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LEGAL OPINIONS IN REAL ESTATE FINANCE TRANSACTIONS

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LEGAL OPINIONS IN REAL ESTATE FINANCE TRANSACTIONS

I. INTRODUCTION

A. The Role of Borrower's Counsel; Reports to Assist in Negotiations.

A real estate lender often requires an opinion from borrower's counsel as a condition to the advance of a loan. If the mortgaged property is located in a different state or the borrower or guarantor is formed under the laws of a different state, the requirement will include opinions from both lead counsel, addressing enforceability of the credit agreement, note, and guaranties, and from local counsel, addressing local law issues. Although the requirement of opinions in these transactions adds expense to the borrower, they are so ingrained in most lenders' closing requirements that it is pointless to argue that the lender drafted the documents and should not require the borrower's counsel to bless them. Rather, borrower's counsel can assist the client by complying with the lender's requirements as efficiently as possible within ethical responsibilities and without undertaking unexpected liabilities. Many studies regarding third party legal opinion guidelines can assist lender's counsel and borrower's counsel in negotiating acceptable opinions.

B. 2012 Report.

The Real Estate Finance Opinion Report of 2012, prepared by the ABA Section of Real Property, Trust and Estate Law, Committee on Legal Opinions in Real Estate Transactions, the American College of Real Estate Lawyers, Attorneys' Opinion Committee, and the American College of Mortgage Attorneys, Opinions Committee (the "***2012 Report***"), appears at 47 REAL PROP. TR. & EST. L. J. 213 (2012) and THE ACREL PAPERS 121 (SPRING 2013). The 2012 Report consists of a guide or commentary to a real estate finance opinion letter and also includes illustrative language of a real estate finance opinion letter. The 2012 Report clarifies that the illustrative form of opinion is not intended to "prescribe or endorse" specific language but "merely to put into a concrete context the consideration" of the issues that are raised in the commentary.

C. Local Counsel Supplement.

While the 2012 Report discusses issues that are of concern both to lead counsel and local counsel, it notes that it was not intended to address specific concerns of local counsel. The same groups that drafted the 2012 Report prepared a report focused specifically on local counsel issues. *Local Counsel Opinion Letters - A Supplement to the Real Estate Finance Opinion Report of 2012* (the "***Local Counsel Supplement***") was published at 51 REAL PROP. TR. & EST. L. J. 167 (2016). The Local Counsel Supplement is intended to be read in conjunction with the 2012 Report and also consists of a commentary and illustrative opinion.

D. UCC Report.

The same groups that drafted the 2012 Report and the Local Counsel Supplement, together with the American College of Commercial Finance Lawyers, produced the *Uniform Commercial Code Opinions in Real Estate Finance Transaction Opinion Letters* (the "***UCC Report***" and, together with the 2012 Report and the Local Counsel Supplement, the "***Real Estate Finance Reports***"), published at 53 REAL PROP. TR. & EST. L. J. 163 (2018/2019). The UCC Report addresses the types of UCC issues that will typically be encountered by real estate counsel as a part of their opinion

practice. The UCC Report addresses collateral that is often involved in real estate financing, such as fixtures, as-extracted collateral, timber, and, in the case of income-producing property, deposit accounts and, in the case of mezzanine financing, investment property. While the UCC Report addresses the elements of creation and perfection of those types of collateral, it cautions that it does not attempt to provide the depth of discussion as might be found in a pure uniform commercial code treatise or report, such as *Special Report of the TriBar Opinion Committee: UCC Security Interest Opinions – Revised Article 9*, 58 BUS. LAW 1451 (2003).

E. Customary Practice Reports.

In addition to the Real Estate Finance Reports, several reports addressing "customary practice" in the giving and receiving of third party opinions are helpful in the preparation of real estate finance opinions. These reports were drafted by one or more of the ACREL Attorneys' Opinions Committee, the ABA RPTE Committee on Legal Opinions in Real Estate Transactions, the ABA Business Section Opinions Committee, and the Working Group on Legal Opinions Foundation. These are *Real Estate Opinion Letter Guidelines*, 38 REAL PROP. PROB. & TR. J. 241 (2003), the *Statement on the Role of Customary Practice in the Preparation and Understanding of Third-Party Legal Opinions*, 63 BUS. LAW 1277 (2008), and *Statement of Opinion Practices and Core Opinion Principles*, 74 BUS. LAW 801 (2019) (the "***Statement of Opinion Practices***" and collectively, the "***Customary Practice Reports***"). Customary practice attempts to set forth the common understanding of opinion givers and opinion recipients in the rendition of third party closing opinions.

II. ETHICAL CONSIDERATIONS IN RENDITION OF FINANCING OPINIONS

Both the 2012 Report and the Local Counsel Supplement focus on the myriad of ethical issues that can arise in the rendition of closing opinions. Although attorneys might focus primarily on opinion issues that could lead to claims of malpractice if an incorrect opinion were delivered, attorneys must also consider whether any ethical considerations would arise in the context of delivery of these opinions.

A. Rule 2.3.

Underpinning all opinions to third parties are the provisions of Rule 2.3 of the Model Rules of Professional Conduct (2007) (the "***Model Rules***"). Model Rule 2.3 provides: "(a) A lawyer may provide an evaluation of a matter affecting a client for the use of someone other than the client if the lawyer reasonably believes that making the evaluation is compatible with other aspects of the lawyer's relationship with the client. (b) When the lawyer knows or reasonably should know that the evaluation is likely to affect the client's interest materially and adversely, the lawyer shall not provide the evaluation unless the client gives informed consent. (c) Except as disclosure is authorized in connection with a report of an evaluation, information relating to the evaluation is otherwise protected by Rule 1.6." Some attorneys obtain express authorization from their clients to render loan opinions, but others may rely upon implied authority in cases in which they have been retained to handle loan closings that routinely require opinions of borrower's counsel. Examples of express authority include provisions in engagement letters or opinion certificates of the borrower in which the firm is authorized to release an opinion to the lender in the form attached to the opinion certificate.

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