AMENDED AND RESTATED REPORT ON THIRD-PARTY LEGAL OPINION PRACTICE IN THE STATE OF WASHINGTON
by
THE LEGAL OPINIONS COMMITTEE OF THE BUSINESS LAW SECTION OF THE WASHINGTON STATE BAR ASSOCIATION

November 30, 2018

The Legal Opinions Committee of the Business Law Section of the Washington State Bar Association (the "**Committee**") determined that developments in the law, opinion practice, and legal practice as a whole warranted a new report (this "**Report**") that integrates, amends, and restates its prior reports.[1] The purpose of this Report is to provide a reference guide for lawyers engaged in preparing and reviewing third-party legal opinion letters in the state of Washington. It does not purport to be exhaustive in its treatment or to replicate the considerable volume of general information already available to practitioners.[2]

I. Introduction

Substantial transactions often involve delivery of a third-party legal opinion letter ("**opinion letter**"). As the name suggests, these opinion letters are addressed directly to a third-party recipient. For example, in a commercial loan transaction, the lender may require as a condition to closing that the borrower provide an opinion letter from the borrower's counsel to the lender. Typically, this opinion letter states that the borrower exists, that it has the power to execute and deliver the loan documents and to consummate the transaction, that all necessary action on the part of the borrower to authorize the transaction has been taken, and that the loan documents are enforceable against the borrower in accordance with their terms.

An opinion letter of this sort represents a formal statement of a lawyer's considered professional judgment, on which a non-client third-party recipient will be entitled to rely as part of its diligence with respect to the transaction. Attorneys must take special care to manage the unique risks associated with such opinion letters.

This Report provides guidance as to the customary practice of Washington lawyers experienced in preparing and reviewing opinion letters. It contains an illustrative form of opinion letter and footnotes that explain: (i) the procedures opinion givers customarily follow when conducting the factual and legal investigations required to support their opinions, and (ii) the customary meaning of certain language used in opinion letters.

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[1] AD HOC COMM. ON THIRD-PARTY LEGAL OPS. OF THE BUS. LAW SECTION OF THE WASH. STATE BAR ASS'N, SUPPLEMENTAL REPORT ON THIRD-PARTY LEGAL OPINION PRACTICE IN THE STATE OF WASHINGTON COVERING SECURED LENDING TRANSACTIONS (2000) [hereinafter 2000 Report]; AD HOC COMM. ON THIRD-PARTY LEGAL OPS. OF THE BUS. LAW SECTION OF THE WASH. STATE BAR ASS'N, REPORT ON THIRD-PARTY LEGAL OPINION PRACTICE IN THE STATE OF WASHINGTON (1998) [hereinafter 1998 Report].

[2] The Legal Opinion Resource Center (the "Resource Center"), an online library co-sponsored by the Legal Opinions Committee of the ABA Business Law Section and the TriBar Opinion Committee, provides an excellent starting place. *See Legal Opinion Resource Center*, AMERICAN BAR ASS'N, https://www.americanbar.org/groups/business_law/migrated/tribar.html.

II. The Importance of Customary Practice

In promulgating this Report, the Committee recognizes that the Restatement (Third) of the Law Governing Lawyers treats bar association reports on opinion practice as valuable sources of guidance on customary practice.[3] The Restatement (Third) of the Law Governing Lawyers and the Restatement (Second) of Torts indicate that the customary practice of lawyers similarly situated is a primary factor in determining compliance with applicable standards of conduct when issuing an opinion letter.[4] Comment e to Section 95 of the Restatement (Third) of the Law Governing Lawyers explains:

> The parties' ultimate agreement as to the nature and extent of the opinion coverage in a particular transaction and the acceptability of limitations, qualifications, and disclaimers will normally follow customary practices for transactions of the kind in question. Similarly, once the form of the opinion has been agreed on, customary practice will also determine the nature and extent of the factual and legal diligence to be employed by the opinion giver in connection with its issuance.[5]

Likewise, a leading report on opinion letters describes the role of customary practice as follows:

> Customary practice establishes the ground rules for rendering and receiving opinions and thus allows the communication of ideas between the opinion giver and counsel for the opinion recipient without lengthy descriptions of the diligence process, detailed definitions of the terms used and laborious recitals of standard, often unstated, assumptions and exceptions….Unless otherwise indicated, an opinion recipient is entitled to assume that the opinion giver has followed customary practice in rendering an opinion. Reciprocally, an opinion giver is entitled to assume that the opinion recipient understands customary practice and recognizes that it has been followed in preparing the opinion letter.[6]

The Committee concurs with a 2008 Statement by the Legal Opinions Committee of the Business Law Section of the American Bar Association (the "**ABA**"), in which the TriBar Opinion Committee and twenty-five other committees, organizations, and sections (including the Business Law Section of the Washington State Bar Association) joined: "Some closing opinions refer to the application of customary practice. Others do not. Either way, customary practice applies."[7]

III. Core Principles of Opinion Practice

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[3] RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 95 reporter's note to cmt. b (Am. Law Inst. 2000).

[4] *See* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS §§ 52, 95 (Am. Law Inst. 2000); RESTATEMENT (SECOND) OF TORTS § 299A (Am. Law Inst. 1965).

[5] RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 95 cmt. e (Am. Law Inst. 2000).

[6] TriBar Op. Comm., *Third-Party "Closing" Opinions*, 53 BUS. LAW. 592, 600 § 1.4(a) (1998) [hereinafter TriBar II].

[7] *Statement on the Role of Customary Practice in the Preparation and Understanding of Third-Party Legal Opinions*, 63 BUS. LAW. 1277, 1278 (2008) [hereinafter ABA Customary Practice Statement].

The following core principles[8] reflect the understanding and practice of attorneys in Washington who regularly prepare and review legal opinions. The Committee believes that these principles are consistent with current national opinion practice.

Principle 1. ***A legal opinion is not appropriate when the costs associated with preparing it exceed the benefits it provides.***

All opinion letters add costs to transactions, but not all add commensurate value. Generally speaking, opinion letters (and the opinions they contain) are appropriate when they add value beyond representations and warranties obtained directly from parties and when the diligence needed to support the opinions can be accomplished in a cost-effective manner. Therefore, in any given transaction, the two initial questions to ask with respect to opinions are whether an opinion letter is appropriate and, if so, what opinions it should contain.

Principle 2. ***The purpose of an opinion letter is to provide an expression of professional judgment as to certain legal underpinnings of a transaction; the purpose is not to insure against loss or guarantee that a court will reach any particular result.***

Although the purpose of an opinion letter is not to insure against loss or guarantee any particular result, an opinion letter may help the parties manage certain legal risks. For instance, when significant legal risks are posed by the structure or documentation of a transaction, the process of preparing and reviewing an opinion letter, through guiding analysis and diligence, may bring these difficulties to light and allow either correction or informed evaluation of the risks by the opinion recipient.

Principle 3. ***It is not appropriate to request an opinion that counsel for the opinion recipient, in the same situation as the opinion giver, would not be prepared to give (the "Golden Rule").***

Lawyers should only give legal opinions that are within their competence and expertise and appropriate in the context of the transaction. Opinion givers should not be expected to give opinions on matters that are not typically within the expertise of lawyers, such as financial statement analysis and economic forecasting. Likewise, it may be inappropriate for a lawyer or law firm with the requisite skills to refuse to give an opinion, otherwise appropriate in the context of the transaction, that lawyers skilled in addressing the matters under consideration would find within their competence and expertise. Nevertheless, the language "otherwise appropriate in the context of the transaction" deserves emphasis. Many situations exist in which an opinion may

[8] Each principle has been expressed elsewhere and the exact formulation may vary. *See, e.g.*, ABA Customary Practice Statement, *supra* note 7; ABA Bus. Law Section Legal Ops. Comm., *Guidelines for the Preparation of Closing Opinions*, 57 BUS. LAW. 875 (2002) [hereinafter 2002 ABA Guidelines]; ABA Bus. Law Section Legal Ops. Comm., *Legal Opinion Principles*, 53 BUS. LAW. 831 (1998) [hereinafter ABA Principles]. A Joint Committee of the Working Group on Legal Opinions and the Legal Opinions Committee of the ABA Business Law Section has been working on a "Statement of Opinion Practices" (the "2018 ABA Statement") that updates the ABA Principles in its entirety, and updates certain provisions of the 2002 ABA Guidelines. At the time of this writing, the 2018 ABA Statement remains subject to completion and approval by the Board of Directors of the Working Group on Legal Opinions Foundation and the American Bar Association's Legal Opinions Committee.

properly be given following the completion of appropriate diligence, but where the cost of conducting such diligence substantially outweighs the value of the opinion.

Principle 4. ***An opinion speaks only to those matters it specifically addresses.***

The opinions included in an opinion letter should be limited to reasonably specific and determinable matters of law that involve the exercise of professional judgment, and should be construed to cover only those matters they specifically address. An important aspect of this principle is that so-called back-door opinions, or opinions by implication, should not be read into an opinion letter. For instance, as a matter of Washington customary practice, an enforceability opinion with respect to a secured lending transaction is understood to address only the enforceability of the borrower's obligations under the agreements, and does not express any opinion with respect to the creation, attachment, or perfection of any security interest purportedly granted by such agreements. Opinions regarding the creation, attachment, or perfection of security interests, if given, are as a matter of customary practice set forth in separate opinions.

Principle 5. ***Opinion letters are based solely on a limited scope of inquiry***.

Opinion givers are not expected to conduct an inquiry of other lawyers in their firm or a review of the firm's records to ascertain factual matters, except to the extent opinion givers recognize that a particular lawyer is reasonably likely to have, or a particular record is reasonably likely to contain, information not otherwise known to them that is necessary to give an opinion. Similarly, opinion givers are not expected to canvass all laws and regulations that might conceivably apply to a transaction. Accordingly, opinions included in an opinion letter addressing the law of the state of Washington are understood to cover only the Washington law that Washington lawyers, exercising customary professional diligence in similar circumstances, would reasonably recognize as being applicable to the client or the transaction that is the subject of the opinion. Such opinions would not be construed to cover municipal and other local law, or certain specialized areas of law (e.g., securities, tax, and insolvency), even though they are otherwise applicable to the client or transaction. An opinion may, however, cover law that would not otherwise be covered if the opinion does so expressly.

Principle 6. ***Reliance by opinion givers on information, and by opinion recipients on an opinion, must be reasonable under the circumstances.***

An opinion giver is entitled to rely on factual information provided by others, including the client, unless the opinion giver knows that the information is incorrect or knows of facts that the opinion giver recognizes would make reliance under the circumstances unwarranted. An opinion recipient is entitled to expect that an opinion giver has exercised the diligence customarily exercised by lawyers who regularly give such opinions; however, an opinion recipient is not entitled to rely on an opinion if it knows the opinion to be incorrect or if reliance on the opinion is unreasonable under the circumstances. The parties may, however, agree to include certain expressly stated factual assumptions that are contrary to fact, and reliance on such assumptions is not unreasonable so long as doing so will not mislead the opinion recipient regarding the opinions given.

IV. A Cautionary Note About Factual Confirmations

No Litigation Confirmations. In the past, opinion letters often contained a "no litigation" confirmation covering the existence of legal proceedings against the opinion giver's client. Although often referred to as an opinion, the no litigation confirmation is different because whether the client has been sued or threatened with a lawsuit is purely a factual matter that requires no legal analysis.

Many practitioners have grown resistant to giving no litigation confirmations. These factual confirmations are often unnecessary, as pending or threatened lawsuits are typically the subject of representations obtained directly from the client in the transaction documents. A widely publicized Massachusetts decision, *Dean Foods Co. v. Pappathanasi*,[9] reinforces the view that factual confirmations expose opinion givers to added risk. In that decision, a law firm that issued an opinion letter stating that, to its knowledge, there were no pending or threatened investigations against the client, was held liable for over $9 million in damages and costs because that "opinion" turned out to be inaccurate.

Today, many firms refuse to give no litigation confirmations. Among those firms that are still willing to give them, the clear trend is toward narrowing the scope to cover litigation challenging or relating to the transaction at hand and not to cover other litigation matters affecting the client's business generally. Some firms further limit the confirmation to matters handled by the opining firm's lawyers.[10]

Negative Assurance Confirmations. A "negative assurance" is a statement that the opinion giver lacks knowledge of particular factual matters. Like the no litigation confirmation, negative assurances do not involve the exercise of the opinion giver's professional legal judgment, are disfavored, and have become much less common. Opinion givers are, however, still occasionally asked to include negative assurance language following a statement that the opinion giver is relying solely on certain sources of information as to factual matters. An example of this type of request is italicized, below:

> Wherever we indicate that our opinion with respect to the existence or absence of facts is based on our knowledge, our opinion is based solely on (i) the current actual knowledge of the attorneys currently with our firm who have performed services related to the Transaction, (ii) the representations and warranties of the Borrower contained in the Credit Agreement, and (iii) the Opinion Certificates. We have made no independent investigation as to such factual matters. *However, we know of no facts which lead us to believe such factual matters are untrue or inaccurate*.

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[9] No. Civ.A. 01-2595 BLS, 2004 WL 3019442 (Mass. Sup. Ct. Dec. 3, 2004).

[10] *See, e.g.*, CORPS. COMM., CAL. STATE BAR, LEGAL OPINIONS IN BUSINESS TRANSACTIONS (EXCLUDING THE REMEDIES OPINION) 62 n.188 (2005 rev. Oct. 2007) available at the Resource Center, *supra* note 2; ABA Bus. Law Section Legal Ops. Comm., *Report on the 2010 Survey of Law Firm Opinion Practices*, 68 BUS. LAW. 785, 796–97 (2013) (summarizing the trend away from giving no litigation confirmations, and describing techniques some lawyers use to materially limit the scope of the confirmation); Donald W. Glazer & Stanley Keller, *A Streamlined Form of Closing Opinion Based on the ABA Legal Opinion Principles*, 61 BUS. LAW. 389, 396 n.18 (2005).

On the surface, the italicized sentence seems fairly benign and is sometimes argued by the requester as merely confirming the opinion giver's compliance with the customary practice of not permitting reliance on factual information the opinion giver knows to be false. However, as a respected opinion practice treatise explains, this type of negative assurance "is a wolf in sheep's clothing, providing an opinion recipient a basis for bringing an action against the opinion giver even if all the opinions given by the opinion giver are true."[11]

Wafra Leasing Corp. 1999-A-1 v. Prime Capital Corp.,[12] which involved federal securities claims, illustrates the dangers of including language of this sort. In *Wafra*, the court declined to dismiss an investor's Rule 10b-5 claims against a law firm that issued an opinion letter with respect to a securities offering. The opinion letter included a negative assurance that no information had come to the firm's attention which would give the firm actual knowledge or actual notice that the documents, certificates, reports, and other information it relied on were inaccurate or incomplete. The court found that this language introduced questions of fact sufficient to overcome potential legal defenses of the opining firm. Although the firm later prevailed on a motion for summary judgment, the victory was the product of years of litigation to resolve questions relating to the negative assurance language.

For all of these reasons, both broad affirmative factual confirmations and negative assurances are strongly disfavored by the opinion bar[13] and are much less frequently requested or given[14] than in the past.

V. Listing of Assumptions, Qualifications, Exclusions, and Other Limitations

The illustrative form of opinion letter includes some assumptions, qualifications, exclusions, and other limitations that are understood as a matter of customary practice to be included whether or not expressly stated.[15] The Committee chose to expressly include them in part

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[11] DONALD W. GLAZER ET AL., GLAZER & FITZGIBBON ON LEGAL OPINIONS: DRAFTING, INTERPRETING AND SUPPORTING CLOSING OPINIONS IN BUSINESS TRANSACTIONS § 18.8 (3d ed. 2008 & Cum. Supp. 2017).

[12] 192 F. Supp. 2d 852 (N.D. Ill. 2002).

[13] For instance, the Legal Opinions Committee of the ABA Business Law Section explains:

> An opinion giver normally should not be asked to state that it lacks knowledge of particular factual matters. Matters such as the absence of prior security interests or the accuracy of the representations and warranties in an agreement or the information in a disclosure document . . . do not require the exercise of professional judgment and are inappropriate subjects for a legal opinion letter even when the opinion is limited by a broadly worded disclaimer.

2002 ABA Guidelines, *supra* note 8, § 4.4.

[14] One special type of negative assurance that is still commonly given in connection with securities offerings is the so-called 10b-5 opinion. In a 10b-5 opinion, the opinion giver typically provides assurance to underwriters and other intermediaries who have a diligence defense that nothing has come to the attention of the opinion giver that would lead the opinion giver to believe that the prospectus or other offering document has any material inaccuracies or omissions. *See* Subcomm. on Sec. Law Ops., ABA Section of Bus. Law, *Negative Assurance in Securities Offerings (2008 Revision)*, 64 BUS. LAW. 395 (2009).

[15] *See, e.g.*, TriBar II, *supra* note 6, § 2.3; Subcomm. on Mortgage Loan Ops., Ass'n of the Bar of N.Y.C. & Attorney Op. Letters Comm., Real Prop. Law Section, The N.Y. State Bar Ass'n, *Mortgage Loan Opinion Report*, 54 BUS. LAW. 119, 128 n.20 (1998) [hereinafter New York Mortgage Loan Opinion Report].

because firms have diverse preferences with respect to the appropriateness of listing customary terms, and greater explicitness may be beneficial in certain situations. The Committee also recognizes that whether and to what extent opinion givers should expressly include customary limitations has become one of the more contentious areas of opinion practice. For instance, in the wake of a New York appellate court's reversal of the lower court's denial of a motion to dismiss in *Fortress Credit Corp. v. Dechert LLP*,[16] some practitioners have concluded that there may be value in expressly stating clearly customary assumptions. In its decision that the claims against an opinion giver's firm should be dismissed, the court noted that the subject opinion letter, "by its very terms" provided, among other things, that it was "clearly and unequivocally circumscribed by the qualifications that defendant assumed the genuineness of all signatures and the authenticity of the documents."[17] The court's reference to the fact that the assumptions were expressly stated has left many practitioners wondering whether the court would have given similar weight to an opinion giver's reliance on clearly customary, rather than express, assumptions.[18]

Although the Committee has chosen to expressly state certain clearly customary terms, we do not advocate their express inclusion in every opinion letter. To the contrary, the Committee is sympathetic to the views expressed by Donald Glazer (co-author of GLAZER AND FITZGIBBON ON LEGAL OPINIONS) and Stanley Keller (the then-Chair of the Legal Opinions Committee of the ABA Business Law Section):

> Opinions can be challenged in many ways, and only with hindsight can one know which express qualification will be helpful in litigation. Thus, the logical alternative to streamlining is to throw the kitchen sink into opinion letters in an effort to assure that every possible limitation is expressly stated. The problem with that approach, however, is that it so overqualifies an opinion letter that it exposes the opinion giver to the risk that a court, concluding that the opinion letter must mean *something*, will disregard the qualifications . . . . Moreover, no recitation of limitations can be complete, and an opinion giver may well have hanged itself by negative implication if the limitation it needed is not stated . . . . Streamlining opinion letters also has the important benefit of focusing the opinion letter on the issues that matter. Rather than becoming buried in an overabundance of limitations, the streamlined form underscores exceptions and assumptions that are unique to the transaction by omitting those that are not. Thus, it prevents misunderstanding and assures that issues of importance receive the attention they deserve. The streamlined form, therefore, furthers the utility of an opinion letter as a device for communicating information the recipient has identified as important.[19]

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[16] 89 A.D.3d 615 (2011).

[17] *Id*. at 617.

[18] It should be noted that the court's first basis of decision was that, absent allegations that the opinion recipient informed the opinion giver that "its obligations were not limited solely to a review of relevant and specified documents" or "that it was to investigate, verify and report on the legitimacy of the transaction," the opinion recipient "cannot establish that [the opinion giver] breached a duty of care," thereby suggesting that it believed the opinion giver's diligence was appropriate under customary practice regardless of whether the express assumptions had been taken. *Id.*

[19] Donald W. Glazer & Stanley Keller, ABA Bus. Law Section Legal Ops. Comm., *Recent Developments—Opinion Practice Implications of the* Fortress *Decision*, LEGAL OPINION NEWSL., Spring 2012, at 8–9.

VI. Structure and Use of the Illustrative Form of Opinion Letter

In General. This Report contains an illustrative form of opinion letter for secured lending transactions, which has been annotated with the Committee's commentary. Although directed at secured lending transactions, much of the opinion letter is of general applicability to other types of transactions. For example, practitioners may find the illustrative language and associated comments helpful when giving existence, power, and authority opinions with respect to entities involved in other types of commercial transactions.

Of course, no one form of opinion letter fits every situation. Rather, for any given transaction, a common starting point may be available from which the parties can negotiate. The illustrative form of opinion letter contains some opinions (such as existence and authority) that are common to nearly all opinion letters. The form also provides examples of common (and a few less common) opinions and related assumptions, qualifications, exclusions, and other limitations. In preparing this Report, the Committee sought to strike a balance between presentation of common elements and inclusion (for illustrative purposes) of additional material that is appropriate only in certain transactions. Accordingly, the form is not meant to be followed indiscriminately. Opinion givers should thoughtfully craft an opinion letter that consists of provisions relevant to the particular transaction. The footnotes and other commentary in this Report are intended to assist with such efforts.

The illustrative form of opinion letter addresses secured lending transactions because it allows inclusion of more opinions commonly given. In addition, in the view of the Committee, that is the context in which opinion letters are currently most commonly requested and given in Washington. In contrast, when the Committee issued its first opinions report in 1998, opinion letters were common in a variety of other commercial transactions, including business acquisitions. The last decade, however, has seen a dramatic decline in the use of opinion letters in mergers and acquisitions.[20]

There are a number of other specialized contexts in which opinion letters are commonly given, such as "true sale" opinions, bankruptcy nonconsolidation opinions, and opinions on behalf of issuers in venture capital financings and other securities offerings. Each of these specialized opinions has, to one degree or another, its own considerations and conventions, although they have many common elements for which the illustrative form of opinion can be helpful. Such opinion letters, to the extent they have their own unique aspects, are beyond the scope of this Report. Washington lawyers are urged to seek out other resources[21] when confronted with transactions that involve such specialized opinions.

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[20] According to a recent survey, the percentage of mergers and acquisitions transactions in which legal opinions of seller's counsel are required as a condition to closing has declined from 68% in 2011 to 16% in 2016. SRS Acquiom, M&A Deal Terms Study, slide 49 (June 22, 2017). Similarly, studies conducted by the ABA Mergers and Acquisitions Committee found that the percentage of private target transactions in which the target's counsel was required to deliver legal opinions has steadily declined from 70% in 2006 to 7% in 2017. M&A Market Trends Subcomm., ABA Bus. Law Section, Private Target Mergers and Acquisitions Deal Points Study, slide 61 (Dec. 22, 2017).

[21] *See, e.g.*, Ops. Comm., Bus. Law Section of the State Bar of Cal., *Sample California Third-Party Legal Opinion for Venture Capital Financing Transactions*, 70 BUS. LAW. 177 (2015) (venture capital financings); TriBar Op. Comm., *Opinions in the Bankruptcy Context: Rating Agency, Structured Financing and Chapter 11 Transactions*,

Form of Opinion Certificate. As part of the diligence with respect to an opinion letter, an opinion giver should ensure that all material facts required to support the opinions have been obtained through reliance on the representations and warranties contained in the transaction documents, public authority documents, or through confirmations received directly from the client or others. If an opinion is based on confirmations received directly from the client, these confirmations should be set forth in a written certificate signed by an appropriate officer or other representative of the client the opinion giver believes to be knowledgeable about the subject matter involved. To this end, the illustrative form of opinion letter includes a form of opinion certificate covering factual matters on which an opinion giver may base its legal conclusions.

VII. Conclusion

We hope that this Report and the illustrative form of opinion letter will be useful to Washington lawyers. We anticipate that this Report, like its predecessor reports, will be supplemented or updated from time to time as practice developments warrant.

We wish to thank Michael Herbst, David Levant, Dennis Ostgard, Virginia Pedreira, and David Rockwell for their substantial contributions to earlier drafts of this Report; Donald Glazer, Stanley Keller, Steven Weise, and Edward Wicks for their helpful comments on an exposure draft prior to its finalization; and Joshua Harms and Carrie Mount for their editorial assistance. Please note that this is a collaborative work reflecting an overall consensus of the Committee; it does not necessarily reflect the views of any given member.

Scott W. MacCormack, Chair

Joel N. Bodansky	Shannon J. Skinner
Diane Lourdes Dick	Keith A. Trefry
Troy J. Hickman	W. Scott Wert
Brian D. Hulse	David H. Zielke
Berrie J. Martinis	

46 BUS. LAW. 717 (1991) (nonconsolidation opinions); *see also* other materials collected at the Resource Center, *supra* note 2.

ILLUSTRATIVE FORM OF OPINION LETTER

[Opinion Giver's Firm Letterhead]

[Date]

[Name and Address of Opinion Recipient(s)][22]
_____
_____
_____

Re: [Brief Description of Transaction]

Ladies and Gentlemen:

We have acted as [limited Washington] counsel to _____, a Washington corporation (the "**Borrower**"),[23] and to _____, a Washington limited liability company (the "**Guarantor**"; together with the Borrower, the "**Loan Parties**" and each a "**Loan Party**"), in connection with the transactions contemplated by the [*Credit Agreement*][24] dated as of [_____ __], 20[__] (the "**Credit Agreement**") between the Borrower and _____, (the "**Lender**"). We provide this opinion letter to you at the request of the Loan Parties pursuant to Section _____ of the Credit Agreement. Capitalized terms used and not otherwise defined in this opinion letter have the definitions assigned to such terms in the Credit Agreement.

[22] The suggested approach is to list as addressees only the lender(s) named in the loan documents or the agent for the named lender(s). The ability of successor lenders who take interests in the loan documents after closing (through assignment or participation) to rely is addressed in the reliance paragraph at the end of the opinion letter. *See infra* note 109 and accompanying text. Including as addressees "all lenders who become parties to the Credit Agreement from time to time" may undercut the protections provided in the reliance paragraph.

[23] The illustrative form of opinion letter assumes that the borrower is a Washington corporation, that the guarantor is a Washington limited liability company, and that the loan documents are governed by Washington law. In an actual transaction, the borrower or the guarantor may be a different type of entity. Accordingly, throughout the opinion letter, references to "corporation," "limited liability company," and similar terms will require modification to reflect the actual status of the borrower or the guarantor. Coverage of entities organized under the law of a jurisdiction other than the state of Washington and of loan documents governed by the law of another jurisdiction are largely beyond the scope of this Report. For additional discussion of these and related issues, see *infra* note 49 (addressing coverage of entities organized under the law of a jurisdiction other than the state of Washington) and note 94 (addressing coverage of loan documents governed by the law of another jurisdiction); see also Comm. on Legal Ops. in Real Estate Transactions, ABA Section of Real Prop., Tr. & Estate Law, et al., *Local Counsel Opinion Letters in Real Estate Finance Transactions*, 51 REAL PROP. TR. & EST. L.J. 167 (2016).

[24] Here and elsewhere in Section A of the opinion letter, the bracketed and italicized text should be completed with the title of the specific document examined.

The law covered by the opinions expressed herein is limited to the law of the state of Washington.[25]

A. Loan Documents and Matters Examined

In connection with this opinion letter, we have examined originals, or copies certified or otherwise identified to our satisfaction, of the following documents[26] [dated as of the date hereof, except as otherwise indicated]:

A1. The Credit Agreement.

A2. [*Promissory Note*] by the Borrower payable to [the order of] the Lender in the stated principal amount of $[_____].

A3. [*Deed of Trust*] (the "**Deed of Trust**") by the Borrower, as grantor, to [_____], as trustee, for the benefit of the Lender, as beneficiary.

A4. [*Security Agreement*] (the "**Security Agreement**") by the Borrower, as debtor, to the Lender, as secured party.

A5. [*Assignment of Leases and Rents*] (the "**Assignment of Leases and Rents**") by the Borrower, as assignor, to the Lender, as assignee.

A6. [*Assignment of Contracts*] by the Borrower, as assignor, to the Lender, as assignee.

A7. [*Environmental Indemnity Agreement*] (the "**Environmental Indemnity Agreement**") by the Borrower [and the Guarantor] for the benefit of the Lender.

A8. [*Pledge Agreement*] (the "**Pledge Agreement**") by the Borrower, as debtor, to the Lender, as secured party.

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[25] Whether or not this language is expressly included, the Committee is of the view that an opinion letter issued by a Washington attorney is limited to the law of the state of Washington unless the opinion letter expressly states that it also covers the law of other jurisdictions. With respect to federal law, if an opinion letter does not state that it covers federal law, that law is understood as a matter of customary practice not to be covered except to the extent that it is expressly addressed by specific opinions in the letter. *See* TriBar II, *supra* note 6, § 4.1; *see also* Comm. on Legal Ops. in Real Estate Transactions, ABA Section of Real Prop., Tr. & Estate Law, et al., *Real Estate Finance Opinion Report of 2012*, 47 REAL PROP. TR. & EST. L.J. 213, 229 § 1.3 (2012) [hereinafter ABA/ACREL Report]. It may be appropriate to request coverage of federal law in an opinion letter provided to a foreign (non-U.S.) recipient; however, it may be more appropriate for the opinion recipient to retain, and rely on the advice of, its own U.S. counsel for the transaction. *See* Legal Ops. Comm., ABA Bus. Law Section, *Cross-Border Closing Opinions of U.S. Counsel*, 71 BUS. LAW. 139 (2016). Furthermore, even when a federal law opinion is given, a number of specific areas of federal law are customarily viewed as excluded unless explicitly included. Thus, if an opinion giver has examined specific federal statutes or regulations (such as securities laws, tax laws, or other specific statutes or regulations) for purposes of giving an opinion, such statutes and regulations should be identified in the opinion letter.

[26] If only unexecuted versions of the transaction documents are provided, the opinion giver may want to identify which versions were examined for purposes of giving the opinion (such as by describing the sender and method, date, and time of delivery).

A9. [*Deposit Account Control Agreement*] (the "**Deposit Account Control Agreement**") among the Borrower, as debtor, [*Bank*], as bank, and the Lender, as secured party.

A10. [*Securities Account Control Agreement*] (the "**Securities Account Control Agreement**") among the Borrower, as debtor, [*Broker*], as securities intermediary, and the Lender, as secured party.

A11. [An unfiled Uniform Commercial Code financing statement in the form attached as **Exhibit [A]** (the "**Financing Statement**"), which is to be filed with the Washington Department of Licensing (the "**Filing Office**").] ***[OR]*** [The Uniform Commercial Code financing statement filed with the Washington Department of Licensing (the "**Filing Office**") on [_____ __], 20[__], under file number [_____] (the "**Financing Statement**").][27]

A12. [*Guaranty Agreement*] (the "**Guaranty**") by the Guarantor to the Lender.

A13. The following with respect to the Borrower: (i) Articles of Incorporation as filed with the Washington Secretary of State; and (ii) Bylaws dated [_____] (collectively, the "**Borrower Entity Documents**").

A14. [*Consent/Resolution*] of the board of directors of the Borrower.

A15. The following with respect to the Guarantor: (i) Certificate of Formation as filed with the Washington Secretary of State; and (ii) Limited Liability Company Agreement dated [_____] (collectively, the "**Guarantor Entity Documents**").

A16. [*Consent/Resolution*] of [members or managers] of the Guarantor.

A17. (i) Certificate of Existence of the Borrower issued by the Washington Secretary of State, dated [_____ __], 20[__]; and (ii) Certificate of Existence of the Guarantor issued by the Washington Secretary of State, dated [_____ __], 20[__] (collectively, the "**Public Authority Documents**").

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[27] Under Article 9A of the Uniform Commercial Code currently in effect in the state of Washington (the "Washington UCC"), financing statements are not signed, which creates a risk that the form of financing statement intended to be covered by an opinion may not be the form actually filed (usually, by counsel for the secured party/opinion recipient). Moreover, in some jurisdictions, financing statements may be filed via completion of a web-based form, meaning that the opinion giver may be unable to review the information in the exact form in which it is transmitted to the filing office. Parties might only receive confirmations or acknowledgments of filings, with no paper form of financing statement to append to the opinion letter. The illustrative form of opinion letter addresses these risks with two alternatives: (a) by attaching to the opinion letter the form of financing statement on which the opinion is given, or (b) by referencing the filing date and file number of any pre-filed financing statement. If the latter alternative is used, the debtor must authorize the pre-filing. *See* RCW 62A.9A-502(d); 62A.9A-509. If a financing statement will be filed in the county real property records as a fixture filing or as a filing covering timber to be cut or as-extracted collateral, it should also be attached or described, with an appropriate reference to the filing office in the county in which the property is located as the place of filing for record.

A18. Certificates of the Borrower and the Guarantor with respect to certain factual matters[, copies of which have been provided to you][, attached as **Exhibit [B]**] (the "**Opinion Certificates**").[28]

[A19. The agreements, contracts, and instruments listed on the certificate attached as **Exhibit [C]** (the "**Specified Agreements**").[29]]

The documents listed in Al through A10 are collectively referred to as the "**Borrower Documents**."[30] The Security Agreement and [*include other applicable documents granting security interests*] are collectively referred to as the "**Security Documents**."[31] The documents listed in A7 and A12 are collectively referred to as the "**Guarantor Documents**." The Borrower Documents and the Guarantor Documents are collectively referred to as the "**Loan Documents**." The documents listed in A13 through A18 are collectively referred to as the "**Authority Documents**." The extension of credit contemplated by the Loan Documents is referred to as the "**Loan**." We have examined only the foregoing documents for purposes of this opinion letter.[32]

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[28] On the role and nature of opinion certificates generally, see *supra* Part VI. Care should be taken so that opinion certificates state objective facts rather than legal conclusions. A certificate that includes one or more legal conclusions is not ineffective in its entirety; rather, it may be relied on for the objective factual statements it contains. Any legal conclusions may also serve as confirmation that the certifying person is not aware that the particular statement is untrue.

Some opinion givers attach copies of opinion certificates to the opinion letter, either in signed or unsigned form. Although the practice is not universal, attaching copies or otherwise providing the opinion certificates to the opinion recipient can help to avoid confusion regarding the facts on which the opinion giver is relying. In some cases, however, the information contained in the opinion certificates will be proprietary or confidential, in which case the client may be unwilling to give it to the opinion recipient.

In the illustrative form of opinion letter, the *opinion giver* is permitted to rely on the accuracy and completeness of the certifications contained in the opinion certificates. *See infra* paragraph B4. Nevertheless, notwithstanding the client's and opinion giver's willingness to deliver or otherwise share copies of the opinion certificates, an *opinion recipient* is not entitled to rely on the factual certifications they contain. If the opinion recipient were entitled to so rely, then the opinion certificates could have the unintended consequence of expanding and/or altering the client's representations and warranties in the transaction documents. In order to avoid any confusion, the illustrative form of opinion certificate includes an express disclaimer stating that no other person is entitled to rely on such certificate.

[29] The list of specific documents relates to the no breach opinion. *See infra* paragraph C11.

[30] Note that the defined term "Borrower Documents" excludes any financing statement[s] described in paragraph A11. This is because a financing statement is an unsigned notice filing that does not contain enforceable obligations. It is common to exclude any financing statement from the enforceability opinion, and to give only limited opinions with respect to it. *See infra* paragraphs C13 and C19.

[31] The term "Security Documents" should be defined to include all documents under which a security interest is granted under Article 9A of the Washington UCC. This may include, but is not limited to, a credit agreement, deed of trust, security agreement, pledge agreement, assignment of leases and rents, and assignment of contracts. If only one document contains a grant of a security interest, then this defined term can be removed and all references to it replaced with the defined term for that particular agreement.

[32] Washington opinion letters generally include a list of the transaction documents that are covered by the opinion letter, and many include an express disclaimer that no other documents have been examined for purposes of the opinion letter. These practices are helpful because, in many cases, a defined term such as "Transaction Documents" in the agreements between the parties will be more inclusive than the list of documents intended to be covered by the opinion letter.

For purposes of this opinion letter, the Revised Code of Washington is sometimes referred to as "**RCW**," and the Uniform Commercial Code currently in effect in the state of Washington is sometimes referred to as the "**Washington UCC**." Additionally, the term "**Collateral**" means all real and personal property in which a lien or security interest is stated to be granted under the Loan Documents, the term "**Mortgaged Property**" means the real property located in the state of Washington and described in the Deed of Trust, and the term "**Article 9A Collateral**" means the Collateral described in the Security Documents in which the Borrower has rights and as to which the creation of a security interest is governed by Article 9A of the Washington UCC.

B. Certain Assumptions

For purposes of this opinion letter, we have relied[33] on the following assumptions:

[The illustrative form of opinion letter includes some assumptions, qualifications, exclusions, and other limitations that are considered as a matter of customary practice to be included whether or not expressly stated. For additional discussion of the Committee's decision to state these terms expressly, see *Part V of this Report. Also note that some of these assumptions are specific to particular types of transactions and may be deleted if they do not relate to the transactions that are the subject of the opinion letter.]*

B1. Each Loan Document, Authority Document, and other document examined by us 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.[34] The form and content of all Loan Documents examined by us as unexecuted final drafts do not differ in any respect relevant to this opinion letter from the form and content of such Loan Documents as executed and delivered.

In some transactions, such as multistate transactions in which the opinion giver is acting solely as local counsel, the parties may agree to a limited review of documents. In such cases, if the opinion giver is asked to review only the deed of trust (and perhaps the security agreement and any other local instruments) and is not expected to review the credit agreement or other loan documents, an express statement to such effect should be included in the opinion letter. An example is set forth below:

> We have examined only the Deed of Trust[, the Security Documents and the Financing Statement], and we have not examined the Credit Agreement or the other Loan Documents[, except that we have examined the Credit Agreement solely with respect to definitions of certain terms used in the Deed of Trust].

[33] Assumptions are made without investigation, whether or not the opinion letter so states. As discussed in Part III, an opinion giver is entitled to rely on factual information provided by others, including the client, unless the opinion giver knows that the information is incorrect or knows of facts that the opinion giver recognizes would make reliance on the information otherwise unwarranted.

[34] Opinion letters commonly assume, whether stated or not, that all signatures are genuine. Opinion recipients occasionally request that an assumption that signatures are genuine not apply to signatures on behalf of the opinion giver's clients. In effect, such a request might be construed to require the opinion giver to assure that signatures are not forgeries and that the persons signing are in fact the persons they purport to be. Such an assurance is a purely factual matter. *See supra* Part IV.

B2. Each party to the Loan other than the Borrower and the Guarantor (each an "**Other Party**") exists and has complied with all legal requirements[35] pertaining to its status as such status relates to its rights to enforce the Loan Documents against the Borrower and the Guarantor, and each such Other Party's obligations set forth therein are enforceable against it in accordance with the terms thereof.[36]

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[35] **Opinion that Lender is not Required to Register or Qualify to do Business in Washington**. When the lender is organized under the law of a jurisdiction other than the state of Washington, the opinion giver may be asked to opine that the lender's activities in making the loan and potentially foreclosing on real or personal property security in Washington do not require the lender to register or qualify to do business in Washington. Such opinions are generally not appropriate, as they depend on the nature of the lender and on facts about its activities that are unknown to the opinion giver. Advice about what governmental filings or approvals are required as a result of the lender's activities in Washington is best given by the lender's counsel. *See* Attorneys' Op. Comm., Am. Coll. of Real Estate Lawyers & Comm. on Legal Ops. in Real Estate Transactions, ABA Section of Real Prop., Prob. & Tr. Law, *Real Estate Opinion Letter Guidelines*, 38 REAL PROP. PROB. & TR. J. 241, 253 § 4.1.a (2003).

Multiple statutory schemes are potentially relevant to the lender's analysis of this issue. For instance, the affirmative requirement to register with the Washington Secretary of State to do business in Washington is set forth in RCW 23.95.505, which is part of Washington's Uniform Business Organizations Code, chapter 23.95 RCW (the "UBOC"). Pursuant to RCW 23.95.520, the following activities, among others, of a foreign entity, as defined in RCW 23.95.105 (a "UBOC Foreign Entity"), do not constitute doing business in Washington under the UBOC: creating or acquiring indebtedness, mortgages, or security interests in property or securing or collecting debts or enforcing mortgages or security interests in property securing the debts. These exceptions are applicable only to UBOC Foreign Entities, which include "business corporations," nonprofit corporations, limited liability companies, limited partnerships, and certain other types of entities, wherever organized. Notably, banks that are not chartered by the state of Washington do not appear to be UBOC Foreign Entities.

Moreover, pursuant to RCW 30A.04.020, the activities described in the foregoing paragraph do not constitute banking or engaging in a trust business for purposes of RCW title 30A, the Washington Commercial Bank Act (the "Commercial Bank Act"). The Commercial Bank Act does not include requirements to register to do business in the state per se, although it has its own regulatory scheme for banks. Other Washington statutes with detailed regulatory schemes for other types of lenders include RCW titles 30B (Washington Trust Institutions Act), 31 (Miscellaneous Loan Agencies, including credit unions), 32 (Washington Savings Bank Act), and 33 (Washington Savings Association Act).

Whether a lender is subject to the Washington business and occupations tax or other taxes with respect to a particular loan is governed by other statutes and that analysis is unrelated to whether the lender is required to register with the Washington Secretary of State.

A lender receiving an opinion that it is not required to register or qualify to do business in Washington could potentially misinterpret such an opinion to mean that it is not required to make any filings with, obtain any approvals from, or pay any taxes to, the state with respect to the loan. Such an interpretation is not appropriate. Even if a lender receives an opinion that it is not required to register or qualify to do business in Washington, such an opinion, without more, means only that the lender is not required to register with the Washington Secretary of State to do business in Washington under the UBOC. Such an opinion does not address any other regulatory scheme, tax issue, or other matter under Washington law.

[36] Certain assumptions regarding other parties to a transaction are appropriate, and in some cases—such as when the opinion giver is serving as special counsel or the borrower or guarantor is organized under the law of a foreign jurisdiction—may be required with respect to the opinion giver's clients.

In addition, it is customary practice in Washington for opinion givers to assume without expressly stating that the trustee named in a deed of trust meets all required qualifications. If the opinion giver nevertheless desires to include an express assumption to this effect, it may add the following to the opinion letter:

> B[]. The trustee named in the Deed of Trust is, and any successor trustee will be, authorized to act as a trustee of a deed of trust under RCW 61.24.010 and RCW 61.24.030(6).

B3. All public records (including their due and proper recordation or filing, and their due and proper indexing) are accurate and complete.

B4. All representations and statements contained in all documents, instruments, and certificates that we have examined in connection with this opinion letter are accurate and complete.

B5. The Loan is primarily for commercial, investment, or business purposes, and not for personal, family, or household purposes, within the meaning of RCW 19.52.080.[37]

B6. The Mortgaged Property is not used principally for agricultural purposes or primarily for personal, family, or household purposes.[38]

B7. The Mortgaged Property has been properly platted and/or subdivided in a manner sufficient to permit the conveyance of a real property interest under applicable Washington law.[39]

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[37] This assumption provides the basis for the usury opinion in paragraph C26. *See infra* note 93. Absent a qualification to the contrary, the enforceability opinion is understood to include an assurance that the interest rate does not violate the state usury statute. Therefore, it is prudent to include this assumption unless the opinion letter expressly excludes any opinion on usury issues. This assumption also establishes the basis for concluding that the loan is a "commercial loan" within the meaning of the Washington Deed of Trust Act, chapter 61.24 RCW. *See* RCW 61.24.005(4). A lender of a commercial loan has greater rights under various provisions of the Washington Deed of Trust Act than does a lender of a loan that is not for commercial purposes. *See, e.g.*, RCW 61.24.100.

[38] The statement to the effect that the mortgaged property is not used principally for agricultural purposes relates to RCW 61.24.030(2), which prohibits nonjudicial foreclosure of a deed of trust unless the deed of trust contains a statement to that effect and that statement is true either when the deed of trust is entered into or on the date of the trustee's sale. Additionally, the mortgaged property cannot be part of the deed of trust grantor's homestead under RCW 6.13.010 in order for the property's rents to be available to a receiver under RCW 61.24.030(4), and cannot be occupied by the borrower as his/her principal residence as of the date of the trustee's sale in order for the lender to pursue a deficiency for waste or wrongfully retained rents, insurance proceeds, or condemnation awards under RCW 61.24.100(3)(a).

The court in *Schroeder v. Haberthur* rejected an argument by the grantor of a deed of trust that timberland is principally used for agricultural purposes within the meaning of the deed of trust statute. 200 Wn. App. 167 (2017). Nevertheless, it remains unclear whether timberland could in some circumstances be considered agricultural, especially where it is used as a site for growing trees that are harvested or replanted in another location early in their life cycles. If the real property includes timberland, it is appropriate to include the following qualification:

> D[]. We do not express any opinion as to whether the Deed of Trust may be foreclosed nonjudicially. Under RCW 61.24.030(2), real property is used for agricultural purposes if it is used in an operation that produces crops, livestock, or aquatic goods. It is unclear under what circumstances timber might be considered to be a "crop" within the meaning of the statute. The Deed of Trust contains an affirmation by the Borrower that the Mortgaged Property is not used principally for agricultural purposes; however, unless this statement is true either on the date the Deed of Trust was granted or on the date of a nonjudicial foreclosure sale under the Deed of Trust, the Deed of Trust may not be foreclosed nonjudicially.

[39] Conveyances that violate the Washington subdivision statute are illegal and may be enjoined by the prosecuting attorney. RCW 58.17.200. Unlike some states, Washington does not have a statutory exemption for sheriff's sales or trustee's sales. *See* RCW 58.17.040; *cf.* ORS 92.010(9)(a) (excluding from Oregon's partition/subdivision statute divisions of land resulting from lien foreclosures).

The Mortgaged Property is not registered property under chapter 65.12 RCW, which provides for a Torrens land registration system.[40]

B8. The signatures of the Borrower on the [Deed of Trust and the Assignment of Leases and Rents] have been properly acknowledged according to applicable law.[41]

B9. The descriptions of the Collateral in the Loan Documents are accurate and sufficiently describe the property intended to be covered thereby. The descriptions of the Collateral in the Financing Statement are accurate and sufficiently indicate the property intended to be covered thereby.[42]

B10. The Borrower holds the requisite interest or rights[43] in and to the Collateral and the Borrower's interest in the Mortgaged Property is of record.[44]

B11. Value has been given to the Borrower under the Borrower Documents.[45]

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[40] Although it is unusual to encounter properties registered under the Torrens system in Washington pursuant to chapter 65.12 RCW, that fact would normally be discovered in the course of a title review by the title insurance company and therefore need not be investigated by the opinion giver. Under RCW 61.24.030(5), a deed of trust must be recorded to be foreclosed nonjudicially, and, under RCW 61.24.040(1)(a), notice of the trustee's sale must be recorded. Consequently, if a deed of trust is registered only under the Torrens system, nonjudicial foreclosure may be unavailable.

[41] RCW 64.04.010 requires generally that "[e]very conveyance of real estate, or any interest therein, and every contract creating or evidencing any encumbrance upon real estate, shall be by deed." RCW 64.04.020 provides that "[e]very deed shall be in writing, signed by the party bound thereby, and acknowledged by the party before some person authorized by this act to take acknowledgments of deeds." Acknowledgments in Washington are usually taken by a notary public. The requirements for acknowledgment of real property instruments are set out in RCW ch. 64.08, and the detailed requirements notaries must follow are set forth in RCW ch. 42.45. Many of these requirements are factual in nature and cannot practically be verified by an opinion giver. Furthermore, where a document is signed outside Washington, it will be acknowledged by an out of state notary or other appropriate official governed by the law of the jurisdiction of signing and will also be subject to RCW 64.08.020 and .040 and RCW ch. 42.45, which have provisions for acknowledgments taken outside Washington. Because of the factual issues involved in all acknowledgments and the foreign law issues involved in acknowledgments of documents to be recorded in Washington that are acknowledged out of state, it is appropriate for an opinion giver to assume that a document requiring acknowledgment has been properly acknowledged in accordance with applicable law.

[42] The opinion giver is not normally expected to inquire into the status of title or the accuracy or adequacy of the description of the collateral.

[43] The debtor must have *either* rights in the collateral *or* the power to transfer rights in the collateral. RCW 62A.9A-203(b)(2).

[44] In Washington, opinion givers are not expected to search the real property records to confirm that a borrower holds title to real property collateral. A title insurance policy is routinely ordered and relied on by the lender to give it comfort as to the borrower's interest in such property.

[45] This assumption supports both the enforceability opinion and the UCC perfection opinion. This is because, under the Washington UCC, value must be given for a security interest in personal property to attach and be enforceable, and the security interest must attach before it can be perfected. RCW 62A.9A-203; 62A.9A-308(a). "Value" is defined for purposes of the Washington UCC to include "a binding commitment to extend credit" and "any consideration sufficient to support a simple contract." RCW 62A.1A-204. An opinion recipient may ask the opinion giver to remove the assumption that value has been given based on the fact that the loan will be advanced at closing or that the loan documents contain a "binding commitment to extend credit." If, however, no advance is made at closing, the opinion giver should be especially reluctant to remove the assumption. The Washington Supreme Court

B12. All conditions precedent to closing the Loan have been satisfied or waived.[46]

B13. Each natural person has sufficient legal capacity to enter into and perform, or to carry out that person's role in, the transactions effected by the Loan Documents.

[B14]. *[The following assumption is only needed if the Guarantor is a corporation and the board has not adopted resolutions to the effect that the Guarantor Documents are reasonably expected to benefit the Guarantor.]* The transactions effected by the Loan Documents may be reasonably expected to benefit, directly or indirectly, the Guarantor.[47]

[B15]. The filing of the Financing Statement has been authorized by the Borrower, and the Financing Statement has been properly filed and indexed in the Filing Office.[48]

[B16]. *[Consider the following assumption if the Loan Documents contemplate perfection by control pursuant to a control agreement as to deposit accounts maintained with a bank that is not the secured party and when the secured party does not become the bank's customer with respect to the deposit accounts.]* The Deposit Accounts (as defined in the Deposit Account Control Agreement) are accurately and sufficiently described in the Deposit Account Control Agreement, and each of such Deposit Accounts is a deposit account as defined in Article 9A of the Washington UCC. The Bank is a bank as defined in Article 9A of the Washington UCC.

[B17]. *[The following assumption should be used if the Borrower or the Guarantor is not a Washington entity or if the opinion giver is not opining as to the following matters.*[49]*]* [The Borrower][The Guarantor] (i) is existing and, where applicable, in good standing under the law of

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reasoned in a 1973 decision that fairly typical conditions to advances contained in loan documents gave the lender such broad discretion that they thereby "rendered the advances optional rather than obligatory." Nat'l Bank of Wash. v. Equity Investors, 81 Wn.2d 886, 899 (1973). Although the decision focused on laws other than the Washington UCC, the court's reasoning may provide a basis for arguments that similar funding conditions prevent a loan transaction from satisfying the value requirement.

[46] Enforceability is predicated on the loan closing. For this reason, it is appropriate for the opinion giver to assume that the contractually specified preconditions to closing have been satisfied or waived.

[47] This assumption refers to RCW 23B.03.020(2)(h), which states: "As to the enforceability of the guarantee, the decision of the board of directors that the guarantee may be reasonably expected to benefit, directly or indirectly, the guarantor corporation shall be binding in respect to the issue of benefit to the guarantor corporation." Accordingly, if the guarantor corporation's board of directors has adopted resolutions setting forth that the guaranty may be reasonably expected to benefit the corporation, then this assumption is unnecessary.

[48] Use this assumption if paragraph A11 refers to a filed, rather than an unfiled, financing statement. *See infra* paragraph C19.

[49] Lenders often make loans to borrowers with multistate operations and properties and may require opinions of local counsel in the states where properties that will secure the loan are located. In such situations, the borrower's regular counsel will normally give opinions as to the borrower's status, authority, and execution and delivery of the loan documents, and local counsel will include an assumption as to such matters.

In some cases, local counsel only opine on enforceability of the deed of trust covering real estate in the attorney's jurisdiction. In addition to the matters related to organizational status described in the preceding paragraph, it may be necessary for such local counsel to assume enforceability of the credit agreement, note, and other loan documents secured by the deed of trust covered by such local counsel's opinion letter.

the jurisdiction of its formation, (ii) has the power to execute and deliver, and to consummate the transactions effected by, [each of the Borrower Documents/the Guarantor Documents], (iii) has authorized, by all necessary action on its part, the execution and delivery of, and the consummation of the transactions effected by, [each of the Borrower Documents/the Guarantor Documents], and (iv) has executed and delivered [each of the Borrower Documents/the Guarantor Documents].

[B18]. *[Add as applicable for constituent entities that need to authorize or sign the Borrower Documents/the Guarantor Documents to the extent the opinion giver is not expressly opining on the following matters.]* Each entity that owns a direct or indirect interest in [the Borrower/the Guarantor] whose authorization or consent is required for [the Borrower/the Guarantor] to be authorized to execute and deliver [the Borrower Documents/the Guarantor Documents] and to consummate the transactions effected by [the Borrower Documents/the Guarantor Documents] (i) is existing and, where applicable, in good standing under the law of the jurisdiction of its formation, (ii) has all necessary power to authorize or consent to such actions, and (iii) has authorized or consented to, by all necessary action on its part, the execution and delivery by [the Borrower/the Guarantor] of, and the consummation of the transactions effected by, each of [the Borrower Documents/the Guarantor Documents].

[B19]. *[Include if not opining as to the execution and delivery of the Loan Documents.]* The Loan Documents have as a matter of fact been executed and delivered by the Borrower and the Guarantor with the intent to be bound thereby.[50]

[B20]. [*Include if not opining on the enforceability of all transaction documents, such as a credit agreement governed by the law of a state other than Washington.]* [Without limiting the opinions in paragraphs C[3], C[5], and C[7]], all [non-Washington law transaction documents] are the enforceable obligations of the parties thereto, enforceable in accordance with their terms under the law governing the same.

[B21]. [*Add any other appropriate entity or transaction-specific assumptions, such as may be applicable for entities in regulated industries.*]

In connection with the opinions in this opinion letter, we have relied without investigation or analysis on information in the Public Authority Documents. Except to the extent the information constitutes a statement, directly or in practical effect, of any legal conclusion at issue, we also have relied, without investigation or analysis, on the information contained in the representations and warranties made by the Borrower and the Guarantor in the Loan Documents and on information in the Opinion Certificates.

[50] Enforceability is predicated on the loan documents having been executed by the person purportedly doing so and delivered with an intent to be bound by their terms. Meyer v. Armstrong, 49 Wn.2d 598, 599 (1956). The opinion giver may only have examined unexecuted drafts of the loan documents and may not be present at the closing. As a result, delivery may be conditioned on facts that the opinion giver is not in a position to ascertain, and the opinion giver may not be in a position to confirm actual execution and delivery of the documents. Under these circumstances, it is reasonable to assume such matters or rely on an opinion certificate that provides the factual support for execution and delivery.

[Add the following if the opinion letter contains knowledge limitations.] The phrase "to our knowledge," or any other similar phrase, is a limitation that means the opinion [or confirmation] using such phrase is based solely on the conscious awareness of information by one or more of the following persons: (i) the lawyer who signs this opinion letter on our behalf, and (ii) any lawyer at our firm who has been actively involved in negotiating the transaction, preparing the Loan Documents, or preparing this opinion letter. Such phrases do not imply that we have undertaken an independent investigation to determine the accuracy of the matters covered by any such statement and any limited inquiry undertaken by us during the preparation of this opinion letter should not be regarded as such an investigation. No inference as to our knowledge of any matters bearing on the accuracy of the facts underlying any such statement should be drawn from the fact of our representation of the Borrower or the Guarantor.

C. Opinions

Based on and subject to the preceding examinations, assumptions, and other provisions, and also subject to the qualifications, exclusions, and other limitations stated or referred to below, we are of the opinion that:

C1. *[For a Washington corporation]* The Borrower is a corporation existing under Washington law.[51]

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[51] Paragraph C1 provides that the borrower is "existing" under Washington law. Opinion recipients sometimes request an opinion that a corporation is "validly existing." The Committee does not consider "validly existing" to have a different meaning from "existing." Similarly, in the past, opinion letters often contained the additional statement that a corporation is "duly incorporated." The Committee does not consider the language "duly incorporated" to impart any additional meaning to an opinion that a corporation is "existing" under Washington law.

With respect to the opinion giver's diligence, RCW 23.95.235 provides that a certificate of existence issued by the Washington Secretary of State for a domestic entity must state, among other things: (a) the name of the entity, (b) that the entity's public organic record has been filed and has taken effect, (c) that the records of the Washington Secretary of State do not reflect that the entity has been dissolved, (d) that all fees, interest, and penalties owed by the entity to the state of Washington and collected through the Washington Secretary of State have been paid, if payment is reflected in the records of the Washington Secretary of State and nonpayment affects the existence of the entity, and (e) that the Washington Secretary of State has not begun the process of administrative dissolution. RCW 23.95.235 also provides that, subject to any qualification stated in a certificate of existence, the certificate of existence may be relied on as conclusive evidence of the facts stated in that certificate and that, as of the date of issuance of that certificate, the subject domestic entity is in existence and duly formed or incorporated, as applicable. Therefore, there is no meaningful distinction in the diligence required for existence opinions and due incorporation opinions in the state of Washington. This represents a divergence of Washington law from the law and practice in some other jurisdictions, although the law in other jurisdictions appears to be moving in a similar direction. *See, e.g.*, OPS. COMM., BUS. LAW SECTION OF THE STATE BAR OF CAL., SAMPLE CALIFORNIA THIRD-PARTY LEGAL OPINION FOR BUSINESS TRANSACTIONS 8 n.17 (2010 rev. 2014). *See generally* TriBar II, *supra* note 6, § 6.1 (discussing practice in other jurisdictions).

A certificate of existence issued with respect to a domestic entity by the Washington Secretary of State may not be relied on as conclusive evidence of the name of the domestic entity for purposes of determining whether a financing statement sufficiently provides the name of that entity as a debtor. *See* RCW 62A.9A-502(a)(1); 62A.9A-503(a)(1). A financing statement sufficiently provides the name of a debtor that is a Washington registered organization only if the financing statement provides the name that is stated to be that organization's name on the public organic record most recently filed with or issued or enacted by the state of Washington that purports to state, amend, or restate that organization's name. RCW 62A.9A-503(a)(1); 62A.9A-102(a)(68); 62A.9A-102(a)(71).

Due Organization Opinion. Sometimes, an opinion giver is asked to opine that an entity is "organized" or "duly organized." Such opinions are generally not cost-effective and should be avoided. The term "organized" means that, in addition to the formation of the corporation, all other steps required for organization of the corporation have been taken. Under the Washington Business Corporation Act, chapter 23B RCW, the other steps involve election of directors to the extent not already named in the articles, the appointment of officers, the adoption of bylaws, and the filing of an initial report with the Washington Secretary of State within 120 days of incorporation. *See* RCW 23B.02.050; 23.95.255. In addition, the corporation's shares must be properly issued to and the consideration determined by the board of directors paid by the corporation's initial shareholders. Because of the diligence required to establish these matters opinion givers should be cautious in giving organization opinions, especially if the opinion giver did not assist with the corporation's formation, the corporation's records are incomplete, or the corporation has been in existence for a substantial period of time.

Interplay with the Enforceability Opinion. The four underlying predicate opinions or assumptions needed for an opinion giver to issue an enforceability opinion are: (a) the corporation must exist under the law of the jurisdiction of its formation, (b) the corporation must possess the requisite corporate power to enter into and perform its obligations under the transaction documents subject to the opinion, (c) the corporation must have taken, or as a matter of law be deemed to have taken, the necessary corporate action empowering its officers and other authorized representatives to execute and deliver the transaction documents and perform the stated obligations, and (d) the authorized persons must have actually executed and delivered the agreements subject to the opinion. When asked to give an enforceability opinion, opinion givers typically have the client confirm in an opinion certificate (with supporting documentation as applicable) that the board of directors has not taken any actions to dissolve the corporation since the effective date of the certificate of existence being relied on, has not amended the articles or bylaws relied on for the predicate opinions, has adopted resolutions and/or taken other actions the opinion giver deems necessary to authorize or ratify the obligations to be performed under the transaction documents, and has authorized designated representatives to execute and deliver the agreements memorializing the authorized transaction. As discussed *infra* note 60, customary practice generally provides that the opinion giver is not required to examine the entire chain of authorization.

Good Standing Opinions. The concept of good standing does not exist under Washington business organizations law, and the Washington Secretary of State does not issue any certificate to such effect. In this respect, Washington law differs from that of some other jurisdictions. In some jurisdictions, such as California and Delaware, the failure to pay state taxes subjects a corporation to suspension of its corporate powers and, eventually, involuntary administrative dissolution. An opinion as to good standing in those jurisdictions is customarily understood to mean that the state taxing authority has assured the opinion giver that state taxes have been paid. The Washington Business Corporation Act, chapter 23B RCW, does not provide for the suspension of the corporate powers of a Washington corporation for nonpayment of state taxes, and there is no statutory mechanism for involuntary dissolution for failure to pay state taxes. Therefore, the Committee is of the view that a good standing opinion with respect to a Washington corporation is inappropriate because it has no legal meaning. If given, it should be understood as merely a confirmation that the Washington corporation is existing as of the date of the opinion letter.

Even though the concept of good standing does not exist under Washington business organizations law, an entity's failure to satisfy certain obligations to the state is still considered when opining on the entity's existence. Contrary to the case with unpaid state *taxes*, under RCW 23.95.605, the nonpayment of fees, penalties, and interest collected through the Washington Secretary of State can become a basis for the Washington Secretary of State to commence the process of administratively dissolving a Washington domestic entity. Until that process is concluded, however, the powers of the obligor entity are not suspended or negatively affected. Therefore, in connection with an existence opinion, opinion givers should consider an entity's fee payment status with the Washington Secretary of State, and whether the process of administrative dissolution for nonpayment of fees has been commenced and concluded. As noted above, factual items set forth in a Washington certificate of existence include statements as to whether all fees, interest, and penalties owed to the state that are collected through the Washington Secretary of State have been paid, if nonpayment affects the existence of the obligor entity (RCW 23.95.235(2)(d)), whether an administrative dissolution proceeding is pending against the entity (RCW 23.95.235(2)(f)), and whether the records of the Washington Secretary of State reflect that the entity has been dissolved (RCW 23.95.235(2)(b)(iv)).

Foreign Qualification. When the borrower is engaged in activities in multiple states, the opinion giver may be asked to provide an opinion that the borrower has qualified to transact business in those states. The Committee is of the view that such foreign qualification opinion requests are inappropriate because the matter necessarily pertains to non-Washington law and the opinion typically is based solely on a certificate from an appropriate governmental

C2. *[For a Washington limited liability company]* The Guarantor is a limited liability company existing under Washington law.[52]

[C2. *[For a Washington limited partnership]* The Guarantor is a limited partnership existing under Washington law.][53]

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official in the state. Therefore, the addition of a legal opinion provides nothing of value. Parties should instead rely directly on the certificate. *See* TriBar II, *supra* note 6, § 6.1.6; 2002 ABA Guidelines, *supra* note 8, § 4.1.

If a foreign qualification opinion is given, it should state that it is given solely in reliance on such a certificate and should be limited to a specified list of states, as opposed to alternative formulations such as that the entity is qualified "in all jurisdictions in which failure to qualify would have a material adverse effect on its financial condition" or wherever "the nature of its properties or business requires it." These latter formulations are overly broad and require the opinion giver to make factual determinations that are inappropriate and to interpret the law of jurisdictions not covered by the opinion letter.

Qualification of a Foreign Corporation in Washington. In situations in which the borrower is incorporated in another state, the opinion giver may be asked to opine that the borrower is authorized to transact business in Washington. In such cases, the following form of opinion may be used:

> C[]. Relying solely on the applicable Public Authority Document, the Borrower is authorized to transact business as a foreign corporation in Washington.

The diligence required for the issuance of such an opinion is similar to the diligence required to give an opinion as to a domestic Washington entity's existence; namely, the opinion giver should obtain a certificate of registration from the Washington Secretary of State. The opinion giver should also ensure that the certificate of registration is included in the defined term "Public Authority Documents" in the opinion letter. RCW 23.95.235 provides that, subject to any qualification stated in the certificate of registration, the certificate of registration may be relied on as conclusive evidence of the facts stated in the certificate, and that as of the date of its issuance, the subject foreign entity is registered and authorized to transact business in Washington.

Opinion that Qualification in Washington is Unnecessary. If a lender is from outside Washington, the opinion giver may be asked to opine that the lender's activities in making the loan and potentially foreclosing on real property security in Washington do not require the lender to qualify to transact business in Washington. Such opinions are generally not appropriate for the reasons discussed *supra* note 35.

[52] The Washington Limited Liability Company Act, chapter 25.15 RCW, provides that a limited liability company is formed when the Washington Secretary of State files the entity's certificate of formation. *See* RCW 25.15.071(2). Under RCW 23.95.235, a certificate of existence for a domestic entity must state, among other things: (a) the name of the entity, (b) that the entity's public organic record has been filed and has taken effect, (c) that the records of the Washington Secretary of State do not reflect that the entity has been dissolved, (d) that all fees, interest, and penalties owed by the entity to the state of Washington and collected through the Washington Secretary of State have been paid, if payment is reflected in the records of the Washington Secretary of State and nonpayment affects the existence of the entity, and (e) that the Washington Secretary of State has not begun the process of administrative dissolution. Note, however, that under RCW 25.15.265, a non-administrative dissolution of a limited liability company may have occurred without the Washington Secretary of State being notified. Therefore, in addition to relying on the certificate of existence, the opinion giver should ensure that the opinion certificate obtained from a limited liability company client provides that the members have not taken any action to dissolve the entity. Finally, note that pursuant to RCW 62A.9A-503(a)(1), a certificate of existence issued with respect to a domestic entity by the Washington Secretary of State may not be relied on as conclusive evidence of the debtor's name for purposes of determining whether a financing statement sufficiently identifies the debtor. *See supra* note 51.

[53] The Washington Uniform Limited Partnership Act, chapter 25.10 RCW, provides that a limited partnership is formed when the Washington Secretary of State files the certificate of limited partnership. RCW 25.10.201(3). Under RCW 23.95.235, a certificate of existence for a domestic entity must state, among other things: (a) the name of the entity, (b) that the entity's public organic record has been filed and has taken effect, (c) that the records of the Washington Secretary of State do not reflect that the entity has been dissolved, (d) that all fees, interest, and penalties

[C2. *[For a Washington general partnership]* The Guarantor is a general partnership under Washington law.][54]

[C2. *[Opinion recipients occasionally request an opinion with respect to a trust or a trustee. The footnoted material may be helpful when giving opinions about trusts.]*[55]]

owed by the entity to the state of Washington and collected through the Washington Secretary of State have been paid, if payment is reflected in the records of the Washington Secretary of State and nonpayment affects the existence of the entity, and (e) that the Washington Secretary of State has not begun the process of administrative dissolution. Note, however, that under RCW 25.10.571 and 25.10.576, a non-administrative dissolution of the limited partnership may have occurred without the Washington Secretary of State being notified. Therefore, in addition to relying on the certificate of existence, the opinion giver should ensure that the opinion certificate obtained from a limited partnership client provides that the partners have not taken any action to dissolve the entity. Note, too, that pursuant to RCW 62A.9A-503(a)(1), a certificate of existence issued with respect to a domestic entity by the Washington Secretary of State may not be relied on as conclusive evidence of the debtor's name for purposes of determining whether a financing statement sufficiently identifies the debtor. *See supra* note 51. Finally, note that for the very few remaining limited partnerships formed prior to June 6, 1945, different rules may apply. *See* RCW ch. 25.12.

[54] The form of opinion for a general partnership does not use the word "existing," but if an opinion recipient requires that "existing" appear in paragraph C2, the Committee does not believe that adding it would change the meaning. The Washington Revised Uniform Partnership Act, chapter 25.05 RCW, defines a partnership as an association of two or more persons to carry on as co-owners a business for profit. RCW 25.05.005(1), (6); 25.05.055(1). In contrast to corporations, limited liability companies, limited partnerships, and certain other business associations, Washington law does not set forth any steps that must be taken to form a general partnership. The partnership agreement may be written, oral, or implied. RCW 25.05.005(7). Moreover, although RCW 25.05.110 permits a partnership to file a statement of partnership authority with the Washington Secretary of State, there is no filing requirement to form a general partnership under Washington law. Normally, however, a general partnership borrower will have a written partnership agreement as evidence of the existence of the general partnership. The opinion giver should obtain appropriate certifications from one or more of the partners or other authorized representatives of the general partnership that the agreement examined by the opinion giver constitutes the entire partnership agreement and that the chief executive office of the partnership is located in the state of Washington. The latter is intended to address RCW 25.05.030(1), which states that (except as provided in RCW 25.05.030(2) with respect to a limited liability partnership), "the law of the jurisdiction in which a partnership has its chief executive office governs relations among the partners and the partnership."

[55] **Trustee Certification Statute; Reliance**. The practice of giving opinions with respect to a trust or a trustee in Washington changed substantially with the enactment of RCW 11.98.075 (effective January 1, 2012), which applies to all trusts (except those excluded from the scope of the trust statute by RCW 11.98.009) regardless of when they were created. *See* note to RCW 11.103.020. The statute generally allows parties dealing with a trustee to rely on a certification of any trustee or any attorney for the trust as to the identity of the trustees, their powers, nonrevocation of the trust, and other facts concerning the trust. The statute provides that "[a] person who in good faith enters into a transaction in reliance on a certification of trust may enforce the transaction against the trust property as if the representations contained in the certification were correct." With this, lenders may increasingly choose to rely on a certification of the trustee or trustees rather than on a legal opinion as to the matters on which such reliance is permitted by the statute. Note that the trust certification statute does not apply to Massachusetts Trusts under chapter 23.90 RCW as to which a certificate of beneficial interest has been provided to the beneficiary. *See* RCW 11.98.009.

Although the trust certification statute permits a third party dealing with the trustee to "require the trustee to furnish copies of those excerpts from the original trust instrument and later amendments which designate the trustee and confer on the trustee the power to act in the pending transaction or any other reasonable information," it also provides that: "A person making a demand for the trust instrument in addition to a certification of trust or excerpts is liable for damages, including reasonable attorney fees, if the court determines that the person did not act in good faith in demanding the trust instrument." RCW 11.98.075(5), (8).

C3. *[For a Washington corporation]* The Borrower has the corporate power to execute and deliver, and to perform its obligations under, each of the Borrower Documents.[56]

Certain Unique Aspects of Giving Opinions about Trusts. An opinion recipient may request that the opinion giver provide opinions similar to the existence, power, and authority opinions typically given on behalf of corporations, limited liability companies, and limited partnerships. If an opinion giver is willing to give such opinions, they should not be given without careful review of the issues and appropriate tailoring and limitations. In giving any opinion with respect to a trust or trustee, the opinion giver should take into account a number of facts that make such opinions unique, including the following:

(a) The fact that, generally, a trust is not an entity, but is rather a relationship among the trustee, the trustor, and the beneficiary. *See In re* Bowden, 315 B.R. 903, 907 (Bankr. W.D. Wash. 2004); RESTATEMENT (THIRD) OF TRUSTS § 2 (Am. Law Inst. 2001).

(b) It may be unclear whether Washington law applies to the trust. *See* RCW 11.98.005(1); *see also* Laughlin v. March, 19 Wn.2d 874, 877 (1941) (the validity of a trust of an interest in land is to be determined by the law of the state where the land is situated).

(c) The various statutory requirements for the creation of a valid trust, including those set forth in RCW 11.98.008 and .011 through .015.

(d) Whether the trust is a typical trust of the type used in estate planning or is a specialized type of trust used for other purposes (such as a Massachusetts Trust under chapter 23.90 RCW).

(e) Whether the transaction is a "significant nonroutine transaction" in which the trustee may not engage in the absence of a "compelling circumstance" without giving certain notices to the trustors of the trust, if living, and to certain beneficiaries pursuant to RCW 11.100.140. Subsection (7) of the statute provides that a person dealing with a trustee may rely on the trustee's written statement that the requirements of the statute have been met for a particular transaction and that, if a trustee gives such a statement, the transaction shall be final unless the party relying on the statement has actual knowledge that the requirements of the statute have not been met.

(f) Whether the execution of a document is within a trustee's power if the instrument is not for a trust purpose (such as execution of a guaranty of debt incurred by the settlor that is not for the benefit of trust property).

Special Rules for Financing Statements Against Trustee Debtors. When giving an opinion that a security interest granted by a trustee under Article 9A of the Washington UCC is perfected by filing a financing statement, an opinion giver should be careful to ensure that the complicated and often counterintuitive requirements for properly completing and filing such a financing statement have been met. *See generally* Norman Powell, *Filings Against Trusts and Trustees Under the Proposed 2010 Revisions to Current Article 9 – Thirteen Variations*, 42 UCC L.J. 375 (2010). Among other things, the opinion giver must be aware that, although the trustee is the debtor, the name of the debtor to be shown on the financing statement is the name of the trust if the trust has a name and, otherwise, the name of the settlor (i.e., the trustor) together with information sufficient to distinguish the trust from other trusts created by the same settlor. RCW 62A.9A-503(a)(3). The financing statement must be filed in the location of the debtor (i.e., the trustee), as determined under RCW 62A.9A-307.

[56] The corporate power opinion confirms that the corporation is permitted, under its charter documents and enabling legislation pursuant to which the corporation is organized, to enter into the transaction in question or to take the action referenced. Under the Washington Business Corporation Act, chapter 23B RCW, Washington corporations are authorized to pursue a broad range of activities. Accordingly, unless the charter documents contain restrictions on the scope of its activities, giving this opinion with respect to a Washington corporation usually should not be difficult. The reference to "corporate power" is intended to emphasize that the power opinion addresses only the corporate power necessary to permit the corporation to enter into and perform its obligations under the transaction documents. The word "corporate" is not necessary; it is understood whether or not expressly stated. The opinion does not address whether third-party, governmental, or internal (such as, in the case of a corporation, director or shareholder) approvals are required to approve, authorize, or take the indicated action. Historically, the opinion referred to both power and authority. Because in this opinion the terms "power" and "authority" have the same meaning and the use of the term

C4. *[For a Washington limited liability company]* The Guarantor has the limited liability company power to execute and deliver, and to perform its obligations under, each of the Guarantor Documents.[57]

[C4. *[For a Washington limited partnership]* The Guarantor has the limited partnership power to execute and deliver, and to perform its obligations under, each of the Guarantor Documents.[58]]

[C4. *[For a Washington general partnership]* The Guarantor has the partnership power to execute and deliver, and to perform its obligations under, each of the Guarantor Documents.[59]]

C5. *[For a Washington corporation]* The Borrower has authorized,[60] by all necessary corporate action on the part of the Borrower, the execution and delivery by the Borrower of, and

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"authority" could create some confusion with the authorization opinion addressed in paragraph C5, the Committee has elected to use the term "power" alone in this opinion.

Opinion recipients will occasionally seek to expand the scope of the corporate power opinion to cover the power of the corporation to own its properties and to carry on its business as it is now conducted. Two objections are frequently raised to giving this expanded opinion. The first is the questionable relevance of the expanded opinion in connection with lending transactions. The second is the difficulty of determining the scope of a large and complex corporation's activities or the nature of its assets. Accordingly, it is appropriate to decline opining as to a corporation's corporate power to conduct its business and to own its properties.

[57] Limited liability companies have the power to engage in any lawful business or activity. *See* RCW 25.15.031. Nevertheless, a limited liability company's certificate of formation or limited liability company agreement may limit its powers. *See also supra* note 56 (discussing the meaning of the power opinion generally).

[58] For a description of limited partnership purposes and powers, see RCW 25.10.021 and 25.10.031. For a discussion of the meaning of the power opinion generally, see *supra* note 56.

[59] Although the Washington Revised Uniform Partnership Act, chapter 25.05 RCW, does not contain restrictions on a partnership's purposes or powers, limitations may be contained in a partnership agreement (written or oral) or in publicly filed statements of authority. *See* RCW 25.05.110; *see also supra* note 56 (discussing the meaning of the power opinion generally).

[60] The authorization opinion means that the corporation has taken all corporate action required to authorize it to execute and deliver and to consummate the transactions effected by, the transaction documents. The reference in the opinion to "all necessary corporate action" is intended to make clear that the opinion speaks only as to internal authorization (such as, in the case of a corporation, director and/or shareholder consent), and does not cover authorization by a governmental authority or any other third party whose consent or authorization might be required. The latter types of authorization are addressed in paragraph C13. In addition, if the corporation operates in a regulated industry, additional opinions regarding compliance with the applicable regulatory requirements may be appropriate.

The opinion certificate obtained from the client should provide the factual support for the authorization opinion. *See* TriBar II, *supra* note 6, §§ 2.2, 2.5. In many cases, a reference to the adoption by the corporation's board of directors of resolutions authorizing the transaction, perhaps together with an incumbency certificate, may provide the necessary support.

Opinion givers are not generally required to examine the entire chain of authorization (for instance, to determine that, from the corporation's formation, each director was properly elected, and that all shares that are entitled to vote were properly issued). The opinion giver is entitled to assume without stating that there are no breaks in such chain of authority.

the consummation by the Borrower of the transactions effected by,[61] each of the Borrower Documents.

C6. *[For a Washington limited liability company]* The Guarantor has authorized, by all necessary limited liability company action on the part of the Guarantor,[62] the execution and delivery by the Guarantor of, and the consummation by the Guarantor of the transactions effected by, each of the Guarantor Documents.

[C6. *[For a Washington limited partnership or general partnership]* The Guarantor has authorized, by all necessary partnership action on the part of the Guarantor, [63] the execution and delivery by the Guarantor of, and the consummation by the Guarantor of the transactions effected by, each of the Guarantor Documents.]

C7. The Borrower has executed[64] and delivered[65] each of the Borrower Documents.

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[61] The opinion refers to the borrower's "consummation" of the transactions "effected by" the Borrower Documents. The Committee chose the word "consummation," instead of the alternative word "performance," to make clear that the opinion does not cover events that are to take place after the opinion is given. Such an opinion should not be construed to cover approvals, authorizations, or other actions that may become necessary as a result of the future occurrence or non-occurrence of specified events or circumstances (such as the requirement that the borrower obtain a building permit to rebuild any encumbered property following a casualty), because the opinion giver has no way to determine whether such events or circumstances will occur. *See* TriBar II, *supra* note 6, § 6.5.4. Similarly, the Committee chose to use the phrase "effected by," rather than the alternative "contemplated by," to avoid an implication that the opinion covers future events and because it believes the phrase "contemplated by" to be undesirably vague.

[62] Due to the flexibility granted by the Washington Limited Liability Company Act, chapter 25.15 RCW, for members of a limited liability company to define management roles and authority, the opinion giver should review the management and member approval provisions of the limited liability company agreement. If no written limited liability company agreement exists, the opinion giver may not be able to satisfy its diligence requirements without requiring the members of the limited liability company to memorialize their agreement in writing.

[63] Special care should be taken by opinion givers when giving authorization opinions with respect to general or limited partnerships. Although Washington law provides each partner in a general partnership substantial authority to bind the partnership to transactions that are consistent with the business of the partnership, a partnership agreement (written or oral) or a statement of authority filed under RCW 25.05.110 may contain restrictions. Likewise, a limited partnership agreement may impose notice or voting requirements beyond what is required by statute.

[64] The execution opinion means that (a) the individual or individuals who signed the applicable document on behalf of the borrower were authorized to sign in a representative capacity, and (b) such execution by those individuals was sufficient, as a matter of law, to make the obligations of the executed document binding on the borrower, assuming that the agreement is delivered to the other parties to the transaction. The board resolutions approving the borrower's participation in the transaction will typically designate the officer or officers having authority to execute and deliver transaction documents on behalf of the borrower. Confirmation that the person signing in fact holds an office with the requisite authority is usually evidenced by an incumbency certificate certifying that the designated person was elected and continues to hold the designated office. If the opinion giver is not in a position to confirm that the authorized officers have executed the documents, or if the opinion giver has examined only unexecuted drafts for purposes of the opinion, then an assumption as to execution is appropriate in place of an opinion. *See supra* note 50 and accompanying text.

[65] The delivery opinion means that the borrower has delivered the transaction documents to the lender with an intent to be bound (meaning there are no unfulfilled conditions or contingencies that must be satisfied before the documents would be binding on the borrower). Conditions to the effectiveness of the documents contained within the documents themselves do not prevent a legally effective delivery. The delivery opinion is, in virtually all cases, coupled with requests for authorization and execution opinions. Under Washington law, "[a] valid written instrument

C8. The Guarantor has executed and delivered each of the Guarantor Documents.

C9. The Borrower Documents are enforceable[66] against the Borrower in accordance with their terms.

C10. The Guarantor Documents are enforceable against the Guarantor in accordance with their terms.[67]

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is predicated upon . . . its execution, and . . . its delivery with intent to put it into effect." Meyer v. Armstrong, 49 Wn.2d 598, 599 (1956).

Because the opinion giver may not be present at the closing, or the closing may be handled through an escrow agent, title company, or other intermediary, the opinion giver may not be able to confirm actual delivery of the documents. Moreover, delivery may be conditioned on satisfaction of certain conditions, and the opinion giver may not, at the time the opinion is given, be in a position to ascertain whether such conditions have been satisfied. Under these circumstances, the opinion giver is justified in assuming delivery of the documents rather than opining that the documents have been delivered. *See supra* note 50 and accompanying text. This is especially helpful in real estate transactions in which physical delivery of the documents, such as deeds and deeds of trust, is a prerequisite to the effectiveness of the conveyance or deed of trust.

[66] Some opinion recipients request the following formulation of the enforceability opinion: "The Borrower Documents are legal, valid, and binding obligations of the Borrower, enforceable against the Borrower in accordance with their terms." This formulation has the same meaning as the opinion in paragraph C9. Additionally, it is not customary practice in Washington to give an unqualified enforceability opinion. For a discussion of common qualifications to the enforceability opinion, see *infra* note 97 and accompanying text.

In the illustrative form of opinion letter, the borrower documents include a security agreement and certain other security documents. As a matter of customary practice, an enforceability opinion with respect to those agreements is understood to address only the enforceability of the borrower's obligations under the agreements, and does not express any opinion with respect to the creation, attachment, or perfection of any security interest purportedly granted in such agreements. Opinions regarding the creation, attachment, or perfection of security interests, if given, are typically set forth in separate opinions, such as those in paragraphs C17, C18, and C19 of the illustrative form of opinion letter. *See* TriBar Op. Comm., *Special Report of the TriBar Opinion Committee: UCC Security Interest Opinions—Revised Article 9*, 58 BUS. LAW. 1449, 1460 § 2.2 (2003) [hereinafter TriBar UCC Opinion Report].

[67] The following matters should be considered when giving an enforceability opinion on a guaranty or any other loan document that raises suretyship issues (such as one in which a person other than the borrower is encumbering its assets to secure the borrower's obligations to the lender, or one in which there are multiple borrowers, which can be considered sureties with respect to one another's obligations).

Effect of Washington's Antideficiency Statute on the Enforceability of Guaranties. Washington's antideficiency statute, RCW 61.24.100, permits an action against a guarantor of a commercial loan for recovery of a deficiency following a nonjudicial foreclosure, but prescribes certain time limits, notices, valuation procedures, and other requirements that may limit the ability of a lender to recover a deficiency against a guarantor.

Waivers of Suretyship Defenses. The form of guaranty will likely contain provisions under which the guarantor purports to waive one or more defenses that arise under the common law of suretyship. In Washington, waivers of suretyship defenses are generally enforceable. *See, e.g.*, Lincoln v. Transamerica Inv. Corp., 89 Wn.2d 571 (1978); Fruehauf Trailer Co. of Canada Ltd. v. Chandler, 67 Wn.2d 704 (1966); Union Bank, N.A. v. Blanchard, 194 Wn. App. 340 (2016); Grayson v. Platis, 95 Wn. App. 824 (1999); Franco v. Peoples Nat'l Bank of Wash., 39 Wn. App. 381 (1984); MGIC Fin. Corp. v. H.A. Briggs Co., 24 Wn. App. 1 (1979); s*ee also* Warren v. Wash. Trust Bank, 92 Wn.2d 381 (1979).

Qualification of Enforceability of Waivers of Suretyship Defenses. Because waivers of suretyship defenses often do not specifically identify the defense purportedly waived or may be unfair if enforced absolutely under all circumstances, there may be circumstances in which waivers are not enforceable as written. Also, waivers of

C11. The execution and delivery by the Borrower of, and the consummation by the Borrower of the transactions effected by, the Borrower Documents (i) do not violate the Borrower Entity Documents[, (ii) do not breach[68] any existing obligation of the Borrower under any of the Specified Agreements],[69] and [(ii)] [(iii)] are not prohibited by, and do not subject the Borrower to

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suretyship defenses may not have been given by all parties that may at some point in the loan relationship have suretyship defenses. Although such circumstances may be adequately covered by the equitable principles limitation to the enforceability opinion, the principal remedies qualification, or in qualifications relating to the implied covenant of good faith and fair dealing, an opinion giver may wish to include a specific qualification relating to the enforceability of waivers of suretyship defenses such as the one that appears in paragraph D7. It is the Committee's view that a qualification such as that set forth in paragraph D7 is customarily understood and that failure to include a specific qualification relating to waivers of suretyship defenses does not mean that the opinion giver is opining that all waivers of suretyship defenses are enforceable or that all suretyship defenses have been adequately waived in the loan documents.

Upstream/Cross Stream Guaranty Issues. If the guarantor is a subsidiary of the borrower or the borrower and the guarantor are owned, directly or indirectly, by a common parent, the guaranty arrangement is sometimes referred to as an upstream guaranty (a guaranty by a subsidiary of its parent's obligations) or a cross stream guaranty (a guaranty by one brother/sister entity of another brother/sister entity's obligations). Upstream and cross stream guaranty issues can also arise if there is no guaranty agreement, but the subsidiary or brother/sister corporation enters into a security agreement or deed of trust securing obligations of the parent or brother/sister affiliate or if the entities are co-borrowers. Depending on the facts and circumstances, such guaranties may be determined by a court to be fraudulent transfers. *See, e.g.*, *In re* Sabine Oil & Gas Corp., 547 B.R. 503 (Bankr. S.D.N.Y. 2016) (upstream guaranties and security interests granted by insolvent subsidiaries were potentially avoidable fraudulent transfers); *see also In re* UC Lofts on 4th, LLC, 2015 WL 5209252 (B.A.P. 9th Cir. 2015) (declining to treat benefit to an upstream entity as reasonably equivalent value).

Completion Guaranties and Other Guaranties of Performance. Guaranties of performance of an obligation other than the payment of money—such as a guaranty that a financed project will be completed—raise additional enforceability issues. For example, these guaranties often provide that the lender may obtain a decree of specific performance requiring the guarantor to complete the project or that the lender can recover the cost to complete the project from the guarantor even if the lender does not itself complete the project. Washington case law suggests that such provisions may not be enforceable as written and that the lender may be entitled only to recover its actual damages arising from breach of the performance obligation. *See* Western Const. Co. v. Austin, 3 Wn.2d 58 (1940); *see also* Sherman v. Western Const. Co., 14 Wn.2d 252 (1942). These limitations are covered by the equitable principles qualification set forth in paragraph D1 and need not be separately stated. If an opinion giver nevertheless desires to include a specific qualification relating to the enforceability of a performance guaranty, then a qualification such as the following may be used:

> D[]. The enforceability of the [Completion] Guaranty may be subject to Washington case law to the effect that a guaranty of performance of an obligation other than an obligation to pay money may not be specifically enforceable and may be enforced only to the extent of a recovery of the amount of the actual loss incurred by the beneficiary of the guaranty as a result of the breach of the performance obligation.

[68] The no breach opinion provides that the borrower's execution and delivery of, and the consummation by the borrower of the transactions effected by, the transaction documents, will not constitute a breach under identified obligations of the borrower. The term "breach" covers situations in which entering into the transactions constitutes the breaking of a promise given by the borrower to some other party or constitutes an "event of default" as that term is defined in some other agreement to which the borrower is a party. The opinion recipient may prefer the term "default" or may ask that both "breach" and "default" be addressed. The Committee views these terms as interchangeable in this context. Because the phrase "conflict with" is uncertain and vague in this context, however, the Committee disfavors the use of this phrase in the no breach opinion.

[69] The term is defined *supra* paragraph A19. The illustrative form of opinion letter reflects the preferred, and increasingly common, approach of using an exhibit to identify specific documents examined, rather than making

the imposition of a fine, penalty, or other similar sanction for a violation under, any statutes or regulations of the state of Washington that in our experience are typically applicable to agreements similar to the Borrower Documents and the transactions effected thereby.[70]

C12. The execution and delivery by the Guarantor of, and the consummation by the Guarantor of the transactions effected by, the Guarantor Documents (i) do not violate the Guarantor Entity Documents[, (ii) do not breach any existing obligation of the Guarantor under any of the Specified Agreements], and [(ii)] [(iii)] are not prohibited by, and do not subject the Guarantor to the imposition of a fine, penalty, or other similar sanction for a violation under, any applicable statutes or regulations of the state of Washington that in our experience are typically applicable to agreements similar to the Guarantor Documents and the transactions effected thereby.

C13. Except for (i) the recordation of the Deed of Trust and the Assignment of Leases and Rents referred to below in paragraphs C15 and C16, (ii) the filing of the Financing Statement referred to below in paragraph C19, and (iii) such approvals, authorizations, actions, or filings that have been obtained or made, no approval, authorization, or other action by, or filing with, any governmental authority of the state of Washington is required in connection with the execution and delivery by the Borrower of, and the consummation by the Borrower of the transactions effected by, the Borrower Documents.[71]

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reference to a vague or insufficiently defined universe (as in "all agreements known to us"). The list of specific documents should be agreed on early enough to allow the borrower to assemble, and the opinion giver to review, the documents.

Certain of the documents examined may be governed by the law of a jurisdiction other than the state of Washington or any other jurisdiction expressly covered by the opinion letter. In such cases, the opinion giver is entitled to assume, without so stating in the opinion letter, that those agreements would be interpreted in accordance with their plain meaning. *See* TriBar II, *supra* note 6, § 6.5.6.

[70] The no violation of laws opinion addresses whether the borrower's consummation of the transactions effected by the transaction documents (a) is prohibited by any Washington statute or regulation, or (b) exposes the borrower to a sanction for violating a Washington statutory or regulatory prohibition (either civil or criminal in nature). This opinion is limited to an examination of statutes or regulations and does not cover common law doctrines or judicial and administrative decisions. It is reasonable to expect the opinion giver to be knowledgeable regarding the laws typically implicated in transactions of the type contemplated by the transaction documents. It is, however, not reasonable to expect encyclopedic knowledge of all Washington statutes and the ability to anticipate novel applications of statutes that are not typically applied to such transactions. Accordingly, the qualifying language at the end of the opinion will be implied whether or not expressly stated.

Sometimes this opinion is expressed by stating that the borrower's performance does not "violate or conflict with" applicable laws. Because the phrase "conflict with" is uncertain and vague in this context, the Committee disfavors its use in the no violation of laws opinion. On occasion, the opinion recipient may ask the opinion giver to opine that the borrower is in full compliance with applicable laws. Such a request is overreaching. The opinion giver can never conduct the diligence necessary to give this opinion (which would include assessing the legal compliance of all activities of the borrower, against all applicable laws), and the cost of achieving even minimal comfort for the opinion giver is unlikely to produce any reasonably commensurate benefit. The legal opinion literature uniformly recognizes such requests to be unreasonable. *See* GLAZER ET AL., *supra* note 11, § 6.3.

[71] The governmental approval opinion addresses only approvals, authorizations, and other governmental actions required under Washington law. The opinion is understood as a matter of customary practice not to cover requirements of local (such as county or municipal) law. *See* TriBar II, *supra* note 6, § 6.7. Accordingly, it speaks only as to whether the borrower has, at or before the closing, obtained the requisite governmental approvals to close the loan transaction, and does not refer to the borrower's performance of the transaction documents.

C14. Except for such approvals, authorizations, actions, or filings that have been obtained or made, no approval, authorization, or other action by, or filing with, any governmental authority of the state of Washington is required in connection with the execution and delivery by the Guarantor of, and the consummation by the Guarantor of the transactions effected by, the Guarantor Documents.

C15. The Deed of Trust is in form sufficient (i) to create a lien on the Borrower's interest in the Mortgaged Property[72] [and a security interest in the Borrower's interest in fixtures affixed to the Mortgaged Property] [, (ii) to be effective as a financing statement filed as a fixture filing from the date of its recording,][73] and [(ii)] [(iii)] for recording in the real property records of the [county] [counties] in which the Mortgaged Property is located.

C16. The Assignment of Leases and Rents is in form sufficient (i) to create a lien on the Borrower's interest in the unpaid rents of the Mortgaged Property[74] and (ii) for recording in the real property records of the [county] [counties] in which the Mortgaged Property is located.

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[72] Customarily, opinion givers opine that a deed of trust "is in form sufficient" to create a lien, rather than that the deed of trust "creates a lien" on the mortgaged property. Beneficiaries under deeds of trust generally address the risks associated with lien creation and priority by obtaining title insurance because there are many formal requirements for lien creation on real Washington property, including that the contract creating the encumbrance must contain an accurate and valid legal description of the mortgaged property, which is a factual matter beyond the expertise of legal counsel.

[73] The bracketed language should be included only if the deed of trust also qualifies as a fixture filing pursuant to RCW 62A.9A-502(c). Additionally, two alternative approaches available under Washington law are discussed below.

First, a separate financing statement meeting the requirements of RCW 62A.9A-502(b) may qualify as a fixture filing if recorded in the appropriate real property records. If a separate financing statement is used, (a) the financing statement must comply with the requirements of RCW 62A.9A-502(b), (b) the words "and the Fixture Filing" should be included in the first line of paragraph C18 after the words "recordation of the Deed of Trust," and (c) the financing statement (referred to in the opinion letter by the defined term "Fixture Filing") should be added to the list of documents identified in Section A of the opinion letter. Note that if a separate financing statement is filed as a fixture filing in the real property records, continuation statements must also be filed in accordance with RCW 62A.9A-515.

Second, a security interest in fixtures may also be perfected by filing a financing statement in the personal property records with the Washington Department of Licensing pursuant to RCW 62A.9A-501(a)(2); however, when perfected in this manner, the security interest will not enjoy the additional priority with respect to fixtures accorded by RCW 62A.9A-334.

Note that special rules apply to fixture filings against transmitting utilities (as defined in RCW 62A.9A-102(81)). *See, e.g.*, RCW 62A.9A-501(b); 62A.9A-515(f).

[74] The opinion states that the assignment of leases and rents is in a form sufficient to create a *lien* on the Borrower's interest in unpaid rents, but many such assignments are written as *absolute* assignments (e.g., "the Borrower hereby assigns and transfers, absolutely, unconditionally and not merely for security purposes, all of its interest in the rents, whether paid or unpaid, from the Property"). A license to collect the rents is then granted back to the borrower so long as no default has occurred. This language is traceable to the laws of certain states that (a) treat such absolute assignments of rents as transferring a present ownership interest in the rents to the assignee rather than just a lien, and (b) provide a lender holding such an absolute assignment with better rights than a lender with a collateral assignment. *See* Julia Patterson Forrester, *Still Crazy After all These Years: The Absolute Assignment of Rents in Mortgage Loan Transactions*, 59 FLA. L. REV. 487 (2007) (discussing the history of such provisions and their treatment in various states). There is no comparable Washington law to the effect that a purportedly absolute

C17. The Security Documents create a security interest in the Article 9A Collateral.[75]

C18. The recordation of the Deed of Trust in the real property records of [the county] [each of the counties] in which the Mortgaged Property is located[76] will constitute the only recordation in the state of Washington necessary [(i)] to give constructive notice to third parties of any lien created by the Deed of Trust on the Borrower's interest in the Mortgaged Property [and (ii) to perfect any security interest created by the Deed of Trust in the Borrower's interest in fixtures affixed to the Mortgaged Property].[77]

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assignment of rents would be enforced as such. Although a Washington court may find that such an assignment creates a lien on the leases and unpaid rents, there is no reported case expressly so holding.

During the 1980s, some bankruptcy courts interpreting Washington law held that, if an assignment of rents was not perfected by appointment of a receiver to collect the rents (or by certain other actions) prior to the bankruptcy of the assignor, the assignment remained inchoate and could be avoided in bankruptcy. *See In re* Johnson, 62 B.R. 24 (B.A.P. 9th Cir. 1986); *In re* Ass'n Ctr. Ltd. P'ship, 87 B.R. 142 (Bankr. W.D. Wash. 1988). To address these cases, RCW 7.28.230 was amended in 1989 to provide that the recording of an assignment, mortgage, or pledge of unpaid rents and profits of real property *intended as security* "shall immediately perfect the security interest" and no further action is required to perfect such interest. The statute also provides that any lien created by such an assignment, mortgage, or pledge, when recorded, shall be deemed "specific, perfected and choate." The Ninth Circuit Court of Appeals subsequently held that the amendment was effective to overrule the holding in the earlier cases. *In re* Park at Dash Point, L.P., 985 F.2d 1008 (9th Cir. 1993).

For the opinion giver to provide an opinion that the assignment of leases and rents is in a form sufficient to create a lien, the assignment should clearly state that the parties intended the assignment to be for security and not an absolute assignment. In the absence of such language, the opinion giver should decline to give a specific opinion that the assignment creates a lien, and should include the following limitation in the opinion letter:

> D[]. We express no opinion as to the enforceability or effect of any assignment of leases and rents that purports to be an absolute assignment rather than an assignment intended as security.

[75] *See* RCW 62A.9A-108 (setting forth requirements for collateral descriptions). Normally, the opinion regarding creation of security interests is limited to those security interests that are governed by Article 9 of the UCC of the opinion giver's jurisdiction. *See* TriBar UCC Op. Report, *supra* note 66, § 2.1(b). Accordingly, the opinion set forth in paragraph C17 does not apply to security interests governed by (a) federal law, (b) the Uniform Commercial Code as enacted in any other jurisdiction, or (c) Washington law other than the Washington UCC. Because of the customary exclusion noted in paragraph D3(i), this opinion is also inapplicable to collateral of a type described in RCW 62A.9A-501(a)(1) (including timber to be cut and as-extracted collateral (such as minerals)). The opinion set forth in paragraph C17 states only that a security interest is created, and avoids expressing an opinion that the security interest secures any particular obligation. By doing so, it avoids expressing an opinion that any dragnet clause (a clause stating that the collateral secures all present and future obligations of the debtor to the secured party) is effective, if such a clause is included.

RCW 62A.9A-203(b) requires, among other things, that the debtor has rights in the collateral and that value has been given. The existence and extent of such rights is primarily factual and it is impractical, if not impossible, to give opinions with respect to a borrower's rights in collateral. Accordingly, opinion givers customarily assume that these elements have been satisfied. *See supra* paragraphs B10, B11.

[76] *See* RCW 65.08.070. The opinion giver may be asked for an opinion identifying the proper place for recording the deed of trust and assuring the opinion recipient that, following due recordation, the deed of trust will create a perfected lien on the real property. Perfection is a concept that typically relates to security interests in personal property; with respect to liens on real property, opinion givers traditionally refer to constructive notice by compliance with applicable recording laws.

[77] Subsection (ii) should be included only if the deed of trust will qualify as a fixture filing under RCW 62A.9A-502(c). Alternatively, a separate financing statement could qualify as a fixture filing if recorded in the appropriate real

C19. *[For perfection by central filing in the state of Washington. Use the first bracketed alternative if the opinion giver has examined an unfiled financing statement; use the second bracketed alternative if the opinion giver has examined a pre-filed financing statement.]* [Upon the filing of the Financing Statement in the Filing Office after the execution and delivery by the Borrower of the Security Documents, the Lender will have a perfected security interest in those portions of the Article 9A Collateral that are described in both the Financing Statement and the Security Documents[78] and in which a security interest can be perfected under Article 9A of the Washington UCC by the filing of a financing statement in the Filing Office.] [*or*] [Upon the execution and delivery by the Borrower of the Security Documents, the Lender will have a perfected security interest in those portions of the Article 9A Collateral that are described in both the Financing Statement and the Security Documents and in which a security interest can be perfected under Article 9A of the Washington UCC by the filing of a financing statement in the Filing Office.][79]

C20. *[For perfection by delivery as to certificated securities in registered or bearer form.]*[80] The security interest created by the Security Documents in the portion of the Article 9A Collateral that consists of certificated securities represented by the Share Certificate[81] will be perfected under Article 9A of the Washington UCC upon the Lender acquiring possession of the Share Certificate in the state of Washington.

C21. *[For perfection by control as to certificated securities in registered form.]* The security interest created by the Security Documents in the portion of the Article 9A Collateral that

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property records and meeting the requirements of RCW 62A.9A-502(b). *See supra* note 73 (discussing these requirements and other matters relating to initial and continued perfection in fixtures).

[78] Because the collateral description in the financing statement may not be consistent with the collateral description in the security documents, protection is provided to the opinion giver by the reference to portions of the Article 9A Collateral that are described in one or more of the security documents and the financing statement. Note that the financing statement may indicate that it covers "all assets" or "all personal property" of the debtor if the debtor authorizes the filing of a financing statement containing such an indication. RCW 62A.9A-504(2); 62A.9A-509; 62A.9A-510. If properly authorized (including pre-filing authorization), such language is a sufficient indication of the collateral covered by the financing statement, but a similar overly generic description of collateral in a security agreement would not reasonably identify the collateral and, accordingly, would not be a sufficient description for creation and attachment purposes. *See* RCW 62A.9A-108(a), (c).

[79] *See* RCW 62A.9A-301 and 62A.9A-307 (setting forth rules to determine the location of the debtor and the law governing perfection of the security interest). Neither version of opinion C19 can be given under Washington law if the debtor (as grantor of the security interest) is located (as determined pursuant to RCW 62A.9A-307) in a jurisdiction other than the state of Washington.

[80] Practitioners must take special care to properly classify ownership interests in business associations as collateral under the Washington UCC. For instance, even if represented by a certificate, an ownership interest in a general partnership, limited partnership, or limited liability company is considered a general intangible rather than a security unless it meets the requirements of RCW 62A.8-103(3). With respect to ownership interests that are properly classifiable as certificated securities, Washington law governs perfection if and so long as the certificate is located in Washington. *See* RCW 62A.9A-305(a)(1); *see also* RCW 62A.9A-313(a); 62A.9A-313(e); 62A.8-301(1)(a). Note that possession of a bearer form certificated security perfects a security interest in that security by control. *See* RCW 62A.9A-314(a); 62A.9A-106(a); 62A.8-106(1).

[81] Any such document should be added to the list of documents in Section A of the opinion letter.

consists of certificated securities in registered form and represented by the Share Certificate will be perfected under Article 9A of the Washington UCC [upon the Lender acquiring possession of the Share Certificate and the Stock Power[82] in the state of Washington][83] [or] [upon the Lender acquiring possession of the Share Certificate in the state of Washington, and the Share Certificate being registered in the name of the Lender upon registration of transfer by the issuer of the Share Certificate.[84]

C22. *[For perfection by control as to uncertificated securities that are not held in a securities account.]* The security interest created by the Security Documents in the portion of the Article 9A Collateral that consists of uncertificated securities described in Schedule [__] to the [_____ Agreement] [and in the Uncertificated Securities Control Agreement[85]] will be perfected under Article 9A of the Washington UCC [by control pursuant to the Uncertificated Securities Control Agreement][86] [or] [upon the issuer's registration of the Lender as the registered owner of such uncertificated securities].[87]

C23. *[For perfection by control pursuant to a control agreement as to deposit accounts maintained with a bank that is not the secured party and when the secured party does not become the bank's customer with respect to the deposit accounts.]* The security interest created by the Security Documents in the portion of the Article 9A Collateral that consists of the Deposit Accounts (as defined in the Deposit Account Control Agreement) will be perfected by control pursuant to the Deposit Account Control Agreement.[88]

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[82] Any such document should be added to the list of documents in Section A of the opinion letter.

[83] *See supra* note 80 regarding the law governing perfection. *See also* RCW 62A.9A-314(a); 62A.9A-106(a); 62A.8-301(1)(a); 62A.8-106(2)(a). Also note that the Stock Power must constitute an effective indorsement. RCW 62A.8-102(1)(k).

[84] *See* RCW 62A.9A-314(a); 62A.9A-106(a); 62A.8-301(1)(a); 62A.8-106(2)(b).

[85] Any such document should be added to the list of documents in Section A of the opinion letter.

[86] Perfection by control is the preferred, but not exclusive, method of perfecting a security interest in uncertificated securities that are not held in a securities account. RCW 62A.9A-314(a). The control agreement must provide that the share issuer has agreed that it will comply with instructions originated by the lender without further consent by the borrower. *See* RCW 62A.9A-106(a); 62A.8-106(3)(b). Also note that, with certain exceptions, the local law of the share issuer's jurisdiction will govern perfection, the effect of perfection or nonperfection, and the priority of a security interest in an uncertificated security. RCW 62A.9A-305(a)(2); 62A.9A-305(c); 62A.8-110(4). Deletion or appropriate revision of the opinion in paragraph C22 will be required if the share issuer's jurisdiction is not the state of Washington.

[87] *See* RCW 62A.9A-314(a); 62A.9A-106(a); 62A.8-106(3)(a); 62A.8-301(2)(a); *see also supra* note 86 (regarding the law that will govern perfection, the effect of perfection or nonperfection, and the priority of a security interest in an uncertificated security).

[88] Except as otherwise provided in RCW 62A.9A-315(c) and (d) for proceeds, a security interest in a deposit account, as defined in RCW 62A.9A-102(a)(29), may be perfected only by control. RCW 62A.9A-312(b)(1). The control agreement must be a record authenticated by the borrower (as debtor), the lender (as secured party), and the depositary bank, and must provide that the borrower, the lender, and the depositary bank have agreed that the depositary bank will comply with instructions originated by the lender directing disposition of the funds in the deposit accounts without further consent by the borrower. *See also* RCW 62A.9A-314(a); 62A.9A-104(a)(2). The local law of the depositary bank's jurisdiction (as determined pursuant to RCW 62A.9A-304) will govern perfection, the effect of perfection or nonperfection, and the priority of a security interest in the deposit accounts. RCW 62A.9A-304.

C24. *[For perfection by control pursuant to a control agreement as to a securities account*[89] *and security entitlements carried in the securities account when the securities intermediary is not the secured party and the secured party does not become the entitlement holder.]* The security interest created by the Security Documents in the portion of the Article 9A Collateral that consists of the Securities Account (as defined in the Securities Account Control Agreement) and the security entitlements with respect to the financial assets carried in such Securities Account will be perfected by control pursuant to the Securities Account Control Agreement.[90] [91]

Deletion or appropriate revision of the opinion in paragraph C23 will be required if the depositary bank's jurisdiction is not the state of Washington.

[89] With respect to transactions involving securities accounts, note the Hague Securities Convention, which became effective as a matter of U.S. law on April 1, 2017. *See* Hague Convention on the Law Applicable to Certain Rights in Respect of Securities Held with an Intermediary, July 5, 2006, 17 U.S.T. 401, 46 I.L.M. 649 (entered into force April 1, 2017); Carl S. Bjerre, et al., *Changes in the Choice-of-Law Rules for Intermediated Securities: The Hague Securities Convention is Now Live,* BUS. L. TODAY, Aug. 2017, at 1, 3. The convention applies to any securities transaction or dispute "involving a choice" between the laws of two or more nations—a circumstance that may arise in any intermediated securities transaction, either at the transaction's outset or later in its life. For instance, a "choice" will be involved whenever any of the issuer, the underlying certificates or the issuer's books, or a wide range of parties (including a secured party) have connecting factors to different nations, regardless of whether the nations are parties to the convention. When applicable, the convention provides choice-of-law rules that may preempt some or all of the corresponding choice-of-law rules provided under common law, the UCC, and federal regulations. In most cases, the choice-of-law results under the convention will be the same as those reached under corresponding UCC principles, but there are some differences. In any event, paragraph D3(vii) excludes any opinion on the effect of international treaties or conventions from the coverage of the opinion letter.

[90] Perfection by control is the preferred, but not exclusive, method of perfecting a security interest in a securities account. RCW 62A.9A-314(a); 62A.8-501(1). The control agreement must sufficiently describe the securities account and provide that the securities intermediary has agreed that it will comply with entitlement orders originated by the lender without further consent by the borrower. *See* RCW 62A.9A-314(a); 62A.9A-106(a); 62A.9A-106(c); 62A.8-106(4)(b); 62A.8-501(1); 62A.9A-308(f). If the control agreement does not establish that the borrower is the entitlement holder of the security entitlements with respect to the financial assets carried in the securities account by stating that the securities intermediary maintains the securities account for the borrower and undertakes to treat the borrower as entitled to exercise the rights that comprise those financial assets, then the opinion giver should assume or otherwise verify that the borrower is the entitlement holder. Also note that, with certain exceptions, the local law of the securities intermediary's jurisdiction (as determined pursuant to RCW 62A.8-110(5)) will govern perfection, the effect of perfection or nonperfection, and the priority of a security interest in the securities account and security entitlements carried in the securities account. RCW 62A.9A-305(a)(3); 62A.9A-305(c); 62A.9A-308(f); 62A.8-110(5). Deletion or appropriate revision of the opinion in paragraph C24 will be required if the securities intermediary's jurisdiction is not the state of Washington.

[91] If a lender requests an opinion regarding perfection by control pursuant to a control agreement as to a commodity account and commodity contracts carried in the commodity account when the commodity intermediary is not the secured party, the following opinion may be used if the commodity intermediary's jurisdiction (as determined pursuant to RCW 62A.9A-305(b)) is the state of Washington:

> C[]. The security interest created by the Security Documents in the portion of the Article 9A Collateral that consists of the Commodity Account (as defined in the Commodity Account Control Agreement) and the commodity contracts carried in the Commodity Account will be perfected by control pursuant to the Commodity Account Control Agreement.

The control agreement must provide that the borrower (as commodity customer), the lender (as secured party), and the commodity intermediary have agreed that the commodity intermediary will apply any value distributed on account of the commodity contracts as directed by the lender without further consent by the borrower. *See*

C25. *[For perfection by control as to letter-of-credit rights.]* The security interest created by the Security Documents in the portion of the Article 9A Collateral that consists of letter-of-credit rights with respect to the Letter of Credit (as described and defined in the [_____ Agreement] and the Consent to Assignment) will be perfected by control pursuant to the [Consent to Assignment].[92]

C26. Washington law provides that the Borrower may not plead the defense of usury or maintain an action for usury with respect to the Loan.[93]

RCW 62A.9A-314(a); 62A.9A-106(b)(2); 62A.9A-106(c); 62A.9A-308(g). With certain exceptions, the local law of the commodity intermediary's jurisdiction will govern perfection, the effect of perfection or nonperfection, and the priority of a security interest in the commodity account and commodity contracts carried in the commodity account. RCW 62A.9A-305(a)(4); 62A.9A-305(b); 62A.9A-305(c); 62A.9A-308(g).

[92] *See* RCW 62A.9A-312(b)(2); 62A.9A-314(a); 62A.9A-107; 62A.5-114(c). Except as otherwise provided in RCW 62A.9A-308(d), a security interest in a letter-of-credit right may be perfected only by control. RCW 62A.9A-312(b)(2). A secured party obtains control of a letter-of-credit right if the beneficiary of the applicable letter of credit has assigned to the secured party the beneficiary's right to all or part of the proceeds of the letter of credit and if the applicable issuer or nominated person has consented to the assignment of those proceeds under RCW 62A.5-114(c) or otherwise applicable law or practice. RCW 62A.9A-107; 62A.5-114. The local law of the jurisdiction of the issuer of the letter of credit (as determined pursuant to RCW 62A.5-116) or a nominated person will govern perfection, the effect of perfection or nonperfection, and the priority of a security interest in a letter-of-credit right perfected by control if the issuer's or nominated person's jurisdiction is a U.S. state, the District of Columbia, Puerto Rico, the U.S. Virgin Islands, or any territory or insular possession subject to U.S. jurisdiction. *See* RCW 62A.9A-306; 62A.9A-102(a)(77). Deletion or appropriate revision of paragraph C25 will be required if the issuer's or nominated person's jurisdiction is not the state of Washington.

[93] An opinion that loan documents are enforceable against the borrower implicitly includes compliance with usury law and no separate opinion should be required. Lenders nevertheless frequently request separate comfort as to compliance with applicable usury laws. Generally, in a commercial loan transaction such a usury opinion can be given on the basis of the business purpose exception from the usury law set forth in RCW 19.52.080, which provides:

> Profit and nonprofit corporations, Massachusetts trusts, associations, trusts, general partnerships, joint ventures, limited partnerships, and governments and governmental subdivisions, agencies, or instrumentalities may not plead the defense of usury nor maintain any action thereon or therefor, and persons may not plead the defense of usury nor maintain any action thereon or therefor if the transaction was primarily for agricultural, commercial, investment, or business purposes: PROVIDED, HOWEVER, That this section shall not apply to a consumer transaction of any amount. Consumer transactions, as used in this section, shall mean transactions primarily for personal, family, or household purposes.

Although the list of entities in the first clause of the statute does not expressly include limited liability companies, they are included by virtue of RCW 1.16.080(2), which provides that the term "association," when used in a statute, includes limited liability companies unless the context clearly indicates otherwise. Pursuant to RCW 1.16.080(1), the term "person," as used in the second clause, "may be construed to include the United States, this state, or any state or territory, or any public or private corporation or limited liability company, as well as an individual."

Paragraph C26 does *not* state that only Washington usury law may govern the transaction; rather, the opinion merely provides assurance that the transaction will not violate Washington usury law. Given the conflict of law principles unique to the issue and the fact that the Washington Supreme Court has held that the usury law is a fundamental policy of the state, Washington practitioners generally should not give opinions that the usury law of a state other than Washington governs. *See* Wash. State Bar Ass'n, WASHINGTON COMMERCIAL LAW DESKBOOK § 30.2(7) (3d ed. 1982); Whitaker v. Spiegel, Inc., 95 Wn.2d 661, 667–68 (1981); Golden Horse Farms, Inc. v. Parcher, 29 Wn. App. 650 (1981).

C27. *[Include if the Loan Documents choose the law of a state other than Washington.]* The Loan Documents provide that they will be governed by the law of the state of [_____]. Although the issue is not free from doubt, if the matter were presented to a Washington state court (or a federal court applying Washington choice-of-law rules), then, assuming the interpretation of the relevant law on a basis consistent with existing authority, such choice-of-law provisions should be given effect, except that (i) creation, perfection, recording, priority, or enforcement of a lien on real property may be governed by the law of the situs of the real property, (ii) to the extent otherwise provided in the Uniform Commercial Code as adopted in any applicable jurisdiction with respect to the perfection or nonperfection, the effect of perfection or nonperfection, or the priority of security interests [and agricultural liens], the law of other jurisdictions may govern such matters, (iii) subject to certain exceptions, Washington choice-of-law rules require a reasonable basis for the selection of the chosen law, such as a reasonable and/or substantial relationship between the parties and/or transactions effected by the Loan Documents and the chosen law, (iv) matters that are procedural rather than substantive may be governed by the law of the forum, and (v) the law of another jurisdiction (including the state of Washington) may be applied notwithstanding the parties' choice of law to the extent that the application of the law of the chosen jurisdiction would violate the public policy of such other jurisdiction and (1) such other jurisdiction has a materially greater interest in the determination of the particular issue and (2) such other jurisdiction's law would apply in the absence of an effective choice of law by the parties. Because of the fundamentally factual nature of many of these issues, and because this opinion is based solely on our review of the Loan Documents, we do not opine that any court considering any or all of these exceptions would necessarily hold that any choice-of-law provision is binding on the parties.[94]

The assumption in paragraph B5 establishes the factual predicate for giving a usury opinion. In addition, the loan documents will usually contain covenants or representations and warranties regarding the borrower's use of the loan proceeds and the opinion giver is entitled to assume that the borrower will comply with such covenants in assessing whether a usury opinion can be given.

Lenders often will request an opinion stating simply that the loan is not usurious or does not violate Washington usury law. Because of the specific business purpose exception to Washington's usury law discussed above, opinion givers in commercial loan transactions generally should decline this request and instead provide the form of opinion in paragraph C26.

[94] Nearly every commercial contract has a provision selecting the law that will govern the agreement. In Washington—as in most states—contractual choice-of-law clauses are subject to a number of limitations. For example, absent express intent to the contrary, such clauses are understood to mean the chosen state's substantive local law and not the totality of its law, including procedural and choice-of-law rules. *See, e.g.*, McGill v. Hill, 31 Wn. App. 542 (1982). Moreover, agreements governing the descent, alienation, transfer, or conveyance of real property located in Washington—including the construction, validity, and effect of such conveyances—are governed by Washington law pursuant to a longstanding principle that the law of the place where the property is located governs such matters. *See, e.g.*, *In re* Stewart's Estate, 26 Wash. 32 (1901). Similarly, in the case of security interests and agricultural liens, provisions of Article 9 of the UCC govern choice-of-law with respect to perfection or nonperfection, the effect of perfection or nonperfection, and priority. Finally, transactions involving securities accounts may be subject to choice-of-law rules set forth in the Hague Securities Convention, discussed at *supra* note 89.

With respect to most other matters, parties have wide latitude to choose the law that will govern their agreements, subject only to judicial balancing tests that take into account facts and circumstances relating to the parties, the transaction, and public policy considerations. Washington courts strive to uphold the parties' intent. Although some states have sought to alleviate uncertainty by enacting statutes that validate the choice of their law to govern agreements that meet certain specified conditions (see, e.g., N.Y. GEN. OBLIG. LAW § 5-1401), Washington has not

enacted a statutory bright-line rule of this sort. Instead, modern Washington choice-of-law principles largely reflect Section 187 of the RESTATEMENT (SECOND) OF CONFLICT OF LAWS (Am. Law Inst. 1971). In an effort to balance the expectations of the parties with the fundamental policies of the state whose law would otherwise apply, the Restatement provides that a choice-of-law clause should be given effect unless either (a) there is no "substantial relationship" between the parties or the transaction and the chosen state and there is no other "reasonable basis" for the selection of the law of the chosen state, or (b) application of the law of the chosen state would be contrary to a fundamental public policy of a state which has a materially greater interest than the chosen state in the determination of the particular issue and which (under the rule of Section 188 of the Restatement) would be the state of the applicable law in the absence of an effective choice of law by the parties. *See, e.g.*, Brown v. MHN Gov't Services, 178 Wn.2d 258 (2013); Schnall v. AT&T Wireless Services, 171 Wn.2d 260 (2011); McKee v. AT&T Corp., 164 Wn.2d 372 (2008); Erwin v. Cotter Health Ctrs., 161 Wn.2d 676 (2007); *see also* TriBar Op. Comm., *Supplemental Report: Opinions on Chosen-Law Provisions Under the Restatement of Conflict of Laws*, 53 BUS. LAW. 592 (2013); Philip A. Trautman, *Choice of Law in Washington—The Evolution Continues*, 63 WASH. L. REV. 69 (1988) (providing historical context for Washington's choice-of-law rules).

For transactions governed by the UCC, Section 1-301 (RCW 62A.1-301 of the Washington UCC), addresses the effectiveness of contractual choice-of-law clauses. Under that section, parties may choose the law of a state that "bears a reasonable relation" to the transaction, unless otherwise required by the UCC. Official comments to the UCC explain that the test of "reasonable relation" is similar to that set forth in *Seeman v. Philadelphia Warehouse Co.*, 274 U.S. 403 (1927), such that the chosen law must be that of a jurisdiction where a significant enough portion of the making or performance of the contract is to occur or occurs.

Many Washington lawyers are reluctant to give an opinion as to choice of law on the grounds that, among other things, the law is uncertain, factual questions are involved, and application of the foreign substantive law may violate public policy. Practitioners increasingly decline to give choice-of-law opinions, or they agree to give them only in the form of reasoned opinions that expressly consider the contacts between the parties or the transaction, on the one hand, and the state whose law has been selected to govern any or all of the agreements, on the other. *See, e.g.*, ABA/ACREL Report, *supra* note 25.

The Committee agrees that a conservative approach is justified. The form of opinion set forth in paragraph C27 attempts to strike a balance: it offers guidance on this evolving area of Washington law, while declining to provide an express and unqualified opinion as to the effect of a choice-of-law clause.

When a separate opinion regarding choice of law—such as that set forth in paragraph C27—is included in the opinion letter, the scope of the choice-of-law opinion will be limited to what is set forth in the separate opinion. To make this clear, the opinion letter should expressly exclude choice of law (see *infra* paragraph D3(viii)) except as may be provided by an express choice-of-law opinion such as that set forth in paragraph C27.

One alternative to giving a choice-of-law opinion is to give an enforceability opinion as to the transaction documents as a whole, without regard to the contractual choice-of-law clause, based on an express contrary-to-the-fact assumption in the opinion letter that the law of the opinion giver's jurisdiction would govern the contract notwithstanding the parties' selection(s) to the contrary. The following or similar assumption and related qualification may be used:

> B[]. That the internal law of the state of Washington, without regard to its choice-of-law principles, governs the provisions of the Loan Documents and the transactions effected thereby, even though all or some of the Loan Documents provide that they are governed by [foreign state] law.

The related qualification language may be added as subparagraph D3(xi):

> [(xi)]. the enforceability of the choice-of-law provisions in the Loan Documents, any provisions of the Loan Documents that reference specific statutes or regulations from jurisdictions other than the state of Washington, or the effect of any provisions of Washington law prescribing specific legends or other language that must be included in Washington agreements in order to obtain the benefit of such provisions.

**[*No Litigation Confirmations*. *In the past, opinion letters often contained a no litigation "opinion" covering the existence of legal proceedings against the opinion giver's client. Opinion givers increasingly decline to provide no litigation confirmations because they do not believe a transactional attorney's role is to be a certifier of facts. The Committee agrees with this position. For additional discussion, see Part IV of this Report.*]

D. Certain Qualifications and Exclusions

The opinions set forth in this opinion letter are subject to the following qualifications and exclusions: [95]

D1. Our opinions may be limited by the effects of bankruptcy, insolvency, reorganization, receivership, moratorium, fraudulent transfer or conveyance, voidable transaction, and other similar law affecting the rights and remedies of creditors generally, and the effects of general principles of equity, whether considered in a proceeding at law or in equity.[96]

D2. Certain provisions contained in the Loan Documents may be limited or rendered unenforceable by applicable law, but, subject to the other limitations applicable to this opinion letter, such unenforceability will not render any of the Loan Documents invalid as a whole or preclude:[97]

Whether or not this assumption is expressly stated, an opinion letter issued by a Washington attorney is limited to the law of the state of Washington unless the opinion letter expressly states that it also covers the law of the foreign jurisdiction(s) governing one or more of the transaction documents. *See supra* note 25 and associated text.

[95] Extensive lists of assumptions, qualifications, exclusions, and other limitations are not cost-effective, necessary or, in many cases, informative. The Committee is of the view, also reflected in the ABA Customary Practice Statement, *supra* note 7, that many common qualifications, including some of those listed in the illustrative form of opinion letter or elsewhere in these notes, should be understood to apply whether or not expressly stated in the opinion letter. *See supra* Part V; *see also* TriBar II, *supra* note 6, § 1.4. The Committee also recognizes, however, that some opinion givers desire to explicitly set forth these customarily implied assumptions, qualifications, exclusions, and other limitations.

[96] Opinion letters may be affected by bankruptcy, insolvency, and other similar law, and by the application of general principles of equity. Insolvency and equitable principles qualifications are implied even if not expressly stated; nevertheless, most practitioners prefer to expressly state them.

[97] The need for additional qualifications to the enforceability opinion beyond the bankruptcy and insolvency and equitable principles qualifications in secured lending transactions is caused by the frequent use of complex loan documents containing remedies and other provisions that are either not enforceable precisely as written in the document or are of questionable enforceability. Many lawyers attempt to deal with these questionable provisions by including an extensive list of exceptions to the enforceability opinion. Current opinion practice, including that in Washington, disfavors extensive lists of assumptions, qualifications, exclusions, and other limitations. This is because extensive lists often result in unnecessary and costly debate between the opinion giver and opinion recipient and can make it difficult to understand the scope of the enforceability opinion. As a substitute for extensive lists, the practice has developed of setting forth a generic qualification excluding from the enforceability opinion certain limited or unenforceable provisions (without specific identification), followed by some form of assurance regarding the validity of the overall transaction and the availability of a remedy to the lender following a default. The following or similar practical realization language is often used:

> D[]. Without limiting the other qualifications set forth in this opinion letter, certain provisions contained in the Transaction Documents may be limited or rendered unenforceable by applicable

(i) judicial enforcement in accordance with applicable law of the state of Washington of the Borrower's obligation to repay the principal amount of advances made under the Loan Documents, together with interest thereon (to the extent not deemed a penalty), subject to nonrecourse or limited recourse provisions, as and to the extent provided in the Loan Documents;

(ii) judicial enforcement in accordance with applicable law of the state of Washington of the Guarantor's obligation to repay amounts set forth in the Guaranty as provided in the Guaranty (to the extent not deemed a penalty and subject to defenses of a surety that have not been or cannot be waived), as and to the extent provided in the Guaranty;

(iii) acceleration in accordance with applicable law of the state of Washington of the Borrower's obligation to repay such principal (to the extent the Loan Documents provide for such acceleration), together with such interest, upon default in the payment of such principal or interest or upon a continuing material default by the Borrower in the performance of any other enforceable obligation under the Loan Documents; or

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law, but in our opinion such law does not make the remedies afforded by the Transaction Documents inadequate for the practical realization of the principal benefits intended to be provided thereby.

The Committee believes that the principal remedies and practical realization approaches are common forms of the generic qualification and assurance, which have gained wide acceptance in Washington and other jurisdictions. Either approach is preferable to having an extensive list of specific exceptions to the enforceability opinion; however, each approach is subject to the criticism that its scope is not precise.

To avoid some of the ambiguity inherent in the practical realization approach, the illustrative form of opinion letter follows the principal remedies approach and is designed to give the opinion recipient assurance as to the availability of the remedies that are most likely to be important to the lender following a material default: (a) judicial enforcement of the payment of principal and interest, (b) judicial enforcement of the guarantor's obligation to repay amounts set forth in the guaranty, (c) acceleration following a payment default or material default in the performance of other enforceable obligations under the loan documents, and (d) foreclosure of liens securing the debt. This approach has been recommended in a number of legal opinion reports. *See, e.g.*, ABA/ACREL Report, *supra* note 25; New York Mortgage Loan Opinion Report, *supra* note 15.

The approach is not free from criticism. The New York Mortgage Loan Opinion Report, *supra* note 15, at 159 n.39, notes that material default "is a term that may not be defined with precision." The New York Mortgage Loan Opinion Report also notes that the existence of a material default depends on future facts and circumstances that are unknown at the time the opinion is issued and the opinion giver will have no way to predict whether a future breach will constitute a material default. As a result, that report states that many lawyers have "elected to include a long laundry list of potential exceptions to enforceability," even though the approach undercuts the primary purpose behind both generic qualification and assurance forms.

Some versions of the principal remedies approach, such as in the one found in the ABA/ACREL Report, *supra* note 25, compound the potential ambiguity related to the use of the term "material" by stating that the "material default" must be to a "material provision." Several commentators have criticized this approach. *See* New York Mortgage Loan Opinion Report, *supra* note 15, at 161 n.40; TriBar II, *supra* note 6, § 3.1. The New York Mortgage Loan Opinion Report states that the term "material default" alone more accurately describes the underlying concept. *Id.* at 161 n.40.

(iv) foreclosure in accordance with applicable law of the state of Washington of any lien or security interest created by the Loan Documents under circumstances described in subsection (iii) above.

D3. We express no opinion as to:

(i) any security interest in commercial tort claims, or the perfection of any security interest in timber to be cut, as-extracted collateral, or collateral represented by a certificate of title;[98]

(ii) except to the extent such limitation or prohibition is rendered ineffective by Sections 9-406 through 9-409 of the Uniform Commercial Code as enacted in any applicable jurisdiction, (a) any purported assignment of, or grant of a security interest in, any contract, agreement, license, permit, or other property, if such assignment or grant of a security interest, or enforcement thereof, is limited or prohibited by the terms of the same or by any applicable law, (b) whether any of the Security Documents or the execution and delivery of, and the consummation of the transactions effected by, the Security Documents, or enforcement of any assignment or grant of a security interest contained therein, violate any such limitation or prohibition, or (c) the effect of any such violation;

(iii) the right of the Lender to manage, take possession of or collect the rents from the Mortgaged Property except by means of having a receiver appointed in accordance with Washington law;[99]

(iv) the Lender's ability, absent a showing of material impairment to the Lender's security, to enforce remedies in the Loan Documents based on a further encumbrance of the Mortgaged Property, lease of the Mortgaged Property, or transfers of interests in the Mortgaged Property or direct or indirect interests in the Borrower;[100]

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[98] Special rules apply to the creation and/or perfection of security interests in these categories of property. For instance, to create a security interest in commercial tort claims, the security agreement must sufficiently identify the commercial tort claims subject to the security interest. RCW 62A.9A-108(e)(1). On perfecting security interests in timber to be cut and as-extracted collateral, see RCW 62A.9A-501. On perfecting security interests in collateral represented by a certificate of title, see RCW 62A.9A-311.

[99] This Washington-specific qualification disclaims any opinion as to a lender's right (a) to take possession of real property collateral or collect rents and profits without having a receiver appointed as permitted by RCW 7.28.230, or (b) to the appointment of a receiver, as RCW 7.60.025 specifies statutory prerequisites to such an appointment.

[100] Secured lending documents typically contain restrictions on transfers of the mortgaged property and interests in the borrower, prohibitions on further encumbrances, and limitations on entering into leases. To the extent that a provision restricts the transfer of title to the mortgaged property, a due-on-sale clause generally permits the lender to declare a default if a transfer occurs without the lender's consent. The Garn-St. Germain Depository Institutions Act of 1982, 12 U.S.C. §§ 1701j-3 *et seq.*, (the "Garn Act") provides that a lender may enforce (with certain exceptions) a contract containing a due-on-sale clause with respect to a real property loan, notwithstanding any provision of state law to the contrary, "if all or any part of the property, or an interest therein, securing the real property loan is sold or transferred without the lender's prior written consent."

The Garn Act does not, however, specifically provide that a lender may exercise its remedies by reason of the occurrence of other types of transfers that do not involve a transfer of title to the mortgaged property, such as the granting of a leasehold estate in, or a junior encumbrance against, commercial real property security or transfers of

(v) provisions of the Loan Documents in conflict with Washington law (including chapters 6.21, 61.12, and 61.24 RCW) that establishes or prescribes the rights, powers, obligations, and liabilities of a trustee of a deed of trust, the manner of appointing a successor trustee, the trustee's fees, attorneys' fees, and other charges that may be imposed in connection with the noticing of defaults and sales, the manner of conducting a foreclosure sale, the disposition of the proceeds of the foreclosure sale, or the effect of a trustee's deed;

(vi) except to the extent that such matters are expressly addressed by specific opinions set forth in this opinion letter, the creation, attachment, perfection, priority,[101] or enforcement of any lien or security interest;

(vii) the effect of, or compliance with, (a) international treaties or conventions; or (b) laws, rules, regulations, or decisions (1) involving land use, zoning, subdivision, environmental, health and safety, building code or human disabilities (including whether any governmental permits, approvals, authorizations, or filings are required in connection with either the development of the Mortgaged Property or the construction of improvements thereon, or as to the effect on the enforceability of the Loan Documents in the event any such required permits, approvals, authorizations, or filings are not made or obtained),[102] (2) of counties, towns, municipalities, and special political subdivisions, and (3) that as a matter of customary practice are understood to be covered only when expressly referenced by the opinion giver, including those concerning criminal and civil forfeiture, equal credit opportunity, anti-discrimination, unfair or deceptive practices, privacy, securities, antitrust, tax, fiduciary duties and disclosure, pension, labor, employee benefits, health care, or financial institution regulation; [103]

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ownership interests in the borrower entity (i.e., non-title transfers). Thus, it is not clear whether the Garn Act authorizes a lender to exercise its remedies upon the occurrence of non-title transfers and preempts prior Washington law in such cases. If it does not, the enforcement of such provisions will be limited by certain decisions of Washington courts to the effect that the lender must demonstrate that enforcement is necessary to protect against impairment of the lender's security or to protect against an increased risk of default. *See* Bellingham First Fed. Sav. & Loan Ass'n v. Garrison, 87 Wn.2d 437 (1976).

[101] Priority opinions are generally not given in Washington opinion practice. For further discussion of the issues that make priority opinions undesirable, and the circumstances in which they might nevertheless be justified, see TriBar UCC Opinion Report, *supra* note 66; see also GLAZER ET AL., *supra* note 11, § 12.8; COMMERCIAL TRANSACTIONS COMM., STATE BAR OF CAL., REPORT ON LEGAL OPINIONS IN PERSONAL PROPERTY SECURED TRANSACTIONS § 6 (2005); LEGAL OPINION LETTERS: A COMPREHENSIVE GUIDE TO OPINION LETTER PRACTICE §10.7[C] (M. John Sterba Jr. ed., 3d ed. 2003 & Supp. 2015).

[102] In cases in which a governmental approval opinion of the sort set forth in paragraph C14 is given, if the opinion giver does not use the exclusion in subsection D3(vii)(a), the opinion giver may wish to include language making clear that such opinion does not extend to approvals related to the development of, and construction of improvements on, the real property. The opinion set forth in paragraph C14 should be understood to exclude such matters even if no specific reference is made to them.

[103] As a matter of customary practice, opinion givers are not expected to canvass all laws and regulations that might conceivably apply to a transaction. *See* TriBar II, *supra* note 6, § 3.5.2. Certain laws and regulations are customarily excluded from the scope of opinion letters in secured lending transactions, either because they are recognized as not generally applicable to such transactions (such as securities, antitrust, and tax laws and regulations), because they involve inherently factual determinations (such as laws relating to fiduciary duty and disclosure), because

(viii) provisions of the Loan Documents that concern choice of law[except as provided above in paragraph C27], choice of forum, consent, or submission to the personal or subject matter jurisdiction of courts, venue of actions, means of service of process, waivers of rights to jury trials, and agreements regarding arbitration;

(ix) provisions of the Loan Documents that purport to appoint any person as attorney-in-fact for another; or

(x) provisions of the Loan Documents that purport to indemnify or exculpate any party for such party's own negligence or misconduct.[104]

D4. We call your attention to the fact that provisions of the Loan Documents regarding payment of attorneys' fees, costs, and disbursements are subject to RCW 4.84.330, which states that if a contract provides that one party is entitled to attorneys' fees to enforce the contract, then the prevailing party in an action to enforce the contract is entitled to an award of reasonable attorneys' fees, costs, and necessary disbursements. In addition, the right of any party to collect fees, costs, and disbursements in any enforcement or foreclosure proceedings under the Loan Documents may be limited to the party's reasonable fees, costs, and disbursements.

D5. *[Add if including subsection (ii) of paragraphs C11 and C12.]* [With respect to the opinions expressed above in subsection (ii) of paragraphs C11 and C12, we express no opinion as to a breach of any existing obligation of the Borrower or the Guarantor that (i) is not readily ascertainable from the plain meaning of the language in any Specified Agreement without regard

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the opinion recipient is better positioned than the opinion giver to address them (such as bank regulations), or because the effort required to give an opinion with respect to them would generally not be cost-effective (such as land use, environmental, and municipal laws). The Committee believes that under customary practice in the secured lending area, those laws and regulations are excluded, and that opinion letters should be understood to exclude them even if no specific reference is made to them.

[104] Indemnification and exculpation clauses are generally enforceable in Washington unless (a) they violate public policy, (b) the negligent act falls greatly below the legal standard for protection of others, or (c) the contractual language is inconspicuous. *See* Johnson v. UBAR, LLC, 150 Wn. App. 533 (2009). Provisions that operate to indemnify or exculpate a party for its own negligent or wrongful acts are disfavored and strictly construed against the party claiming indemnification or exculpation. *See* McDowell v. Austin Co., 105 Wn.2d 48 (1985). Because of the uncertainty regarding the enforceability of such provisions in specific cases, the Committee believes that it is appropriate to exclude them from the scope of the enforceability opinion. This approach is consistent with the recommendations contained in other reports and commentaries on the subject. *See, e.g.*, OPS. COMM., BUS. LAW SECTION OF THE STATE BAR OF CAL., SAMPLE CALIFORNIA THIRD-PARTY LEGAL OPINION FOR BUSINESS TRANSACTIONS 19 (2010 rev. 2014).

In addition to these general principles, provisions in contracts for construction, alteration, repair, or maintenance of real estate, contracts for certain design or surveying services, or contracts for motor carrier transportation that purport to indemnify against liability for damages caused by or resulting from the sole negligence of the indemnitee or its agents or employees are against public policy and are void and unenforceable under RCW 4.24.115. RCW 4.24.115 also provides that the validity and enforceability of provisions in such an agreement that purport to indemnify against liability for damages caused by or resulting from the concurrent negligence of the indemnitee or its agents or employees will be limited. The qualification contained in paragraph D3(x) is intended to be broad enough to include circumstances covered by this statute, but opinion givers may wish to expressly reference the statute in appropriate cases.

to parol or other extrinsic evidence bearing on the interpretation or construction of such Specified Agreement and without regard to any interpretation or construction that might be indicated by the law of any jurisdiction other than the state of Washington that may govern such Specified Agreement or (ii) arises from (a) any financial covenant or other provision in any Specified Agreement that requires financial or numerical calculations or determinations to ascertain compliance,[105] (b) any provision in any Specified Agreement that relates to the occurrence or existence of any material adverse change, effect or event or similar concept, (c) any cross-default provision that relates to a default under any agreement or instrument that is not a Specified Agreement, (d) any provision incorporated by reference in a Specified Agreement from any other agreement or instrument that is not itself a Specified Agreement, or (e) any purported grant of a security interest in, any purported assignment for security or other assignment or transfer of, or any foreclosure, collection, or other realization with respect to, any Specified Agreement that by its nature or terms is not assignable or transferable, in whole or in part, without the consent of any person unless such consent is obtained.]

D6. Washington deed of trust and foreclosure statutes may limit the enforceability of certain provisions of the Deed of Trust and other Loan Documents. Without limiting the generality of the foregoing, we advise you that:

(i) RCW 61.12.120 and RCW 61.24.030(4) generally prohibit judicial foreclosure of a mortgage or deed of trust or exercise of the trustee's power of sale under a deed of trust, respectively, while any other action relating to the obligation or matter secured thereby is pending or any judgment obtained in such other action is being executed upon. RCW 61.12.120 also prohibits a mortgagee from prosecuting a separate action for the same matter while the mortgagee is foreclosing its mortgage or prosecuting a judgment of foreclosure.

(ii) After a trustee's sale under a deed of trust, RCW 61.24.100: (a) may affect a beneficiary's ability to recover a deficiency judgment against a borrower, grantor or guarantor (or a general partner in any thereof) on obligations that the deed of trust secures by (x) limiting or completely barring the right to a deficiency judgment if the deed of trust secures a commercial loan and (y) completely barring the right to a deficiency judgment in all other cases, and (b) may limit or completely bar recovery of an obligation in an agreement or instrument that is not secured by the deed of trust if that obligation or its substantial equivalent is also secured by the deed of trust, such as a hazardous substance indemnity contained in both the deed of trust and in a separate unsecured agreement or instrument.

(iii) RCW 61.24.090 allows various parties the right to cure defaults in obligations secured by a deed of trust set forth in the notice of trustee's sale and cause the

[105] Because it is impractical for the opinion giver to determine whether the borrower's performance under the transaction documents would violate or cause the borrower to violate financial covenants in other documents to which the borrower is a party (or constitute a "material adverse event"), it should not be inferred that an opinion giver has performed the underlying financial analysis and calculations as to compliance with financial covenants. This is consistent with the core principle that opinion givers should not be expected to give opinions on matters that are not within the expertise of lawyers (such as financial statement analysis and economic forecasting). *See supra* Part III.

nonjudicial foreclosure sale to be discontinued following such cure. Such cure of a monetary default may be made on a nonaccelerated basis at any time prior to the eleventh day before the scheduled date of the trustee's sale or any continuance thereof.

(iv) RCW 61.24.030(2) and (5) impose as conditions precedent to the nonjudicial foreclosure of a deed of trust the requirements that (a) the deed of trust state that the real property conveyed is not used principally for agricultural purposes (however, if the statement is false on the date the deed of trust was granted or amended to include that statement, and false on the date of the trustee's sale, then the deed of trust must be foreclosed judicially) and (b) the deed of trust has been recorded in each county where the real property or some part of it is situated. RCW 61.24.030(2) provides that real property is used for agricultural purposes if it is used in an operation that produces crops, livestock, or aquatic goods.

(v) Certain acts in the execution, completion, or assembly of the Deed of Trust may cause it not to be in technical compliance with the formatting requirements for recorded instruments set forth in RCW 65.04.045. Nevertheless, RCW 65.04.045(2) provides that "an instrument may be recorded if a minor portion of a notary seal, incidental writing, or minor portion of a signature extends beyond the margins." RCW 65.04.048 provides: (i) documents that must be recorded immediately and that do not meet margin and font size requirements (but do meet legibility requirements) may be recorded for an additional fee of fifty dollars, and (ii) in addition to preparing a properly completed cover sheet as described in RCW 65.04.047, the person preparing the document for recording must sign a statement attached to the document that reads substantially as follows: "I am requesting an emergency nonstandard recording for an additional fee as provided in RCW 36.18.010. I understand that the recording processing requirements may cover up or otherwise obscure some part of the text of the original document."

(vi) *[Add if an agent bank, indenture trustee, MERS, or other representative for the holders of the secured obligations is named as the beneficiary of a Washington deed of trust.]* RCW 61.24.005(2) defines the "beneficiary" of a deed of trust as "[t]he holder of the instrument or document evidencing the obligations secured by the deed of trust, excluding persons holding the same as security for a different obligation" and does not expressly provide for such holder or holders to appoint an agent, an indenture trustee, a nominee, or any other representative to act as beneficiary. In *Bain v. Metropolitan Mortgage Group, Inc.*, 175 Wn.2d 83, 285 P.3d 34 (2012), the Washington Supreme Court responded to a question certified to it by the U.S. District Court for the Western District of Washington as to whether Mortgage Electronic Registration Systems, Inc. ("MERS") was a lawful beneficiary under two deeds of trust where MERS was named as beneficiary but never held the notes evidencing the obligations secured by the deeds of trust. The Washington Supreme Court stated that only the actual holder of the promissory note or other instrument evidencing the obligations secured by a deed of trust may be a beneficiary with the power to proceed with a nonjudicial foreclosure on real property, and concluded that MERS was an ineligible beneficiary under the Washington Deed of Trust Act, chapter 61.24 RCW, if it never held the promissory notes or other debt instruments that were secured by the deeds of trust in question. Although the Washington Supreme Court stated that nothing in its opinion should be construed to suggest that an agent cannot represent

the holder of a note, at least for some purposes, it found that on the record before it MERS was not a beneficiary by contract or under agency principles. The Washington Supreme Court stated that nothing in its opinion should be interpreted as preventing the parties from proceeding with judicial foreclosures; at the same time, it acknowledged that it did not consider that issue, which must await a proper case. The *Bain* decision has created uncertainty as to the ability to foreclose or otherwise enforce a Washington deed of trust if the deed of trust names as beneficiary an agent, an indenture trustee, a nominee, or any other representative or person other than the actual holder or holders of the instruments or documents evidencing the obligations secured by the deed of trust. Our opinion, as to the enforceability of the [Deed of Trust], is qualified by the effects of the *Bain* decision, and we express no opinion on the effects of the *Bain* decision.][106]

D7. The enforceability of the Loan Documents may be subject to Washington case law to the effect that a guarantor or other surety[107] may be exonerated if the beneficiary of the guaranty or suretyship obligation alters the original obligation of the principal obligor, fails to inform the guarantor or surety of material information pertinent to the principal obligor or any collateral, elects remedies that may impair the subrogation rights of the guarantor or surety against the principal obligor or that may impair the value of any collateral, fails to accord the guarantor or surety the protections afforded a debtor under Article 9A of the Washington UCC, or otherwise takes any action that materially prejudices the guarantor or surety unless, in any such case, the guarantor or surety validly waives such rights or the consequences of any such action. While express and specific waivers of a guarantor's or surety's right to be exonerated are generally enforceable under Washington law, we express no opinion as to whether the Loan Documents contain an express and specific waiver of each exoneration defense a guarantor or surety might assert.

D8. *[Add if any collateral or the borrower or guarantor's business is of a highly regulated nature or is likely to involve governmental filings or approvals.]* We express no opinion as to: (i) whether any limitation is imposed or any approval, authorization, or other action by, or filing with, any governmental authority is required due to the nature of any of the Collateral, including any Collateral consisting of alcohol, liquor, food, drugs, or tobacco *[consider alternate or additional categories specific to the transaction, such as firearms, ammunition, nuclear materials, defense materials, etc.] [*or due to the nature of [the Borrower's/the Guarantor's] business]; or (ii) the effect of any such limitation or the failure to satisfy any such requirement.

D9. *[Include only if the Credit Agreement has European Union bail-in provisions.]* We express no opinion on the enforceability or effect of any provision in the Loan Documents relating to the [Bail-In Legislation] or any [Bail-In Action] (each as defined in the Credit Agreement),

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[106] For additional discussion, see LEGAL OPS. COMM., WASH. STATE BAR ASS'N., OPINIONS ON DEEDS OF TRUST IN FAVOR OF AGENTS, TRUSTEES AND NOMINEES (March 14, 2013).

[107] Even when a loan transaction does not involve a guaranty, the transaction may nonetheless raise suretyship issues. For instance, suretyship issues may arise in loan transactions that involve multiple borrowers or third-party grantors of collateral. *See supra* note 67.

including any effect on the enforceability of the obligations of the Borrower or the Guarantor under the Loan Documents.[108]

D[]. *[Insert other appropriate transaction-specific qualifications and exclusions.]*

This opinion letter is delivered as of its date and without any undertaking to advise you of any changes of law or fact that occur after the date of this opinion letter even though the changes may affect the legal analysis, a legal conclusion or information confirmed in this opinion letter. No opinions are implied beyond those expressly stated in this opinion letter.

[Select one of the following alternative forms of reliance language.][109] [This opinion letter is rendered only to you and is solely for your benefit in connection with the transactions contemplated by the Loan Documents.] ***[OR]*** [The opinions expressed in this letter are solely for the benefit of the Lender in connection with the Loan Documents. We consent to reliance on the opinions expressed herein, solely in connection with the Loan Documents, by any party that becomes a successor or additional Lender subsequent to the date of this opinion letter in accordance with the provisions of the Loan Documents (each a "**Successor Lender**") as if this opinion letter were addressed and delivered to such Successor Lender on the date hereof, on the condition and understanding that: (i) in no event shall any Successor Lender have any greater rights with respect hereto than the original addressees of this letter on the date hereof, nor, in the case of any Successor Lender that becomes a Successor Lender by assignment, any greater rights than its assignor; (ii) in furtherance and not in limitation of the foregoing, our consent to such reliance shall in no event constitute a reissuance of the opinions expressed herein or otherwise extend any statute of limitations period applicable hereto on the date hereof; and (iii) any such reliance also must be actual and reasonable under the circumstances existing at the time such Successor Lender becomes a Successor Lender, including any circumstances relating to changes in law, facts, or any other developments known to or reasonably knowable by such Successor Lender at such time.] This opinion letter may not be used or relied on for any other purpose or by any other person without our prior written consent.

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[108] The European Union Bank Recovery and Resolution Directive, (the "Directive"), which became effective January 1, 2016, confers on European regulators extensive powers designed to prevent European Union ("EU") financial institutions from failing. Council Directive 2014/59, 2016 O.J. (L 173) 191. Under Article 55 of the Directive, EU financial institutions are required to include in their contracts that are governed by non-EU law (such as, for example, credit agreements governed by U.S. law) provisions recognizing the right and power of EU authorities to write down, reform the terms of, cancel, and convert to equity the liabilities of a failing EU financial institution. Because EU financial institutions are lenders or potential future lenders in many U.S.-based syndicated loans, these so-called bail-in provisions have become nearly universal in multi-lender credit agreements, even if the initial lenders are all U.S. financial institutions. The Loan Trading and Syndication Association has promulgated a standard version of the bail-in provisions, which appear to be in common use by major U.S. banks. Without such provisions, future assignments to EU financial institutions would not be possible. Because these provisions give EU authorities the power to cancel or modify EU financial institutions' obligations under the credit agreement, there is concern that such action could relieve the borrower and its affiliated parties from their obligations under the loan documents or otherwise result in a modification of their obligations. As a result, many U.S. firms include an exclusion in their opinion letters for the effect of bail-in provisions.

[109] Two alternative forms of reliance language are provided. The first alternative strictly limits reliance. The second permits full reliance by successor lenders, but expressly states that reliance must be reasonable and that consent to future reliance does not constitute reissuance of the opinions or create any obligation to update the opinions.

Very truly yours,[110]

[Firm Name]

[110] Consistent with customary opinion practice, the recommended practice in Washington is for opinion letters to be signed in the firm's name rather than in the name of an individual lawyer.

CERTIFICATE OF OFFICER
of
_____

[*Use only those paragraphs that relate to the opinions being given and modify or add to them as required in the context of the opinion letter and to support the precise language used in the applicable opinion paragraphs of the letter*.]

By this certificate, dated as of _____, 20__, the undersigned certifies to _____ ("**Law Firm**") as follows:

1. **Capacity**. I am the _____ of _____, a Washington corporation (the "**Company**"), and in such capacity I have personal knowledge of the affairs of the Company and believe that I am aware of all material matters affecting the certifications made in this certificate after making such inquiries of others as I believe necessary to knowledgeably make those certifications.

2. **Transaction Documents**. This certification is made in connection with the documents, instruments, and agreements listed on **Schedule 1** attached to this certificate (the "**Transaction Documents**") to be entered into by the Company with or in favor of _____. I am generally familiar with the terms and provisions of the Transaction Documents and the Company's obligations thereunder and have made such inquiry of persons as I have deemed appropriate to verify or confirm the statements contained in this certificate.

3. **Legal Opinion—Reliance**. Law Firm has been requested to provide certain legal opinions on behalf of the Company in connection with the Company's entering into the Transaction Documents and the transactions effected thereby. This certificate is made to provide certain factual and other information that I understand Law Firm will rely on in preparing its legal opinions on behalf of the Company. No party, other than Law Firm, is entitled to rely on this certificate.

4. **Existence—Organizational Documents**. The Company's articles of incorporation were filed with the Washington Secretary of State on _____ and a true and correct copy, including all amendments, is attached as **Exhibit A**. A true and correct copy of the Company's bylaws, including all amendments, is attached as **Exhibit B**. No actions have been taken, or are contemplated, by the Company's board of directors or shareholders to amend, rescind or otherwise modify the Company's articles of incorporation or bylaws. The documents attached as **Exhibit A** and **Exhibit B** are complete and in full force and effect on the date of this certificate. The Company has not adopted a plan of liquidation or otherwise taken, or omitted to take, any action the effect of which could reasonably be expected to cause the dissolution or liquidation of the Company or its business and assets.

5. **Authorizing Resolutions**. The authorized number of directors on the Company's board of directors is ___. Attached as **Exhibit C** is a true, correct, and complete copy of resolutions

duly adopted by the directors of the Company [by unanimous written consent] [at a meeting duly called at which a quorum was present throughout]. Those resolutions have not been amended, modified or revoked and are in full force and effect on the date of this certificate. No other shareholder or director resolutions concerning the transactions and Transaction Documents described in those resolutions have been adopted. The individual[s] signing the document attached as **Exhibit C** [are all the duly elected and serving directors of the Company] [is the duly elected and serving secretary of the Company].

6. **Execution and Delivery**. _____, the _____ of the Company, has been authorized to sign the Transaction Documents on behalf of the Company, and has, in fact, signed each of the Transaction Documents. The Company's intent to enter into a binding agreement is demonstrated by such signature, and the Company has delivered each executed Transaction Document to the other party or parties thereto with the intent of creating a binding agreement on the part of the Company.

7. **Incumbency**. Each of the individuals named in **Schedule 2** attached hereto is a duly elected or appointed officer of the Company currently holding the office indicated opposite such individual's name in **Schedule 2** and the signature written opposite such individual's name in **Schedule 2** is his or her true and correct signature.

8. **No Special Regulation of Company**. The Company is engaged only in the business of _____. The Company is not currently engaged, and does not propose to engage, in any industry, business or activity, or to own any property or asset, that causes or would cause it to be subject to special local, state, or federal regulation not applicable to business corporations generally, and I am not aware of any regulatory or other approval, authorization, or filing with any federal, state, municipal, or other governmental commission, board, or agency, or other governmental authority, that is necessary or required for the Company to execute and deliver the Transaction Documents or to consummate the transactions effected thereby [except the recording of any applicable real property security instruments and the filing of a Uniform Commercial Code financing statement].[111]

9. **No Breach of Other Agreements or Orders**. The execution and delivery by the Company of, and the consummation by the Company of the transactions effected by, the Transaction Documents do not: (a) breach, or result in a default under, any existing obligation of the Company under any material agreement or instrument to which the Company is a party; or (b) breach or otherwise violate any existing obligation of the Company under any court or administrative order that names the Company and is specifically directed to it or its property. In reaching this conclusion, I have examined or am generally familiar with the Company's significant

[111] This paragraph may be included if the opinion giver is issuing the opinions to which the paragraph relates and if it is not clear that neither the borrower's business nor the collateral is of a highly regulated nature, such that there may be laws or regulations that limit the borrower's ability to grant security interests in its property or to incur debt or that would limit the lender's ability to realize on the collateral in a default situation. Examples include pharmaceuticals, alcohol, firearms, defense materials, public utility services, and certain securities businesses. Also, where such legal limitations exist or may exist, the opinion giver may consider adding an appropriate qualification or exclusion to the opinion letter.

agreements, such as those with its bank or other lenders and agreements with the Company's customers and suppliers under which the Company has significant obligations or rights.

10. **Reliance on Other Certificates**. In addition to this certificate, in providing its legal opinions, Law Firm may rely on any certificate provided by the Company or any officer of the Company to any party in connection with the Transaction Documents.

I certify as to the foregoing as of the date first set forth above.

[NAME OF COMPANY, a _____]

By:

_____

Name: _____

Title: _____

[***Optional***: The undersigned certifies that _____ is the duly elected or appointed _____ of the Company, that such individual currently holds that office, and that such individual's signature written above is such individual's true and correct signature.

_____

Name: _____, as _____ [*title*] of the Company]

Name:

_____

SCHEDULE 1

List of Transaction Documents

1. _____.
2. _____.
3. _____.
4. _____.
5. _____.

SCHEDULE 2

Incumbency

Name	Title	Signature