OPINIONS OF COUNSEL:
RECENT CASES AND LEGAL DEVELOPMENTS

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I. RISK OF LIABILITY – HOW HAVE ISSUER'S COUNSEL BEEN STUNG?

A. CAUSES OF ACTION COMMONLY ASSERTED IN CASES INVOLVING LIABILITY FOR THE ISSUANCE OF OPINION LETTERS

i. Negligence

Elements of a Cause of Action for Negligence:

1. duty of care;
2. breach of duty of care; and
3. injury to the plaintiff as a result thereof.

"To permit Plaintiff's general negligence claim…would, in effect, permit Plaintiff to make an end run around New York privity requirements….absent contractual privity or a relationship approaching privity, the 'duty' element of a negligence claim is missing". *Gaddy v. Eisenpress,* 199 WL 1256242 (S.D.N.Y. 1999).

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[1] The author wishes to acknowledge the assistance of Ronit D. Appel, an associate at Schoeman, Updike & Kaufman, LLP. This outline was prepared on November 22, 2011.

ii. Negligent Misrepresentation

Elements of a Cause of Action for Negligent Misrepresentation:

1. duty of care;*
2. the giving of false information;
3. reasonable reliance by the plaintiff on the false information; and
4. damage.

*Where no privity exists between the parties, a duty of care may lie where the parties have a relationship "so close as to approach privity". A relationship "so close as to approach privity" may be found to exist where: (1) the defendant was aware that the representation was to be used for a particular purpose or purposes; (2) in the furtherance of which a known party or parties was intended to rely; and (3) there must have been some conduct on the part of the defendant linking the defendant to the plaintiff, which evinces the defendant's understanding of the plaintiff's reliance. *See Credit Alliance Corp. v. Anderson & Co.*, 65 N.Y.2d 536, 551, 493 N.Y.S.2d 435, 443 (N.Y. 1985).

Section 552 of the Restatement (Second) of Torts (1977) states:

(1) One who, in the course of his business, profession or employment, or in any other transaction in which he has a pecuniary interest, supplies false information for the guidance of others in their business transactions, is subject to liability for pecuniary loss caused to them by their justifiable reliance upon the information, if he fails to exercise reasonable care or competence in obtaining or communicating the information.

(2) Except as stated in Subsection (3), the liability stated in Subsection (1) is limited by loss suffered

(a) by the person or one of a limited group of persons for whose benefit and guidance he intends to supply the information or knows that the recipient intends to supply it; and

(b) through reliance upon it in a transaction that he intends the information to influence or knows that the recipient so intends or in a substantially similar transaction.

(3) The liability of one who is under a public duty to give the information extends to loss suffered by any of the class of persons for whose benefit the duty is created, in any of the transactions in which it is intended to protect them.

iii. Breach of Contract/Third-Party Beneficiary Theory

Elements of a Cause of Action for Breach of Contract:

1. the existence of a contract;
2. performance of the contract by one party;
3. breach of the contract by the other party; and
4. damages suffered as a result of the breach.

See, e.g., *Eaves v. Designs for Finance, Inc.*, 2011 U.S. Dist. LEXIS 33654, at *55, n. 22 (S.D.N.Y. March 30, 2011).

Elements of a Third-Party Beneficiary Claim:

1. the existence of a valid and binding contract between other parties;
2. that was intended for the plaintiff's benefit;

3. the benefit to the plaintiff is sufficiently immediate to indicate the assumption by the contracting parties of a duty to compensate the plaintiff if the benefit is lost.

See e.g., Nat'l Bank of Canada v. Hale & Dorr, LLP, 17 Mass. L. Rep. 681, 2004 Mass. Super. LEXIS 142 (Mass. Super. 2004) discussed infra. *Also see, e.g., Mandarin Trading Ltd. v. Wildenstein*, 16 N.Y.3d 173, 919 N.Y.S.2d 465 (N.Y. 2011).

iv. Fraudulent Inducement

Elements of a Cause of Action for Fraudulent Inducement:

1. a representation of material fact was made;
2. such representation was false;
3. the representation was known to be false by the party making it;
4. the representation was made for the purpose of inducing the other party to rely upon it; and
5. the party to whom the representation was made rightfully relied upon the representation;
6. in ignorance of its falsity; and
7. to his injury

See, e.g. Eaves v. Designs for Finance, Inc., supra, at *19-20.

v. Fraud

Elements of a Cause of Action for Fraud:

1. a material misrepresentation or omission of fact;
2. made by the defendant with knowledge of its falsity and

3. with intent to defraud;
4. reasonable reliance on the part of the plaintiff; and
5. resulting damage to the plaintiff.

See, e.g., See, e.g. Eaves v. Designs for Finance, Inc., supra, at *33.

"The recipient of a fraudulent misrepresentation of fact is justified in relying upon its truth, although he might have ascertained the falsity of the representation had he made an investigation." Section 540 of the Restatement (Second) of Torts (1977).

II. CASE LAW[2]

A. CASES IN WHICH LIABILITY WAS IMPOSED

***Dean Foods Co. v. Pappathanasi*, 18 Mass. L. Rep. 598 (Mass Super. 2004)**

In connection with the signing of a stock purchase agreement, the law firm representing the seller issued an opinion letter which stated that "[t]o [its] knowledge" there was no litigation pending against the seller when, in fact, the seller was involved in a criminal grand jury investigation. The Court held that the plaintiffs must demonstrate that the defendant law firm failed to conform to customary practice. Citing a 1998 report of the TriBar Opinion Committee, the Court held that a professional duty is owed by a third-party opinion giver to the opinion recipient, and if the opinion is negligently rendered and results in damage to the opinion recipient, the opinion recipient has a claim against the opinion giver. The Court ruled that the inclusion of the phrase "to

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[2] The issue of liability in the context of opinion letters is not a commonly litigated area. As such, the number of cases issued in the past year on this topic is small. This outline includes cases issued in the past year, as well as other older, seminal cases.

our knowledge" in an opinion does not by itself limit the investigation required by customary diligence. The Court found that the law firm was negligent, as it did not conduct the inquiry it was required to make by customary practice.

***Eaves v. Designs for Finance, Inc.*, *supra*.**

In this action, the plaintiff alleged that the defendants devised a scheme to market and sell illegal tax shelters, including the BETA Multiple Employer Death Benefit Plan (the "BETA Plan"). The defendants allegedly represented the BETA Plan as a legitimate multiple employer-welfare plan under the Internal Revenue Code, despite their knowledge that it was an illegal tax shelter. Defendant Designs for Finance, Inc. ("Designs"), the BETA Plan sponsor, obtained opinion letters from two law firms, which endorsed the plan.

With respect to the plaintiff's fraud claims, the Court held that no claim for fraud could lie as to certain of the opinion letters because those letters were addressed to Designs, and not to the plaintiffs or to BETA Plan participants generally. Moreover, the letters expressly stated that "[t]his opinion is intended to be relied upon only by you and not by participating Employees or Employers…". The Court, however, found that a claim for fraud could lie with respect to an opinion letter addressed to BETA Plan participants and with respect to an opinion letter sent together with the opinion letter addressed to the BETA Plan participants and explicitly referenced therein. With respect to the plaintiff's negligent misrepresentation claims, the Court held that "for an attorney to be liable to a non-client third party based upon an opinion letter, the letter must urge or expressly authorize reliance thereon by the third party". *Id.* at *48. The Court dismissed the plaintiff's negligent misrepresentation claims with respect to the letters that expressly stated that the opinions were rendered only to Designs and were not intended to be relied upon by BETA Plan participants, but allowed the plaintiffs to proceed with their negligent misrepresentation claims with respect to the letters directed to BETA Plan participants.

B. CASES IN WHICH THE COURTS DECLINED TO IMPOSE LIABILITY

***City Nat'l Bank of Detroit v. Rodgers & Morgenstein*, 155 Mich. App. 318, 399 N.W.2d 505 (Mich. 1986)**

As part of a mortgage loan transaction, the plaintiff in this action sought reassurance that certain managing partners of a partnership had authority to consent to the extension of a letter of credit to the partnership. The partnership agreement was ambiguous regarding the authority of the managing partners to act without the concurrence of the other partners. The plaintiff obtained an opinion letter from counsel for the partnership, which stated that the partners who consented to sign the documents relating to the closing had authority to do so. When the plaintiff's demands for payment were denied, the plaintiff brought suit against the law firm, amongst others. The Court held no cause of action had been alleged because the opinion letter amounted to "an expression of opinion in the exercise of professional judgment rendered upon facts (i.e., the partnership agreement provisions) fully disclosed and known to all...the opinion did not constitute a summary of facts which could be checked against a record". 155 Mich. App. at 323-324, 399 N.W.2d at 508. The Court rejected the plaintiff's argument that its reliance upon the legal opinion was justifiable, holding that, "[t]his is not a situation in which plaintiff was without special knowledge or without the ability to interpret the partnership agreement through its own legal counsel". 155 Mich. App. at 325, 399 N.W.2d at 508.

***Nat'l Bank of Canada v. Hale & Dorr, LLP*, 17 Mass. L. Rep. 681, 2004 Mass. Super. LEXIS 142 (Mass. Super. 2004)**

The defendant in this action issued an opinion letter in connection with a credit agreement between its client, Whistler Corporation of Massachusetts ("Whistler"), and the plaintiffs. In its letter, the defendant represented that "to our knowledge" there was no litigation pending or threatened against its client which could, among other things, "have a material adverse effect on the business, condition, affairs, or operations of [Whistler] or any

material impairment of the right or ability of [Whistler] to carry on its operations as now conducted". In fact, law partners in defendant's litigation department were representing the client in a pending litigation but the attorneys involved in the Credit Agreement representation and the preparation of the opinion did not make any inquiry of their litigation law partners. After the Credit Agreement was executed, the plaintiffs discovered the existence of a lawsuit against the defendant's client. The defendant alleged that it did not err in excluding that litigation from its opinion letter because it could not have had a material adverse effect on Whistler.

The Court granted the defendant's motion for summary judgment dismissing the plaintiffs' claims of negligence and negligent misrepresentation, holding that an attorney has a duty of reasonable care to non-clients if the attorney "knows or has reason to know a nonclient is relying on the services rendered". *Id.* at *22 (internal citation omitted). The Court stated that where the attorney's client's interests conflict with those of the third party non-client, however, no duty is owed by the attorney to the non-client. Notable, the Court found that the plaintiff Bank's interests to make a loan and secure its repayment were in conflict with the client's interests as a borrower to obtain a loan and protect its property. The Court denied the defendant's motion for summary judgment on the plaintiffs' claims of misrepresentations, holding that a statement on which liability for misrepresentation may be based must be a statement of fact, not an opinion. The Court found that the phrase "to our knowledge", as defined in the opinion letter, rendered the defendant's statement of opinion actionable. The Court granted the defendant's motion for summary judgment dismissing the plaintiffs' breach of contract claims, holding that "[a]s there was no contractual relationship between the [plaintiffs] and the [d]efendant, there can be no breach of contract"(*Id.* at *36). However, the Court held that "the [plaintiffs] were a third-party beneficiary of the [d]efendant's contract with Whistler, specifically the [d]efendant's preparation of the Opinion Letter" (*Id.* at *38). The Court declined to award summary judgment on the third-party beneficiary claim, though, holding that there were

disputed facts as to whether the litigation in fact had a material adverse affect on Whistler.

***Prudential Insurance Co. of America v. Dewey, Ballantine, Bushby, Palmer & Wood*, 80 N.Y.2d 377, 590 N.Y.S.2d 831 (1992)**

A law firm issued an opinion letter to the plaintiff in connection with a proposed restructuring of a debt owed by the law firm's client to the plaintiff. The opinion letter contained an assurance that the mortgage documents that were to be recorded in connection with the debt restructuring represented "legal, valid and binding" obligations, which, when recorded, would be enforceable against the law firm's client "in accordance with [the documents'] respective terms". No specific dollar amount was assured. The plaintiff later learned that one of the recorded documents erroneously stated the outstanding balance of the first preferred mortgage securing the debt as $92,885.00, rather than the correct sum of $92,885,000.00. As a result, the plaintiff suffered significant losses when the law firm's client filed for bankruptcy, whereupon the plaintiff commenced the instant action, contending that the law firm's opinion letter had falsely assured it that the mortgage documents in question would fully protect its existing $92,885,000.00 security interest. The Court held that attorneys may be held liable for economic injury arising from negligent misrepresentation where there is actual privity of contract between the parties or a relationship so close as to approach privity. The Court held that a duty of care was owed to the plaintiff, but that the facts do not prove a breach of that duty because neither procedural nor substantive misrepresentations were made by the law firm.

***Ouwinga v. John Hancock Variable Life Insurance*, 2010 U.S. Dist. LEXIS 115729 (W.D. Mich. 2010)**

In this action, the plaintiffs contended that the defendants were involved in a scheme to perpetrate a fraud upon the plaintiffs by representing to the plaintiffs that their participation in a "Benistar 419 Plan" was fully tax-deductible as a "welfare benefit plan" under the Internal Revenue Code, when in fact the IRS had

indicated through various notices, rulings, and regulations that such plans did not qualify as tax-deductible plans. The IRS ultimately disallowed the plaintiffs' tax deductions for their contributions to the plan, effectively deeming the plan an abusive tax shelter. The plaintiffs brought suit against, among others, the lawyers that issued legal opinion letters which provided assurances and praise for the plan and its tax benefits. The Court held that the plaintiffs could not state a viable negligent misrepresentation claim against the lawyer defendants because they could not establish that those defendants owed the plaintiffs a duty of care where no relationship existed between the parties. The Court noted that the tax opinion letters were provided to Benistar and expressly stated that they were not to be relied on by anyone else, including "any particular employer participating in the Benistar 419 Plan". The Court further held that "mere opinions are generally not actionable as misrepresentations". *Id.* at *36.

***Allen v. Steele*, 252 P.3d 476 (Co. 2011)**

The plaintiffs sued defendant Allen, an attorney who allegedly provided them with erroneous information regarding a statute of limitations, which led to their missing the filing deadline in a negligence suit. The information was provided during an initial consultation; the complaint did not allege that the plaintiffs had formed an attorney-client relationship with attorney Allen. The Court held that an attorney may be liable to a non-client for negligent misrepresentation, which is defined by Section 552 of the Restatement (Second) of Torts. The Court further held that "[c]ase law from across jurisdictions indicates that the most common form of negligent misrepresentation against an attorney arises when an attorney provides a written opinion to a third party at the request of the attorney's client, in order to close a 'variety of commercial transactions'". *Id.* at *482. Where non-clients are concerned, an attorney's liability is generally limited to a narrow set of circumstances in which the attorney has committed fraud or a malicious or tortious act, including negligent misrepresentation. *Id.* At 365. he Court held that a non-client plaintiff is most likely to state a claim of negligent misrepresentation against an attorney if it is based on facts similar to those presented in *Mehaffy, Rider,*

Windholz & Wilson v. Central Bank Denver, N.A., 892 P.2d 230 (Colo. 1995) (attorneys prepared opinion letters to induce a third party bank to purchase their clients' municipal notes and bonds. The letters were prepared for the benefit of the bank and most were addressed to the bank. The Court held that the attorneys could be liable to the plaintiff and that there were issues of fact that precluded an award of summary judgment). The Court held that in the instant case, the plaintiffs had not sufficiently pled all of the elements mandated by the Restatement (Second) of Torts.

***Larner v. Yang*, 2011 Cal. App. Unpub. LEXIS 5785 (Cal. Aug. 1, 2011)**

This action involves claims for professional negligence in connection with a lawyer's alleged mishandling of an immigration matter. The Court held that "a third party can in some instances have standing to sue for a lawyer's professional negligence, but in those cases, the attorney's acts were directed toward the third party and were intended to induce action by the third party" (such as where an opinion letter was intended to be shown to a prospective lender to induce the lender to make a loan). *Id.* at *4. The Court held that "'[i]n order to show a duty was owed to a third party beneficiary of a legal services agreement the third party must show that 'that was the intention of the purchase of the legal services - - the party in privity,' and that 'imposition of the duty carries out the prime purpose of the contract for services'". *Id.* at *4-5. The Court held that the plaintiff had not made such a showing and affirmed the lower court's judgment dismissing the plaintiff's claims.

***Kelter v. Hartstein*, 2011 Cal. App. Unpub. LEXIS 4965 (Cal. June 28, 2011)**

In this action, the plaintiff sued, among others, the attorneys who developed and sold him a pension plan designed to claim income tax deductions for contributions made to the plan. The plan was found by the IRS to constitute an illegal tax shelter, and litigation ensued. The Court held that the plaintiff could not establish that he justifiably relied on the opinion letter provided by

the defendant law firm. The letter stated that it was intended only for ECI, the developer and marketer of the pension plan. The plan moreover warned that it may not be appropriate for all employers and not all employers would qualify for its tax benefits. The letter advised employers to consult their own tax advisors because whether any particular plan qualifies as a Section 412(i) plan depends on how each employer operates its plan. The Court held that "[g]iven the letter's clear statements and limitations regarding the opinions it expressed, [plaintiff] could not justifiably rely on the letter as a misrepresentation inducing him to form the Rio Plan". *Id.* at *33-34. The Court further held that the plaintiff's vague and conclusory allegations regarding fraud and concealment failed to state a claim against the defendant law firm.

III. PROTECTION AGAINST LIABILITY/QUALIFICATIONS AND LIMITATIONS – WHAT SHOULD AN OPINION ISSUER WATCH FOR WHEN ISSUING OPINIONS

A. LIMITATION OF RELIANCE - The opinion letter should contain clear language as to who may rely on it. Additionally, an opinion issuer may also choose to limit the right of the recipient to make or furnish copies of the opinion to others. Consider the following sample provision:

Sample language as to reliance and furnishing of copies:

This opinion is made for the benefit of the addressee of this opinion, and its successors and assigns as the Lender or administrative agent for the Lender under the Loan Documents and may not be circulated, quoted, otherwise referred to, delivered to or relied upon by any other party or in any other transaction; provided, however, (i) copies of this opinion may be delivered to [XYZ Bank], who we are informed is providing the funding for Lender to make the Loan and for the purposes of this opinion may rely on this opinion as if it were making the Loan directly

and were deemed to be the "Lender" under the Loan Documents, (ii) copies of this opinion may be delivered to any person that becomes a Lender in accordance with the provisions of the Loan Agreement, and any such Person may rely on the opinions expressed above as if this opinion letter were addressed and delivered to such Person on the date hereof, and (iii) copies of this opinion may be furnished to your auditors, attorneys or other professional advisors acting on your behalf in connection with the Loan, but for their information only and not their reliance.

Standard Reliance Language for CMBS loan opinion:

The foregoing opinions may be relied upon by Lender and its successors and/or assigns (including, without limitation, any trustee in connection with a securitization of the Loan) in connection with the Loan and by any rating agency involved in the securitization of the Loan[, and their respective counsel,] but may not be relied upon by any other person or entity or for any other purpose.

In *Eaves v. Designs for Finance, Inc.*, *supra*, the Court held that the following disclaimer language contained in an opinion letter barred the plaintiff's claims:

> We have rendered this opinion to you [Designs] in order to permit you to design and further develop the Program and understand the federal tax issues raised with respect to the design of the Program. This opinion is intended to be relied upon only by you and not by participating Employees or Employers.
>
> …This opinion is addressed to you and may be relied upon only by you unless our express written consent is obtained after disclosure to us of such facts as we deem necessary to address the specific circumstances of any third party.

Id. at *34-35.

B. LIMITATION ON SCOPE OF DILIGENCE - Including the words "to our knowledge" does not by itself limit the investigation required by customary diligence. Neither does an express disclaimer of any search of litigation records limit liability for failure to disclose a pending or threatened litigation known by another partner in the issuer's law firm**.** In *Nat'l Bank of Canada v. Hale & Dorr, LLP, supra,* the opinion letter contained the following: "any reference to 'our knowledge' or 'knowledge' or any variation thereof shall mean the conscious awareness of the attorneys in this firm [the Defendant] who have rendered substantive attention to [Whistler] of the existence or absence of any facts which would contradict our opinions set forth below. We have not undertaken any independent investigation to determine the existence or absence of such facts should be drawn from the fact of our representation of [Whistler. Without limiting the foregoing, with respect to our opinion[] in paragraph[]…7 below [regarding litigation], we have not conducted a search of the dockets of any court or administrative or other regulatory agency.

C. FACTS VS. LEGAL OPINION - The preparer of an opinion letter should ensure that it is clear from the opinion letter whether the letter constitutes a professional opinion rendered upon facts fully disclosed or known to all (generally, no liability) or a summary of facts which can be checked against a record (generally, subject to liability if facts are incorrect). *See City Nat'l Bank of Detroit v. Rodgers & Morgenstein*, *supra*.

i. <u>But beware</u>: In *Nat'l Bank of Canada v. Hale & Dorr, LLP, supra*, the Court held that '"[a] statement on which liability for misrepresentation may be based must be one of fact, not of expectation, estimate, opinion, or judgment'" (internal citation omitted), <u>but</u>

"'a statement of opinion may be actionable where the speaker possesses superior knowledge concerning the subject matter to which the misrepresentations relate, or where the opinion is 'reasonably interpreted by the recipient to imply that the speaker knows facts that justify the opinion'" (internal citation omitted). *Id.* at * 27-29. The Court held that <u>through the opinion letter's definition of the phrase"[t]o our knowledge" and through the defendant's admission that it reviewed twenty-seven items for the purpose of the opinions expressed in the opinion letter, the defendant represented that "'it possesse[d] superior knowledge concerning the subject matter to which the representations relate[,]' and that it made its statements *with* certainty</u>… Consequently, it [wa]s reasonable for the Banks to have concluded that the [d]efendant 'knew facts that justif[ied] the opinion'" (internal citation omitted) (emphasis added).

ii. <u>Qualifications and Limitations May Be Ignored</u>: In *Nat'l Bank of Canada v. Hale & Dorr, LLP, supra*, the opinion issuer expressly stated that no litigation searches were performed. In *Dean Foods Co. v. Pappathanasi, supra,* the opinion stated that "actual knowledge" means that nothing has come to our attention which causes [us] to doubt the accuracy thereof. The Court found that language created apparent certainty of the confirmation by the attorneys that there was no pending litigation, at a time when the issue was not conclusively resolved, thus denying the opinion recipient the opportunity to assess the risk.

iii. <u>Statements of Opinion are Not Per Se Unactionable</u>: "While it is true that 'statements that, in retrospect, were inaccurate or were too highly optimistic do not typically constitute material misstatements (internal citation omitted)"…statements made when the issuer did not actually believe its opinions at the time given are actionable as fraudulent misrepresentations. This principle applies to negligent misrepresentation claims as well. *Eaves v. Designs for Finance, Inc., supra.*

D. RELYING ON CUSTOM AND PRACTICE IN MULTI-STATE TRANSACTIONS – It is recognized in opinion practice that custom and practice will define the diligence required and the content and scope of opinions. However, given customary practice will differ across the country, this imprecise standard leaves much to be desired. *See* Statement of the Role of Customary Practice in the Preparation and Understanding of Third-Party Legal Opinions, 63 BUS. LAW. 1277 (2008). "Including the phrase 'to our knowledge' in an opinion does not by itself…state a limitation on the investigation required by customary diligence." TriBar Report, p. 619.

IV. NO-LITIGATION OPINION LETTERS OR OTHER OPINIONS REGARDING FACTUAL MATTERS ASCERTAINABLE FROM A SEARCH OF THE RECORDS

A. DILIGENCING WITHIN THE ISSUER'S FIRM. What duty does the issuer have to canvas other attorneys in the firm representing the client on other matters when giving no litigation or no breach opinions?

Before delivering an opinion letter, opinion preparers (regardless of the size of the law firm) do not, as a matter of customary practice, circulate [in contrast to responses to audit letter inquiries] a summary of the factual information on which

they are relying to every lawyer (or even some lawyers) in the firm or check that information against the firm's client files. Customary practice reflects an appropriate balancing of the costs such a procedure would entail and the benefits it could be expected to produce.

Third Party "Closing" Opinions * * * A Report of The TriBar Opinion Committee (1998), at p. 614.

But see Dean Foods Co. v. Pappathanasi, supra, at *48 ("A see-no-evil, hear-no-evil, speak-no-evil approach cannot be what the TriBar Report is teaching the opinion-writing bar"). A no litigation opinion is not as much an opinion as it is a confirmation of facts. However, the inclusion of a statement regarding the materiality of any such litigation involves judgment and not merely a confirmation of facts, and, as such, is more of a statement of opinion.

B. SHOULD FACT BASED OPINIONS BE GIVEN OR REQUIRED EVEN IF LIMITED TO ACTUAL KNOWLEDGE?

C. LAWS COVERED: AN OPINION SHOULD SPECIFY THE LAWS IT COVERS

i. **Federal Laws –** should only be covered if a Federal issue is germane to the transaction. Opinion issuers typically expressly exclude bankruptcy and securities laws, state and federal, but will generally include language to the following effect: We express no opinion with respect to the effect of any law other than the law of the State of New York <u>and the federal law of the United States</u>.

ii. **Custom and Practice –** Consider specifying "Applicable Laws" based upon the following sample opinion language:

The law covered by this opinion is limited to the Applicable Law. "<u>Applicable Law</u>" means,

with respect to each Loan Party, as applicable, the New York Limited Liability Company Law, the New York Business Corporation Law, the Uniform Commercial Code in effect in the State of New York (the "NYUCC"), and those laws, rules, and regulations of the State of New York [and of the United States of America] as in effect on the date hereof which in our experience are normally applicable to such Loan Party and to transactions of the type provided for in the Loan Documents to which such Loan Party is a party; provided, however, that Applicable Law does not include the requirements of or compliance with (i) any federal or state securities or Blue Sky laws, commodities, insurance, healthcare, environmental, tax, labor, investment company or ERISA laws and regulations, (ii) any statutes, administrative decisions, rules, regulations or requirements of any county, municipality, subdivision or local authority of any jurisdiction, (iii) any antitrust or unfair competition laws and regulations, including those imposing notice or filing requirements; (iv) any federal or state laws and regulations relating to banks, bank holding companies or banking; (v) any bulk sales laws and regulations; (vi) any state and federal antifraud statutes, rules or regulations; (vii) any federal or state laws pertaining to patents, trademarks, copyrights or similar property or any interest therein; and (viii) any laws and regulations relating to the prevention of terrorism or money laundering. We have assumed the validity and constitutionality of each statute, rule, regulation or executive order covered by this opinion letter. We express no opinion with respect to the law of any other jurisdiction other than the State of New York and no opinion is expressed as to the effect the law of any other jurisdiction might have upon the subject matter of the opinions expressed herein under conflict of laws principles or otherwise.

iii. **Delaware Formation, Authority and Execution and UCC Opinions –** Custom and practice has evolved where law firms that are not admitted to practice in Delaware nevertheless will issue these opinions particularly as to Delaware limited liability companies and Delaware corporations and as to Delaware UCC issues. Should we be re-visiting this practice? Does this constitute the practice of law without a license?

iv. **Reliance on Local Counsel Opinions –** Avoid language such as: Insofar as our opinion pertains to matters of (foreign state) law, we have relied upon the opinion of (foreign state) counsel, Messrs. (foreign counsel), dated ________________, a copy of which is attached hereto. In this author's view, it is preferable to state assumptions that parallel the opinions given by (foreign state) counsel rather than to rely on such (foreign state) counsel's opinion.

v. **Choice of Law Opinions –** If the opinion does not cover the law of the jurisdiction specifically chosen by the parties to the loan documents as the governing law, the opinion issuer should discuss with lender's counsel whether a clean or reasoned choice of law opinion can be given in the issuer's jurisdiction. The issuer should be aware that a general enforceability opinion includes the enforceability of the choice of law provision unless the opinion clearly states that no such opinion is being rendered. In states where a clean choice of law opinion is not available, lender's counsel should require that the local counsel opinion cover the enforceability of all of the loan or transaction documents (without

regard to the choice of law as though the chosen law was the local jurisdiction) and not simply those being recorded in the local jurisdiction. This approach may be costly in loans with multiple properties in multiple states and, accordingly, may be reconsidered where the only contact with the local jurisdiction is the location of one of several mortgaged properties or where there are significant contacts with the chosen law jurisdiction.

D. NON-CONSOLIDATION OPINIONS AND SPECIAL DELAWARE OPINIONS – ARE LENDERS REQUIRING THEM OUTSIDE OF THE CMBS MARKET?

V. ETHICAL CONSIDERATIONS

A. CONSENTS, CONFIDENCES AND CONFLICTS - There are professional responsibility considerations that must be addressed when borrower's counsel issues an opinion letter in favor of the lender to facilitate the transaction. Tthe need to obtain client consent to deliver an opinion letter to a third party, the protection of client confidences and the identification and resolution of conflicts of interest all arise in the context of borrower's counsel issuing an opinion to a lender in a real estate financing transaction. The consent may be properly inferred from a provision in the loan commitment or loan agreement signed by the client that makes the delivery of the opinion to the lender a condition to closing. However, if an opinion would require disclosure of confidential information, a specific consent to such disclosure should be obtained.

B. RULES OF PROFESSIONAL CONDUCT - Rule 2.3 of the American Bar Association Model Rules of Professional Conduct and Rule 2.3 of the New York State Rules of Professional Conduct provides:

i. A lawyer may provide an evaluation of a matter affecting a client for the use of someone other than the client if the lawyer reasonably believes that making the evaluation is compatible with other aspects of the lawyer's relationship with the client.

ii. When the lawyer knows or reasonably should know that the evaluation is likely to affect the client's interests materially and adversely, the lawyer shall not provide the evaluation unless the client gives informed consent.

iii. Unless disclosure is authorized in connection with a report of an evaluation, information relating to the evaluation is protected by Rule 1.6.

C. CONFLICTS OF INTEREST. An attorney issuing an opinion should disclose if he/she has a personal or financial interest in the outcome of the transaction or a special relationship beyond that of attorney-client which could compromise the attorney's professional judgment.

D. CREDIBILITY. Issuing counsel may not rely on any assumptions whether of factual matters or otherwise known to be false or which issuing counsel has reason to believe are false. Lender's counsel in reviewing and approving borrower's counsel's opinion has a responsibility to his/her client to call to the client's attention matters in the legal opinion which are not correct.

Cases of Interest:

In *People of the State of Colorado v. Stevens*, 883 P.2d 21 (Co. 1994), the respondent admitted that she violated DR 5-101(A) by issuing opinion letters when she had a personal interest in the content of the opinion rendered. ("The respondent completed several research projects for the STAPO partner lawyer involving the Vann bankruptcy case. The respondent issued opinion letters…addressed to Vann…concerning issues relating to Vann's ability to use certain contributions to his compensation plan. Out of the funds he ultimately withdrew from the compensation plan, Vann paid the STAPO partner lawyer $39,000. The respondent received approximately $3,000 from these funds and had a personal interest in assuring that Vann received the funds and paid them to the STAPO partner lawyer. The respondent has admitted that her conduct violated DR5-101A…"(*Id*. at 23.))

In *People of the State of Colorado v. Spangler*, 676 P.2d 674 (Co. 1983), a lawyer was suspended from the practice of law for, among other things, photocopying a securities opinion letter issued by another firm and issuing it to his own client, on his own stationary, as his own opinion letter.

Matter of Persky, 92 A.D.2d 372, 460 N.Y.S.2d 316 (1st Dep't 1983) involved the ethical ramifications of a decision of the United States Court of Appeals for the Second Circuit (*Newburger, Loeb & Co., Inc. v. Gross*, 563 F.2d 1057 (2d Cir. 1977)), which held that the respondent issued an opinion letter stating that a certain partnership could be transformed to a corporation even without the consent of all of the limited partners despite the respondent's belief that this was not the case. The Hearing Panel of the Committee on Grievances held that:

> There is no doubt that [respondent] knowingly and intentionally participated in the transaction and indeed played an active and central role in its consummation. Nevertheless, we do not believe that the [respondent] knew that the transfer was wrongful when he

> counseled its accomplishment and opined as to its legality. The question, as a matter of law, of the legality of the transfer absent the consents of Bleich and Donoghue, was not completely free from doubt. At least prior to the District Court opinion, arguments could be marshaled, although not ultimately persuasive[,] for the position that the transfer was permissible without their consents.
>
> In addition, representatives of 17 law firms were present at the closing and were informed that the Rosenman firm would not give the requisite opinion. Nonetheless, after being presented with [respondent's] opinion that the transfer was lawful, apparently no objection was made by any counsel in attendance and all parties agreed to the closing. In fact, the partner of Rosenman Colin who had indicated that his firm could not give such an opinion, did not state any objection or dissent when [respondent] offered his opinion, and his clients also participated in the closing.

Matter of Persky, supra, 92 A.D.2d at 375, 460 N.Y.S.2d at 318.

The holdings of the Hearing Panel of the Committee on Grievances were accepted by the Court, which held that:

> [A]t least on the ethical question, a significant portion of the negative language of the opinions of the District Court and the Circuit Court of Appeals insofar as it related to respondent is undercut by the hearing panel's finding.

Id.