

# **Inclusive Real Estate Secured Transaction Opinion**

*In Which are Incorporated the Principal Concepts*

*of*

*The ABA Section of Business Law  
Legal Opinion Accord*

*and*

*The ABA Section of Real Property,  
Probate and Trust Law*

*and*

*The American College of Real Estate Lawyers  
Report on Adaptation of the Legal Opinion Accord*

**A REPORT OF THE JOINT ABA/ACREL COMMITTEE COMPRISING:**

**THE AMERICAN BAR ASSOCIATION, SECTION OF REAL PROPERTY, PROBATE AND TRUST LAW, COMMITTEE ON LEGAL OPINIONS IN REAL ESTATE TRANSACTIONS, SUBCOMMITTEE ON CREATION OF AN INCLUSIVE OPINION:** David L. Miller, Washington, D.C., Co-Chair; Mark R. Spradling, Houston, Texas, Co-Chair; Benson Joel Barr, Southfield, Michigan; Gurdon H. Buck, Hartford, Connecticut; Frederic W. Clark, Philadelphia, Pennsylvania; Dianne S. Coscarelli, Cleveland, Ohio; William B. Dunn, Detroit, Michigan; Kenneth P. Ezell, Jr., Nashville, Tennessee; Timothy W. Grooms, Little Rock, Arkansas; Karl B. Holtzschue, New York, New York; Raymond Iwamoto, Honolulu, Hawaii; Thelma Rivera-Miranda, Hato Rey, Puerto Rico; Robert A. Thompson, San Francisco, California; and William L. Thompson, Jacksonville, Florida; and

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# Inclusive Real Estate Secured Transaction Opinion

## I. INTRODUCTION

The ABA Legal Opinion Accord and the report of which it is a part<sup>1</sup> are impressive in many ways, and have received some acceptance, but they have yet to become the nationwide standard that their authors had hoped. Particularly given the availability of state bar association reports in many jurisdictions, practitioners have evidenced mixed responses to learning a new body of legal opinion practices. This is at least in part because the Accord looks and perhaps is difficult to master and the Accord omits coverage of many substantive areas common to legal opinions in real estate transactions.

To address at least the latter issue, a joint committee of the ABA and the American College of Real Estate Lawyers published a report adapting the Accord for loans secured by real property.<sup>2</sup> But, if the Accord is difficult to master, it is even a more challenging task to achieve a clear and comprehensive knowledge of how the Accord works as supplemented—and modified—by the ABA/ACREL Report.

The principal goal of this report is to facilitate understanding of the ABA Business Law Report (including the Accord) and the ABA/ACREL Report (collectively, the “**Opinion Reports**”).

## II. FALSE BREVITY

One of the fundamental approaches of the Accord, which the ABA/ACREL Report also follows, is that each legal opinion letter that is to be governed by the Accord (or the Accord as modified and supplemented by the ABA/ACREL Report) will incorporate those documents by reference. This would result in very short opinion letters, and in the ability to quickly check any variations between a given opinion letter and the Accord or the ABA/ACREL Report.

While brevity undoubtedly is a virtue (and is the soul of wit<sup>3</sup>), this brevity is only skin deep. Behind the short-form of Accord opinion lies a complex set of code-like and specific interpretive rules that have no history of interpretation by courts. No attorney will or should give or receive an opinion that incorporates the Accord or the ABA/ACREL Report without being sufficiently comfortable that he or she understands those documents and how they are likely to be interpreted in the future. Few have achieved this level of comfort.

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<sup>1</sup> The “**Accord**” is part of the *Third-Party Legal Opinion Report, including the Legal Opinion Accord, of the Section of Business Law, American Bar Association*, 47 BUS. LAW. 167 (1991) (reprinted in 29 REAL PROP. PROB. & TR. J. 487 (1994))(referred to below as the “**ABA Business Law Report**”).

<sup>2</sup> *Report on Adaptation of the Legal Opinion Accord of the Section of Business Law of the American Bar Association for Real Estate Secured Transactions of the Section of Real Property, Probate and Trust Law of the American Bar Association and the American College of Real Estate Lawyers*, 29 REAL PROP. PROB. & TR. J. 569 (1994) (referred to below as the “**ABA/ACREL Report**”).

<sup>3</sup> W. Shakespeare, *Hamlet*, Act 2, Scene 1, line 78 (1601).

### III. INCLUSIVE OPINION FORM

Despite these difficulties, we believe that the goals of the Opinion Reports are worth pursuing and that these publications are worth understanding.

The Joint Committee believes that it would enhance the understanding of the Opinion Reports if we could show how an opinion might look if it included the principal concepts contained in these two published opinion letter reports, without specifically referring to them; that is, a kind of one stop shopping. The form of opinion letter which follows this brief introduction attempts to do just that for real estate loans, the most common kind of real estate transactions giving rise to third-party legal opinion letters.

This form of opinion letter is intended primarily to serve an educational purpose, not to serve as a model. We also recognize that this form of opinion is not the only way to set forth the positions stated in the Opinion Reports. This form of opinion letter perhaps gives rise to the opposite of the risk of false brevity, the risk of false comprehensiveness; nor does this form expressly cover each principle stated in the Opinion Reports. Finally, both the Opinion Reports permit private ordering between the parties to each transaction, the use of which would result in changes to the opinions, assumptions and other qualifications in this form.

The Opinion Reports both are useful and constitute significant progress toward achievement of a national consensus for real estate opinion practice. We intend through this "inclusive" form of opinion letter to enhance understanding of the meaning of the Opinion Reports.

**INCLUSIVE REAL ESTATE SECURED TRANSACTION OPINION**

[date]

[Name and Address  
of Opinion Recipient]

Re: \$[\_\_\_\_\_] Loan (the “**Transaction**”) from [\_\_\_\_\_] (“**Lender**”) to [\_\_\_\_\_] (the “**Client**”)<sup>1</sup>

Ladies and Gentlemen:

We provide this Opinion Letter to you at the request of the above referenced Client pursuant to Section [\_\_\_\_\_] of the [Agreement] described below.<sup>2</sup>

**I.  
BACKGROUND**

1.1 Documents Reviewed. We have acted as [special]<sup>3</sup> counsel to the Client in connection with the preparation of the following documents relating to the Transaction:<sup>4</sup>

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<sup>1</sup>References to Sections (§) and Paragraphs (¶) in the footnotes to this Opinion Letter are references to Sections and Paragraphs of the Accord and the ABA/ACREL Report.

<sup>2</sup> The Client must consent to the rendering of the Opinion Letter. Such consent may be implied by the Client’s execution of a Transaction Document that requires an opinion letter. *See* Certain Guidelines for the Negotiation and Preparation of Third-Party Legal Opinions following the Accord, Part II, F.

<sup>3</sup> Describe limited or special role, if appropriate. *See* the Illustrative Opinion Letter following the Accord.

<sup>4</sup> Set forth below in the text are examples of common real estate loan transaction documents. This form opines as to the enforceability only of specifically identified Transaction Documents. *See* Section 1.4 of this opinion form. Add to the list any other operative documents for the Transaction; conform names in the list to actual names of documents; create other defined terms as needed. Consider the particular issues raised, and any additional qualifications that would be appropriate, if a guaranty is to be one of the Transaction Documents.

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

1.2 Transaction Documents. The documents described in items (a) through (e) above are referred to in this Opinion Letter as the “**Transaction Documents**.” The Transaction Documents described in items (b) through (d) above are referred to in this letter as the “**Security Documents**.”<sup>5</sup> All property described in any of the Security Documents in respect of which provision is made by the Security Documents for a lien or security interest is referred to in this Opinion Letter as the “**Collateral**.” Except as otherwise indicated herein, capitalized terms used in this Opinion Letter are defined as set forth in the Agreement or the Glossary attached to this Opinion Letter.

1.3 Opining Jurisdiction. The **Law** (as defined in the attached Glossary) covered by the opinions expressed in this Opinion Letter is limited to the Law of the State of [\_\_\_\_\_] (the “**State**”), [and the General Corporation Law of the State of Delaware ]. Except as set forth in Paragraphs 2.1 and 2.2 below, we express no opinion concerning the Laws of any other jurisdiction, [the other Laws of Delaware,] or the effect thereof.<sup>6</sup>

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<sup>5</sup> The “Security Documents” should include all documents that provide for the creation of a lien or security interest to secure obligations of the Client under the Transaction Documents.

<sup>6</sup> See Accord, §1, §10, §22 . If the Client is a corporation formed other than in the “State,” the corporate laws of its state of formation should be named in the Opinion Letter. Under Accord §10(c), coverage of the law in which the Client exists is implicit in a “Remedies Opinion.” The Laws of other jurisdictions may be included as well. For example, the “Federal Law of the United States” may be added. Because the “Opining Jurisdiction” defined in the attached Glossary can include more than one jurisdiction, this form introduces the term “State”; if only one jurisdiction is involved, the term “Opining Jurisdiction” can replace the “State.”

1.4 Scope of Review. In connection with the opinions hereinafter set forth, we have limited the scope of our review of the documents related to the Transaction to [originals/photocopies of] the Transaction Documents and the Financing Statements. In addition, in connection with the opinions hereinafter set forth, we have reviewed such other documents and certificates of public officials and certificates of representatives of the Client, and have given consideration to such matters of law and fact, as we have deemed appropriate, in our professional judgment, to render such opinions.<sup>7</sup>

1.5 Reliance Without Investigation. We have relied, without investigation or analysis, upon information in **Public Authority Documents** (as defined in the attached Glossary). Except to the extent the information constitutes a statement, directly or in practical effect, of any legal conclusion at issue, we have relied, without investigation or analysis, upon the information contained in representations made by the Client in [Sections \_\_\_\_ of] the Agreement and on information provided [by officials of the Client] [in certificates of officers of the Client], which we reasonably believe, in each case, to be an appropriate source for the information. Except to the extent the information constitutes a statement, directly or in practical effect, of any legal conclusion at issue, we have relied, without investigation or analysis, upon information provided to us by Lender, as set forth in [\_\_\_\_\_].<sup>8</sup>

1.6 Opinions of Other Counsel. We note that various issues concerning [specify legal issues] are addressed in the opinion of [\_\_\_\_\_] (the “**Other Counsel**”), separately provided to Lender. [In rendering the opinions set forth below, we have relied upon the information contained in such opinion of the Other Counsel without investigation or analysis, and we express no opinion with respect to those matters.]<sup>9</sup>

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<sup>7</sup> Accord §2 and the accompanying commentary permit the Opinion Giver to limit the scope of inquiry to specific documents, but only if the limitation is explicit; *e.g.* “we have reviewed only the following documents and made no other investigation or inquiry.” Some opinion givers prefer to identify each of the documents reviewed, and to disclaim any factual inquiry beyond the identified documents.

<sup>8</sup> *See* Accord §3 and the accompanying Commentary as to permissible reliance on information provided by others. Consider specifying the Public Authority Documents, Client certificates, and other documents so relied upon.

<sup>9</sup> Accord §8 describes the relationship of the Opinion Giver with Other Counsel giving opinions in the same Transaction. This description is rather complex. Consider carefully the appropriate level of assurance to be given by an Opinion Giver concerning the legal opinions of Other Counsel.

## II. OPINIONS

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

2.1 Status. The Client is a [corporation], validly existing in good standing in its jurisdiction of organization.<sup>10</sup>

2.2 Authorization. All actions or approvals by the Client, and its [shareholders], necessary to bind the Client under the Transaction Documents have been taken or obtained.<sup>11</sup>

2.3 Execution. The Client has duly executed and delivered the Transaction Documents and the Financing Statements for valid consideration.<sup>12</sup>

2.4 Remedies Opinion. The Transaction Documents are legal, valid, binding and enforceable against the Client in accordance with their terms. [That is, under the law of contracts of the Opining Jurisdiction, and other laws of the Opining Jurisdiction that we, in the exercise of customary professional diligence would reasonably recognize as being directly applicable to the Client, the Transaction, or both: the Transaction Documents form a contract; a remedy will be available with respect to each agreement of the Client in the Transaction Documents or such agreement will otherwise be given effect; and any remedy expressly provided for in the Transaction Documents will be given effect as stated.]<sup>13</sup>

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<sup>10</sup> The opinion in this Paragraph is implicit in the Remedies Opinion under the Accord. *See* Accord Commentary, §10.4(ii)(A). If the Client is not formed in the State, it would be appropriate to add to the end of this sentence an opinion that the Client also is “qualified to do business in the State.”

<sup>11</sup> The opinion in this Paragraph is implicit in the Remedies Opinion under the Accord. *See* Accord Commentary, §10.4(ii)(B). Actions by the “Client” include actions by its management, such as the board of directors of a corporation. In a partnership or other entity, “partners” or other owners of the ownership interests in the Client would replace “shareholders” and due diligence should be expanded to cover any requisite actions and status of the partners or other owners.

<sup>12</sup> Accord Commentary §10.4(i) states that the Opinion Giver must have established that all of the conditions necessary under contract law for formation of a contract have occurred.

<sup>13</sup> This is the “Remedies Opinion” defined in the Glossary of the Accord; *see also* Accord Commentary §10.1. This Remedies Opinion follows the Accord formulation that every agreement in the Transaction Documents is enforceable. While consistent with the Accord, the bracketed explanation of the Remedies Opinion is unnecessary and portions of it are superseded by the Generic Qualification in Paragraph [3.6] below.

2.5 Form of Security Documents. The Security Documents are in a form sufficient to create a lien on or security interest in all right, title and interest of the Client in the Collateral, except to the extent the Collateral includes items or types of **Personal Property** (as defined in the attached Glossary) in which a security interest cannot be created under Article 9 of the Uniform Commercial Code.<sup>14</sup>

2.6 Usury Opinion. Assuming that no fees, charges, benefits, or other compensation will be paid, directly or indirectly to Lender or for Lender's benefit, except as specified in the Transaction Documents, and assuming that no amounts to be paid as specified in the Transaction Documents constitute a penalty, the Transaction, as evidenced by the Transaction Documents, does not violate the usury laws of the State.<sup>15</sup>

2.7 No Breach or Default Opinion. Execution and delivery by the Client of, and performance of its agreements in, the Transaction Documents do not (i) violate the [articles or certificate of incorporation or bylaws; partnership agreement or certificate] of the Client, (ii) [to the best of our **Actual Knowledge** (as defined in the attached Glossary)], breach, or result in a default under, any existing obligation of the Client under the Other Agreements specified in Attachment [\_\_\_] hereto (the "**Specified Other Agreements**"), or (iii) [to the best of our Actual

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If the Transaction Documents split the choice of law between the Opining Jurisdiction and other jurisdictions, insert at the beginning of the sentence a phrase such as

The provisions which Section \_\_\_ of the Agreement provides are to be governed by the Law of the State are legal, valid, . . . .

If the Transaction Documents prescribe arbitration, Accord §10 would call for including a provision to the following effect:

This Paragraph includes an opinion that a court will give effect to an agreement contained in the Transaction Documents to arbitrate disputes, but does not indicate how the arbitration will deal with any dispute under the contract formed by the Transaction Documents.

If there is a guaranty, include a similar remedies opinion as to its enforceability against the guarantor; add the guaranty to the list of documents in paragraph 1.1; and revise as appropriate the status opinions, the qualifications and other provisions in this opinion letter.

<sup>14</sup> This lien opinion is added to the Remedies Opinion of the Accord by ABA/ACREL Report ¶7. Note that this opinion covers only the form of documents, and does not cover the Financing Statements or other issues such as actual perfection of liens.

<sup>15</sup> Under the ABA/ACREL Report ¶10 and ¶16, a usury opinion is implied. The assumption that the amounts paid do not constitute a penalty is consistent with the Generic Qualification, paragraph 3.6 below.

Knowledge] breach or otherwise violate any existing obligation of the Client under any Court Order which is identified in Attachment [ ] hereto (the “**Specified Court Orders**”), which the Client has certified to us are the only Court Orders. Our Opinion in this Paragraph does not extend to any action or conduct of the Client that a Transaction Document may permit but does not require, except to the extent that (i) such action or conduct takes place simultaneously with, and (ii) we had Actual Knowledge that it constituted part of, the consummation of the Transaction.<sup>16</sup>

2.8 No Violation of Law Opinion. Execution and delivery by the Client of, and performance by the Client of its payment obligations in, the Transaction Documents neither are prohibited by applicable provisions of statutory law or regulation of the State nor subject the Client to a fine, penalty or other similar sanctions under, any statutory law or regulation of the State. Our opinion in this Paragraph relates only to statutory laws and regulations that we, in the exercise of customary professional diligence, would reasonably recognize as being directly applicable to the Client, the Transaction, or both.<sup>17</sup>

### **III. QUALIFICATIONS**

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

3.1 Assumptions. In rendering the foregoing opinions, we have relied, without investigation, upon the assumptions set forth below unless in a given case the particular assumption states, directly or in practical effect, a legal conclusion expressed in the opinion:<sup>18</sup>

- (a) [A Client who is a natural person, and] natural persons who are involved on behalf of the Client, have sufficient legal capacity to enter into and perform the Transaction or to carry out their role in it.
- (b) The Client holds the requisite title and rights to any property involved in the Transaction.

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<sup>16</sup> This Paragraph is the “No Breach or Default Opinion” referred to in Accord §15. For the “Specified Other Agreements,” consider using contracts dealing with money borrowed by the Client; contracts filed by the Client with the SEC; or other written contracts (other than the Transaction Documents) to which the Client is a party or by which it or its property is bound.

<sup>17</sup> This Paragraph is the “No Violation of Law Opinion” referred to in Accord §16, as modified by the ABA/ACREL Report.

<sup>18</sup> These assumptions are taken from Accord §4. Subsections (q) and (r) were added by ABA/ACREL Report ¶4.

- (c) Each party to the Transaction (other than the Client) has satisfied those legal requirements that are applicable to it to the extent necessary to make the Transaction Documents enforceable against it.
- (d) Each party to the Transaction (other than the Client) has complied with all legal requirements pertaining to its status as such status relates to its rights to enforce the Transaction Documents against the Client.
- (e) Each document submitted to us for review is accurate and complete, each such document that is an original is authentic, each such document that is a copy conforms to an authentic original, and all signatures on each such document are genuine.
- (f) Each Public Authority Document is accurate, complete, and authentic and all official public records (including their proper indexing and filing) are accurate and complete.
- (g) There has not been any mutual mistake of fact or misunderstanding, fraud, duress or undue influence.
- (h) The conduct of the parties to the Transaction has complied with any requirement of good faith, fair dealing and conscionability.
- (i) Lender and any agent acting for Lender in connection with the Transaction have acted in good faith and without notice of any defense against the enforcement of any rights created by, or adverse claim to any property or security interest transferred or created as part of, the Transaction.
- (j) There are no agreements or understandings among the parties, written or oral, and there is no usage of trade or course of prior dealing among the parties that would, in either case, define, supplement or qualify the terms of the Transaction Documents.
- (k) All statutes, judicial and administrative decisions, and rules and regulations of governmental agencies, constituting the Law of the Opining Jurisdiction are generally available (i.e., in terms of access and distribution following publication or other release) to lawyers practicing in the Opining Jurisdiction, and are in a format that makes legal research reasonably feasible.
- (l) The constitutionality or validity of a relevant statute, rule, regulation or agency action is not in issue unless a reported decision in the Opining Jurisdiction has specifically addressed but not resolved, or has established, its unconstitutionality or invalidity.
- (m) **Other Agreements and Court Orders** (as such terms are defined in the attached Glossary) would be enforced as written.

- (n) The Client will not in the future take any discretionary action (including a decision not to act) permitted under the Transaction Documents that would result in a violation of law or constitute a breach or default under any Other Agreement or Court Order.
- (o) The Client will obtain all permits and governmental approvals required in the future, and take all actions similarly required, relevant to subsequent consummation of the Transaction or performance of the Transaction Documents.
- (p) All parties to the Transaction will act in accordance with, and will refrain from taking any action that is forbidden by, the terms and conditions of the Transaction Documents.
- (q) The Security Documents have been or will be duly recorded and/or filed in all places necessary (*if* and to the extent necessary) to create the lien as provided therein.
- (r) The description of the Collateral is accurate and is sufficient under Law (i) to provide notice to third parties of the liens and security interests provided by the Security Documents and (ii) to create an effective contractual obligation under Law.

We have no Actual Knowledge that the foregoing assumptions are false. We have no Actual Knowledge of facts that, under the circumstances, would make our reliance on the foregoing assumptions unreasonable.<sup>19</sup>

3.2 Exclusions. None of the foregoing opinions include any implied opinion unless such implied opinion is both (i) essential to the legal conclusion reached by the express opinions set forth above and (ii) based upon prevailing norms and expectations among experienced lawyers in the State, reasonable in the circumstances.<sup>20</sup> Moreover, unless explicitly addressed in this Opinion Letter, the foregoing opinions do not address any of the following legal issues, and we specifically express no opinion with respect thereto: <sup>21</sup>

- (a) Federal securities laws and regulations administered by the Securities and Exchange Commission (other than the Public Utility Holding Company Act of 1935), state “Blue Sky” laws and regulations, and laws and regulations relating to commodity (and other) futures and indices and other similar instruments;

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<sup>19</sup>Accord §5 describes circumstances when assumptions may not be relied upon.

<sup>20</sup>This first sentence is taken from Accord §18.

<sup>21</sup>This list of excluded legal issues is taken from Accord §19.

- (b) Federal Reserve Board margin regulations;
- (c) pension and employee benefit laws and regulations (*e.g.*, ERISA);
- (d) Federal and state antitrust and unfair competition laws and regulations;
- (e) Federal and state laws and regulations concerning filing and notice requirements (*e.g.*, Hart-Scott-Rodino and Exon-Florio), other than requirements applicable to charter-related documents such as a certificate of merger;
- (f) compliance with fiduciary duty requirements;
- (g) Local Law;
- (h)
  - (i) the characterization of the Transaction as one involving the creation of a lien on Real Property or a security interest in Personal Property except to the extent that the enforceability of remedies against the Client set forth in the Transaction Documents is dependent on the characterization of the Transaction expressed by the parties to it;
  - (ii) title to Collateral or the accuracy of its description;
  - (iii) the sufficiency of the description of the Collateral to provide notice to third parties of the lien or security interest provided for in the Security Documents; and
  - (iv) the creation, attachment, perfection, or priority of a lien on Real Property Collateral or a security interest in Personal Property Collateral, or enforcement of a security interest in Personal Property Collateral separately from enforcement of the lien on Real Property Collateral as contemplated by §9-501([4] or [d]) of the Uniform Commercial Code.<sup>22</sup>

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<sup>22</sup> This paragraph (h) is taken from Paragraph 17 of the ABA/ACREL Report. ABA/ACREL Report ¶18 notes that this qualification is not inconsistent with the opinion in paragraph [2.5]. Paragraph [2.5] speaks to the form of documents, while this paragraph (h) covers the actual status of the lien or security interest. The ABA/ACREL Report notes that the status of the lien on Real Property Collateral is customarily dealt with solely by title insurance, and an opinion, if any, as to the status of a security interest on Personal Property Collateral should be given separately (if at all).

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

3.3 Bankruptcy and Insolvency Exception. The opinion set forth in Paragraph [2.4]<sup>23</sup> of this Opinion Letter is subject to the following qualifications: The effect of bankruptcy, insolvency, reorganization, receivership, moratorium and other similar laws affecting the rights and remedies of creditors generally. This exception includes:<sup>24</sup>

- (a) the Federal Bankruptcy Code and thus comprehends, among others, matters of turn-over, automatic stay, avoiding powers, fraudulent transfer, preference, discharge, conversion of a non-recourse obligation into a recourse claim, limitations on *ipso facto* and anti-assignment clauses and the coverage of pre-petition security agreements applicable to property acquired after a petition is filed;

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<sup>23</sup> The qualifications in Paragraphs 3.3, 3.4 and 3.5 of this Opinion Letter correspond to the General Qualifications described in §§11-14 of the Accord. Consistent with the presumption established by the Accord, this Opinion Letter is written as if the General Qualifications are to apply only to the Remedies Opinion (Paragraph 2.4 of this Opinion Letter). The Accord would permit any or all of the General Qualifications to be made applicable, by private ordering, to any opinion in addition to the Remedies Opinion. Similarly, the ABA/ACREL Report would permit the Generic Qualification in Paragraph 3.6 of this Opinion Letter to be made applicable to opinions in addition to the Remedies Opinion.

<sup>24</sup> This is the “Bankruptcy and Insolvency Exception” in Accord §12.

- (b) all other Federal and state bankruptcy, insolvency, reorganization, receivership, moratorium, arrangement and assignment for the benefit of creditors laws that affect the rights and remedies of creditors generally (not just creditors of specific types of debtors);
- (c) all other Federal bankruptcy, insolvency, reorganization, receivership, moratorium, arrangement, and assignment for the benefit of creditors laws that have reference to or affect generally only creditors of specific types of debtors and state laws of like character affecting generally only creditors of financial institutions and insurance companies;
- (d) state fraudulent transfer and conveyance laws; and
- (e) judicially developed doctrines relevant to any of the foregoing laws, such as substantive consolidation of entities.

3.4 Equitable Principles Limitation. The opinion set forth in Paragraph [2.4] of this Opinion Letter is subject to the following qualifications: The effect of general principles of equity, whether applied by a court of law or equity. This limitation includes principles:<sup>25</sup>

- (a) governing the availability of specific performance, injunctive relief or other equitable remedies which generally place the award of such remedies, subject to certain guidelines, in the discretion of the court to which application for such relief is made;
- (b) affording equitable defenses (*e.g.*, waiver, laches and estoppel) against a party seeking enforcement;
- (c) requiring good faith and fair dealing in the performance and enforcement of a contract by the party seeking its enforcement;
- (d) requiring reasonableness in the performance and enforcement of an agreement by the party seeking enforcement of the contract;
- (e) requiring consideration of the materiality of (i) the Client's breach and (ii) the consequences of the breach to the party seeking enforcement;
- (f) requiring consideration of the impracticability or impossibility of performance at the time of attempted enforcement; and
- (g) affording defenses based upon the unconscionability of the enforcing party's conduct after the parties have entered into the contract.

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<sup>25</sup> This is the "Equitable Principles Limitation" in Accord §13.

3.5 Other Common Qualifications. The opinion set forth in Paragraph [2.4] of this Opinion Letter is subject to the following qualifications: To the extent the Law of the State applies any of the following rules to one or more of the [identify state law provisions] [provisions of the Transaction Documents] covered by an opinion to which this Paragraph [3.5] applies, that opinion is subject to the effect of generally applicable rules of Law that:<sup>26</sup>

- (a) limit or affect the enforcement of provisions of a contract that purport to require waiver of the obligations of good faith, fair dealing, diligence, and reasonableness;
- (b) provide that forum selection clauses in contracts are not necessarily binding on the court(s) in the forum selected;
- (c) limit the availability of a remedy under certain circumstances where another remedy has been elected;
- (d) limit the right of a creditor to use force or cause a breach of the peace in enforcing rights;
- (e) relate to the sale or disposition of collateral or the requirements of a commercially reasonable sale, including, without limitation, statutory cure provisions and rights of reinstatement [and limitations on deficiency judgments];<sup>27</sup>
- (f) limit the enforceability of provisions releasing, exculpating or exempting a party from, or requiring indemnification of a party for, liability for its own action or inaction, to the extent the action or inaction involves gross negligence, recklessness, willful misconduct or unlawful conduct;
- (g) may, where less than all of a contract may be unenforceable, limit the enforceability of the balance of the contract to circumstances in which the unenforceable portion is not an essential part of the agreed exchange;
- (h) govern and afford judicial discretion regarding the determination of damages and entitlement to attorneys' fees and other costs;
- (i) may, in the absence of a waiver or consent, discharge a guarantor to the extent that (i) action by a creditor impairs the value of collateral securing guaranteed debt to the detriment of the guarantor, or (ii) guaranteed debt is materially modified;

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<sup>26</sup> These are the "Other Common Qualifications" in Accord §14, as modified by ABA/ACREL Report ¶12 and ¶13. Depending on the Generic Qualification used in Paragraph [3.6] below, some or all of these Other Common Qualifications may be superfluous.

<sup>27</sup> See ABA/ACREL Report ¶13.

- (j) may permit a party who has materially failed to render or offer performance required by the contract to cure that failure unless (i) permitting a cure would unreasonably hinder the aggrieved party from making substitute arrangements for performance, or (ii) it was important in the circumstances to the aggrieved party that performance occur by the date stated in the contract;
- (k) limit or affect the enforceability of a waiver of a right of redemption;
- (l) impose limitations on attorneys' or trustees' fees;
- (m) limit or affect the enforceability of any provision that purports to prevent any party from becoming a mortgagee in possession, notwithstanding any enforcement actions taken under the Security Documents; and
- (n) limit or affect the enforceability of provisions for late charges, prepayment charges or yield maintenance charges, acceleration of future amounts due (other than principal) without appropriate discount to present value, liquidated damages and "penalties."<sup>28</sup>

3.6 Generic Qualification.<sup>29</sup> The opinion set forth in Paragraph [2.4] of this Opinion Letter is subject to the qualification that certain [remedies, waivers, and other] provisions of the

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<sup>28</sup> Three additional rules that would have been added to Accord §14 by the "Exposure Draft" of the ABA/ACREL Report were deleted in the "pre-publication" and "publication" drafts; viz:

(o) *limit or affect the enforceability of provisions that provide for the application of insurance or condemnation proceeds to reduce indebtedness;*

(p) *limit or affect the enforceability of provisions that provide for the acceleration of indebtedness upon any transfer or change in the control, ownership, or management of any party,*

(q) *limit or affect the enforceability of provisions purporting to assign the rents, issues, and profits of the **Real Property Collateral**.*

Some or all of these additional qualifications may be appropriate in certain circumstances. Qualification (q) above might be expanded, in appropriate circumstances, to disclaim any "true sale" or "true lease" opinion, as well as disclaiming any opinion that a purported absolute assignment of rents would be enforced as such.

<sup>29</sup> This is the "Generic Qualification" as discussed at length in ¶¶11 and 11A of the ABA/ACREL Report. Those paragraphs in the Report include an extensive discussion of the use of Generic Qualifications and the assurances that go with them, and a number of alternative

Transaction Documents may not be enforceable; nevertheless, [subject to the other qualifications set forth in this Opinion Letter,] such unenforceability will not render the Transaction Documents invalid as a whole or preclude (i) the judicial enforcement of the obligation of the Client to repay the principal, together with interest thereon (to the extent not deemed a penalty) as provided in the Note,<sup>30</sup> (ii) the acceleration of the obligation of the Client to repay such principal, together with such interest, upon a [material<sup>31</sup>] 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*],<sup>32</sup> and (iii) the foreclosure<sup>33</sup> in accordance with applicable Law of the lien on and security interest in the Collateral created by the Security Documents upon maturity or upon acceleration pursuant to clause (ii) above.<sup>34</sup>

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formulations of such provisions. In addition to the discussion in the ABA/ACREL Report, the same volume in which it is published includes another thoughtful analysis. Karl B. Holtzschue, *Opinions on Real Estate Transactions in a Post-Accord World: The Opinion Giver's Perspective*, 29 REAL PROP. PROB. & TR. J. 655, 697-717. The ABA/ACREL Report did not specifically endorse any particular form of Generic Qualification. This paragraph is derived, with some modification, from the *American College of Real Estate Lawyers Statement of Policy on Mortgage Loan Enforceability Opinions*, in THE ATTORNEY'S OPINION LETTER IN REAL ESTATE TRANSACTIONS 1 (American College of Real Estate Lawyers ed., 1992).

<sup>30</sup> This may have to be limited for states with single form of action rules and may also have to be limited for states that impose other limitations on deficiency judgments. Consider, as appropriate, adding to clause (i) an exception for non-recourse provisions.

<sup>31</sup> As to the use of the word "material" see Accord §13(e), and Paragraph [3.4(e)] of this Opinion Letter.

<sup>32</sup> The addition of comfort that the loan can be accelerated for a material breach of a material provision is described in Paragraph 11A of the ABA/ACREL Report as a compromise. Some argue that this phrase can be a trap for the unwary and that such material provisions should be specifically identified by including in the opinion letter a list of the provisions that the recipient of the opinion letter has identified as significant. On the other hand, others would respond that this would just replace one laundry list, the provisions that may not be enforceable (prepared by the opinion giver), with another laundry list, the provisions important enough to merit specific treatment in the opinion (prepared by the opinion recipient).

<sup>33</sup> Consider, in jurisdictions that permit non-judicial sales, expanding the reference in clause (iii) to foreclosure to include a sale under a power of sale contained in the Mortgage. Also, it may be appropriate in some jurisdictions to add reference to other specific collateral documents such as an assignment of leases and rents.

<sup>34</sup> An alternative to the comfort in clauses (i) through (iii) is what is known as the "practical realization" approach, for example: "such unenforceability does not make the Transaction Documents legally inadequate for the [practical] realization of the principal benefits or security [intended to be] provided thereby, [subject to the economic consequences of any delay

3.7 Choice of Law. The opinion set forth in Paragraph [2.4] of this Opinion Letter is given as if the Law of the Opining Jurisdiction governs each Transaction Document, without regard to whether the Transaction Document so provides, and without regard to any choice of law rules except as provided below in this Paragraph.<sup>35</sup> While the preceding sentence excludes any opinion on the effectiveness of any governing law provision in the Transaction Documents, if a Transaction Document contains a governing law provision choosing the Law of the Opining Jurisdiction to govern the contract, the opinion set forth in Paragraph [2.4] of this Opinion Letter includes an opinion (subject to the other qualifications in this Part III) that such governing law provision choosing the Law of the Opining Jurisdiction will be given effect under the choice of law rules of the Opining Jurisdiction; however, the opinion set forth in Paragraph [2.4] of this Opinion Letter does not include an opinion as to what Law governs (i) if the Transaction Document contains a governing law provision choosing the Law of an **Other Jurisdiction** (as defined in the attached Glossary) or does not contain a governing law provision, or (ii) to the extent the opinion as to what Law governs requires a determination that the Law of the Opining Jurisdiction is not contrary to a fundamental policy of the Law of an Other Jurisdiction.<sup>36</sup>

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which may result from applicable law, rules, or judicial decisions.]” While this is sometimes referred to as the traditional approach, its use has been heavily criticized for, among other things, its apparent ambiguity and subjectivity, by the American College of Real Estate Lawyers (supra, note [29]) and it has fallen into disfavor in many quarters. On the other hand, the practical realization approach has been included in model forms developed in two recent New York bar reports, *Report on Third-Party “Closing” Opinions, of the Tri-Bar Opinion Committee* (Special Committee on Legal Opinions in Commercial Transactions, New York County Lawyers’ Association; Corporation Law Committee, The Association of the Bar of the City of New York; and Special Committee on Legal Opinions of the Business Law Section, New York State Bar Association), 53 BUS. LAW. 591 (1998); and *1998 Mortgage Loan Opinion Report*, of the Association of the Bar of the City of New York, Committee on Real Property Law, Subcommittee on Mortgage Loan Opinions, and the New York State Bar Association, Real Property Law Section, Attorney Opinion Letters Committee, 54 BUS. LAW. 119 (1998) and 33 REAL PROP. PROB. & TR. J. 551 (1998). Although recommending against use of “practical realization” language, the Maryland Bar Report includes a sample clause which makes the practical realization comfort subject to economic consequences of delay. Special Joint Comm. of the Md. State Bar Ass’n & the Bar Ass’n of Baltimore City, *Report of the Special Joint Committee on Lawyers Opinions in Commercial Transactions*, 45 Bus. Law. 705 (1990).

<sup>35</sup> The first sentence in this Paragraph follows Accord §10(b), as modified by ABA/ACREL Report ¶8.

<sup>36</sup> The second sentence in this Paragraph follows Accord §10(d)(i) as supplemented by ABA/ACREL Report ¶9. Despite the wording in this Paragraph of this Opinion Letter, the ABA/ACREL Report notes that it would “not be uncommon” for a real estate secured transaction opinion to exclude any choice of law opinion, and that choice of law opinions, when given, often are given as reasoned opinions, and upon assumptions of factual matters having a bearing on the opinion conclusion. Nevertheless, the ABA/ACREL Report would presume (in the absence of a

## IV.

### ADDITIONAL CONFIRMATIONS<sup>37</sup>

4.1 Legal Proceedings. We hereby confirm to Lender, pursuant to the request set forth in Section [\_\_\_] of the Agreement, but without investigation, analysis, or review of court or other public records or our files, other than our litigation docket and information provided to us by the Client, that there are no actions or proceedings against the Client, pending or overtly threatened in writing, before any court, governmental agency or arbitrator which (i) seek to affect the enforceability of the Agreement, or (ii) except as disclosed in [the Agreement or an exhibit, annex or schedule thereto] [an officer's certificate], come within [the objective standard established in the Agreement for disclosure of such matters] [other objective threshold].<sup>38</sup>

## V.

### USE OF THIS OPINION

5.1 The opinions expressed in this Opinion Letter are solely for Lender's use in connection with the Transaction for the purposes contemplated by the Transaction Documents. Without our prior written consent, this Opinion Letter may not be used or relied upon by Lender for any other purpose whatsoever, except for the use of this Opinion Letter (i) in connection with review of the Transaction by a regulatory agency having supervisory authority over Lender for the purpose of confirming the existence of this Opinion Letter, (ii) in connection with the assertion of a defense as to which this Opinion Letter is relevant and necessary, or (iii) in response to a court order.<sup>39</sup>

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contrary indication in the Opinion Letter) that the Opinion Giver has addressed certain aspects of choice of law, such as whether the Opining Jurisdiction has sufficient nexus to the transaction; whether an Other Jurisdiction has a closer nexus; and whether the Other Jurisdiction has a "materially greater interest than the chosen state in the determination of the particular issue," citing *Restatement (Second) of Conflict of Laws* 187(2)(b) (1969).

<sup>37</sup> If an explained opinion is to be provided, it may be included or referred to at this place in the Opinion Letter.

<sup>38</sup> Include this paragraph if the Opinion Letter is to provide information as to pending or threatened legal proceedings. This paragraph is derived from Accord §17 and the Illustrative Opinion Letter following the Accord. *See also* Accord §3(a)(1).

<sup>39</sup> This is taken from Accord §20. If others are to be permitted to receive copies of the Opinion Letter or to rely on it, insert a provision such as the following:

A copy of this Opinion Letter may be delivered by Lender to [\_\_\_\_][lending bank] [syndicate participants] [subsequent purchasers] [rating agency] [other] in connection with [state purpose], and such [person] [persons] may rely on this Opinion Letter as if it were addressed and had been delivered to [it] [them] on the

Very truly yours,

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date hereof.

## GLOSSARY

As used in the Opinion Letter to which this Glossary is attached, except as otherwise defined in such Opinion Letter, the following terms (whether used in the singular or the plural) shall have the meanings indicated:

Actual Knowledge: with respect to the Opinion Giver, the conscious awareness of facts or other information by the Primary Lawyer or Primary Lawyer Group.

Client: the party or parties to the Transaction (including predecessor entities where relevant) for which the Opinion Giver provides legal representation.

Collateral: collectively or individually, all Real Property described in the Security Documents and all Personal Property described in the Security Documents, in respect of which provision is made by the Security Documents for a lien or security interest, unless a different meaning is given in the Transaction Documents.

Constituent Documents: the articles or certificate of incorporation, by-laws, partnership documentation or similar organization documents of the Client.

Court Orders: court and administrative orders, writs, judgments and decrees that name the Client and are specifically directed to it or its property.

Law: the statutes, the judicial and administrative decisions, and the rules and regulations of the governmental agencies of the Opining Jurisdiction, including its Local Law (but subject to any limitations on coverage of Local Law set forth in the Opinion Letter to which this Glossary is attached).

Local Law: the statutes and ordinances, the administrative decisions, and the rules and regulations of counties, towns, municipalities and special political subdivisions (whether created or enabled through legislative action at the Federal, state or regional level -- *e.g.*, water agencies, joint power districts, the Maine Turnpike Authority, The Southern California Rapid Transit District, the Port Authority of New York and New Jersey), and judicial decisions to the extent that they deal with any of the foregoing.

Opining Jurisdiction: a jurisdiction whose applicable Law is addressed by the Opinion Giver in the Opinion; if there is more than one such jurisdiction (*e.g.*, the United States and a particular state), the term refers collectively to all.<sup>40</sup>

Opinion: a legal opinion that [includes a declaration that it is governed by the Accord and] is rendered by the Opinion Giver to one or more persons involved in the Transaction other than the Client.

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<sup>40</sup> See Accord § 21.

Opinion Giver: the lawyer or legal organization rendering the Opinion.

Opinion Letter: the document setting forth the Opinion that is delivered to and accepted by the Opinion Recipient.

Opinion Recipient: the addressee or addressees of the Opinion Letter.

Other Agreements: contracts, other than the Transaction Documents, to which the Client is a party or by which it or its property is bound.

Other Counsel: a lawyer or legal organization (other than the Opinion Giver) providing a legal opinion pertaining to particular matters concerning the Client, the Transaction Documents or the Transaction (i) directly to the Opinion Recipient, or (ii) to the Opinion Giver in support of the Opinion.

Other Jurisdiction: the jurisdiction whose law a Transaction Document provides will govern that contract, if not the Opining Jurisdiction.

Personal Property: property or rights and interests in property treated under Law as personalty or otherwise not as Real Property.

Primary Lawyer:

- (a) the lawyer in the Opinion Giver's organization who signs the Opinion Letter;
- (b) any lawyer in the Opinion Giver's organization who has active involvement in negotiating the Transaction, preparing the Transaction Documents or preparing the Opinion Letter; and
- (c) solely as to information relevant to a particular opinion issue or confirmation regarding a particular factual matter (*e.g.*, pending or threatened legal proceedings), any lawyer in the Opinion Giver's organization who is primarily responsible for providing the response concerning that particular opinion issue or confirmation.

Primary Lawyer Group: all of the Primary Lawyers when there are more than one.

Public Authority Documents: certificates issued by the Secretary of State or any other government official, office or agency concerning a person's property or status, such as certificates of corporate or partnership good standing, certificates concerning tax status, certificates concerning Uniform Commercial Code filings or certificates concerning title registration or ownership.

Real Property: property or rights and interests in property treated under Law as real property, including fixtures.

[Security Documents: mortgages, deeds of trust, security agreements, assignments of leases, rents or both (regardless of whether stated as absolute or as a security assignment), or similar instruments which provide for the creation of a lien on or security interest in Collateral to secure the obligations of the Client under the Transaction Documents.]

[Transaction: the business exchange (*e.g.*, loan, sale of securities, merger or acquisition) by the Client and the other parties.]

[Transaction Documents: the contract documents setting forth the principal terms of the Transaction addressed by the Opinion, including the Security Documents, and other contracts ancillary thereto that are explicitly addressed by the Opinion. Unless otherwise included by express statement in an Opinion Letter, contracts of persons other than the Client (such as guaranties and letters of credit) are not included in the term Transaction Documents.]

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