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The Newsletter of the Committee on Legal Opinions in Real Estate Transactions

From the Chair

The Committee on Legal Opinions in Real Estate Transactions of the ABA Section of Real Property, Trust and Estate Law is pleased to present this Fall/Winter 2021 issue of ***Opinions Matters***, our Committee's semiannual newsletter. The Committee's goal for this newsletter is to keep our members and other lawyers informed of developments in opinion practice, with a focus on real estate opinion practice. We monitor and report on actions and reports of various organizations, such as the Legal Opinions Committee of the ABA Business Law Section, the Working Group on Legal Opinions Foundation, and the TriBar Opinion Committee. Along with the American College of Mortgage Attorneys' Opinions Committee and the American College of Real Estate Lawyers' Attorneys' Opinions Committee, the Committee undertakes various reports on opinion letter practice with a focus on real estate finance transactions.

The 2021 (33rd Annual) RPTE National CLE Conference (previously known as the Spring Symposia) is scheduled to be held on April 21-23, 2021; however, it will be virtual as was the 2020 CLE Conference. We expect to provide periodic updates in the RPTE Real Estate Financing Group Community (https://connect.americanbar.org/rpteconnect/communities/community-home?CommunityKey=e0ea5a3d-87ec-4e54-ab6c-d809e1ba322c).

And, now, on to some highlights of this issue:

With the completion in recent years of three reports on opinion practice, namely the 2012 report on opinions in real estate finance transactions, the 2016 report on local counsel opinions and the 2018 report on Uniform Commercial Code opinions in real estate finance transactions, the Committee is undertaking two new projects.

One project involves updates and revisions to the Real Estate Opinion Letter Guidelines (2003) to reflect almost two decades of developments. Bill Dunn describes the status of this project in *Further Considering Real Estate Opinion Letter Guidelines: Moving Ahead*. Participants in this project also include the ACREL and ACMA

Charles L. Menges, Editor-in-Chief

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opinion committees and the Real Estate Affinity Group of the Working Group on Legal Opinions Foundation (WGLO). The Opinions Committee of the ABA Business Law Section may also participate.

In *A Modest Proposal: Follow-On Legal Opinions*, Marshall Grodner describes the other project that the Committee anticipates undertaking with ACREL and ACMA. In a previous issue of this newsletter, contributors have discussed many of the issues that arise (and often confound opinion givers) in issuing opinions on loan amendments, loan assumptions and other post-loan origination transactions. Marshall notes that customary practice is beginning to coalesce around best practices for these types of opinions.

Charlie Menges leads the Committee's Task Force on Fannie Mae and Freddie Mac Opinions, and provides a report on that effort. Should you have interest in getting involved with the Task Force, please contact Charlie or the Committee Chair.

Ken Jacobson reports on the 2020 Fall Meeting of the Working Group on Legal Opinions Foundation in *What Happened At the Fall 2020 Meeting*. That meeting dealt with, among other things, the Committee's two new projects as well as a new real estate affinity group within WGLO.

Charlie Menges discusses proposed legislation under consideration in Virginia to establish a safe harbor for when an amendment of a credit facility secured by a mortgage does not require the mortgage to be modified in order to secure the amended debt with the same priority as the original mortgage. This proposal may be of interest to other states as well, and it is also being studied by the Uniform Law Commission.

As always we encourage our readers to suggest potential topics for articles, to submit articles, to review submitted articles or otherwise to assist with keeping *Opinions Matters* topical and informative.

Summary of Selected Recent Business Law Section Legal Opinions Committee Community Discussion Activity June 2020 – December 2020

This summary of Business Law Section Legal Opinions Committee Community Discussion activity among its members does not necessarily represent the views of that Committee or the Committee on Legal Opinions in Real Estate Transactions, but rather reflects views of individual members of the Business Law Section Committee on Legal Opinions on current practice topics. The comments referred to below may be viewed by members of the Business Law Section Legal Opinions Committee at that Committee's "Discussion" web page at https://connect.americanbar.org/businesslawconnect/communities/community-home/digestviewer?communitykey=64cee91d-6dbd-4bde-852eac3bdc056be2&tab=digestviewer --or https://bit.ly/2Jz8c9B.

1. **Electronic Signatures on Opinion Letters**. Charles Menges, Richmond, VA, commented that following the onset of the COVID-19 pandemic, there has been much discussion about opinions relating to transaction documents that are signed electronically.[1] He asked for views about electronic signatures on opinion letters and distinguished such ***electronic signatures***, through a platform such as DocuSign, from ***manual signatures scanned as PDF documents***. He believes that his firm has not signed its opinion letters electronically and would like to know whether other firms are doing so. Some lawyers representing opinion recipients ask for original opinion letters at closing which has traditionally meant an original, manual or wet-ink signature. Finally, he noted a nagging concern that permitting electronic signatures on opinion letters might increase the risk to the opinion giver or firm. For example, the convenience of clicking a button to electronically sign, may make it more likely that an opinion letter will be "signed" in violation of the firm's opinion procedures. Perhaps the risk is lessened by requiring the formality of a manual signature.

The replies were consistent that the validity of an opinion letter is not affected by the manner in which it is signed and that nothing is inherently wrong or inappropriate about either permitting or prohibiting signing an opinion letter with an electronic signature.

Joel Greenberg, New York, NY, uses PDF Expert software which allows him to use the Apple "Pencil" to manually sign a PDF document. He does not believe the lawyers at his firm have used and applied a stored or saved signature. Cynthia Baker, Chicago, IL, has been signing opinions

1. *See, e.g.,* Alexia J. Neal, Brandon Duckworth, & Christopher R. Bullock, Electronic Signatures and Legal Opinions, 5 Opinions Matters at 5-7 (Spring 2020), available at the Committee's webpage.

with the Adobe signature function for years, and does not recall ever receiving an objection. She also commented that the critical issue for an opinion letter is its delivery by an authorized representative, not its execution.

Steven Weise, Los Angeles, CA, observed that no statute of frauds applies to opinion letters and that the "signing" (however accomplished) is the manifestation of the opinion giver's intent to "make" the representations embodied in the opinion letter. Jack Burton, Santa Fe, NM, noted that Sections 1-201(b)(37) & (43) of the Uniform Commercial Code define the terms "signed" and "writing"/"written" and suggests that, because it codifies decades of commercial practice, it should be applied by analogy to transactions that are not within the Code. He also suggested that, as a practical matter, the opinion giver could "sign" an opinion letter using a script-like font, perhaps in blue ink. Lawrence Rutkowski, New York, NY, replied that his firm has been using computer-generated script, affixed by a partner, to sign opinion letters both before and during the pandemic. He, Elizabeth Blair, Napa, CA, and David Peterson, Orlando, FL, all stressed the importance of an audit trail to help ensure that any issued opinion will have been duly authorized. Stanley Keller, Boston, MA, wrote that a firm's process and controls for opinion letters should apply whether a signature is manual or electronic.

Brandon Mason, Minneapolis, MN, has seen many law firms or lawyers electronically signing opinions. He noted that big accounting firms have long been using electronic signatures for audit opinions and other communications and there is federal, state, and territorial legislation authorizing electronic signatures as valid. Recognizing that a majority of legal opinions he sees have a manual signature, he posited some reasons, the fact that our profession is often tradition-bound and the possibility that lawyers who must manually sign will be more likely to carefully review the opinion letter before signing. He believes that those reasons are not significant when weighted against the benefits of electronic signatures.

2. <u>Effect of Existing Defaults on Enforceability</u>. John Stockton, Harrison, NY, questioned the need for an assumption that there are no existing defaults or breaches when opining on the enforceability of an amended loan agreement. David Peterson, Orlando, FL, expressed a belief that defaults are not relevant for the remedies opinion, but might be applicable to the no conflicts opinion if that opinion did not only relate to defaults in ***<u>other</u>*** agreements that are caused by execution and delivery of the transaction documents. Charles Menges, Richmond, VA, also believes that defaults are not relevant unless the amendment documents expressly provide that they are not effective if there is any existing default. Robert Grauman, Waltham, MA, proposed that the assumptions are unnecessary and suggested that the opinion giver rely on a client certificate, or the reps and warranties contained in the transaction documents, to the effect that there are no existing defaults or breaches.

3. <u>Cross Border Guarantee and Opinion by Borrower's Counsel</u>. Vikas Varma, Goshen, N.Y., questioned the reasonableness, in connection with a guarantee made by a Delaware corporation of the obligations of its non-US parent entity, of a request for an opinion that a choice of law of the non-US jurisdiction and that a judgment of the courts in that non-US jurisdiction would be recognized and given effect/enforced by courts in the "relevant Jurisdiction". Stanley Keller, Boston, MA, commented that these opinions are sometimes given but it depends on the provision and the law of the applicable US state being covered. He suggested reviewing Cross-Border Closing Opinions of U.S. Counsel, 71 Bus. Law. 139 (Winter 2015/2016) available at the ABA Legal Opinion Resource Center webpage. He also noted that an upstream guarantee involves corporate power, a matter of internal affairs governed by the law of the US jurisdiction in which the US subsidiary is organized.

Robert Grauman, Waltham, MA, added a few caveats for the opinion giver: (1) assuming that the guarantee is enforceable under the law of the chosen non-US jurisdiction, (2) confirming that an upstream guarantee is valid under the law of the US jurisdiction in which the US subsidiary is organized, and whether or not shareholder approval is necessary (as it may be under the New York Business Corporation Law), and (3) clarifying the meaning of "relevant Jurisdiction". Mark Duedall, Atlanta, GA, shared an example of a typical choice of law opinion, in this case dealing with a Delaware court and documents governed by the laws of the Province of Québec.

Barry Fischer, Chicago, IL, suggested the opinion giver determine whether the US jurisdiction adopted the Uniform Foreign-Country Money Judgments Recognition Act (2005) or its predecessor, the Uniform Foreign Money Judgments Recognition Act (1962) (in either case, the "Act"). If so, the opinion giver should generally be able to assume that the requirements of Sections 3 and 4 of the Act are met. Marshall Grodner, Baton Rouge, LA, also referred to the Act and wished "good luck" to an opinion giver if the relevant state does not have the Act. He also noted that the choice of law analysis is a regular choice of law analysis under the law of the relevant state. Charles Menges, Richmond, VA, commented that it might be helpful to attach to the opinion letter a list of the various conditions to enforcement contained in the Act. The importance of the satisfaction of the conditions cannot be overstated. John Williams, Wilmington, DL, shared a cautionary tale in which a reported Delaware case granted the Plaintiff's motion to vacate a foreign judgment.

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Further Considering Real Estate Opinion Letter Guidelines: Moving Ahead

Following my article and "snapshot" in the Spring 2020 issue of ***Opinions Matters*** of Real Estate Opinion Letter Guidelines (2003) in the context of the Statement of Opinion Practices (2019), the respective opinion committees of the ABA Real Property, Trust & Estate Law Section, the American College of Mortgage Attorneys, and the American College of Real Estate Lawyers, as well as the real estate affinity group of the Working Group on Legal Opinions Foundation, have all endorsed a project to "update the Guidelines." A steering committee representing these sponsors is being formed, from which a drafting group will be appointed to work on the product.

This project begins with a look at the real estate centered portion of the Real Estate Opinion Letter Guidelines – those appearing in bold print inserted into the original Guidelines for Preparation of Closing Opinions of the ABA Business Law Section (2002) – to see if the statements represent present-day guidance. In that discussion we will consider the function of "guidelines" as "here's what you should do" statements or as "here are principles to guide." That will lead to consideration of inclusion of substantive content into previous reports, the Real Estate Finance Opinion Report of 2012 and its supplementary report Local Counsel Opinion Letters in Real Estate Finance Transactions, and eventually an examination of how reports and guidance can be provided in a single consistent source.

We will also consider how prevailing customary practice has affected the basis for Guidelines. From inception, real estate opinion practice and corporate practice have been fundamentally consistent although manifested differently. I believe that there is gain in assuring that the fundamentals are the same and practice guidance as mutually consistent as reasonably possible. Throughout this process, we will reflect on how the Statement of Opinion Practices fits with the original Guidelines and changes the overall function of guidelines and specifically the terms of them. The literal effect is demonstrated with my article.

Because this endeavor has an existing starting point, we are establishing space on the ABA RPTE Legal Opinions in Real Estate Transactions Committee webpage on which we will post references and resources related to it. That page and its materials are available to all. We welcome your comments and suggestions.

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A Modest Proposal: Follow-On Legal Opinions

With all due respect to Jonathan Swift, and although we are living through a pandemic and not a famine, I have "A Modest Proposal" for the legal opinion community—we need guidance on opinions dealing with amendments to credit facilities. Opinion givers have seen a rise in opinion requests regarding amendments to current financing transactions. Unfortunately, there is little guidance in the opinion literature for amendment opinions. My modest proposal is not to kill the babies, but to form a drafting committee among various interested groups, including the ABA RPTE Committee on Legal Opinions in Real Estate Transactions, the American College of Real Estate Lawyers Attorneys' Opinion Committee, the Working Group on Legal Opinions, the American College of Commercial Finance Lawyers, the Commercial Finance Committee of the ABA Business Law Section, as well as other groups, to issue some sort of report regarding these type of opinions. Sentiments have been moving in that direction.

Customary practice is beginning to coalesce regarding these types of opinions. As a first step, there seems to be a consensus on what to call these types of opinions: "Follow-On Opinions." In the past, these opinions have been called "continuing perfection," "no adverse affect," "bring down" or "amendment" opinions. Now that "follow-on opinions" have a name, it is time for guidance from the legal opinion community regarding the specifics of these opinions.

The general scenario arises where there was an original credit facility, represented by a credit (or loan) agreement, with numerous other loan documents. Some, if not most, facilities include a security agreement and a mortgage. A closing opinion was issued at the original closing, including the typical entity opinions (good standing, power and authority, and due authorization, execution and delivery), enforceability, and in the case of a secured financing, creation or perfection of security interests or a mortgage lien, or both.[1] At a later date, the credit agreement, and possibly some of the other loan documents, are amended. A new legal opinion is requested at the closing of the amendments.

A new report would give the opinion giver and the opinion recipient guidance on issues that arise in this follow-on opinion scenario. The first threshold issue in follow-on opinions is whether the opinion addresses the existing documents, the amendment documents only, the existing loan documents as amended, or the amendment documents and the existing documents as amended.

1. However, opinions on liens and security interests in real estate financings tend to be more limited than in other contexts. *See* the ABA/ACREL/ACMA report, *Uniform Commercial Code Opinions in Real Estate Finance Transactions*, 53 Real Prop. Tr. & Est. L. J. 163 (2019).

Anecdotal evidence seems to indicate that there is a growing consensus that it is the amended documents only, but a recitation that the original documents were reviewed (but no opinion is given as to these documents) is not outside that consensus. I personally like listing (and limiting my scope of review to) particular existing loan documents. Would this consensus change, if there were new money and new lenders under the amendments? It should not, particularly if the original opinion dealt with successors and assigns to the lender by a so-called "Wachovia" reliance limitation or something similar—the new lenders would be able to rely on the old opinion as of its date (with its other caveats) for the existing loan documents, like new lenders or participants typically do when there are no amendments, and the new follow-on opinion would cover the new money.

A second issue is whether it makes a difference whether your firm issued the original opinion. My initial feeling is that it should not, although it seems that to the extent that your firm did not render the initial opinion, there will be more due diligence necessary, in particular an initial review of the entity organizational documents and a more in depth review of the original loan documents. As a practical matter, it is a cost issue not an opinion issue.

A third issue is whether you can rely on the original consents/resolutions (assuming they authorized amendments) or whether to require new resolutions for the authorization, execution and delivery opinion. My conservative lawyer approach would be to require new resolutions.

Another important issue deals with security interests. At first my position was that I will give the standard UCC creation and perfection opinions, but you will need to do an amended and restated security agreement and file a new financing statement; we will not give "continuing perfection" opinions. My position has matured, and I think there is a growing consensus that "continuing perfection" or "reaffirmation" opinions are acceptable. There is no consensus, however, as to the formulation of these opinions, except that they generally start with the amendment document "does not, in and of itself." Some opinion givers like to follow with "impair the validity and perfection of the security interest." Others like "adversely affect the validity and perfection of the security interest." Another formulation is "result in the security interest becoming invalid or unperfected." Most will follow with something to the effect that "to the extent that the security interest was and remained validly created and perfected, prior to the amendment." I generally find these different formulations are a distinction without a difference, as a practical matter. I will note in the mortgage situation, however, that there is more push-back on issuing these "reaffirmation" opinions since the lender can rely on the original title policy, and a mortgage modification endorsement, if necessary, although if I am the title insurance agent, my opinion to this effect is the basis for the mortgage modification endorsement in any event.

A fourth issue is whether special assumptions, in addition to the typical assumptions (implicit or explicit), are needed. I would suggest additional assumptions may be needed. One additional assumption would be to the effect that "the parties to the existing loan documents were validly existing at the time of execution of the existing loan documents, the parties had the power and authority to execute and deliver the existing loan documents, and the existing loan documents prior to the amendment (i) were duly authorized, executed and delivered, (ii) were the valid and binding obligations of the parties thereto, (iii) remain in full force and effect, and (iv) have not been otherwise amended." There could be an additional acceptable caveat to (iv), something like "in a manner that would materially affect the opinions in this opinion letter," although a materiality caveat may be problematic to some opinion givers, even though I find it personally acceptable. This lengthy suggestion can be broken down into several separate assumptions. An assumption as to no defaults under the existing loan documents may also be acceptable. In a secured transaction, an assumption that the financing statement has not been terminated, released or amended might be necessary as well, particularly if the existing financing statement is not a defined "existing loan document." Attaching a copy of the filed financing statement to the opinion may also be a good idea, but may not be necessary if properly described in the opinion. The opinion giver should also consider adding an assumption to the effect that the amendment does not amount to a novation, if any opinion is given as to continuing security interests or mortgage liens.

There are many other issues that should also be dealt with in any report. Guidance is needed for opinion givers and recipients of follow-on opinions. This article is "A Modest Proposal" to the legal opinion community to come together and draft a report dealing with follow-on opinions. It is, with all due respect to Ernest Hemmingway, "A Call to Arms" to all the groups in the legal opinion community to get to work on this project.

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The Task Force on Fannie Mae and Freddie Mac Opinions

The government sponsored entities, Federal National Mortgage Association and Federal Home Loan Mortgage Corporation (usually referred to as Fannie Mae and Freddie Mac, respectively, or GSEs), have established forms of legal opinions which borrowers' counsel are expected to follow in connection with commercial real estate loans that are originated by banks and other lending institutions, sold to Fannie Mae or Freddie Mac and then usually securitized. The loans primarily finance multifamily and senior housing properties. Counsel for the originating lender (often referred as "seller/servicer" because the lender sells the loan to Fannie Mae or Freddie Mac and retains servicing responsibilities) is required by the applicable GSE that is purchasing the loan to obtain a legal opinion consistent with the GSEs applicable promulgated form.[1] Seller/servicer counsel understandably is usually reluctant to permit substantial deviation from the promulgated form, lest such noncompliance causes the GSE not to purchase the loan from the originating lender.

For borrower's counsel, this presents a dilemma. Although many lawyers may be content to adopt a lender's form of legal opinion instead of starting from the opinion giver's form, most lenders making conventional (i.e. non-GSE) loans permit borrower's counsel to use such counsel's preferred form of opinion letter as a starting point and then provide comments to the extent the opinion letter is perceived to be deficient in some respects. However, trying to use a law firm's standard form of opinion letter in lieu of the Fannie Mae or Freddie Mac form will likely be a non-starter or, at the very least, will result in extensive negotiation and much higher legal fees for the borrower. At the same time, the GSE-promulgated forms are notably inconsistent with the current customary opinion practice. For example, they contemplate that the opinion letter should recite all kinds of documents that the opinion giver has reviewed even though many of those documents are not the subject of any of the opinions included in the opinion letter. They also do not include all of the assumptions and qualifications that an opinion giver would customarily list, including, for example, an assumption as to the genuineness of signatures.[2]

1. Although in-house lawyers at the GSE may review an opinion letter as submitted by borrower's counsel in large loan transactions, the responsibility to review the opinion letter and determine its compliance with the GSEs requirements is delegated to the seller/servicer counsel in the majority of the loans to be sold to the GSE.
2. The Statement of Opinion Practices states that the genuineness of signatures may be implicitly assumed without mentioning such assumption expressly in the opinion letter. However, should an opinion giver omit such an express assumption, relying on the Statement of Opinion Practices, if the lawyer knows that the opinion recipient would not accept the assumption if it were stated expressly?

The respective opinion committees of the ABA Section of Real Property, Trust and Estate Law, the American College of Real Estate Lawyers and the American College of Mortgage Attorneys have established a task force to examine the legal opinion forms and requirements of Fannie Mae and Freddie Mac. The task force's study is still in its early stages, and no formal recommendations have yet been made. However, preliminary discussions have focused on three possible approaches:

- Fannie Mae and Freddie Mac probably cannot be persuaded to adopt the practice of most conventional lenders and allow borrower's counsel to start with its own form of legal opinion rather than the forms promulgated by the GSEs. Although the Task Force can try to pursue this, the Task Force's efforts will probably be better spent on other approaches.

- The Task Force should engage with in-house counsel at Fannie Mae and Freddie Mac to discuss ways in which the promulgated forms can be revised to more closely follow current customary opinion practice. Preliminary contacts in this regard have been encouraging.

- Because many law firms have developed "hybrid" opinion letter forms that Fannie Mae and Freddie Mac will accept in lieu of strictly following the promulgated forms, it may be useful to share such forms among members of the task force and perhaps ultimately make them available to other lawyers on the respective opinion committees. Such hybrid forms, for example, may follow the format of the Fannie Mae and Freddie Mac forms but contain substantive assumptions and qualifications that the opinion givers require in conventional loans.

Any member of the ABA RPTE Committee on Legal Opinions in Real Estate Transactions or of the ACREL or ACMA opinion committees is welcome to participate in this task force as it moves forward with its study and recommendations.

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What Happened At the Fall 2020 Meeting of the Working Group on Legal Opinions Foundation

The Fall 2020 Meeting of the Working Group on Legal Opinions Foundation ("WGLO") concluded last October. In past years, the meetings were conducted, in New York, each as an in-person meeting lasting several hours on a single day preceded by small group breakout dinner sessions devoted to substantive opinion-related topics the evening before. Due to COVID-19 considerations, the 2020 Spring Meeting of WGLO was canceled and the 2020 Fall Meeting was conducted as a virtual meeting through Zoom. The Fall 2020 Meeting was conducted over several days on October 20, 2020, October 22, 2020, October 27, 2020 and October 29, 2020 and addressed a variety of topics of interest to the attorneys that issue and review opinion letters.

As a reminder, WGLO (website: https://www.wglo.net/), is an organization whose mission, per its website is "… to bring together all constituencies concerned with giving and receiving legal opinions in order to foster a national opinion perspective, broaden the consensus that exists and provide a continuing forum for discussion of opinion issues." There are three categories of members of WGLO: the ABA's Business Law Section, law firms and bar associations (such as the ABA's Section of Real Property, Trust and Estate Law and state bar associations). Among WGLO's activities is the hosting of a Spring meeting and a Fall Meeting each year (although in 2020, as noted above, only the Fall 2020 virtual conference was held). Lawyers that are partners in, or, employed by member law firms may, as of the writing of this article, access written materials from the Fall 2020 conference through the WGLO website (note that a log-in is required to access those materials).

Two programs were presented on October 20. The first program, "Is There a Consensus on Opinion Practice: How Practitioners Are Addressing Current Opinion Issues", addressed a variety of issues regarding areas of consensus in opinion practice, including discussions of opinion-related issues affected by Dodd-Frank, CFIUS, the Hague Securities Convention and bail-in provisions in documents. One topic dealt with during the first program pertained to third-party reliance on opinion letters such as reliance by assignees, rating agencies and loan participants and discussed limitations on who may rely on opinion letters. This topic will be presented again in a webinar scheduled for January 12, 2021 at 1:00pm ET. The second program, "Takeaway: Another Look at the Use of Representations in Opinion Practice," addressed the use of representations in opinion practice.

Two programs were also presented on October 22. The first program, "Recent Opinion Developments", reviewed recent judicial decisions. The decisions are not necessarily decisions related to opinion letters themselves, but, rather addressed substantive legal issues bearing upon opinions. There was not time during the session to cover all of the over 30 decisions that were referenced in the written materials presented in connection with the program. The referenced decisions covered topics such as corporate authority, securities, contract formation, contract interpretation, contract modification, jurisdiction, choice of law, choice of forum, third-party beneficiary, contract claims, risk allocation, secured transactions-UCC, guaranties, and lawyer liability. The second program, "Disclosure in the Context of Opinion Practice", dealt with disclosures to non-clients in the context of opinion practice and whether opinion givers have disclosure obligations to non-client opinion letter recipients beyond those in the opinion letter itself.

The programming presented on October 27, 2020 began with the presentation of the Fuld Award to Richard Howe, of New York. The Fuld Award, named for James J. Fuld, who wrote the seminal article on opinion practice in 1973, has been awarded annually (except for 2013) by WGLO to an individual or organization that has made a significant contribution to legal opinion practice in business transactions.

The initial program on October 27, 2020, "Current Ethics Issues Relating to Transactions Practice", pertained to current ethics issues in business transactions. The programming on October 27, 2020 concluded with a meeting of six affinity groups. WGLO has established various affinity groups where lawyers can meet with lawyers practicing in similar practice areas. The six affinity groups that met were the Capital Markets/Public Securities, Commercial Law and Finance, Corporate/Alternative Entities, Cross-Border Transactions, Private Equity/Venture Capital and Real Estate Affinity Groups.

During the Real Estate Affinity Group meeting, there was a discussion concerning the initiation of the project that will update the 2003 Real Estate Opinion Letter Guidelines issued by the opinions committees of RPTE and ACREL. The opinions committees of ACREL, ACMA and RPTE (as well as the WGLO's Real Estate Affinity Group) have all approved the initiation of that project. The 2003 Real Estate Opinion Letter Guidelines adopted the BLS Guidelines and Principles in their entirety and added real estate-centric provisions to deal with opinion practice issues of particular interest to real estate attorneys. Substantial changes were made to the BLS Principles and Guidelines by the Statement of Opinion Practices, and, accordingly, the 2003 Real Estate Opinion Letter Guidelines will be updated. Concern was expressed that those portions of the BLS Guidelines not addressed by the Statement of Opinion Practices might at some future time be the subject of an effort by WGLO and BLS to address those portions of the Guidelines not addressed by the Statement. Efforts are underway to establish a

steering committee for the update project. In addition, one of the participants in the Real Estate Affinity Group meeting indicated that the WGLO's local counsel opinion letter project remains ongoing and there may be a revised draft of the report that will be circulated later this year. There was also some discussion regarding the (then) upcoming WGLO program on follow-on opinions in light of the practice in many real estate loan modification transactions where opinions are requested and provided. The consensus was that this topic has been largely unaddressed in the existing opinion-letter literature and might be a subject for a potential project. It was pointed out that real estate lawyers will be interested in that program and possible follow-on work inasmuch as real estate lawyers frequently deal with opinions in the context of mortgage loan amendments (which, as was pointed out, may be especially timely due to COVID-19 relief amendments and LIBOR transition related amendments that are anticipated to be forthcoming).

The final day of programming was October 29, 2020 and consisted of a single program, "Follow-On Opinions: Advancing the Practice". This program was presented as a break-out session. Conference attendees divided into three "virtual" groups where the break-out program leaders worked through a variety of topics in interactive sessions with attendees. The breakout sessions were, in a way, a follow-on to a webinar presented by WGLO in August 2020. A feature of the break-out program format is that attendees speak without attribution in order to facilitate discussion. Follow-on opinions are opinions that may be issued in a transaction following the origination of that transaction. Among the topics discussed were opinions to be provided in the context of loan modifications. There was a consensus that the opinion giver in the loan modification context had to address the documents provided at the origination of the loan either by assuming certain matters with respect to those documents (e.g., that the documents delivered at loan origination are enforceable and have not been subsequently modified except for the modification wrought by the loan modification in question) or establishing (or re-establishing) the facts and legal conclusions reached in the context of the opinions provided in connection with the origination of the loan.

WGLO's Fall Meeting provided attendees with a deep-dive into several opinion-related topics. The affinity group session and the break-out session on the final day of the conference provided participants with an opportunity to discuss opinion issues on an interactive basis.

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Mortgage Modification Opinions: Is There A Need for Legislation?

Introduction

The Virginia General Assembly will consider a bill in its 2021 session that would provide a "safe harbor" as to when an amendment to an existing mortgage[1] is required if the loan documents secured by the mortgage are amended after the mortgage was executed and recorded, in order to be certain that the mortgage would continue to secure the loan as so amended and with the priority the existing mortgage would have absent amendment.[2] If adopted, the proposed law would have implications for opinion practice in financing transactions involving real estate collateral in Virginia, particularly with the increasing number of loan amendments and restructurings that are anticipated due to the current economic distress. The proposal may also be of interest to lawyers in other states.

The proposed legislation will be useful for many commercial mortgage loan amendments but particularly for amendments to large corporate credit facilities that are secured by various assets of the corporate borrower, including real property in multiple states. In the typical multistate transaction, the amendments to the credit agreement or other loan documents are negotiated and executed first, with a provision in the loan amendment documents requiring the borrower to execute and record any mortgage amendments, to obtain endorsements to the lender's title insurance policies and to obtain local counsel opinions on the mortgage amendments. Often, satisfaction of the latter requirements related to mortgage amendments are deferred for 90 or 120 days after the loan documents are amended. In many cases, the loan amendment documents allow the borrower to avoid satisfying such requirements if local counsel in each state in which a mortgage is recorded is willing to opine that the previously recorded mortgage securing the credit facility is adequate to secure the credit facility as amended and that the priority of the mortgage will not be impaired on account of the amendment to the credit facility.

But will local counsel be willing to issue such an opinion?

1. In Virginia, deeds of trust are used almost exclusively rather than mortgages. However, for purposes of this article, the term "mortgage" is used to include a deed of trust or a deed to secure debt in addition to a traditional mortgage.
2. The bill was proposed by the Business Law Section and Real Estate Section of the Virginia Bar Association (VBA). The VBA is a voluntary organization of lawyers that, among other things, promotes professionalism among Virginia lawyers and from time to time submits legislative proposals deemed to be in the public interest. The Virginia State Bar is the mandatory bar organization that does not engage in legislative activity.

The Reluctance to Issue the Opinion

Many, and perhaps most, real estate lawyers in Virginia are reluctant to do so. The reasons for such reluctance vary, but there seems to be a perception that the case law on the subject is sparse, that the opinion giver would need to make a judgment call whether the loan amendment would prejudice potential junior creditors and/or would constitute a novation of the loan and, perhaps most importantly, that lawyers just don't give opinions as to the priority of mortgages.[3] Even if a lawyer believes that, for a given loan amendment, a separate mortgage amendment is not necessary or that lien priority would be preserved, it is quite another matter for a lawyer to issue a formal opinion to that effect. By contrast, the priority of future advances secured by a mortgage that complies with a specific Virginia statute on the subject,[4] is not generally problematic. However, there is no comparable statute in Virginia that codifies existing case law and the Restatement's position (discussed below) as to the priority of mortgage loan *amendments*, and the future advance statute by its terms does not expressly include loan amendments.

As a result, the borrower who is amending its credit facility secured by a mortgage on property in Virginia may be required to incur the delays and expenses of preparing and recording mortgage amendments, obtaining title insurance endorsements or title updates to confirm that there are no intervening parties with an interest in the mortgaged property, as well as the expense of obtaining customary legal opinions as to the mortgage as amended, in addition to the expense and time already incurred in previously amending the credit facility secured by such mortgage. If the law on the subject of mortgage modifications were reasonably clear by statute, perhaps such delays, expenses and other inefficiencies in the mortgage amendment process could be avoided.

Is a Mortgage Required to be Amended When the Loan is Amended?

As a general rule, if a mortgage or the obligation it secures is modified by the parties, the mortgage loses its priority as against junior interests in the mortgaged property if the modification is "materially prejudicial" to the holders of such junior interests[5] and the mortgage did not reserve the right to make such a modification.[6] Unfortunately, it is not entirely clear what constitutes "material prejudice." Increasing the principal amount of the debt secured would probably fall into that category, but otherwise there is little guidance on the subject. Many lawyers might regard an extension of the maturity date, an increase in the interest rate or a postponement of principal amortization as materially prejudicial if a junior lienor relied upon the stated maturity date, the stated interest rate or the continuing amortization of the loan in making a second mortgage loan on the property.

On the other hand, how much knowledge as to the terms of the existing secured debt (which presumably is a predicate for determining whether such party has been "materially prejudiced" by an amendment to the debt) should be imputed to the junior lienor? It has become more common in recent years for mortgages, particularly multi-state mortgages securing large corporate credit facilities such as syndicated loans and debt securities, to provide, within the four corners of the recorded mortgage, very few terms of the debt secured other than the names of the lender or other secured parties and the maximum principal amount of the debt secured. Many states do not require the maturity date to be stated in the mortgage (although that may affect the application of the statute of limitations). Under such circumstances, it's difficult to see how subsequent lienholders or other third parties are prejudiced by amendments to the terms of the secured debt if they were unaware of, and therefore had no basis to rely on, terms that can only be found in unrecorded debt instruments.[7]

However, almost all well-drafted mortgages, especially those securing large corporate credit facilities, will state that they secure not only the original loan documents but also such documents as they may from time to time be amended, supplemented, extended, restated, etc. The Restatement states that a mortgage that reserved the right to make modifications is effective to secure the modified loan without affecting the priority, even in the case of a modification that increases the principal amount of the secured loan.[8] Is this not sufficient for a lawyer then to be comfortable that no mortgage amendment is required when the original mortgage expressly contemplated

3. *See also* Section 3.12 of the 2016 Local Counsel Report (Joint Drafting Committee, *Local Counsel Opinion Letters in Real Estate Finance Transactions: A Supplement to the Real Estate Finance Opinion Report of 2012*, 51 Real Prop Tr. & Est L. J.167 (2016)), which states that, among other things, an opinion as to mortgage priority is not a matter of customary opinion practice and may not be feasible because of the lack of clarity of the law.

4. Section 55.1-318 of the Code of Virginia (1950), as amended.

5. Referred to hereafter as "junior lienors."

6. Restatement of the Law (3rd) (Mortgages), Section 7.3 (hereafter, the "Restatement").

7. Of course, in theory a junior lienor may have obtained from the mortgagor or the mortgagee more detailed information than is shown by the recorded mortgage and relied upon that information in deciding to obtain a second mortgage or other interest in the mortgaged property. However, it's questionable how often this happens in the real world, and, in any event, it would not apply to judgment creditors and other similar parties who become junior lienors without the opportunity make such inquiry.

8. Restatement, §7.3.

amendments to the credit facility? Should this also be sufficient comfort that lien priority is preserved? Perhaps—but for many real estate lawyers, a lingering concern over "material prejudice" to junior lienors may cause them to hesitate, even though the cases citing material prejudice apparently do not involve a mortgage that contemplated amendments (except where the secured debt is increased).

Beyond increases in the secured debt, lawyers may also worry that junior lienors will argue that other specific amendments to the debt were not of the type contemplated by the language in the mortgage that authorized amendments to the secured debt.

Equally important to many lawyers is the issue of potential novation. Even if the mortgage by its terms states that it secures debt as it may be amended from time to time, if an amendment to the debt (especially an amendment and restatement) is extensive enough to constitute a "novation," the mortgage may need to be amended to confirm that it secures the debt as novated, and, in any event, the priority of the original mortgage may be lost. In theory, a novation of debt results in an extinguishment of the mortgage lien, with the debt secured deemed to be paid off and replaced by the novated debt. Failing to modify the mortgage after the secured debt is novated, including perhaps also re-mortgaging (or re-conveying, in the case of a deed of trust) the property to secure the amended debt and ratifying the terms of the existing mortgage as amended, would seem fatal to any concept that the original mortgage continued to enjoy the same priority or even that the original mortgage continued to secure the amended debt at all—and fatal to an opinion about this as well. Novation is largely dependent on the parties' intention and does not occur merely because loan documents are substantially modified, but many lawyers are reluctant to make the judgment call that a particular loan amendment transaction is *not* a novation.

By contrast, consider debt secured by a security interest in personal property perfected by filing under Article 9 of the Uniform Commercial Code. Once a UCC-1 financing statement has been filed, most lawyers would agree that the financing statement does not need to be amended on account of any changes to terms of the documents evidencing the debt secured unless changes are also being made as to the matters disclosed by the financing statement, i.e., the name of the debtor, the name of the secured party or the description of the collateral. The financing statement constitutes a "notice filing" of the security interest in the collateral but not of the terms of the secured debt. In fact, how would one amend a financing statement if the information set forth on the financing statement is not changing?[9]

Other Statutes

At least one state already has a law addressing mortgage amendments. A Maryland statute provides that "any change or modification to a mortgage or deed of trust or to an obligation secured by a mortgage or deed of trust does not extinguish the existing lien of the mortgage or deed of trust or otherwise adversely affect the existing lien priority of the mortgage or deed of trust," subject to the qualification that the priority of the lien of the mortgage or deed of trust as to any increase in the principal amount of the secured debt dates from the date of the amendment.[10] A Louisiana statute provides that, "[a]s to all obligations, present and future, secured by the mortgage, notwithstanding the nature of such obligations or the date they arise, the mortgage has effect between the parties from the time the mortgage is established and as to third persons from the time the contract of mortgage is filed for registry."[11] The comments accompanying the Louisiana statute make it clear that the statute is intended to permit a mortgage to secure not just future advances under a line of credit but also obligations that may not then be contemplated by the mortgagor "except in the broadest sense of an expectation that he may some day incur an obligation to the mortgagee."

However, statutes in other states specifically addressing the priority of mortgages securing future advances may not apply to the priority of a mortgage when the debt secured by the mortgage is amended or restated (as opposed to the priority of advances under the original credit facility). As noted above, a Virginia statute on future advances expressly provides that a "credit line deed of trust," if properly drafted and subject to certain exceptions, will secure future advances with the priority established on the date and time of recordation of the deed of trust.[12] However, it is by no means clear if that priority applies to indebtedness that is amended after the deed of trust is recorded, and, in any event, "credit line" deeds of trust are not generally used to secure term loans and other credit facilities that don't contemplate future advances of principal.

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9. However, even in the case of a UCC security interest, many lawyers worry that an amendment amounting to a novation of the debt secured may result in the original financing statement becoming ineffective. If called upon to render an opinion that an existing financing statement is effective to perfect the security interest as amended, opinion givers may add an assumption that the amendment does not constitute a novation, or alternatively, may require that a new financing statement be filed in place of the previous one (which, of course, means that the priority of the previous financing statement is irretrievably lost).

10. Md. Real Property Code Ann. §7-111. It should be noted that Section 7-102 of the Maryland Real Property Code requires that, except as to guaranties and indemnities, the principal amount secured by a mortgage or deed of trust must appear on the face of the document.

11. Louisiana Civil Code Art. 3298.

12. Section 55.1-318 of the Code of Virginia (1950), as amended.

Proposed Legislation

Regardless of whether the reluctance of lawyers to issue such opinions is well-founded, the legislation to be considered by the Virginia legislature attempts to provide clear guidance to lenders and borrowers (and their counsel who may be asked to give an opinion on the subject) as to whether a mortgage does or does not need to be amended in order for the mortgage to secure the amended debt with the same priority that the mortgage enjoyed without the amendment. As proposed, even if the amendment constitutes a novation of the debt, the mortgage would not need to be amended and would retain its lien priority. However, the following elements must be satisfied:

- *The existing, recorded mortgage must state that it secures indebtedness or other obligations as they may be amended, modified, supplemented or restated, or words of similar effect.* This puts junior lienors on notice that the mortgage secures amendments to the loan. If the mortgage states only that it secures indebtedness under the original loan documents, a junior lienor should be entitled to rely on that limitation.

- *The real property encumbered by the mortgage is not single family residential property.* This recognizes the fact that other state statutes deal with second mortgage lending on homes in different ways, and the proposed legislation would only complicate (and perhaps contradict) those statutory schemes. In addition, first mortgages on homes are seldom amended, and, in any event, lawyers are not usually called upon to issue opinions as to residential mortgages.

- *The aggregate principal amount of the debt is not increased.* This reflects the general consensus that such an increase would in all likelihood materially prejudice junior lienors who rely on one of the most fundamental provisions of the mortgage, namely, the maximum amount secured.

- *The lender secured by the debt is not being changed.* This is designed to prevent the parties from "gaming the system" by assigning the debt to a new lender and then amending and restating the debt instruments so as to avoid the need to record a new mortgage securing a new loan with a different lender.

- *The maturity of the debt is not being extended, if the maturity date was stated in the mortgage.* If the maturity date is not set forth in a mortgage, subsequent lienholders presumably would not be prejudiced because they didn't rely on the maturity date.

Other exceptions or limitations may be considered as well. For example, if the loan amendment documents amend any terms that are also set forth in the mortgage—such as the interest rate or the monthly payments of principal and interest, a junior lienor may have relied upon those terms and therefore may be materially prejudiced if they are amended without any record notice. On the other hand, if the mortgage does not set forth any specific terms of the secured debt, other than the principal amount and perhaps the maturity date, it may be presumed that junior lienors have not relied on those terms and therefore would not be prejudiced by any changes to them.

Conclusion

If the proposed legislation or something substantially similar is adopted by the Virginia General Assembly, lawyers practicing in Virginia should be less reluctant to render an opinion that an existing mortgage is effective to secure loan obligations as amended and that the mortgage priority will not be impaired by the loan amendment, or the statute itself may be clear enough to avoid the need for any opinion at all. In addition, the borrower in such a transaction should be able to avoid the delay and expense associated with preparing, negotiating and recording a mortgage amendment and obtaining a title insurance endorsement that insures the amended mortgage through the date of recordation of the mortgage amendment. Alternatively, borrower's counsel may be able to persuade the title insurance company that issued the lender's title insurance policy to issue an endorsement insuring that the mortgage secures the amended loan, without requiring execution and recordation of a mortgage amendment, which would eliminate the need for such a legal opinion. Of course, the golden rule of lending still being very much in effect, borrower's counsel may be required to issue such an opinion *in addition to* obtaining an endorsement to the lender's policy—but at least borrower's counsel should not suffer the angst in giving such an opinion that it suffers currently in those states without such legislation.

The Uniform Law Commission has established a committee to study the proposed Virginia legislation for consideration as a uniform law that other states may wish to adopt as well. No formal action has been taken by ULC on the proposal as of the date of publication of this article.

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The following is the legislation as originally proposed by the Virginia Bar Association:

A deed of trust which has been recorded and which states that it secures indebtedness or obligations under a note, loan agreement, credit agreement or other loan documents (collectively, the "Loan Documents") and

that it also secures indebtedness or other obligations under the Loan Documents as they may be amended, modified, supplemented or restated, or words of similar effect, shall secure such Loan Documents as so amended, modified, supplemented or restated from time to time, without the necessity of recording an amendment to such deed of trust and without regard to whether any such amendment, modification, supplement or restatement may otherwise constitute a novation of the indebtedness or other obligations under the Loan Documents, and shall have the same priority as the priority of the original deed of trust recorded; provided, that foregoing shall not apply to any amendment, modification, supplement or restatement of Loan Documents if (a) the deed of trust securing such Loan Documents conveys an interest in residential real estate containing not more than one dwelling unit or (b) such amendment, modification supplement or restatement of Loan Documents (i) increases the aggregate amount of the principal of the indebtedness secured by the original deed of trust, (ii) changes or substitutes the noteholder, lender, or agent of any lender named in the original Loan Documents or (iii) extends the maturity date of the indebtedness or obligation secured if such maturity date was set forth in the original deed of trust, and the effect of any such amendment, modification, supplement or restatement shall be governed by the law that would otherwise apply without regard to this statute.

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