



WHAT'S YOUR
OPINION?

The New Real Estate Opinion Letter Guidelines

Once again, there is news on the legal opinion front. The Real Property, Probate and Trust Law Section and the American College of Real Estate Lawyers have finalized and will shortly adopt "Real Estate Opinion Letter Guidelines" as their most recent contribution to the burgeoning body of opinion letter literature. The third-party legal opinion letter is, of course, that curious but venerable custom in loan transactions in which a lender, which has its own lawyer, requests legal advice from the other party's attorney. In the case of some opinions, such as the authorization of the borrower to enter into a transaction or the authority of its signatories, the reliance on advice from adversary counsel is justified by the

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need to maintain the confidentiality of the borrower's business records and affairs or the lack of access by the lender's lawyer to relevant information. In other cases, most notably the enforceability opinion, the practice has been viewed by many to be, at best, redundant with the information or legal advice that the lender's own lawyer is professionally obligated to provide his or her client and therefore unnecessary. Against this background a significant body of commentary has evolved.

A Short History of Opinion Letter Custom and Commentary

After a long period of inattention to the subject, the past 25 years have witnessed a virtual explosion of opinion letter literature. The "jurisprudence" of this subject consists of the large number of opinion reports undertaken by state and national

bar association opinion committees and at least two treatises that address both the format and meaning of opinion letters and, in many cases, the due diligence appropriate to support them.

The benchmark event in opinion letter commentary was the publication by the ABA Business Law Section of its "Legal Opinion Accord" in 1991. *Third-Party Legal Opinion Report, Including the Legal Opinion Accord, of the Section of Business Law, American Bar Association*, 47 BUS. LAW. 167 (1991). The objective of the Accord project was to create a protocol setting forth the presumed meaning of various opinions customarily requested in large commercial loan and other business transactions, as well as the assumptions, exceptions, and other limitations qualifying those opinions. The provisions of the Accord (some version of which is typically set forth in excruciating length and detail in traditional opinion letters) were intended to be incorporated by reference into a very concise opinion document. The avowed

purpose of the Accord was not only to shorten opinion letter text but, more importantly, to achieve a greater uniformity of usage and understanding in opinion letter practice.

The Accord found a ready audience among real estate lawyers, particularly local counsel in multi-state loan transactions, who were increasingly challenged by the multitude of real estate opinion forms and state bar reports and who were now being presented with Accord-based opinion requests. In 1993, a combined effort by the opinion committees of the Real Property, Probate and Trust Law Section and ACREL produced a *Report on Adaptation of the Legal Opinion Accord of the Section of Business Law of the American Bar Association for Real Estate Secured Transactions*, 29 REAL PROP. PROB. & TR. J. 569 (1994). The purpose of the ABA/ACREL Adaptation report was to alert real estate practitioners to the need to qualify or modify an Accord-based opinion to reflect the peculiarities of real estate law and practice, and, secondarily, to enhance the likelihood of the Accord's becoming the basis for a national standard for a more uniform real estate opinion practice. The Adaptation report was followed in 1998 by the adoption by the same joint ABA/ACREL committee of the "Inclusive Real Estate Secured Transaction Opinion," available at www.abanet.org/ftp/pub/rppt/incl_art.doc. By setting forth within the text of the opinion the various definitions, assumptions, exceptions, and other qualifications of the original Accord, as modified by the Adaptation, the Inclusive Opinion was intended to be more understandable than having to refer to a densely worded independent protocol, as in the Accord's model. Several states, most notably Texas and California, also responded with new real estate opinion reports and model opinion language based upon the Accord's provisions and the Adaptation report.

Customary Practice

Ironically, even while the real estate bar used the Accord as a basis for pursuing national uniformity in opinion norms and practice, the Accord's original sponsor, the ABA Business Law Section,

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effectively abandoned efforts to achieve acceptance of the Accord by its intended audience of institutional commercial lenders. Pursuing an alternative strategy for streamlining opinion practice, the Business Law Section, along with several other state bar business opinion committees, most notably the TriBar Opinion Committee in New York, began to promote the concept of "customary practice." Under this view, it is urged that, given an identifiable pattern of custom and use that is well established and widely recognized, certain familiar assumptions, exceptions, and other opinion letter qualifications can be deemed to be understood or implicit in all opinion letters and therefore need not be stated. The result, it is believed, achieves a shortening of the opinion letter text and at least some degree of uniformity.

Unfortunately, this approach is most problematic precisely in the circumstance sought to be addressed by the concept—that is, the multistate loan transaction. In this context, questions immediately arise as to whose local custom and practice govern an interjurisdictional opinion, how does an opinion giver or recipient know or learn the other party's customary usage and traditional understandings, and what happens when local or individual customary practices conflict. The most notable instance of such disparities in custom may well be the difference between the New York and the California views as to the prima facie meaning of enforceability in the typical "remedies" opinion. Does the opinion mean, as urged by the TriBar Committee, that "each and every" provision of loan documents is enforceable or only, as the California reports suggest, the "essential" provisions? Critics of the customary practice approach contend that, until an objectively ascertainable and reliably uniform customary practice

can be identified and agreed upon, the best hope for a uniform national approach is a written protocol based on, or comparable to, the Accord.

Nonetheless, whatever its advisability for, or contributions to, achieving concision or uniformity, the recognition and exposition of customary practice have been of great benefit to the opinion practitioner. For many lawyers it was the Accord's "Certain Guidelines for the Negotiation and Preparation of Third-Party Legal Opinions," *Third-Party Legal Opinion Report*, 47 BUS. LAW. at 224, "drawn from current custom and practice," that were most readily accepted and used in opinion negotiations. The Accord Guidelines provide an authoritative normative basis for countering inappropriate opinion requests by opinion recipients as well as refusals by opinion givers to address reasonable recipient concerns.

The Accord Guidelines were ancillary to the substantive provisions of the Accord and limited by their terms to Accord-based opinions. More recently, the Business Law Section promulgated certain *Legal Opinion Principles*, 53 BUS. LAW. 831 (1998), and, late in 2001, *Guidelines for the Preparation of Closing Opinions*, 57 BUS. LAW. 345 (2001), both of which apply to non-Accord opinions as well. This extension and further elaboration in the Business Law Guidelines of the original Accord Guidelines for non-Accord opinion practice in general were therefore important steps.

The Real Estate Opinion Guidelines

The Business Law Guidelines and the earlier Principles are limited to the context of unsecured loans and other business transactions. Yet as with the Accord, because of the issues in common, it is impossible to ignore their relevance to real estate secured loan opin-

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ions of the Business Law Section's reports. Thus, it was not surprising that the same joint ABA/ACREL committee that undertook the Accord Adaptation and Inclusive Opinion projects determined to supplement the Business Law Guidelines with additional provisions tailored to real estate loan transactions. A final version of the resulting Real Estate Opinion Letter Guidelines is scheduled to be published in late 2002.

The format chosen for the Real Estate Guidelines is that of an integrated document following the organization of the Business Law Guidelines and supplementing its provisions with the discussion of real estate issues, thereby providing a single reference for real estate practitioners. Under the heading of "Purpose, Scope and Reliance," the Real Estate Guidelines adopt the positions of the previously published Business Law Guidelines regarding the role of the opinion-giver as a part of the opinion recipient's due diligence process (§ 1.1), and with respect to the appropriate limitation of opinion requests to specific matters within the opinion-giver's professional judgment and competence (§§ 1.2, 1.4), and to matters reasonably relevant to the lender's legitimate concerns (§ 1.3). The Business Law Guidelines also include the assumption that the recipient's reliance on the opinion will be informed by a familiarity with applicable customary practice and that the opinion may be relied upon only by those expressly authorized to do so (§ 1.7). The Real Estate Guidelines add important caveats regarding the role of the local counsel opinion giver in multi-state transactions. Specifically, the Real Estate Guidelines discuss the ethical implications and limitations with respect to a request that the borrower's counsel in effect represent both parties in providing the opinion to the lender

(§ 1.1.a), or a request that the opinion address in a general fashion the adequacy of the loan documents for the lender's purposes (§ 1.1.b). Significantly, the Real Estate Guidelines also elaborate on the cost/benefit criteria regarding the appropriate scope of an opinion request, noting that an enforceability opinion by borrower's counsel in an intrastate transaction (or a multistate transaction for which the lender is represented by its own local counsel) is of little value and therefore normally not warranted (§ 1.2). In addition, the Real Estate Guidelines condemn requests for "conduit opinions," which are given in exclusive reliance on independent sources (§ 1.5.b), and warn against unintended implied opinions regarding legal compliance and related matters (§ 1.5.a).

Under the heading of "Process," the Real Estate Guidelines generally adopt the positions of the Business Law Section on the negotiating process and client consent. With regard to the former, the Business Law Guidelines include familiar exhortations that the parties exchange and discuss opinion drafts as early in the transaction negotiations as practicable, respond promptly and in good faith to each party's legitimate concerns, and, in general, work to avoid last-minute delays (§ 1.2), and that the opinion giver, when appropriate, seek the expertise of other opinion counsel (§ 2.2). As to the consent issue, when client consent to a third-party opinion is ethically required, the Guidelines confirm that, in most circumstances, such may be inferred by the client's execution of loan documents calling for a closing opinion (§ 2.4).

Under the heading of "Content," the Business Law Guidelines recite the oft stated Golden Rule of reciprocity—that is, counsel for an opinion recipient should not request an opinion that the

lawyer would not give nor should an opinion-giver refuse, without good reason, to give an opinion that is customarily requested. In addition, the Guidelines disapprove the use of a "materiality" standard in favor of objective criteria, such as dollar amounts (§ 3.2), and acknowledge the "presumption of regularity," which eliminates the need for undue investigation into client records or operating history (§ 3.3). On the latter point, the Real Estate Guidelines add a more general statement with regard to the presumed scope of factual due diligence and document review, and note, especially in the case of the local counsel opinions, the importance and effectiveness of express limitations on both (§ 3.3.a). The Business Law Guidelines address the question of "knowledge" in terms of stated limitations on due diligence for fact based opinions, such as the existence of pending legal proceedings or conflicting contractual obligations. The Real Estate Guidelines add a discussion of the need for a definition of both knowledge and who within the opinion giver's organization possesses it (§ 3.4.a).

The final section of the Guidelines addresses "Specific Opinions." The Business Law Guidelines conclude that opinions regarding the foreign qualification and good standing of the borrower are, for different reasons, inappropriate or unnecessary (§ 4.1), that opinions regarding valid status of outstanding equity securities of the borrower are rarely cost justified (§ 4.2), that opinions regarding comprehensive legal or contractual compliance are inappropriate (§ 4.3), and that an opinion-giver should not be asked to state his or her lack of knowledge of particular factual matters (§ 4.5) or that he or she has no reason to believe that the borrower has made a material misstatement or omission of material fact (§ 4.5). The Guidelines note that the opinion-giver generally ought not be asked to evaluate the likely outcome of pending litigation (§ 4.7) and suggest that a general public policy exception in the enforceability opinion is unduly broad (§ 4.8).

It is for the last mentioned subject, the enforceability opinion, that the Real

Estate Guidelines make some of their most significant contributions. The Guidelines begin by acknowledging the "generic exception" included in virtually every real estate remedies opinion. The Guidelines reflect an emerging consensus that the "generic exception" assurance of the availability of the remedies of acceleration and foreclosure in the case of a borrower's material breach of a material covenant is preferable to the traditional but vague concept of the lender's obtaining "practical realization of the principal benefits" of the loan documents (§ 4.0). The Guidelines also indicate the inappropriateness of any general assurances that specified exceptions to enforceability will not affect the realization of the lender's intended benefits under the loan documents (§ 4.0.a).

The Real Estate Guidelines then address a number of specific enforceability opinions, which may or may not be excluded by the generic exception but which, in any event, are often expressly requested and are often controversial in nature. Section 4.0.b states that the general enforceability opinion

includes by implication an opinion that a loan is not usurious under applicable law and indicates the assumptions for such opinions that should be understood, even if not expressly stated. The Real Estate Guidelines go on to condemn title opinions with respect to real or personal property (§ 4.0.c) but acknowledge the frequent use of an opinion on whether the *form* of a mortgage or security agreement is sufficient to create a lien or security interest in loan collateral (§§ 4.0.c, 4.0.d). The Guidelines acknowledge that, because of the difficulty of isolating factual and technical elements inherent in land use and environmental compliance opinions, such opinions are rarely given (§ 4.3.a). The Guidelines address the difficulties inherent in opinions relating to the need for an out-of-state lender to qualify to do business in a local jurisdiction or the possible local taxation of the lender as a result of a given transaction (§ 4.1.a). Finally, the Real Estate Guidelines address the complicated subject of choice of law opinions in multi-state loan transactions, concluding

that generally, because of the fact-intensive and policy-laden nature of the legal evaluation, only a "reasoned" or "explained" opinion is possible.

Conclusion

The new Real Estate Guidelines have consolidated and expanded upon important recent commentary on legal opinions and created a valuable resource for the opinion letter practitioner. Whether as a stepping stone to recognition of a uniform opinion practice or simply a valuable resource in the negotiation of opinion letter scope and qualifications, the Real Estate Opinion Letter Guidelines and the Business Law Guidelines and Principles that preceded them constitute a significant event in the still nascent area of opinion letter literature. It will be interesting to see whether these efforts to articulate customary opinion practice ultimately lead to general reliance on an unwritten "common law" of national opinion letter custom or, instead, to a revived pursuit of the elusive goal of a national real estate opinion "Accord." ■