: *Practical Guide to Commercial Real Estate in South Carolina*.

⁹⁶ 2010 S.C. LEXIS 289 (S.C. S. Ct. Aug. 16, 2010).

⁹⁷ 2010 S.C. LEXIS 289 (S.C. S. Ct. Aug. 16, 2010) (Pleicones, J., dissenting).

rely on that doctrine must have been injured by the conduct at issue.⁹⁸ There would appear to be no such requirement under the *Matrix* decision.

The decision in *Matrix* provides that its ruling as to the denial of equitable relief to a lender that has engaged in the unauthorized practice of law was to be given prospective application, so as to apply only “to all filing dates after the date of [the *Matrix*] opinion.”⁹⁹ There was originally some uncertainty as to the meaning of the term “filing dates” as used in *Matrix*; that uncertainty, however, was resolved in *BAC Home Loan Servicing, L.P. v. Kinder*,¹⁰⁰ which explained that the *Matrix* holding was applicable only to mortgages recorded after the date of the *Matrix* decision.¹⁰¹

In addition, the Supreme Court accepted in its original jurisdiction two cases addressing mortgage loan modifications.¹⁰² The issue in both cases is whether under *State v. Buyers Serv. Co.*¹⁰³ and the related cases attorney involvement is required in the preparation of mortgage loan modification documents, and if so, what is the consequence of the absence of such attorney involvement upon the enforceability of both the modification documents and the original loan documents being modified. One of those cases¹⁰⁴ concerned a commercial real estate loan, and thus also at issue in that case is the question of the extent to which the *Buyers Service* line of cases applies to commercial as opposed to residential transactions. Both cases have been briefed and argued, and a decision is pending.

As a result of the foregoing case law, an opinion preparer should consider whether the unauthorized practice of law was implicated in the transaction, both from an ethical viewpoint (whether the delivery of the opinion could be deemed aiding and abetting UPL) and from an enforceability viewpoint (whether a mortgage could be deemed unenforceable as a result of any underlying UPL). Accordingly, an opinion giver in this context should seek to include an express assumption in the opinion that there has been no unauthorized practice of law in the transaction. In the alternative, the opinion preparer may take an express qualification as to the effect of the unauthorized practice of law in the transaction upon enforceability of the documents in the following form:

We express no opinion with respect to (i) the compliance of the parties with the requirements of reported case law in the State of South Carolina addressing the unauthorized practice of law in the State of South Carolina in the conduct of a real estate closing and (ii) the enforceability of the mortgage described in the Transaction Documents in the event that any parties to the transactions shall fail to comply with any requirements of the reported case law in the State of South Carolina addressing the unauthorized practice of law in the State of South Carolina in the conduct of a real estate closing.

⁹⁸ See, e.g., *Arnold v. Spartanburg*, 201 S.C. 523, 23 S.E.2d 735 (1943); 27A AM JUR 2D *Contracts* §136 (1996)

⁹⁹ 394 S.C. at 140, 714 S.E.2d at 535.

¹⁰⁰ Op. No. 27146 (S.C. Sup. Ct. filed July 25, 2012) (Shearouse Adv. Sh. No. 25 at 18).

¹⁰¹ *Id.* at 22.

¹⁰² The two cases are *Crawford v. Central Mortgage Co.*, Case No. 2012-205608 and *Warrington v. Bank of South Carolina*, Case No. 2012-206826.

¹⁰³ 292 S.C. 426, 357 S.E.2d 15 (1987).

¹⁰⁴ *Warrington v. Bank of South Carolina*, Case No. 2012-206826.

4. UPL Implications on Local Counsel

If local counsel in a multi-state transaction is requested to render an opinion as to the enforceability of the mortgage and any related documents under South Carolina law but is not conducting or supervising the closing and real estate title work (including the recording of the mortgage),¹⁰⁵ the opinion preparer must confirm that a South Carolina licensed attorney is supervising the title work, real estate documents and recording.¹⁰⁶ At a minimum, where the opinion giver is engaged only to render an opinion under State law, the opinion giver should obtain the name of the attorney performing the title work and supervising the local real estate matters on behalf of the title company and verify that such attorney is licensed in the State.¹⁰⁷ In addition, the opinion should include an assumption that no unauthorized practice of law has

¹⁰⁵ Such functions are often handled by local counsel selected by the title insurance company.

¹⁰⁶ See *In re: Calhoun*, 371 S.C. 403, 639 S.E.2d 679 (S.C. 2007); and *In re Robinson*, 371 S.C. 501, 640 S.E.2d 460 (S.C. 2007). See *Buyers Service and Doe Law Firm v. Richardson* for other matters requiring the supervision of South Carolina lawyers. The opinion preparer will still need to assume proper indexing and filing by the governmental filing office upon delivery for recording.

¹⁰⁷ Whether the opinion giver needs to take additional steps to confirm that a South Carolina attorney is supervising matters of title in the State is not clear, but several attorney disciplinary case suggests that that the attorney must “insure” that a South Carolina licensed attorney is actually performing such functions. See *In the Matter of Jack Schoer*, Opinion No. 26824 (S.C. June 1, 2010). In *Schoer*, the closing attorney acted under the assumption that a named South Carolina attorney was supervising the title documents, document preparation, recordation and disbursement of funds relating to the closing but “failed to insure that this was the case when, in fact, it was not.” This case suggests that an attorney must take additional steps to verify that a South Carolina attorney is supervising all matters of title relating to a closing involving real property in the State.

In addition, in the case of *In re Pstrak* the lawyer was engaged to attend several closings, with his duties limited to reviewing the closing documents, having the documents properly executed, and answering any questions that the client might have concerning the documents or the closing. The lawyer understood that other lawyers had examined or reviewed the abstract of title, had drafted or reviewed the closing documents, and would handle recording and disbursement. He also understood that another lawyer would be responsible for updating the title and recording the documents. In fact, the loan documents had been prepared by the owner of a title company, and there were no other lawyers participating in the transaction. In finding that the lawyer had assisted in the unauthorized practice of law in violation of Rule 5.5(b), the Court noted that the lawyer had a duty “to ensure that the other aspects of the closing required to be handled by an attorney were handled or properly supervised by a person licensed to practice law in South Carolina.”

Also, in *In re Robinson*, the lawyer was retained to close a series of residential transactions. The lawyer was not asked to undertake the associated title work; rather, he was advised that another South Carolina attorney had done the title work and had provided appropriate title opinions prior to closing. The Supreme Court noted that the lawyer “took no affirmative action to verify” the representations as to the other lawyer’s involvement in the title work, and did not ask for copies of that title work. As a result, the Court found the conduct of the lawyer to be in violation of the Rule 5.5 prohibition on assistance in the unauthorized practice of law.

In the case of *In re Boulware*, a lawyer agreed to attend closings for another lawyer when that other lawyer was unavailable. The other lawyer provided assurance that he would handle or supervise all other aspects of the closing, but in fact had no involvement; the other aspects of the closings were handled by a title company. Even though she had relied on the express representations of that other lawyer, the closing lawyer was sanctioned for the unauthorized practice of law.

The discussion of the *Pstrak*, *Robinson* and *Boulware* disciplinary cases is taken from the Chapter entitled Multi-State Practical Ethics by Mark S. Sharpe in the S.C. Bar Publication, *Practical Guide to Commercial Real Estate in South Carolina*.

occurred in connection with the closing.¹⁰⁸ As a result of the potential for the courts to preclude a secured party engaging in UPL from enforcing its rights under the loan documents by way of legal or equitable remedies and the ethical considerations, the opinion preparer will need confirmation that a South Carolina attorney has participated in all necessary aspects of the transaction to the extent required by applicable state law.

It is important to note that the unauthorized practice of law (as determined by the Supreme Court) is a felony by statute in the State.¹⁰⁹ As such, there are criminal penalties to be considered as well.

¹⁰⁸ While such assumption may afford the opinion giver some protection as it relates to rendering the opinion to a third party, it will not protect the opinion giver from any ethical violations and disciplinary action as a result of any UPL if UPL is implicated.

¹⁰⁹ S.C. Code Ann. § 40-5-310.

VII. THE “UCC OPINION” – ARTICLE 9 SECURED TRANSACTIONS

If a loan is secured by personal property consisting of the types of property subject to Article 9 of the South Carolina Uniform Commercial Code (the “UCC”),¹ an opinion on the creation and perfection of the security interest (the “UCC Opinion”) may be requested by the lender. The UCC Opinion does not include a priority opinion.² When a UCC Opinion is given, the opinion will include a list of the security documents creating the security interest and additional qualifications and assumptions specific to a UCC Article 9 secured transaction.

The section is subdivided into the three general categories based on types of collateral as follows: (1) Filing Collateral; (2) Investment Property; and (3) Deposit Accounts. The governing law and the requirements for creation, attachment and perfection are addressed for the different types of collateral. The due diligence necessary to render a UCC Opinion is also covered.

This section covers issues relating to a UCC Opinion in connection with a “typical” secured transaction under Article 9 of the UCC. It does not address all of the intricacies of the UCC and possible security interest opinions that may be requested. If the opinion preparer does not have sufficient expertise in this area, the opinion preparer should consult with counsel familiar with the UCC and the law relating to secured transactions.

A. **FILING COLLATERAL.** For purposes of this Report, “Filing Collateral” means the types of personal property subject to the UCC in which a security interest may be perfected by the filing of a financing statement pursuant to Section 9-310(a) of the UCC and includes accounts, equipment, inventory, and general intangibles. To the extent perfection by filing is permissible in certain circumstances, it may also include investment property, instruments and chattel paper, as such terms are defined in the UCC.³

1. **Governing Law General Rule – Location of Debtor.** Section 9-301(1) of the UCC provides that the local laws of the jurisdiction where the Borrower is located will govern perfection, the effect of perfection or nonperfection, and the priority of a security interest in Filing Collateral.

a. **Registered Organizations.** A “registered organization” is defined in Section 9-102(a)(70) of the UCC as an entity organized under the law of a state which must maintain a public record showing that the entity has been organized in the state. For registered organizations, Section 9-307(e) of the UCC provides that a debtor is deemed located in the state in which it is organized. For purposes of this Report, a South

¹ Unless otherwise noted, all references in this Report to the UCC shall be to the Uniform Commercial Code in effect in South Carolina as of the date of this Report, Title 36 of the Code of Laws of South Carolina, 1976, as amended.

² Due to the difficulties in giving priority opinions, the necessary due diligence and the laundry list of additional assumptions and qualifications for priority opinions, opinions as to priority are customarily not given and should not be requested. For a more detailed discussion relating to priority opinions, *see* Special Report by the TriBar Opinion Committee: “U.C.C. Security Interest Opinions – Revised Article 9,” 58 BUS. LAW. 1449 (2003).

³ In addition to filing, a security interest may be perfected by methods other than filing for investment property, instruments and tangible chattel paper.

Carolina corporation or limited liability company is deemed to be a registered organization located in South Carolina under Section 9-307(e). However, South Carolina does not specifically impose requirements on the Secretary of State to maintain public records to determine that corporations and limited liability companies are “registered organizations.”⁴ For purposes of this Report, we have also assumed that the Borrower is located in South Carolina and the law of South Carolina will govern perfection, the effect of perfection or nonperfection, and priority of a security interest in the Filing Collateral.

b. **Foreign Location.** If the Borrower is a “registered organization” that has been formed under the laws of another jurisdiction, then the opinion preparer should not opine on such matters unless deemed sufficiently competent in the applicable UCC laws of such jurisdiction to give the opinion. For business entities organized under the laws of the State of Delaware, the South Carolina opinion preparer may either (a) hire local Delaware counsel, or (b) give the opinion based solely upon a review of the applicable provisions of the Delaware UCC, provided the opinion preparer is sufficiently competent to give such opinion on Delaware UCC law.⁵ However, with respect to option (b), the opinion preparer should proceed with caution.⁶ Such practice could raise a question of the unauthorized practice of law and ethical considerations with respect to competency in the specific area of law. If hiring Delaware counsel is cost-prohibitive for the transaction and the opinion preparer is not sufficiently competent in the specific area of Delaware law, the opinion should not be given.

2. **Creation of Security Interest in Filing Collateral.** The enforceability opinion only covers the enforceability of the security agreement as an enforceable contract. The enforceability opinion does not address whether a valid security interest has been created under the UCC. To cover the creation of an enforceable security interest, the UCC Opinion includes the opinion that the security agreement is sufficient to create a security interest in favor of the secured party in all of the right, title and interest of the debtor in the Filing Collateral described in the security agreement. The Filing Collateral covers only the types of collateral in which a security interest may be perfected by filing.⁷

3. **Attachment.** Under Section 9-203 of the UCC, in order for a security interest to “attach” (or become enforceable against the debtor), (i) value must have been given, (ii) the debtor must have rights in the collateral, (iii) a security agreement must be authenticated, and (iv) a security agreement must provide a sufficient description of the collateral.

a. **Value Given.** Value is typically deemed to be a question of fact, and the opinion assumes that value has been given. (However, there is usually little question as to whether value has been given in a transaction.)

⁴ Delaware law imposes such requirements on the secretary of state so that Delaware corporations and limited liability companies are “registered organizations” by definition.

⁵ State variations to Article 9 of the UCC are explained in greater detail in P. Christophorou, K. Kettering, L. Soukup & S. Weise, *Under the Surface of Revised Article 9: Selected Variations in State Enactments from the Official Text of Revised Article 9*, 34 Uniform Commercial Code L.J. 331 (Spring 2002) (“*Under the Surface*”).

⁶ See Special TriBar Report at 1460, n. 38, Appendix B, at 84-85.

⁷ Limiting the scope of the security interest opinion to specific types of collateral such as the “Filing Collateral” and “Fixtures” subject to the UCC is customary and appropriate. See Special TriBar Report at 1457-59.

b. **Rights in the Collateral.** Determining with legal certainty the existence of the debtor's "rights" in (or the ability to transfer rights in) personal property is not possible. Therefore, the second requirement for attachment, "rights in the collateral," is also assumed in the opinion.⁸

c. **Security Agreement.** A security agreement is defined in Section 9-102(a)(73) as an agreement that creates or provides for a security interest. Under the UCC, "authenticate" means to sign or otherwise execute a record of the agreement.⁹ Section 9-509 of the UCC states that the authentication of a security agreement by the debtor gives the secured party the authority to file a financing statement covering the collateral described in the security agreement.

d. **Collateral Description.** Under Section 9-108(b), describing the collateral in terms of specific Article 9 "types" of collateral (such as "accounts" or "general intangibles") is legally sufficient. Under Section 9-108(c), however, supergeneric descriptions (such as "all assets") in a security agreement are legally insufficient. Since supergeneric collateral descriptions may be used in a financing statement, but not in a security agreement, the collateral descriptions in the security agreement and in the financing statements may not necessarily be identical. In such case, the security agreement should specifically authorize the filing of a financing statement containing a supergeneric collateral description.

e. **Due Diligence.** Therefore, assuming value has been given and the debtor has rights in the collateral, to render an opinion with respect to the creation and enforceability of a UCC security interest, the opinion giver must: (a) review the security agreement to confirm the existence of an authenticated record evidencing the creation or provision of a security interest, and (b) confirm the sufficiency of the collateral description contained in the security agreement.

4. **Perfection By Filing – The General Rule.** The general rule under Section 9-310(a) of the UCC requires that a financing statement must be filed to perfect a security interest in personal property subject to the UCC. However, the general "perfection by filing" rule is subject to several exceptions identified in Section 9-310(b) of the UCC.

a. **Exceptions to General Rule.** The filing of a financing statement is not effective to perfect a security interest in (a) deposit accounts and letter of credit rights, which may be perfected only by "control" under Section 9-312(b) of the UCC, (b) money, which may be perfected only by possession under Section 36-9-313 of the UCC, or (c) property subject to a statute, regulation, or treaty of the United States that preempts the UCC or property subject to a certificate-of-title statute pursuant to Section 9-311(a) of the UCC.

⁸ See Special TriBar Report at 21-22.

⁹ See § 9-102(a)(7) of the UCC. Under § 9-102(a)(69) of the UCC, a record can be stored in electronic format.

b. **Fixture Filing.** Section 9-501(a)(2) of the UCC provides that a security interest in fixtures may be perfected by filing in the Office of the Secretary of State. However, to constitute a “fixture filing” under Section 9-102(a)(40) of the UCC, which is entitled to the special priority rules for “fixture filings” pursuant to Section 9-334 of the UCC, a fixture filing must be filed in the office designated for recording a mortgage on the related real property as provided in Section 9-501(a)(1) of the UCC. A mortgage may qualify as a fixture filing provided it meets the requirements of a “fixture filing” under Section 9-502(c) of the UCC. A mortgage filed as a fixture filing is effective for the term of the mortgage. Local filing offices may not be required to index mortgages filed as a fixture filing separately.

c. **Other Local Filings.** Financing Statements covering “as-extracted collateral” or “timber to be cut” are also filed in the local real estate records office pursuant to Section 9-501(a)(1)(A) of the UCC.¹⁰

d. **Defining the Financing Statement.** In listing the loan and security documents reviewed by the opinion preparer, the opinion will describe the financing statement. However, since the financing statement is not signed and does not create obligations on the debtor, it should not be included in the definition of the “Loan Documents.”

5. **Financing Statement Requirements.** An effective financing statement is required to contain (a) the correct legal name of the debtor, (b) the correct legal name of the secured party, and (c) an indication of the collateral covered by the financing statement (which may be styled as an “all assets” or “blanket” security interest).¹¹ Under Section 9-516 of the UCC, the UCC filing office must reject any financing statement that lacks the requisite information. The opinion giver should confirm that the financing statement contains all of the required information. With respect to debtors that are “registered organizations” organized under the laws of South Carolina, the opinion giver should rely on an appropriate certificate from the South Carolina Secretary of State to confirm the debtor’s exact legal name.

B. INVESTMENT PROPERTY. Under Section 9-102(a)(49) of the UCC, “investment property” means a security (whether certificated or uncertificated), security entitlement, securities account, commodity contract or commodity account. For purposes of this section, “Investment Property” covers investment property perfected by control or possession.

1. **Creation and Attachment of Security Interest in Investment Property.** The basis for the opinion as to the creation and attachment of a security interest in Investment Property is essentially the same as the opinion for Filing Collateral.

2. **Perfection of Investment Property.** A security interest in investment property may be perfected by filing or by control.¹² Additionally, a security interest in investment

¹⁰ “As-extracted collateral” and “timber to be cut” as collateral are not covered in detail in this Report.

¹¹ See §§ 9-502, 9-503 and 9-504 of the UCC.

¹² See §§ 9-312 – 9-314 of the UCC.

property that is a certificated security may be perfected by delivery.¹³ Pursuant to Section 9-106 of the UCC, a secured party has control of investment property as provided in Section 8-106. Section 8-106 provides that “control” exists:

- a. for a certificated security in bearer form, upon delivery to the secured party;
- b. for a certificated security in registered form upon delivery of the security to the secured party (1) if indorsed to the secured party in blank by an effective indorsement or (2) if registered in the name of secured party upon re-registration or re-issue of the security in the name of the secured party;
- c. for an uncertificated security (1) upon delivery¹⁴ of the security to the secured party or (2) upon the issuer’s agreeing to comply with the instructions of the secured party without the debtor’s further consent; and
- d. for a security entitlement (1) at the time (if any) at which the secured party becomes the entitlement holder of such security entitlement, (2) upon the agreement of the securities intermediary to comply with the instructions of the secured party without further consent by the debtor, or (3) at the time (if any) upon which another person having control of such securities entitlement agrees that such control is on behalf of the secured party.¹⁵

3. **Due Diligence.** Prior to rendering a perfection opinion with respect to investment property, the opinion giver will need to verify that the applicable elements of possession or control are satisfied. If investment property is not a sufficient portion of the collateral, the opinion preparer may prefer to exclude investment property from the opinion.

4. **Partnership or Membership Equity Interests.** If collateral consists of equity interests in a partnership or limited liability company, additional due diligence is warranted. The proper method for perfection of a security interest in such equity interests depends upon the classification of such interests as a security or general intangible. Under Section 8-103(c) of the UCC, an equity interest in a partnership or a limited liability company (whether certificated or uncertificated) is not a “security” unless one of the following conditions is met: (i) such interest is publicly traded, (ii) the interest is held in a securities account, (iii) such interest is an investment company security, or (iv) the issuer of the interest has “opted in” to Article 8 of the UCC by express agreement.¹⁶ If none of those exceptions apply, then limited liability company interests and partnership interests are general intangibles pursuant to Section 9-102(a)(42) of the UCC, and a security interest therein is perfected by filing as set forth above for Filing Collateral.

¹³ See § 9-313 of the UCC. The requirements for delivery of certificated securities are set forth in § 8-301(a) of the UCC.

¹⁴ The requirements for delivery of uncertificated securities are set forth in § 8-301(b) of the UCC.

¹⁵ A securities intermediary is defined in § 8-102(a)(14) of the UCC as a clearing corporation, or a bank or broker that, in ordinary course of its business, maintains securities accounts for others and is acting in that capacity.

¹⁶ For protected purchaser rights under Article 8 of the UCC, a lender may request that the issuer of the interests “opt in” to the provisions of Article 8 of the UCC by the terms of its organizational documents so that the interest are treated as securities and perfection is obtained by control.

C. DEPOSIT ACCOUNTS. Pursuant to Section 9-102(a)(29) of the UCC, a “deposit account” means a demand, time, savings, passbook or similar account maintained with a bank and does not include investment property or accounts evidenced by an instrument (such as a certificated certificate of deposit).¹⁷

1. **Creation of Security Interest in Deposit Accounts.** The basis for the opinion as to creation and attachment of a security interest in deposit accounts is essentially the same as for Filing Collateral.

2. **Perfection by Control.** A security interest in a deposit account may be perfected only by “control” under Section 9-312(b)(1) of the UCC. Pursuant to Section 9-104 of the UCC, a secured party has control of a deposit account when (i) the secured party is the depository bank; (b) the secured party becomes the depository bank’s customer with respect to such deposit account; or (c) the depository bank agrees to comply with instructions regarding the deposit account from the secured party without further consent of debtor in an authenticated record agreed to by the debtor, the secured party and the depository bank.

3. **Due Diligence.** In order to render this opinion, the opinion preparer must either assume or confirm that the collateral described is in fact a “deposit account” under Section 9-102(a)(29) of the UCC and must confirm that the elements of “control” under Section 9-104 of the UCC have been satisfied.

4. **Choice of Law.** Unlike the general choice of law provisions which are based on the location of the debtor, the law governing the perfection and priority of a security interest in a deposit account is determined by the “location” of the depository bank.¹⁸ However, under Section 9-304(b)(1) of the UCC, the depository bank and the debtor may specify the “location” of the depository bank for choice of law purposes in writing, and such designation may be made in the deposit account control agreement.

5. **Uncertificated Certificate of Deposit Accounts.** By definition of “deposit account” under Section 9-102(a)(29), an uncertificated certificate of deposit account is treated as a “deposit account” for purposes of perfection under the UCC.¹⁹

D. SAMPLE UCC OPINIONS. In addition to the Filing Collateral opinions covered in the Illustrative Form Opinion, the following are examples of additional opinion provisions relating to “Control Collateral” and other UCC opinions in general.

¹⁷ Note the distinction between a certificated certificate of deposit (which is deemed an instrument for the purposes of perfection) and a certificate of deposit account (which is uncertificated and treated as a deposit account). Also, note the distinction between the term “account” defined in § 9-102(a)(2) of the UCC (which is perfected by filing) and “deposit account” (which is perfected by control).

¹⁸ § 9-304 of the UCC.

¹⁹ See S.C. Code Ann. § 36-9-102, Official Comment 12.

1. **Define UCC.** Include a statement in the opinion that the UCC shall mean the Uniform Commercial Code in effect in the State of South Carolina (the “UCC”) and terms not otherwise defined herein shall have the meanings set forth in the UCC.

2. **List Applicable Documents Reviewed.** In addition to the Loan Agreement and Note, list the relevant security instruments:

In rendering the opinions set forth herein, we have reviewed [insert as applicable]:

() [the Security Agreement dated _____ (the “Security Agreement”), between the Borrower, as the debtor, and the Lender, as the secured party;]

() [the Pledge Agreement dated _____ (the “Pledge Agreement”), between the Borrower, as the pledgor, and the Lender, as the pledgee;]

() [The Assignment of Deposit Account made by the Borrower to the Lender (the “Assignment of Account”);]

() [the Deposit Account Control Agreement dated _____ (the “Deposit Account Control Agreement”), among the Borrower, the Lender and _____, as the Bank (the “Bank”);]

() [the Securities Account Control Agreement dated _____ (the “Securities Account Control Agreement”), among the Borrower, the Lender and _____, as the securities intermediary (the “Securities Intermediary”).]

[We have also reviewed a copy of the UCC-1 financing statement naming Borrower as debtor and Lender as secured party, filed or to be filed with the Office of the Secretary of State of South Carolina (the “Financing Statement”).]

3. **Sample UCC Opinions.** The following paragraphs are sample forms of UCC security interest and perfection opinions, provided in addition to those set forth in the Illustrative Form of Opinion:

() The Security Agreement is sufficient to create a security interest in favor of the Lender in the Borrower’s right, title and interest in the UCC Filing Collateral described in the Security Agreement.

() The Financing Statement is in proper form for filing in the Office of the Secretary of State of South Carolina, and, upon the filing of the Financing Statement in that filing office, is sufficient to perfect a security interest in favor of the Lender in the portion of the personal property described in the Security Agreement and identified in the Financing Statement to the extent such collateral consists of the types of personal property that are subject to Article 9 of the UCC, to the extent such property is owned by the Borrower, and to the extent that such security interest may be perfected by filing the Financing Statements under Article 9 of the UCC (the “Filing Collateral”).

() The Pledge Agreement is sufficient to create a security interest in favor of the Lender in the Borrower's right, title and interest in the investment property (as such term is defined in Section 9-102(a)(49) of the UCC) described in the Pledge Agreement (the "Investment Property").

() A security interest in that portion of the Investment Property consisting of certificated securities²⁰ will be perfected in favor of the Lender upon delivery to the Lender in the State of South Carolina of the originals of the certificated securities for holding by the Lender in the State of South Carolina²¹ either (a) in bearer form or (b) in registered form, issued or indorsed in the name of the Lender or in blank by an effective indorsement or accompanied by undated stock powers with respect thereto duly indorsed in blank by an effective indorsement.²²

() A security interest in that portion of the Investment Property consisting of uncertificated securities²³ will be perfected in favor of the Lender when the issuer thereof has agreed that it will comply with the instructions with respect to such uncertificated securities originated by the Lender without further consent by the registered owner of such uncertificated securities.²⁴

() A security interest in that portion of the Investment Property consisting of security entitlements²⁵ will be perfected in favor of the Lender upon the execution and delivery of the Securities Account Control Agreement by the Borrower, the Lender and the Securities Intermediary.²⁶

() The Assignment of Account is effective to create a security interest in favor of the Lender in the Borrower's right, title and interest in the deposit account and the funds described therein, to the extent such deposit account constitutes a "deposit account" within the meaning of Section 9-102(a)(29) of the UCC (the "Deposit Account").

²⁰ See § 8-102(a)(4) of the UCC (defining certificated securities).

²¹ This statement is necessary to ensure that the opinion set forth in this paragraph is a matter of South Carolina law. Under § 9-305(a) of the UCC, the local law of the jurisdiction where a "security certificate" (which includes certificated limited liability company interests and partnership interests that qualify as "securities" under the UCC) is located governs matters of perfection, the effect of perfection or non-perfection, and the priority of a security interest in the certificated security represented thereby, when such security interest is perfected by a method other than by filing. Note, similar assumptions may be needed (or further qualifications included) to the extent the choice of law provisions of the UCC require the application of the law of a state other than South Carolina with respect to perfection.

²² See §§ 9-106(a) and 8-106(a) and (b) of the UCC re: control of certificated securities.

²³ See § 8-102(a)(18) of the UCC (defining uncertificated securities as any security that is not represented by a certificate).

²⁴ See §§ 9-106(a) and § 8-106(c) of the UCC re: control of uncertificated securities.

²⁵ See § 8-102(a)(17) of the UCC (defining security entitlements).

²⁶ See § 9-106(a) and (c) and § 8-106(d) and (e) of the UCC re: control of securities entitlements. A secured party having control of all securities entitlements carried in a securities account also has control over the securities account.

(___) The security interest of the Lender in the Deposit Account will be perfected upon the execution and delivery of the Deposit Account Control Agreement by the Borrower, the Lender and the Bank.²⁷

4. **UCC Specific Assumptions and Qualifications.** The following paragraphs are examples of some of the types of assumptions and qualifications that may be applicable for UCC security interest and perfection opinions, provided in addition to those set forth in the Illustrative Form of Opinion:²⁸

___ We express no opinion with respect to the security interest of the Lender in any commercial tort claims.²⁹

___ Perfection of the security interest of the Lender in any proceeds of the Filing Collateral is subject to the limitations set forth in Section 9-315 of the UCC and, in addition, we note that with respect to certain types of proceeds other parties such as holders in due course, protected purchasers of securities, persons who obtain control over securities entitlements and buyers in the ordinary course of business may acquire a superior interest or may take their interest free of the security interest of the Lender.

___ No opinion is expressed as to whether the Lender is a “protected purchaser” of any securities within the meaning of Section 8-303³⁰ of the UCC.

___ We express no opinion as to the effect of any prohibitions against assignment that may be contained in any account, lease agreement, promissory note, chattel paper, general intangible, health-care receivable or letter-of-credit right.³¹

___ In the case of any UCC Filing Collateral hereafter acquired by the Borrower, Section 552 of the Bankruptcy Code (11 U.S.C. Section 101 *et seq.*, as amended from time to time) limits the extent to which the property acquired by a debtor after the commencement of a case under the Bankruptcy Code may be subject to a

²⁷ Note if the secured party is the bank with which the deposit account is maintained, a secured party has control of a deposit account under § 9-104(a)(1), without the necessity of a separate control agreement. The Lender’s security interest in the Deposit Account shall be perfected upon the Lender’s obtaining control under 9-104(a)(1), provided the lender is the depository bank.

²⁸ Refer to the Illustrative Form of Opinion for more detailed UCC related qualifications for Filing Collateral.

²⁹ Since this type of collateral is very specific and uncommon, and § 9-108(e)(1) of the UCC requires that the security agreement describe commercial tort claims with specificity, it should be excluded from the security agreement unless it is actually relevant to the transaction collateral. If specific commercial tort claims are properly identified as collateral (or commercial tort claims are not referenced in the documents, this exception would not be applicable.

³⁰ A “protected purchaser” is a purchaser of a certificated or uncertificated security, or of an interest therein, who (a) gives value, (b) does not have notice of an “adverse claim” to such security (as defined in § 8-102(a)(1), and (c) obtains control of such security. A “purchaser” is defined broadly in § 1-201(33) of the UCC to include a person who is granted a security interest in the security.

³¹ Prohibitions against assignments are found generally in §§ 9-406, 9-407, 9-408 and 9-409. Revised Article 9 has expanded the invalidation of restrictions on alienability, but applicability of the restrictions should be carefully analyzed for particular classes of collateral.

security interest arising from a security agreement entered into by the debtor before the commencement of such case.³²

___ We have assumed that the Borrower has rights in the UCC Filing Collateral or the power to transfer rights in the UCC Filing Collateral to a secured party,³³ and we express no opinion as to the nature or extent of the Borrower's rights in, or title to, any of the Collateral and we note that the security interest of the Lender will not attach to any after acquired property until the Borrower acquires rights therein.

___ We assume that the Loan Documents have been issued for value (as defined in Section 1-201(44) of the UCC), and we express no opinion as to the adequacy and sufficiency of any consideration given therefor.³⁴

___ We have assumed that the Borrower is not incorporated *or* [formed] in any jurisdiction other than as indicated in its Articles of Incorporation *or* [Articles of Organization].³⁵

___ We have assumed that the Lender's jurisdiction is the State within the meaning of Section 9-304 of the UCC. We have assumed that the Deposit Account Control Agreement is the only written agreements among the Borrower, the Lender and the Bank with respect to the Deposit Account Collateral and that no other agreement provides for the Lender's or the Bank's jurisdiction with respect to such deposit accounts. Furthermore, we have assumed that there are no other control agreements affecting the Deposit Account Collateral pledged as collateral under the Deposit Account Control Agreement and that the Lender will continue to maintain control of the Deposit Account Collateral under Section 9-104 of the UCC. We further call your attention to the fact that rights to money or funds contained in a deposit account are subject to the rights of transferees under Section 9-332 of the UCC. Security interests in deposit accounts are also subject to the rights of the depository bank under Sections 9-327, 9-340, 9-341 and 9-342 of the UCC and a collecting bank under Section 4-210 of the UCC.

___ We express no opinion with respect to Borrower's right or title to any personal property, the location of any personal property, or the priority of any security interest.³⁶

³² Although the Illustrative Form of UCC Opinion includes an express statement that *enforcement* of the Loan Documents is subject to applicable bankruptcy laws, the qualification does not address limitations on the *attachment* of a pre-petition security interest on property of the Borrower acquired following the commencement of a bankruptcy proceeding. The qualification set forth in this paragraph identifies these additional limitations for the opinion recipient.

³³ A debtor need not have "rights in the collateral" for a security interest to attach so long as it has the "power to transfer rights in the collateral to a secured party." § 9-203(b)(2).

³⁴ The giving of "value" is a requirement for a security interest to attach.

³⁵ Because the definition of "registered organization" refers to "an organization organized solely under the laws of a single state," this qualification is necessary to protect against the risk that the borrower is incorporated or formed in multiple jurisdictions. *See* § 9-102(a)(70).

³⁶ Several exceptions may pertain to issues relating to priority; however, no opinion on priority should be given. In view of all of the exceptions typically included in a full priorities opinion, the costs and expenses of rendering such a full priorities opinion would far exceed the value of the opinion and would likely not be of significant value to the

___ With respect to the Financing Statement, we note that: (i) the effectiveness of a financing statement under the UCC terminates five years after the filing unless a continuation statement is filed prior to such termination in accordance with Section 9-515 of the UCC, and (ii) Sections 9-507(c) and 9-508(b) of the UCC provide that if the debtor so changes its name, identity or corporate structure or a new debtor's name is so different that a filed financing statement becomes seriously misleading under Section 9-506 of the UCC, the filing is not effective to perfect a security interest in collateral acquired by the debtor more than four months after the change unless an appropriate amendment under Section 9-507(c)(2) of the UCC or a new initial financing statement under Section 9-508(b)(2) of the UCC, as the case may be, is filed before the expiration of that period. For purposes of this opinion, we have assumed that the Borrower will remain the debtor and will not change its name, identity, jurisdiction of business organization or corporate structure during the term of the Loan Documents and that the collateral will remain subject to the jurisdiction of the State of South Carolina.³⁷

___ We express no opinion regarding the effectiveness of certain waivers described in Section 9-602 of the UCC.

___ With respect to fixtures, a secured party must also comply with the requirements of Section 9-604 of the UCC. In addition, real property may be sold only pursuant to judicial foreclosure proceedings.

opinion recipient. As an alternative, some opinion recipients may desire a filing priorities opinion which focuses primarily on counsel's review of a UCC search report rather than a listing of theoretical adverse interests that could, under every conceivable circumstance, have priority. The purpose of a filing priority opinion is to confirm that (a) a UCC search correctly identifying the debtor has been obtained from the proper filing office, (b) the search report shows financing statements on file as of an identified date, (c) the financing statement for the transaction has been properly indexed, and (d) counsel has reviewed the search report and made a determination, unless otherwise stated, that no other person has a currently effective financing statement naming the debtor or that no prior filing has priority either because the earlier filing describes different collateral or because appropriate releases, terminations or subordinations have been obtained. However, the risk in rendered filing priority opinion still probably exceeds its value, and recipient's counsel is just as capable of reviewing a UCC search report certified by the filing office.

³⁷ § 9-515(d) of the UCC; and *see also* §§ 9-507 and 9-508 of the UCC.

VIII. NO BREACH OR DEFAULT; NO VIOLATION OF LAWS; NO APPROVALS/CONSENTS OPINIONS

A. No Breach of Default; No Violation of Laws

Most closing opinions will require that the opinion preparer include the multiple-part opinion that the entering into and consummation¹ of the transaction by the company will not (i) violate the company's organizational documents (such as articles, bylaws, operating agreement, etc.); (ii) violate any court orders to which the company is bound; or (iii) result in a breach of or default under any other contracts to which the company is a party. These opinions are commonly requested and commonly given. What the lender or seller is looking for in these opinions – which is different than most of the other opinions requested – are the legal consequences of the proposed transaction itself on the company. For example, lenders will want to verify that their loan to the company will not result in any adverse consequences to the company that will in turn have unintended or unforeseen consequences for the lender. If the transaction at hand results in a default by the company under an existing agreement with another lender, depending on the contractual remedies provided in the agreements, that lender may be able to accelerate its loan which not only could affect the value and availability of the new lender's collateral, but it would likely affect the loan-paying ability of its borrower.

The first opinion request relating to assurances that the execution and delivery of the transaction documents and the consummation of the transactions by the company will not violate its organizational documents arguably does not add anything to the opinion if the opinion preparer has already given the standard due execution and delivery opinions and the power and authority opinions. This duplicative opinion requires the same due diligence that the power and authority/due execution and delivery opinions require and one could not be given without the other.² While little risk is involved in giving this opinion, to avoid opening up the door to a discussion on what type of transactions would “conflict with” the company's organizational documents, the opinion preparer should use the precise term “violate” as opposed to the imprecise and nebulous phrase “conflicts with”.³

The second prong of the “no breach or default” opinion requires that the opinion preparer indicate that the consummation of the transaction will not “violate any court orders to which the company is bound.” The focus here is on the obligations of the company that are not a result of their private contractual agreements, but rather the product of governmental action, such as injunctions, restraining orders, judgments, etc.. Again, this opinion should be narrowed to the particular transaction at hand and not to the company's activities in general, and the opinion preparer should reference specific court orders in a schedule or in the opinion body itself.⁴ It is

¹ The best practice is to limit the opinion to the consummation of the transaction as opposed to opining over the performance of the obligations under the transaction. Consummation will only include actions by the company up to and including the closing, while performance extends to post-closing obligations – obligations of the company under the transaction documents themselves. For a discussion on consummation vs. performance, *see* GLAZER §§ 13.2.3, 14.4, 15.5, and 16.3.7.

² Practitioners typically will include this opinion despite the redundancy, but it would be acceptable to omit this opinion (or allow for its omission, as applicable). *See* the discussion in GLAZER § 16.2.

³ *See* GLAZER § 16.3.2.

⁴ *See* GLAZER § 14.

not advisable to narrow the opinion by limiting it to “orders known to the opinion giver” or similar language. This approach requires a more extensive inquiry into the company’s records and activities and can be avoided by utilizing a list of court orders that are to be covered by the opinion.

Finally, an opinion preparer is typically asked to give an opinion that the entering into/consummation of the transaction “will not result in a breach of or default under any other contracts to which the company is a party.” Similar to the approach suggested above relating to court orders, the opinion preparer should limit the opinion to a defined set of contracts of which the opinion preparer has actual knowledge. While limiting the contracts covered in the opinion to “contracts known to counsel” is preferred over an unlimited list of contracts (such as “all contracts to which the company is a party”), the best approach is to list the contracts in a schedule or within the body of the opinion itself rather than use the knowledge qualifier approach. The opinion preparer should also use the term “violate” in lieu of “conflicts with” for the same reasons outlined above. “Violate” indicates an actual default or breach of another contract while “conflicts with” could be interpreted to include any and all adverse consequences that could result. Precision is key in narrowing these opinions.

B. No Governmental Approvals or Consents

Another common closing opinion requested by lenders is the opinion that “no consent or approval of, or filing with, any governmental authority is required to be obtained or made by the Company in connection with its execution and delivery of the Documents.” Sometimes it will be stated in the affirmative such as “All consents, approvals, authorizations of, and filings and registrations on the part of the Company with, any state or federal authority required for the consummation of the Transaction have been made or obtained.” Regardless of form, the focus here is on the Company’s compliance with all legal and regulatory requirements necessary for it to enter into the transaction documents, and therefore, it is more important when the particular Company is in a regulated industry that requires certain authorizations, permits, etc. in order to consummate the transaction. The scope of this opinion as a matter of customary practice is limited to the state and federal level as well as to published rules and regulations.⁵

Similar to the no violation of laws and no breach or default opinions discussed above, the opinion given should be limited to those approvals and filings necessary to consummate the transaction – to close the deal – and should not include post-closing obligations or future performance by the Company under the agreement at hand. Including in the opinion that no consents, approvals, or filings are necessary for the Company’s “performance” under the transaction documents is a broader opinion and should be specifically negotiated and deliberated by the opinion preparer. Most state legal opinion reports advise the opinion preparer not to give that broader opinion;⁶ however, the TriBar 1998 Report states that the opinion “often” covers performance and its illustrative opinion includes performance in the scope of this particular

⁵ See GLAZER § 15.2 (opinion neither covers approvals and filings at the municipal or local law such as zoning compliance nor does it apply to obscure laws that a lawyer exercising reasonable diligence could not be expected to recognize as applicable to the Company or the transaction).

⁶ GLAZER § 15.5 at fn. 6.

opinion.⁷ In the event that the opinion preparer agrees to opine over future performance, they should do so only after determining if the Company's future obligations are easily discernible and if the cost of undergoing that due diligence to give the opinion is justified and acceptable to the Company. As you will see in the Illustrative Opinion, it is recommended that you limit the scope of the opinion to the execution and delivery of the documents and the consummation of the transaction without offering to opine over future performance.

Reviewing corporate or other authority documents and filings at the Secretary of State's Office and possibly at the Office of the Clerk of Court in the County where the Company owns real estate will be sufficient due diligence for an opinion preparer to give the no consents/filings opinion in most standard real estate financed transactions. For example, if the Company has had a name change since it has acquired title to any real property or after it has mortgaged such real property, a name change affidavit should be on file in the County in which the real property is located to ensure the Grantor indices are updated. However, if the Company is part of a heavily regulated industry, the opinion preparer must exercise a higher and more detailed level of due diligence and ensure that they understand the industry's requirements or associate counsel that does.

⁷ *Id.* at fn. 7.

IX. THE NO LITIGATION OPINION

The “no litigation” opinion is not really a legal opinion, but rather a factual confirmation. The no litigation confirmation is different from other opinions customarily included in a standard closing transaction in that it does not call for a legal analysis. An opinion preparer should exclude “no litigation” opinions if possible. A limited knowledge and no investigation qualifier may not be sufficient to protect against possible liability. Any language should be carefully drafted and limited to pending cases of which the opinion preparer has actual knowledge, and if “threatened” actions are covered, coverage should be limited to claims “overtly threatened in writing.” However, an opinion preparer would not give an opinion with respect to the possible outcome of any litigation.¹

An understanding of customary practice is critical when analyzing a no litigation opinion. Customary practice does not require a lawyer to conduct an inquiry within the firm regarding litigation involving the client except to the extent that the opinion preparer has identified a particular lawyer as being reasonably likely to have information that is unknown to the opinion preparer and that is necessary to support the opinion. This established practice is a result of the time and cost restraints associated with a transaction that are imposed upon the opinion preparer. It also reflects the impracticality of obtaining useful information from lawyers not working on the transaction. Lawyers engaged to render a no litigation opinion should prepare their clients before rendering the opinion regarding the need to make disclosures that are not misleading. To avoid misunderstanding, some lawyers prefer to spell out the scope of their inquiry in the opinion. Regardless of whether or not a lawyer chooses to specify or limit the scope of his or her due diligence, the meaning of the opinion and its evaluation by a recipient turns on key terminology in the opinion, as explained by customary practice.

The opinion is requested by the recipient not because of the opinion giver's expertise in the law, but because of the opinion giver's presumed familiarity with any litigation in which a party to the transaction is involved or such preparer's ability to ask the right questions of the right people. Such presumptions are appropriate for either inside counsel or outside counsel who represent the company in question on a regular basis. However, it is not appropriate when the opinion giver is only one of many firms retained by such company. Therefore, some firms will refuse to render the opinion, and in that event, the recipient has to consider whether the company's representations and warranties in the applicable agreement sufficiently address its concerns, or if the opinion can be obtained from more appropriate counsel. Because the opinion is often not appropriate for local counsel, the opinion is not included in the Illustrative Opinion attached to this report. However, there are instances in which it is appropriately requested, and therefore, is addressed herein in some detail.

Some lawyers may resist giving no litigation opinions altogether due to the liability and ethical dilemmas, and some firms refuse to render the opinion. In such event, the recipient has to consider whether the company's representations and warranties in the applicable agreement sufficiently address its concerns. Because the opinion is often not provided, the opinion is not included in the Illustrative Form of Opinion.

¹ See ABA Guidelines § 4.7.

If given, the opinion may take several forms. One published version of the opinion provides as follows:

Except as listed on Schedule _____ hereto, the Company is not a party to any pending [or overtly threatened in writing] action or proceeding known to us that may adversely affect the transactions contemplated by the Agreement or that may have a materially adverse effect on the Company.²

The purpose of the no litigation opinion is to provide comfort to the recipient that by entering the subject transaction, the recipient is not buying a lawsuit. The opinion supplements any representations that the client/company may make in a document that it is not involved in legal proceedings that may adversely affect its business or the subject transaction.

A second formulation of the opinion is as follows:

We advise you that to our knowledge, there is no action, suit or proceeding at law or in equity, or by or before any governmental instrumentality or agency or arbitral body, now pending or overtly threatened against the Company except as listed on [the disclosure schedule to the Agreement] [or the officer's certificate rendered to us in connection with this opinion.]³

As set forth in Glazer and Fitzgibbon,⁴ the phrase "no action, suit or proceeding at law or in equity" encompasses all legal proceedings regardless of whether the requested relief is of an equitable or legal nature. The proceedings in question are limited to legal proceedings before bodies that can render binding results on the parties to such legal proceedings. Therefore, a dispute that is the subject of non-binding arbitration or mediation would not be required to be disclosed.

The phrase "overtly threatened" includes both oral and written threats. This phrase does not include unasserted claims that might arise from an existing state of facts that are better fleshed out in an audit (either formal or informal).

The "to our knowledge" qualification emphasizes that the opinion is fact-based and establishes the scope of the inquiry necessary to meet the due diligence obligations of the opinion giver. The guiding principle underlying the opinion itself and the knowledge qualification in particular is that the benefits associated with the opinion should outweigh the costs associated with the scope of the required due diligence. By virtue of the formulation of the opinion with a knowledge qualifier, the opinion preparer avoids the review of all of the files of the company in question and minimizes the attendant cost associated with such review.

² See the 1998 Report of the TriBar Opinion Committee (53 BUS. LAW. 591) and the Illustrative Opinion Letter for Inside Counsel.

³ See the Report of the Legal Opinion Committee of the Business Law Section of the North Carolina Bar Association, as supplemented.

⁴ Donald W. Glazer, Scott FitzGibbon & Steven O. Weise, *Glazer and FitzGibbon on Legal Opinions: Drafting, Interpreting and Supporting Closing Opinions in Business Transactions* (Aspen Law Publishers, 3d ed. & 2012 Cumulative Supp.).

The no litigation opinion is customarily understood not to cover investigations unless it expressly uses that word. Many reports, therefore, recommend the exclusion of any reference to an investigation. Even if investigations are not specifically listed as matters to be disclosed, a lawyer must assess if the status of a particular investigation requires that it be treated as a "threatened proceeding." If the opinion explicitly refers to investigations, it is understood to cover only governmental investigations into activities that could result in an action against the company and not investigations of a more general nature such as hearings conducted by legislative or governmental agencies directed towards the adoption of the new legislation or regulation. The no litigation opinion should only cover legal proceedings in which the company in question is a defendant. Therefore, the opinion language could be limited by referring to proceedings "against the company" or to which the "company is a party" instead of proceedings "affecting the company" or to "which the company is otherwise subject."

The case of *Dean Foods Co. v. Pappathanasi*, 18 Mass L. Rep. 598, 2004 WL 3019442 (Mass. Super. Dec. 3, 2004), is illustrative of the dilemma that an opinion preparer may find himself or herself when the preparer has knowledge of an investigation that may be pending. In the *Dean Foods* case, the opinion preparer relied on the conclusion of a litigation partner that the lack of ongoing explorative discussions with a U.S. attorney regarding an investigation for a six month period meant that the investigation had probably gone away. The opinion preparer, in reliance on the litigation partner's conclusion and the client representative's fear that the disclosure of an investigation would incite family members and interfere with a prospective sale, failed to disclose the investigation as a threatened action in the opinion. After the opinion was issued, the litigation partner was informed that the company was, in fact, the target of a federal grand jury investigation, and because of the failure of the opinion preparer to disclose the same, the firm was held liable in connection with the rendition of its opinion.

Some malpractice carriers have misread the conclusion of the *Dean Foods* case and have required mass e-mails or other burdensome levels of inquiry to be imposed upon opinion preparers. However, firm-wide e-mails requesting information for an opinion is neither practical nor required by *Dean Foods*. Customary practice nevertheless does require that an attorney adhere to an appropriate level of inquiry. Inadequate inquiry on the part of opinion preparers can result in liability to the firm. The real lesson of *Dean Foods* is that an opinion preparer must determine if he or she is providing an opinion in the face of inquiry notice about factual circumstances that may be the basis of an adverse impact on the company or the transaction in question. If so, the information must be disclosed or the no litigation opinion refused. Regardless of the extent of the inquiry demanded, the resulting opinion must be both truthful and not misleading. It is the essence of the work of an opinion preparer to make these determinations. A clear understanding of customary practice is essential. Law firms should consider the *Dean Foods* opinion when considering whether to establish policies and procedures with respect to opinion practice and factual investigations in particular. Liability was imposed on the law firm in *Deans Food*, in part, because the firm failed to adhere to its own established procedures. Before establishing or making changes in opinion procedures, law firms should well consider how their own opinion preparers would deal with facts similar to those in *Dean Foods*. It is possible for law firms to overcompensate due to the risk of the liability. It is critical, however, to manage the fear of liability and provide the service for which the lawyer is being engaged.

In connection with the rendition of a no litigation opinion, lawyers must clearly understand what customary practice mandates as far as the disclosure of threatened proceedings. Not all threats are required to be disclosed. Customary practice acknowledges that there is inherent uncertainty in any threat, so therefore, opinion preparers are permitted to treat as a threat only an unequivocal statement to a responsible corporate official or to the company's legal counsel that a claimant intends to bring a proceeding in the near future. Consequently, customary practice permits opinion preparers to disregard certain statements to lower level employees that do not formally put the company on notice that an action is about to be commenced as well as idle threats and posturing about assertions made in the heat of the moment that when later viewed more dispassionately, appear unlikely to result in a formal action. To make clear the limited scope of the opinion, the opinion preparer should qualify the phrase "threatened proceeding" with the adverb "overtly." One would argue that customary practice already understands that "overtly threatened litigation" is the standard whether or not the word "overtly" is used. An opinion preparer must investigate enough to determine if an oral threat is made that would rise to the level of a required disclosure if made in writing. The Tri-Bar 1998 report uses "unambiguous oral threat of litigation," to illustrate the point.

If an opinion addresses only proceedings that have a material adverse effect on the company, that materiality limitation does narrow the coverage of the opinion. However, bear in mind that the materiality limitation, while helpful when a company is routinely engaged in numerous proceedings that represent nothing more than the normal cost of doing business, such materiality limitations may introduce imprecision into the closing opinion. It is difficult, at best, to determine if a proceeding is material because that determination requires a judgment about the prospects of winning and the consequences of losing. Even more difficult is determining if losing would impact the company's overall financial condition. Therefore, many opinion preparers define materiality by reference to an objective standard or avoid using the term "material" at all. The most common objective standard is a fixed dollar threshold, one that normally keeps the schedule of proceedings referred to in the opinion from becoming extensive. Use of an objective standard does not solve the situation where the importance of the proceeding is not quantifiable in monetary terms. What is ultimately important to the opinion recipient may depend on its perceived need to know and plans. Therefore, because proceedings that do not seek monetary damages may be important, opinion recipients may refuse to allow the opinion to be limited to proceedings claiming only a specified dollar amount.

Another limitation in the formulation of the no litigation opinion is to provide that there are no pending or threatened actions or proceedings against the company in question that may affect the transaction which is the subject of the opinion request. This approach is recommended if a no litigation confirmation is required and the opinion giver is willing to provide it.

An example of such formulation is as follows:

We advise you that we do not represent the Company in any action, suit or proceeding now pending at law or in equity, or by or before any governmental instrumentality or agency or arbitral body, or overtly threatened in writing against the Company by a potential claimant that challenges the validity or enforceability of,

or seeks to enjoin the performance of, the Transaction Documents [except...].

Another is the Boston Streamlined Opinion which provides as follows:

[Except as disclosed in Schedule _____ to the Credit Agreement,] we are not representing _____ or either of the subsidiaries in any pending litigation in which it is a named defendant [, or in any litigation that is overtly threatened in writing against it by a potential claimant,] that challenges the validity or enforceability of, or seeks to enjoin the performance of, the Credit Documents.

Either of these formulations should be acceptable to an opinion recipient. If not, the recipient should rely on a “no litigation” certificate from the parties to the transaction.

It is also advisable to add a paragraph which advises the recipient that neither the attorney-client privilege nor the work product doctrine are being waived. Language along the lines of the following is suggested:

Except for the information disclosed in this opinion letter, the borrower, entrusting us to issue this opinion letter did not intend to waive the attorney-client privilege. Moreover, please be advised that our response to you should not be construed in any way to constitute a waiver of the protection of the attorney work product doctrine with respect to any of our files involving the borrower.

In conclusion, while the no litigation opinion is in actuality a factual statement, it forces a lawyer to make judgment calls that are the essence of the practice of law. The lawyer faced with a judgment call to make should consider whether the language of the offered no litigation opinion can be altered to one of the formulations discussed above such that the opinion can be given in light of facts known or if the no litigation opinion simply may not be able to be included in the overall opinion. Even if offered on a more limited scope, the opinion may not be misleading.

X. ETHICAL CONSIDERATIONS IN OPINION PRACTICE

Ethical considerations are implicated in every aspect of the opinion process. Before a lawyer delivers an opinion, the lawyer must recognize and understand the ethical considerations inherent in opinion practice. Therefore, any analysis of opinion practice must include a discussion of the applicable Rules of Professional Conduct¹ and the law governing lawyers.²

Conflicts are inherent in opinion practice given that (1) the lawyer is delivering an opinion which discloses information about a client to a third party and (2) the lawyer's disclosure to the third party must be truthful and not misleading. Generally, a lawyer may not disclose client information that is deemed confidential without the client's consent.³ However, in the context of a closing opinion, such disclosure is generally deemed to be authorized unless such disclosure would be adverse to the client.⁴

In addition to understanding the duties of confidentiality and disclosure owed to the parties, the lawyer must be competent to give the opinions requested.⁵ Such competency requires an understanding of many areas of law, which may include corporate law, contract law, commercial law, real estate law, UCC secured transactions and other areas of law that may be specific to the transaction and covered by the opinion, as well as customary opinion practice.

Probably one of the most pervasive considerations in opinion practice is the duty of professionalism and civility owed to all parties in the transaction. In requesting and negotiating opinions, lawyers must remain civil and professional and remember the "Golden Rule."⁶ While acknowledging the risks and concerns on both sides, the parties must not make unreasonable demands where the opinion can be given or when the risk is not justified.

In requesting, negotiating, preparing and delivering a third-party legal opinion, remember the following important ethical considerations:

A. THE CLIENT

The traditional closing opinion is delivered by a lawyer to a third party non-client at the request of and on behalf of a client. As a result, there are ethical issues associated with the issuance of third-party opinions that differ from those in which an opinion is issued to one's own client. A lawyer who issues an opinion to a client is guided by the same principles and considerations that are pertinent to opinions prepared for third parties. In such context, however, the lawyer must adhere to all of the duties that the ethical rules impose upon lawyers when dealing with a client.

¹ Rule 407, SCACR, the South Carolina Rules of Professional Conduct [hereinafter the "Rules"], specifically Rules 1.1, 1.2, 1.3, 1.4, 1.6, 1.8, 1.10, 1.13, 1.16, 2.3, 3.3, 3.4, 4.1, 4.2, 4.3, 4.4, 5.1, 5.5, and 8.4.

² See RESTATEMENT OF THE LAW (THIRD) OF THE LAW GOVERNING LAWYERS.

³ Rule 1.6.

⁴ Rules 1.2(a) and 2.3 (a). *But see* Rule 2.3(b) (disclosure is not permitted without consent where disclosure is likely to be adverse to client).

⁵ Rule 1.1.

⁶ See 1998 TriBar Report, §1.3, and ABA Guidelines §3.1.

1. **Duty to Non-Client.** The delivery of a legal opinion does not establish a client relationship with the third-party recipient; however, it does impose a duty of care on the opinion giver to the third party, the standard for which is based on customary practice.⁷ While the duty of care to a non-client in delivering an opinion does not rise to the level of that owed to a client, the lawyer does owe a duty of care to the third-party addressee (and any other third party entitled to rely thereon) that is reasonable under the circumstances.⁸ However, absent an express agreement by the opinion giver to render an opinion to the non-client, a lawyer is not required to deliver an opinion to a non-client.⁹ Furthermore, the opinion giver is not an advocate for the opinion recipient's position, but rather the opinion giver must be "fair and objective" in rendering third-party opinions.¹⁰

Comment [3] to Rule 2.3 provides in part:

When the evaluation is intended for the information or use of a third person, a legal duty to that person may or may not arise. That legal question is beyond the scope of this Rule. However, since such an evaluation involves a departure from the normal client-lawyer relationship, careful analysis of the situation is required.

In the context of third-party legal opinions, a legal duty to the third party does arise, and the opinion giver is liable to the third party for a breach of that duty, the determination of which is based on the customary practice of lawyers who regularly give and negotiate opinions.¹¹

2. **Lawyer Liability.** Breach of the duty of care to the third-party opinion recipient (and any other parties entitled to rely thereon) will result in civil liability to such party for professional negligence, including negligent misrepresentation.¹² (In addition to opinion liability, lawyers may have liability to third parties under federal securities laws; however, such liability is beyond the scope of this discussion.)¹³ However, it is important to remember that a closing opinion is not a guarantee by the opinion giver regarding the matters covered by the opinion, but rather it is an expression of the lawyer's professional judgment.¹⁴

With the increasing number of transactions involving the issuance of closing opinions, cases involving lawyer liability to third parties on legal opinions are becoming more common. One such case, *Dean Foods Co. v. Pappathanasi*,¹⁵ has raised concerns for lawyers in considering the level of due diligence and duty of care appropriate and necessary in third-party opinion practice. The court in *Dean Foods* held a law firm liable for negligent misrepresentation

⁷ Rule 2.3. See generally GLAZER §§ 1.6.1 and 2.3.2.

⁸ GLAZER § 1.6.1, at 21, and see §1.6.1 notes 4 and 5.

⁹ 1998 TriBar Report, §1.7 at p. 605.

¹⁰ 1998 TriBar Report, § 1.2(a), n. 8, p.p. 595 – 596, citing the RESTATEMENT (THIRD) OF LAW GOVERNING LAWYERS §152 Comment c.

¹¹ See note 8 *supra*.

¹² See GLAZER §§ 1.6.3 and 2.3.2. See also RESTATEMENT (THIRD) OF LAW GOVERNING LAWYERS §48.

¹³ See 1998 TriBar Report, "Non-Opinion Liability," p. 603.

¹⁴ See § 1.2(a) of the 1998 TriBar Report, p.p. 595 – 596. See also ABA Legal Opinion Principles §§ I.D and II.B. See also §1.4 of the ABA Guidelines regarding opinions beyond the professional competence of lawyers and §3.5 of the ABA Guidelines regarding "would/should" meaning in closing opinions.

¹⁵ 18 Mass L. Rep. 598 (Mass. Super. Dec. 3, 2004).

in delivering a “no litigation” opinion. The court’s decision in the *Dean Foods* case has been the topic of a lot of discussion and debate among opinion givers.¹⁶ Giving “no-litigation” and similar types of factual confirmations can be fraught with danger due to the factual nature of such statements and the level of diligence implicated by the *Dean Foods* case. As a result, it is recommended that lawyers avoid giving such opinions or, at a minimum, significantly limit the scope of the confirmation and proceed with caution.¹⁷

B. CONFIDENTIALITY AND TRUTHFUL COMMUNICATION

1. **Duty of Confidentiality.** A lawyer owes a duty of confidentiality to the client and may not disclose confidential information about the client without the client’s informed consent.¹⁸ Rule 1.6(a) provides:

A lawyer shall not reveal information relating to the representation of a client unless the client give informed consent, the disclosure is implicitly authorized in order to carry out the representation, or the disclosure is permitted by [the Rules].

However, Rules 1.2(a) and 2.3(a) authorize disclosure of client information to third parties under certain circumstances where such disclosure is implicit in the representation, such as delivery of opinions which are necessary in order to close a transaction on behalf of the client. Comment [5] to Rule 2.3 provides:

Information relating to an evaluation is protected by Rule 1.6. In many situations, providing an evaluation to a third party poses no significant risk to the client; thus, the lawyer may be impliedly authorized to disclose information to carry out the representation. See Rule 1.6(a). Where, however, it is reasonably likely that providing the evaluation will affect the client’s interests materially and adversely, the lawyer must first obtain the client’s informed consent.

While it is now understood that a lawyer is giving a closing opinion at the request of the client in order to close the transaction on behalf of the client,¹⁹ the lawyer may choose to identify in the opinion the document provision requiring the opinion or specifically note that the opinion is being delivered at the request of the client. Only if a particular disclosure in the opinion likely would materially and adversely affect the client’s interest, would the lawyer be required to consult with and obtain the client’s express consent for such disclosure in the opinion.²⁰

¹⁶ For detailed discussions on the *Dean Foods* case, see D. Glazer & A. Field, “No-Litigation Opinions Can Be Risky Business, Looking at the Facts and Beyond,” 14 Bus. Law Today 37 (July/August 2005); Richard R. Howe, “Commentary on Dean Foods Decision,” 4 ABA Section of Business Law Committee on Legal Opinions, Legal Opinion Newsletter 3 (June 2005); and “Chicago Meeting Report,” 4 ABA Legal Opinion Newsletter 2 (September 2005). Lawyers should be familiar with the *Dean Foods* case and commentaries to understand the risks and duty of care imposed on lawyers in rendering legal opinions, particularly opinions that are factual confirmations.

¹⁷ See Howe, note 16 *supra*. See also GLAZER § 17.1, n. 3a, p. 314 – 315 (2006 Supp.). For a general discussion of the “no-litigation” opinion, see GLAZER Chapter Seventeen.

¹⁸ Rule 1.6.

¹⁹ See generally Rules 1.2, 1.6 and 2.3.

²⁰ Rule 2.3(b). See Section 2.4 of the ABA Guidelines. See also *Dean Foods* case regarding non-disclosure of an investigation involving the client and lack of the client’s consent to disclose. A narrow definition of knowledge and

2. **Necessary Disclosure and Truthful Statements to Others.** In a closing opinion, a lawyer may be requested to disclose certain facts about a client or may need to assume certain facts in order to render opinions about the client and the transaction. In making such disclosures or assumptions, a lawyer must be truthful and cannot make statements or fail to disclose information which makes the opinion misleading. In making statements to others, a lawyer owes a duty of truthfulness to such parties. Rule 1.4 states:

In the course of representing a client a lawyer shall not knowingly:

- (a) make a false statement of material fact or law to a third person; or
- (b) fail to disclose a material fact when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6.

Comment [1] to Rule 4.1 provides in part:

A lawyer is required to be truthful when dealing with others on a client's behalf, but generally has no affirmative duty to inform an opposing party of relevant facts. A misrepresentation can occur if the lawyer incorporates or affirms a statement of another person that the lawyer knows is false. Misrepresentations can also occur by partially true but misleading statements or omissions that are the equivalent of affirmative false statements. . . .

In a closing opinion, a lawyer may have a duty to inform the third party of relevant facts if failure to do so would likely mislead the recipient. Furthermore, a lawyer cannot make or rely on an assumption that the lawyer knows to be untrue.²¹ However, in certain circumstances, assumptions contrary to fact may be expressly agreed to by the parties (e.g., the recipient may agree to the giver's assumption of governing law contrary to the applicable choice of law provisions).²²

3. **When the Duty of Confidentiality and Truthful Disclosure Conflict.** A conflict can arise when in order to protect client confidential information which the lawyer cannot fully disclose relevant facts to deliver a requested opinion (or explain to the intended recipient why the opinion cannot be given) because such disclosure would be adverse to the client's interest. The problem can present itself in the form of the "no conflicts" or "no litigation" opinion. For example, a lawyer may be aware of a "threatened" potentially adverse claim against the client, but the client does not consent to its disclosure for a number of reasons.²³

limited scope of diligence stated in the opinion are not sufficient to limit liability, specifically where there is a duty and actual knowledge.

²¹ See GLAZER §4.3.4.

²² See GLAZER §4.3.6.

²³ The client may not deem the threat legitimate, material or applicable, and disclosure could raise undue concerns or derail the transaction. See *Dean Foods*, comment at note 20 *supra*.

Comment [4] to Rule 2.3 provides in part:

If after a lawyer has commenced an evaluation, the client refuses to comply with the terms upon which it was understood the evaluation was to have been made, the lawyer's obligations are determined by law, having reference to the terms of the client's agreement and the surrounding circumstances. In no circumstances is the lawyer permitted to knowingly make a false statement of material fact or law in providing an evaluation under this Rule. See Rule 4.1.

Comment [4] to Rule 4.1 provides in part:

Ordinarily, a lawyer can avoid assisting a client's crime or fraud by withdrawing from the representation. Sometimes it may be necessary for the lawyer to give notice of the fact of withdrawal and to disaffirm an opinion, document, affirmation or the like. In extreme cases, substantive law may require a lawyer to disclose information relating to the representation to avoid being deemed to have assisted the client's crime or fraud. If the lawyer can avoid assisting a client's crime or fraud only by disclosing this information, then under paragraph (b) the lawyer is required to do so unless the disclosure is prohibited by Rule 1.6.

Opinion recipients generally are better served by not requesting opinions that require lengthy, non-standard or questionable qualifications to the opinion.²⁴ Such qualifications can give rise to a duty on the opinion recipient to evaluate and assume the risk. It is also unfair to request the opinion giver to limit an exception when a known or questionable issue with a specific opinion exists if such revision would be misleading, inaccurate, incomplete or subject the opinion giver to undue risk. Notwithstanding the opinion language, the opinion recipient cannot rely on an opinion where the recipient has knowledge, actual or constructive, of the potential risk involved with the opinion.²⁵

4. **Avoiding Misleading Opinions.** A lawyer must avoid making statements or assumptions or giving opinions that are misleading. While an opinion may be true as stated, it may still be misleading if the lawyer knows that an issue relevant to the opinion and important to the recipient needs to be disclosed in order to make the opinions not misleading.²⁶

5. **Conflicts.** When a conflict arises, you have to consider your ethical obligations to your client, your obligations to the third party and your other professional and legal obligations under the Rules in dealing with those conflicts.²⁷

²⁴ See §1.3 of the 1998 TriBar Report, note 19.

²⁵ See §1.6 of the 1998 TriBar Report.

²⁶ Rule 4.1, and *see* comment [1] to Rule 4.1. *See also* §1.5 of the ABA Guidelines. *See also* §1.4(d) of the 1998 TriBar Report.

²⁷ Rule 4.1, and *see* comment [4] to Rule 2.3 and comment [4] to Rule 4.1.

C. COMPETENCY

A lawyer must provide competent representation to a client. Rule 1.1 defines competent representation as “legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.” Comment [1] to Rule 1.1 provides in part:

In determining whether a lawyer employs the requisite knowledge and skill in a particular matter, relevant factors include the relative complexity and specialized nature of the matter, the lawyer's general experience, the lawyer's training and experience in the field in question, the preparation and study the lawyer is able to give the matter and whether it is feasible to refer the matter to, or associate or consult with, a lawyer of established competence in the field in question.

1. **Required Level of Expertise.** Competency in the context of opinion practice requires an understanding of customary practice,²⁸ as well as the specific areas of law covered by the opinion. The lawyer must be able to make an independent professional judgment about the law covered by the opinion and understand the duty of care, diligence and meaning of the opinions.²⁹

2. **Associating Other Counsel.** If the opinion covers matters of law beyond the opinion preparer's professional knowledge and areas of competence, the lawyer may need to associate other counsel. However, the lawyer must be cautious in selecting such counsel and delivering opinions based thereon. Any special counsel opinions should be delivered separately to the opinion recipient rather to general counsel for reliance.³⁰

Section 2.2 of the ABA Guidelines states:

When the opinion giver lacks the legal expertise to render a requested opinion, consideration should be given to whether that opinion should be sought from other counsel. An opinion of other counsel should be sought by the opinion recipient only when the opinion's benefits justify its costs. A primary opinion giver normally should not be asked to express its concurrence in the substance of an opinion of other counsel.

²⁸ See ABA Legal Opinion Principles § I.B. See also, *Dean Foods* and note 16 *supra*, Glazer & Field and Howe on *Dean Foods*. See also GLAZER § 1.6.1, at 23. Opinion preparers should be familiar with the nationally recognized customary practice as set forth in the ABA and TriBar reports and may be held to such standards. See also “Law Office Opinion Practices,” at 328 (“Competence requires not only familiarity with customary opinion practice but also relevant opinion literature, and the policies and procedures of their firm or department.”)

See “law Office Opinion Practices,” at 328 (“An opinion giver thus has the responsibility to know customary practice – that is, of knowing the practice normally followed by lawyers who regularly give opinions and lawyers who regularly advise opinion recipients regarding opinions of the kind involved.”)

²⁹ See notes 7 and 8 *supra*.

³⁰ This trend is referred to as “unbundling” opinions. See GLAZER § 5.2. See also 1998 TriBar Report §§ 5.2, 5.3 and 5.5.

3. **Specialty Areas.** Specialty areas of law are not deemed to be covered in the closing opinion unless expressly stated.³¹ For example, an opinion is not deemed to cover securities or tax laws unless opinions on such matters are expressly stated. However, if specialty areas are covered, the opinion giver is held to a higher standard of competence.³² Opinions on Delaware corporate law may also be deemed beyond the competence of the opinion giver, and giving such opinions can be risky, as the opining lawyer will be held to the standard of a competent Delaware corporate lawyer.³³

D. CIVILITY AND PROFESSIONALISM

All lawyers admitted to practice in the State must take the Lawyer's Oath prescribed by the Supreme Court, which includes an oath of civility and professionalism in practice.³⁴ The Lawyer's Oath provides in relevant part:

To opposing parties and their counsel, I pledge fairness, integrity, and civility, not only in court, but also in all written and oral communications; . . .

I will employ for the purpose of maintaining the causes confided to me only such means as are consistent with trust and honor and the principles of professionalism, and will never seek to mislead an opposing party, the judge or jury by a false statement of fact or law; . . .

1. **Negotiating the Opinion.** Parties negotiating opinions should not make unreasonable demands for opinions or refuse to give opinions that are customary and reasonable under the circumstances.³⁵ To facilitate the negotiations, lawyers requesting opinions must provide the opinion preparer with the scope of opinions being requested at the onset of the transaction. Is it unfair to request opinions that are not customary or which would require extensive due diligence without prior knowledge and sufficient time and opportunity to negotiate the opinion. Such request violates the duty of civility and professionalism in practice, and such opinions should not be requested or expected to be given.

It is the responsibility of counsel to the opinion recipient to notify the opinion preparer of the scope of opinions early in the transaction. Appropriate opinions may be deemed inappropriate if requested at the eleventh hour. (This, however, does not preclude the request for opinions resulting from changes in the transaction initially unknown to the parties or to address a specific concern resulting from the negotiations.) Often unreasonable opinion requests are made by or on behalf of the intended opinion recipient, and its counsel is unyielding in its demands. Such unreasonable demands and negotiating tactics may be deemed unethical.

³¹ See ABA Legal Opinion Principles § II.D. Note also that opinion practice is evolving as a specialty area. "Law Office Opinion Practice" at 327 ("Over the past thirty years, the giving and receiving of third party legal opinions has developed as a specialized area of practice.")

³² See RESTATEMENT OF LAW GOVERNING LAWYERS §52.

³³ See 1998 TriBar Report §§5.1, 5.2 and 5.3.

³⁴ Rule 402(k), SCACR [hereinafter *Lawyer's Oath*].

³⁵ See §1.2 of the ABA Guidelines.

2. **The Golden Rule.** The “Golden Rule” is the guiding principle in all opinion negotiations. The opinion recipient should not request an opinion it would not give in a similar circumstance, and the opinion giver should not refuse to give an opinion it is able to give under the circumstances. In both instances, the parties must take into consideration customary practice, the timing of the request, the due diligence necessary to give the opinion, the cost to the client and the benefit of the opinion to the recipient.³⁶

Section 3.1 of the ABA Guidelines states the “Golden Rule” as:

An opinion giver should not be asked to render an opinion that counsel for the opinion recipient would not render if it were the opinion giver and possessed the requisite expertise. Similarly, an opinion giver should not refuse to render an opinion that lawyers experienced in the matters under consideration would commonly render in comparable situations, assuming that the requested opinion is otherwise consistent with these Guidelines and the opinion giver has the requisite expertise and in its professional judgment is able to render the opinion. Opinion givers and counsel for opinion recipients should be guided by a sense of professionalism and not treat opinions simply as if they were terms in a business negotiation.

If the requested opinion is not customary in the State and is not appropriate under the circumstances, the opinion should not be given. Threats by opposing counsel or attempt to strong-arm or pressure the opinion giver to give inappropriate or unreasonable opinions are deemed to violate the duties of civility and professionalism.

The TriBar Report notes: “An opinion cannot change the facts or the state of the law.”³⁷ Pressuring counsel for changes in the language of an opinion does not change the facts or the applicable law, and any such request or change should be viewed with caution. Also, just because an opinion may be given by other firms does not mean it is appropriate in the given transaction.³⁸

The Preamble to the Rules, “Preamble: A Lawyer’s Responsibilities,” provides a summary of the lawyer’s ethical considerations in the opinion practice area:

[9] In the nature of law practice, however, conflicting responsibilities are encountered. Virtually all difficult ethical problems arise from conflict between a lawyer’s responsibilities to clients, to the legal system and to the lawyer’s own interest in remaining an ethical person while earning a satisfactory living. The Rules of Professional Conduct often prescribe terms for resolving such conflicts. Within the framework of these Rules, however, many difficult issues of professional discretion can arise. Such issues must be resolved through the exercise of sensitive professional and moral judgment guided by the basic

³⁶ See ABA Guidelines § 3.1. See also GLAZER § 1.8. See also “Statement on Professionalism for North Carolina Business Lawyers” (2008).

³⁷ 1998 TriBar Report at 600.

principles underlying the Rules. These principles include the lawyer's obligation zealously to protect and pursue a client's legitimate interests, within the bounds of the law, while maintaining a professional, courteous and civil attitude toward all persons involved in the legal system.

3. **Customary Practice Guidance**. The standard of care, level of competency, and liability in opinion practice are established by the Rules and applicable law governing lawyers and are guided by "customary practice" which is continually evolving. A lawyer rendering, requesting and negotiating legal opinions should be familiar with the nationally recognized reports and guidelines, specifically the ABA and TriBar reports, and evolving trends in customary practice. Usually, attorneys familiar with customary practice will not pressure opinion givers for questionable opinions once a reasonable objection has been made. Counsel should not assume that all opinion requests are non-negotiable. If the opinion request is inconsistent with the ABA guidelines and customary practice, the opinion should not be given, and an attorney familiar with customary practice will not unduly pursue it.³⁹

E. UNAUTHORIZED PRACTICE OF LAW (UPL)

In certain contexts, opinion practice can raise issues relating to the unauthorized practice of law, particularly in multi-jurisdictional practice areas and in multi-state credit transactions⁴⁰. Giving opinions on the law of another jurisdiction may be acceptable in opinion practice if the lawyer is competent to render such opinion;⁴¹ however, it does not address the issue of whether such practice is deemed the unauthorized practice of law by the laws of the jurisdiction covered by the opinion.⁴² Furthermore, a lawyer cannot assist another in the unauthorized practice of law. Rule 5.5(a) states:

A lawyer shall not practice law in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction or assist another in doing so.

Since the practice of law is defined by each state, a lawyer must determine if any opinion practice violates the law of each applicable jurisdiction under its Rule 5.5 and exemptions.⁴³ For example, in South Carolina, transactions involving an interest in real estate must be closed under the supervision of a lawyer licensed in this State.⁴⁴ Therefore, in transactions involving South Carolina real estate, the lawyer may need to consider implications of the unauthorized practice of law in delivering a local counsel closing opinion. Also, unless you are inside counsel, you should not state in an opinion "we are licensed in the state," as it is the members of the firm who

³⁸ See §1.6 of the ABA Guidelines. See also §1.3 of the 1998 TriBar Report.

³⁹ See GLAZER § 1.8, n. 5. See also 1998 TriBar Report § 1.3, n. 19.

⁴⁰ For a discussion of UPL in MJP, including a hypothetical case involving a SC bond lawyer, see Anthony E. Davis, "Multijurisdictional Practice by Transactional Lawyers – Why the Sky Really *Is* Falling," 70 The Bar Examiner 1, 15 (February 2001).

⁴¹ See §§2.7.1 and 2.7.3 of GLAZER. See also "Law Office Opinion Practice" at 331.

⁴² Rule 5.5(c)(4) permits temporary practice for an existing client in limited circumstances.

⁴³ See ABA "State Implementation of ABA MJP Policies" (November 7, 2008).

⁴⁴ See *State v. Buyers Service Company, Inc.*, 292 S.C. 426, 357 S.E. 2d 15 (1987).

are licensed, not the firm, and the members may be licensed in other jurisdictions.⁴⁵ Instead, state the opinion is limited to the laws of the state.

If UPL is a potential concern in the transaction, the opinion preparer may consider including the following qualification in a local counsel opinion:

_____. In transactions involving real property located in the State, certain aspects of the transaction must be handled by or conducted under the direct supervision of an attorney licensed in the State. To the extent that any unauthorized practice of law has occurred in connection with the transactions contemplated by the Transaction Documents, the party engaging in that unauthorized practice of law may be precluded from enforcing its rights under the loan documents in the South Carolina courts by way of legal or equitable remedies.⁴⁶ [You have represented to us that _____, a South Carolina licensed attorney and agent for _____ Title Insurance Company in the State, has conducted the title examination, prepared or reviewed and approved the title and lien documents, will record or supervise the recording of all documents to be recorded in connection with the transaction and will supervise the closing and disbursement of funds relating to the South Carolina property.]⁴⁷ Solely for the purposes of delivering this opinion as local real estate counsel to the debtor, we have assumed that there has occurred no unauthorized practice of law, as determined by the law South Carolina Supreme Court, in connection with the transactions contemplated by the Transaction Documents.⁴⁸

⁴⁵ Note that admission to a state's bar, however, does not mean one is competent on the law of that state to render an opinion. See *Law Office Opinion Practice* at 331.

⁴⁶ See *Matrix Financial Services Corporation v. Frazer* 2010 WL 3219472 (S Ct. 2010). See also, *Wachovia Bank, N.A., v. Ann T. Coffey*, 389 S.C. 68, 698 S.E. 2d 244 (Ct. App. 2010) (lender cannot foreclose on its mortgage where the loan was closed without attorney supervision).

⁴⁷ This statement is inserted to remind counsel of its ethical obligation under Rule 5.5 of the Rules of Professional Conduct (Rule 407 SCACR) to take steps to verify that South Carolina counsel is supervising matters relating to real estate title in a mortgage loan in accordance with the requirements of *Buyers Service* and its progeny. This sentence may be deleted if the opinion giver has verified that such matters have been conducted or supervised by a South Carolina attorney, but that can often be difficult to verify. What steps that need to be taken to confirm that a South Carolina attorney is supervising matters of title in the State are not entirely clear, but at least one attorney disciplinary case suggests that that the attorney must "insure" that a South Carolina licensed attorney is actually performing such functions. See *In the Matter of Jack Schoer*, Opinion No. 26824 (S.C. June 1, 2010). In *Schoer*, the closing attorney acted under the assumption that a named South Carolina attorney was supervising the title documents, document preparation, recordation and disbursement of funds relating to the closing but "failed to insure that this was the case when, in fact, it was not." This case suggests that an attorney must take additional steps to verify that a South Carolina attorney is supervising all matters of title relating to a closing involving real property in the State. See also *In re: Calhoun*; and *In re Robinson*. This Report does not address what steps an opinion preparer must take to comply with Rule 5.5 and the related cases, but the opinion preparer may consider requiring a certificate from other counsel to verify that such requirements have been met. In such case, the opinion preparer may assume that the certificate is true and correct and that the South Carolina real estate counsel has performed the necessary services.

⁴⁸ This qualification is only appropriate in the context of a local counsel opinion where the opinion giver is being asked to deliver an enforceability opinion in connection with a mortgage loan and is not supervising matters relating to title, recording and closing. While such qualification may afford the opinion giver some protection as it relates to rendering the mortgage enforceability opinion to a third party, it will not protect the opinion giver from any ethical violations and disciplinary action as a result of any unauthorized practice of law if implicated in the transaction.

F. LIABILITY VS. ETHICS

The opinion giver, generally a firm, may be liable for negligent opinions and may incur damages as a result, but the individual attorney is accountable for ethical violations. (Remember, the Supreme Court attorney disciplinary cases are published “In the Matter of [*insert your name here*].”)

In summary, when requesting, negotiating, preparing and delivering a third-party legal opinion, remember the following important considerations:

- Care Owed to Non-Client. You owe a duty of care to the opinion recipient and can be liable for professional negligence for breach of that duty.
- Client Confidentiality. You owe a duty of confidentiality to the client. Therefore, if any opinion disclosure would likely be adverse to the client’s interest, you must obtain the client’s consent. You must also consider your other ethical obligations to the client.
- Truthful Statements to Others. Statements made to third parties must be truthful, and statements (express or by omission) made in the opinion should not be intended to mislead the recipient.
- Conflicts. When a conflict arises, you have to consider your ethical obligations to your client, your obligations to the third party and your other professional and legal obligations under the Rule in dealing with those conflicts.
- Competency. You must be competent to deliver the opinions or seek outside counsel. Competency covers the area of law and the law of the applicable jurisdiction. Competency also includes an understanding of customary practice and opinion issues.
- Customary Practice. The standard of care, level of competency, and liability in opinion practice are established by “customary practice” which is continually evolving. A lawyer rendering, requesting and negotiating legal opinions should be familiar with the nationally recognized reports, specifically the ABA and TriBar reports.
- Civility and Professionalism. Obey the “Golden Rule” in negotiations and at all times treat others with civility, professionalism and respect.

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