

**REPORT ON THIRD-PARTY LEGAL OPINION
CUSTOMARY PRACTICE IN FLORIDA**

BY THE

**LEGAL OPINION STANDARDS COMMITTEE OF THE
FLORIDA BAR BUSINESS LAW SECTION**

AND THE

**LEGAL OPINIONS COMMITTEE OF THE REAL
PROPERTY, PROBATE AND TRUST LAW SECTION OF
THE FLORIDA BAR**

DECEMBER 3, 2011

FOREWORD

We are pleased to present this “Report on Third-Party Legal Opinion Customary Practice in Florida.” This Report, which reflects customary third-party legal opinion practices of Florida counsel in a myriad of commercial transactions, is a joint effort of the Legal Opinion Standards Committee of The Florida Bar Business Law Section and the Legal Opinions Committee of The Florida Bar Real Property, Probate and Trust Law Section. This Report has been prepared to provide guidance to Florida attorneys who render third-party legal opinions, and to both Florida and out-of-state attorneys who, on behalf of their clients, receive third-party legal opinions from Florida attorneys, as to the nature and meaning of the content of legal opinions and to articulate the diligence recommended to render such opinions.

This Report, which took more than five years to complete, was the collective effort of an extremely dedicated group of experienced lawyers from around the State of Florida. Our respective Committee members shared their ideas, insight, drafts and edits, and we want to thank each of them for their efforts. We particularly want to acknowledge the diligent work of the members of the Steering Committee. It was the Steering Committee that initially took on the critical role of drafting the various sections of this Report and synthesizing these sections into a cohesive whole. It was also the Steering Committee that initially reviewed the comments received on the exposure draft of the Report and made proposed changes to the Report in light of the comments. Their extraordinary efforts were a key difference between an acceptable report and a great report.

We would additionally like to thank the law firms of the Committee members who participated in this project. While this project took Committee members away from their efforts on behalf of firm clients, the foresight of the law firms in understanding that the time invested in this project was for the collective good of our profession is to be saluted. We also appreciated the willingness of several of these firms to house and feed our respective Committees and the Steering Committee during our many meetings, which are real costs that are hidden contributions to this project.

Further, we want to thank the leadership of the Business Law Section and the Real Property, Probate and Trust Law Section. Our respective Section leadership recognized the need for our Sections to revisit the topic of third-party legal opinion customary practice and supported our collective efforts though the long gestation of this Report.

We would also like to thank RR Donnelley & Sons Company. RR Donnelly graciously agreed to typeset this Report without cost to either of our respective Sections. Their able assistance allowed us to focus all of our attention on the content of this Report without having to worry about typesetting and formatting issues, and we very much appreciate their important contribution to this Report.

Finally, we want to thank our respective families and the families of each of our Committee members for their unsung efforts with respect to this project. We recognize that finding a way to balance our desire to be with our families with our commitment to our profession is sometimes difficult. Late nights, early mornings and the simple reality of what it means to spend hundreds of hours on a Bar related project imposed real burdens on many of our Committee members, and thereby on their families. On the off chance that one of our loved ones or the loved one of any of the members of our respective Committees reads this Report, we hope you will know that we are appreciative of your sacrifice.

December 3, 2011

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+ This Report reflects the consensus of the members of the Committees. It does not necessarily reflect the views of the individual members of each of the Committees or their respective law firms, nor does it mean that each member of each Committee agrees with all of the positions taken in the Report.

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BACKGROUND OF THE REPORT

A. Overview

This “Report on Third-Party Legal Opinion Customary Practice in Florida” (the “**Report**”) reflects what the Committees (as defined below) believe to be customary third-party legal opinion practice of Florida counsel for a myriad of commercial transactions, including loan transactions, real estate transactions, acquisitions of stock or assets and other types of commercial transactions. It has been prepared as a reference tool to provide guidance to Florida attorneys who render legal opinions, and to both Florida and out-of-state attorneys who receive legal opinions from Florida attorneys on behalf of clients, as to the nature and meaning of the content of legal opinions and to articulate the diligence recommended in order to render such opinions.

This Report is a joint effort of the Legal Opinion Standards Committee (the “**Business Law Section Committee**”) of the Business Law Section of The Florida Bar (the “**Business Law Section**”) and the Legal Opinions Committee (the “**RPPTL Section Committee**”, and, together with the Business Law Section Committee, the “**Committees**”) of the Real Property, Probate and Trust Law Section of The Florida Bar (the “**RPPTL Section**”). The Business Law Section and the RPPTL Section have a long and active history of providing guidance to Florida lawyers regarding third-party legal opinion issues, and this Report reflects an effort to update and consolidate all of the guidance previously published.

Initially, on January 21, 2010 this Report was published as an exposure draft. It was then distributed to interested members of the Business Law Section and RPPTL Section, and to persons around the country who are active in the third-party legal opinions community, for their comment prior to its finalization. Following a comment period (which ended on June 30, 2010), the Committees made changes to the Report in response to the comments received. This Report, dated December 3, 2011, is the final Report of the Committees.

B. History of The Florida Bar’s Efforts to Create Opinion Standards for Use by Florida Counsel

In June 1991, the Business Law Section Committee promulgated its “Report on Standards for Opinions of Florida Counsel” (the “**1991 Report**”). The 1991 Report, which was adopted by the Business Law Section, sought to create normative opinion standards for Florida counsel in an era during which normative opinion standards were first being considered. In that regard, shortly after the 1991 Report was adopted, the American Bar Association Section of Business Law (the “**ABA Business Law Section**”) adopted its “Third Party Legal Opinion Report, Including the Legal Opinion Accord” (commonly called the “**Accord**”). The Accord, in the same manner as the 1991 Report but on a national scale, sought to establish normative standards for opinions in business transactions.

Normative opinion standards were intended to be objective standards adopted prospectively to be utilized in opinion giving and opinion receiving practices. These standards were to be followed in all situations (in the nature of a contract between the parties) in which the parties agreed to incorporate the standards into opinions of counsel, and were intended to simplify and improve the opinion process. With respect to the 1991 Report, the normative opinion standards reflected therein did not necessarily reflect the customary opinion practices of that era, but reflected a view of what opinion practices should be for Florida counsel on a going-forward basis. This can be compared to this Report, which is intended to provide guidance regarding legal opinion customary practice in Florida to Florida counsel who are rendering and (on behalf of clients) receiving third-party legal opinions. As more particularly described in this Report, the Committees believe that Florida customary practice (as reflected in this Report) is the standard of care to which Florida attorneys rendering third-party legal opinions as to matters of Florida law should be held.

When the 1991 Report was published, it was anticipated that additional sections of the 1991 Report would be adopted thereafter to reflect standards for additional third-party legal opinions that were not covered by the 1991 Report. In that regard, three additional supplements to the 1991 Report were published in the years following the 1991 Report, as follows:

- in 1996, the RPPTL Section Committee promulgated a supplement to the 1991 Report entitled: “Opinions in Real Estate Transactions, including Loan Transactions,” setting forth standards for opinions of Florida counsel with respect to Florida real estate transactions (“**RPPTL Report No. 1**”);

- in 1998, the Business Law Section Committee promulgated a supplement to the 1991 Report setting forth standards for opinions of Florida counsel with respect to opinions under Article 9 and Article 8 of the Uniform Commercial Code (the “**1998 Secured Transactions Report**”); and
- in 2004, the RPPTL Section updated RPPTL Report 1 to reflect certain changes in opinion practices with respect to Florida real estate transactions subsequent to the publication of RPPTL Report No. 1. (“**RPPTL Report No. 2**”).

The 1991 Report, RPPTL Report No. 1, the 1998 Secured Transaction Report and RPPTL Report No. 2 are sometimes collectively referred to in this Report as the “**Prior Florida Reports.**”

Since the 1991 Report was promulgated, several trends in third-party legal opinion practices have emerged:

1. Although the Prior Florida Reports were well received in Florida and continued to be used until the publication of the exposure draft of this Report, many out-of-state opinion recipients and their counsel in multi-state transactions were unwilling to accept some of the approaches taken in the 1991 Report, and as a result many Florida counsel moved away from using the Prior Florida Reports;
2. Express and wholesale incorporation of normative opinion standards such as the 1991 Report and the Accord into third-party legal opinions was not ultimately accepted by some opinion recipients and their counsel, including, more particularly, by New York based money-center financial institutions and investment banking firms and their counsel;
3. The remedies opinion standard set forth in the 1991 Report was not widely accepted, due to the fact that it was considered too “pro-opinion giver” and out of the mainstream at that time;
4. Since 1998, there have been a number of significant reports published by well-respected state and local bar associations or sections of bar associations setting forth their views regarding third-party legal opinion customary practices in their jurisdictions. This has included, among others, seven reports by the TriBar Opinion Committee, four reports by the Legal Opinions Committee of the California Bar Business Law Section, and reports by the Legal Opinions Committees of the Business Law Sections of the Pennsylvania Bar, the North Carolina Bar and the Maryland Bar. Further, during this same time-period, the ABA Business Law Section Committee on Legal Opinions (the “**ABA Committee**”) has promulgated its “Legal Opinion Principles” and “Legal Opinion Guidelines.” All of these reports have significantly added to the literature on third-party legal opinion customary practice;
5. In recent years, there have been a number of cases reported in jurisdictions other than Florida in which lawyers have been sued with respect to third-party legal opinions that they rendered. These cases have brought significant focus to the issue of what is customary third-party legal opinion practice, since customary practice is the standard of care to which lawyers rendering third-party legal opinions are likely to be held. This emphasis on liability for compliance with customary practice makes it imperative for the benefit of all Florida lawyers that the Business Law Section and the RPPTL Section, which represent the interests of lawyers on all sides of these issues, provide guidance to the judiciary in Florida regarding their views on what is the third-party legal opinion customary practice in this state;
6. For the first time since the Silverado Conference which led to the adoption of the Accord, there has been an effort led by the ABA and by a number of state and local bar associations or sections of bar associations (including the Business Law Section) with interests in third-party legal opinion practices, to begin a national dialogue on legal opinion issues. These efforts began with a program on Legal Opinion Risk Management in 2006 and continue to this day through the auspices of the Working Group on Legal Opinions (“**WGLO**”). The WGLO brings together, under what it calls its “big tent,” opinion givers, opinion recipients (including financial institutions, insurance companies and investment banking firms) and those with an interest in legal opinion matters, including malpractice insurers and rating agencies from around the country and from outside the United States, to discuss and consider issues of interest with respect to legal opinion customary practice; and

7. The adoption of the *Statement on the Role of Customary Practice in the Preparation and Understanding of Third-Party Legal Opinions* (the “**Customary Practice Statement**”) in 2008 focused on the importance of customary practice as a source of the criteria for determining whether an opinion giver has satisfied its obligations of competence and diligence. The Customary Practice Statement also reminded everyone that bar association reports (such as this Report) are valuable sources of guidance on customary practice. As of October 6, 2011, the Customary Practice Statement had been adopted by 33 bar associations or sections of bar associations, including the Business Law Section and the RPPTL Section. A copy of the Customary Practice Statement is attached hereto as Appendix “C” and is reprinted with the permission of the American Bar Association.

Over the last few years, many Florida practitioners have requested that the Business Law Section update the Prior Florida Reports. In response to these requests, in June 2006, the Business Law Section determined that because of the changes in third-party legal opinion practices in Florida since the 1991 Report, it would update the 1991 Report. The Business Law Section Committee, which had been dormant for several years, was reconstituted to take responsibility for this effort. Further, in September 2006 the RPPTL Section agreed to work together with the Business Law Section in this effort. The RPPTL Section Committee was already organized and actively engaged, having recently completed the preparation of RPPTL Report No. 2.

The decision to update the Prior Florida Reports was made because the leaders of the Business Law Section and the leaders of the RPPTL Section believed that their members would benefit from the guidance provided in a comprehensive report detailing customary third-party legal opinion practices in Florida. Further, although the Committees applaud the efforts of the WGLO and the ABA Business Law Section to facilitate a national dialogue on third-party legal opinion issues and are actively participating in these efforts, they have concluded that the interests of their respective members will not be served by waiting until the conclusion of the national debate over customary third-party legal opinion practices before providing guidance to Florida counsel as to customary third-party legal opinion practices in this state.

The purposes and goals of this Report are described with more specificity in “Introductory Matters – Purpose and Goal of this Report.” This Report is intended to report on third-party legal opinion customary practice of Florida counsel, including what opinion-givers should be prepared to give and what opinion-recipients should be prepared to accept. It is also an effort to create a practice manual for use by Florida attorneys in their opinion-giving and opinion-receiving practices. See “How to Use This Report” below. This Report supercedes the Prior Florida Reports.

C. Materials Considered in the Preparation of this Report

Unlike 1991, when there was little published that provided guidance to the Business Law Section Committee for its use in developing the 1991 Report, the Committees have had the benefit of the myriad of national, state and local bar association reports that had been published since 1998 reflecting third-party legal opinion customary practice in a significant number of jurisdictions. In that regard, in the preparation of this Report, in addition to the Prior Florida Reports, the Committees actively reviewed and considered the following ABA, state and local bar reports:

1. “Third-Party Closing Opinions” report issued in 1998 by the TriBar Opinion Committee (the “**TriBar Report**”);
2. “Legal Opinion Principles” adopted in 1998 by the ABA Committee;
3. “Inclusive Real Estate Secured Transaction Opinion Report” issued in 1999 (the “**Real Estate Report**”) by the ABA Section of Real Property, Probate and Trust Law, now called the Real Property, Trust and Estate Law Section (“**RPTE**”) and the American College of Real Estate Lawyers (“**ACREL**”);

4. “Pennsylvania Third-Party Legal Opinions” report issued in 2000 (and updated in 2007) by the Legal Opinion Steering Committee of the Corporation, Banking and Business Law Section of the Pennsylvania Bar Association;
5. “Guidelines for the Preparation of Closing Opinions” issued in 2002 by the ABA Committee (the “**ABA Guidelines**”);
6. “U.C.C. Security Interest Opinions – Revised Article 9” issued in 2003 by the TriBar Opinion Committee;
7. “Real Estate Opinion Letter Guidelines” issued in 2003 by the RPTe and ACREL;
8. “Report on Third-Party Remedies Opinion” (the “**California Remedies Report**”) issued by the Business Law Section of the State Bar of California (the “**California Business Law Section**”), which was originally issued in 2004 and was updated in 2007;
9. “The Remedies Opinion – Deciding When to Include Exceptions and Assumptions” issued in 2004 by the TriBar Opinion Committee;
10. “Third-Party Legal Opinions in Business Transactions, Second Edition” issued in 2004 by the Legal Opinion Committee of the Business Law Section of the North Carolina Bar Association, as well as the Supplement thereto issued in March 2009;
11. “Legal Opinions in Business Transactions (Excluding the Remedies Opinion)” issued in 2005 by the Corporations Committee of the Business Law Section of the State Bar of California;
12. “Streamlined Form of Opinion” issued in 2005 by the Boston Bar Association;
13. “Report on Third Party Closing Opinions: Limited Liability Companies” issued in 2006 by the TriBar Opinion Committee;
14. “Report on Lawyer’s Opinions in Business Transactions” issued in 2007 (and updated in 2009) by the Special Joint Committee of the Section of Business Law and the Section of Real Property, Planning and Zoning of the Maryland State Bar Association, Inc.;
15. “Special Report of the TriBar Opinion Committee: Duly Authorized Opinions on Preferred Stock” issued in 2008 (the “**TriBar Preferred Stock Report**”);
16. “Amended and Restated Report on Legal Opinions to Third Parties in Georgia Real Estate Secured Transactions” issued by the Real Property Law Section of the State Bar of Georgia in 2009;
17. “Sample California Third-Party Legal Opinion for Business Transactions” of the Opinions Committee of the California Business Law Section (November 2009 Draft);
18. “Form of Legal Opinion” published by the National Venture Capital Association (October 2009);
19. “Report on Selected Legal Opinion issues in Venture Capital Financing Transactions” of the Opinions Committee of the California Business Law Section (November 2009).
20. “Special Report of the TriBar Opinion Committee: Opinions on Secondary Sales of Securities” issued in 2011; and
21. “Supplemental TriBar LLC Opinion Report: Opinions on LLC Membership Interests” issued in 2011 (the “**TriBar LLC Membership Interest Report**”).

In the preparation of this Report, the Committees relied heavily on the reports of other bar associations and sections of bar associations that are set forth above. Also, in the preparation of this Report, the Committees had the benefit of the materials presented at meetings of the WGLO on various legal opinion topics. In that regard, the Committees viewed their task as first to determine the customary practice of Florida counsel with respect to third-party legal opinions and second to document those practices. Wherever the work of other bar associations

and the WGLO best reflected what the Committee believed to be the customary third-party legal opinion practices in Florida, the Committee borrowed liberally from such work. Although specific attribution to particular reports is not included for each section of this Report, the Committees acknowledge their use of all of these reports and thank each of these bar associations and sections of bar associations for their fine thinking and cogent analysis that helped shape this Report.

To the extent legally permissible, copies of the bar association reports and reference materials that are referenced in this Report are expected to be available in the future on the webpages of the Business Law Section Committee and the RPPTL Section Committee. Many of these same materials are also available in the “Legal Opinion Resource Center” contained on the webpage of the ABA Committee.

The Customary Practice Statement provides that bar association reports are valuable sources for guidance of customary practice, and the Committees believe that this Report sets forth the customary practice with respect to opinions issued by Florida counsel with respect to matters under Florida law. In addition to bar association reports, several treatises have been published that express the views of the authors regarding third-party legal opinion practice. These treatises do not reflect customary practice in Florida. Nevertheless, the Committees want to bring to the attention of Florida lawyers the following treatises which they may find helpful in connection with their third-party legal opinion practices: (i) Glazer & FitzGibbon on Legal Opinions, which is co-authored by Donald W. Glazer, co-chair of the TriBar Opinion Committee and a former chair of the ABA Committee, Steven Weise, a former chair of ABA Committee and of the ABA Business Law Section, and Scott FitzGibbon; (ii) Legal Opinions in Business Transactions, which is authored by Arthur N. Field, another former chair of the TriBar Opinion Committee and the ABA Committee and the current chair of the WGLO; and (iii) Real Estate Opinion Letter Practice, which is authored by Robert A. Thompson, a former chair of the legal opinion committees of both the RPTE and ACREL.

D. Process followed by the Committees in the Preparation of this Report

This Report is a joint effort of a broad cross-section of Florida lawyers representing the interests of both opinion givers and counsel to opinion recipients. Participants included attorneys practicing in large firms, mid-size firms and small firms, and attorneys practicing in a significant number of different practice areas. It also involved the participation of lawyers from around the State of Florida. In preparing this Report, efforts were made to involve a large group of attorneys in reviewing and commenting on this Report, so as to ensure that this Report reflects a broad consensus as to what constitutes customary third-party legal opinion practices in Florida.

In September 2006, a steering/drafting committee (the “**Steering Committee**”) was organized consisting of members of both the Business Law Section Committee and the RPPTL Section Committee. The members of the Steering Committee took on the responsibility of drafting various sections of this Report.

Between September 2006 and May 2009, the Steering Committee, the Business Law Section Committee and the RPPTL Section Committee met on a regular basis. Many of these meetings were day-long, in-person meetings, while others were telephonic conference calls. During those meetings and conference calls, various sections of this Report were reviewed. Thereafter these sections were redrafted by members of the Steering Committee and re-circulated to the members of the Business Law Section Committee and the RPPTL Section Committee for further review. In May 2009, the Committees began a joint collaborative effort to finalize the exposure draft of this Report. This process continued until January 2010 when the exposure draft of the Report was approved by the Executive Council of the Business Law Section and the Executive Council of the RPPTL Section.

Following the adoption of the exposure draft of this Report, this Report was circulated for comment to members of the Business Law Section and the RPPTL Section, as well as to other persons around the country who are knowledgeable about third-party legal opinion practices. The Committees also held a public forum regarding the Report at which interested parties had the opportunity to provide their comments. Further, the Committees presented half-day seminars on “Legal Opinion Customary Practice in Florida” in Tampa and Miami in order to educate lawyers around the state about the Report.

The comment period with respect to the exposure draft of the Report ended on June 30, 2010. Comments regarding the Report were received from several parties. Initially, the Steering Committee reviewed the comments received and made proposed changes to the Report based upon the comments. Thereafter, each of the Committees considered the comments and the revised draft of the Report presented by the Steering Committee and made additional revisions to the Report. The Committees believe that the changes that were made in the final Report based upon the comments received have substantially improved the Report by making it clearer, more accurate and more useful.

After the Committees reviewed and approved the final Report, the Report was formally approved by the Executive Council of the Business Law Section (on December 1, 2011) and by the Executive Council of the RPPTL Section (on December 3, 2011).

E. Where this Report fits into Efforts to Nationalize Third-Party Legal Opinion Customary Practice

There has been considerable debate in the last few years at the national level over whether a national third-party legal opinions practice has developed. Topics discussed at sessions of the WGLO have included the similarities of and differences between various state and local bar reports and whether state and local bars should consider drafting reports for their members regarding issues of customary practice or refer their members to reports of other state and local bars that (in the view of those committees) reflect third-party legal opinion customary practices in their state or locality. This dialogue has been further fueled by the WGLO's organization of an Association Advisory Board (consisting of representatives of a large number of state and local bars (or sections of bars), including the Business Law Section, the business law sections of Texas, California, North Carolina, Pennsylvania, and the TriBar Opinion Committee, as well as other associations representing constituencies of lawyers, such as the National Association of Bond Lawyers, the American College of Commercial Finance Lawyers and the American College of Investment Counsel) as a forum for the discussion of these issues.

The Committees believe that, in most cases, opinion practices are determined on a state-by-state basis and that, while customary practice is quite similar from jurisdiction to jurisdiction, there is not yet a national consensus on numerous aspects of third-party legal opinion customary practice. This Report will add to the body of literature describing customary third-party legal opinion practices. To the extent that third-party opinion practices in Florida are similar to practices in other states (particularly in other large commercial states that (like Florida) have large number of commercial transactions), it will add to the mix of information that will be available for discussion as state and local bars and the ABA meet in the WGLO's "big tent" to consider these issues. In that regard, the Committees believe that for a national third-party legal opinion customary practice to emerge, various state and local bar associations and the ABA will need to engage in a meaningful dialogue to articulate customary practice standards that will be acceptable in the vast majority of jurisdictions.

The Committees also believe that standards with respect to opinions on certain areas of the law, such as issuances and sales of securities under the Securities Act of 1933 and opinions in cross-border transactions, are better left to development by the ABA Committee. Various members of the Committees are active participants in those efforts and, wherever appropriate, this Report cites to reports promulgated by the ABA Committee in order to provide Florida lawyers with meaningful guidance as to how to deal with opinion practices in those specialized areas of the law.

Finally, the Committees are pleased that this Report represents the joint efforts of lawyers who represent clients in all types of commercial transactions, including loan transactions, real estate transactions, acquisitions of stock or assets and other types of commercial transactions. For too many years, business lawyers and real estate lawyers have gone their separate ways in developing customary third-party legal opinion practices. The Committees believe that their joint collaboration is in the best interest of lawyers in Florida, and they are pleased to see that those seeking to develop national consensus with respect to third-party legal opinion customary practice are including both business lawyers and real estate lawyers as active participants in this dialogue.

F. Plans to Continue to Monitor Customary Practice so that the Guidance provided in this Report remains Current

Following the completion of this Report, the Business Law Section Committee and the RPPTL Section Committee intend to periodically review customary practice in Florida to determine whether to update or expand the guidance provided in this Report. The Committees also intend to monitor the activities of other state and local bar associations and sections of bar associations, the ABA and the WGLO so that Florida's practitioners continue to receive the benefits of future efforts by these other organizations. If considered necessary, one or more supplements to this Report may be issued in the future.

G. How to Use this Report

This Report is intended to be a practice guide rather than a treatise. As a result, the key to using this Report is the use of the illustrative forms of opinion letters that accompany this Report in conjunction with the commentary regarding the Committees' views on the meaning of the words in the opinion and the diligence that is recommended to be completed to give the opinions set forth in this Report. This Report contains four illustrative opinion letter forms: (i) a form of opinion letter to be used in a commercial loan transaction; (ii) a form of opinion letter to be used in a loan transaction secured by real estate, (iii) a form of opinion letter to be used in connection with a share issuance by a Florida corporation; and (iv) a form of opinion letter to be used when acting as local Florida counsel in a loan transaction. This Report also includes an illustrative form of certificate to counsel that can be used with each of the forms of opinion letters. In the view of the Committees, these illustrative forms together cover many of the third-party legal opinions given in transactions in Florida.

The illustrative forms that accompany this Report have been developed to provide Florida practitioners with opinion forms that can be used in their day-to-day opinion-giving practices. Each of the illustrative forms keys off of the various sections of this Report, which seek to interpret the words in the form opinions and provide guidance regarding the diligence that is recommended to be completed to render the particular opinions. In this regard, each of the illustrative forms is annotated with guidance and with references to sections of this Report where further information about the Florida third-party legal opinion customary practice regarding such opinion is described.

We recommend that Florida attorneys who render opinions pay careful attention to the "Introductory Matters" and "Common Elements of Opinions" sections of this Report. These sections include information about matters important to all of the third-party legal opinions covered by this Report. Following these sections, this Report includes guidance regarding the opinions that are generally rendered in commercial transactions. These opinions can be broken into the following categories:

1. Opinions that are the "building blocks" for or are necessary to render a remedies opinion, including opinions on entity status and organization, authorization to transact business in Florida, entity power, authorization of the transaction, execution and delivery, no violation and no breach or default and no required governmental consents or approvals;
2. The remedies opinion;
3. The "no litigation" confirmation;
4. Opinions on particular substantive areas of commercial practice, including opinions with respect to the issuance of securities, opinions with respect to collateral under the Uniform Commercial Code ("UCC") and opinions in connection with real estate transactions; and
5. Special opinions that are often requested, including opinions on the enforceability of choice of law provisions in agreements and opinions with respect to usury.

This Report also includes advice regarding special matters to be considered when Florida counsel is acting as local counsel.

H. Questions

The Committees welcome questions regarding this Report and regarding third-party legal opinion customary practice in Florida. Questions can be e-mailed to the Committees at FloridaOpinions@gmail.com.

INTRODUCTORY MATTERS

A. Purpose and Goal of this Report

This Report is intended for use by Florida lawyers who render third-party legal opinions with respect to matters of Florida law on behalf of a client (the “**Client**”) and for use by lawyers who represent clients receiving third-party legal opinions from Florida counsel with respect to matters of Florida law. A third-party legal opinion, which is referred to in this Report as an “opinion” or an “opinion letter,” is a written legal opinion letter that is delivered in connection with a commercial transaction (the “**Transaction**”) and that is given by counsel representing one party (the “**Opining Counsel**”) to another party (the recipient of the opinion) that is not the client of the lawyer rendering the opinion (the “**Opinion Recipient**”). The Transaction may relate to a debt or equity financing, a real estate purchase, an acquisition of stock or assets, or any other type of commercial transaction. The opinion is usually part of the documentation exchanged in connection with the closing of the Transaction and is generally required to be delivered as a condition to the completion of the Transaction pursuant to the agreements between or among the parties and relating to the Transaction (the “**Transaction Documents**”). This Report:

1. articulates what the Committees believe to be the meaning of the content of certain third-party legal opinions with respect to matters of Florida law given by Florida Opining Counsel;
2. articulates the diligence recommended in order to render such opinions, so that the expectations of Opinion Recipients and counsel for Opinion Recipients (“**Recipient’s Counsel**”) as to the diligence to be undertaken by Opining Counsel to render such opinions will be consistent with the customary practice of Florida counsel rendering such opinions;
3. articulates assumptions, qualifications and definitions generally included under Florida customary practice in opinions of Florida counsel as to matters of Florida law;
4. seeks to reduce the friction that often arises in opinion practice and seeks to reduce the costs incurred by clients in connection with the negotiation of opinions;
5. seeks to reduce the potential for misunderstanding between Opining Counsel and their Client regarding the issuance of opinions; and
6. seeks to improve the understanding of the public and the bar as to the purposes and limitations of opinions.

This Report is not intended to be a treatise on the subject of third-party legal opinions. Rather, it is intended to provide practical guidelines for Florida counsel who are called upon to render third-party legal opinions regarding matters under Florida law or have clients that receive third-party legal opinions from Florida counsel regarding matters under Florida law.

B. Purpose of Third-Party Legal Opinions

The Restatement of the Law (Third) of the Law Governing Lawyers (the “**Restatement**”), Section 95, comment c, states, in part, that:

“Unless effectively stated or agreed otherwise, a legal opinion or similar evaluation constitutes an assurance that it is based on legal research and analysis customary and reasonably appropriate in the circumstances and that it states the lawyer’s professional opinion as to how any legal question addressed in the opinion would be decided by the courts in the applicable jurisdiction on the date of the evaluation.”

This Report’s description of the purpose of a third-party legal opinion is similar, though not identical to, the Restatement’s description of such purpose.

In Florida, an opinion is delivered in a formal written letter that confirms Opining Counsel’s informed and reasoned understanding of certain facts or events relating to the Client and the Transaction and the effect of

certain legal principles applicable to the specific Client and Transaction. This informed and reasoned understanding is achieved after Opining Counsel has reviewed certain facts related to the Client and the specific Transaction to which the opinion relates and analyzed certain legal principles related to the Client and the Transaction. As such, an opinion is an expression of the Opining Counsel's informed and reasoned judgment, based upon an analysis of the facts, laws, assumptions and other matters relevant to the opinion at the time the opinion is rendered, as to how the Florida Supreme Court "should" decide the legal issue considered in the opinion if the Court were properly presented with that issue as of the date of the opinion. However, an opinion is not a guarantee that the Florida Supreme Court would make this decision.

This Report's wording on this issue is slightly different than the wording included in the Restatement, since the Committees believe that an opinion does not provide assurance that a particular legal issue "would be decided" in a certain way by the Florida Supreme Court, but rather reflects how the Florida Supreme Court "should" decide the legal issue based on the facts, law, assumptions and other matters relevant to the opinion as interpreted under customary practice in Florida. Notwithstanding the difference in wording, the Committees believe that the Restatement wording and the wording in this Report have the same substantive meaning.

C. What is Customary Practice and Why is it Important

This Report articulates what the Committees believe to be the customary practice regarding the nature and meaning of the terms used in third-party legal opinions, the types of assumptions, qualifications and definitions generally included in such opinions and the diligence or analysis that is recommended to be performed by Opining Counsel in order to give such opinions. As more fully described in "Standard of Care" below, the Committees believe that "customary practice" establishes the criteria for determining whether an Opining Counsel's activities with respect to a particular opinion have satisfied such Opining Counsel's obligations of competence and diligence.

The Committees believe that Florida customary practice governs every opinion regarding matters of Florida law delivered by a Florida attorney to a third-party Opinion Recipient (whether or not the Opinion Recipient is located within the State of Florida), regardless of whether the opinion letter incorporates this Report by reference or otherwise mentions Florida third-party legal opinion customary practice. If a Florida Opining Counsel chooses a different standard of customary practice other than Florida customary practice to apply to a particular opinion, or if Opining Counsel desires to modify customary practice applicable to a particular opinion, then such standard or modification should be expressly stated in the opinion letter and would be applicable to such opinion. If Opining Counsel does not expressly state the difference or modification, then Opining Counsel may have an increased risk of liability with respect to such opinion.

One of the issues that the Committees wrestled with in this Report is the use of the words "customary practice." The Committees believe that "customary practice" is a term of art that, following the language in the Restatement, establishes the standard of care against which attorneys rendering third-party legal opinions should be measured. At the same time, the Committees believe that many lawyers in Florida and around the United States also use the term "customary practice" to refer to the common practices of attorneys in their jurisdiction with respect to particular legal opinions. This Report uses the words "customary practice" to identify the opinion practices that the Committees believe set the applicable standard of care against which a Florida Opining Counsel's conduct should be measured with respect to a third-party legal opinion rendered by such counsel as to matters of Florida law. In those cases where the Report instead discusses the Committees' views regarding opinions that are not intended to set the applicable standard of care but rather just to give guidance, such as opinion requests that the Committees believe should not be asked of or rendered by Florida counsel, the Report uses words such as "commonly rendered" or "not commonly given," or words to that effect, instead of the words "customary practice." As a consequence, in dealing with such circumstances, the Committees believe that an Opining Counsel who renders one or more of the opinions discouraged by this Report should not be viewed as violating the applicable standard of care solely because such Opining Counsel renders such opinions.

D. The “Golden Rule”

In connection with the giving and receiving of third-party legal opinions, the “golden rule” means that an attorney should neither ask for, nor advise its Client to demand, opinions that an attorney qualified to render such an opinion would not reasonably be willing to give. Simply stated, if a Recipient’s Counsel would not be willing to give a particular opinion under substantially similar circumstances, then such Recipient’s Counsel should not (on behalf of their client, the Opinion Recipient) ask Opining Counsel to render such opinion. All attorneys who render third-party legal opinions or who advise Opinion Recipients regarding third-party legal opinions should abide by the “golden rule.”

E. Standard of Care

Section 95 of the Restatement, entitled “An Evaluation Undertaken for a Third Person,” provides that an attorney who provides an opinion to a non-client “must exercise care with respect to the non-client to the extent stated in Section 51(2)” and “not make false statements prohibited under Section 98.” These two sections of the Restatement are described below regarding the “duty of care” and the potential liability for “false statements.”

1. Duty of Care. Section 51(2) of the Restatement provides that “a lawyer owes a duty to use care” to a non-client when and to the extent that the non-client is invited to rely on the lawyer’s opinion, the non-client relies on such opinion and “the non-client is not, under applicable tort law, too remote from the lawyer to be entitled to protection; . . .” As noted in Section 95 of the Restatement, comment e, “. . . once the form of the opinion has been agreed on, customary practice will also determine the nature and extent of the factual and legal diligence to be employed by the opinion giver in connection with its issuance.”

Accordingly, whether a lawyer has satisfied the “duty to use care” standard in connection with the preparation and delivery of a third-party legal opinion begins with an understanding of customary practice with respect to the factual and legal diligence that should be performed by Opining Counsel in connection with the issuance of such legal opinion.

2. False Statements. Section 98 of the Restatement provides, in part, that “a lawyer communicating on behalf of a client with a non-client may not “knowingly make a false statement of material fact or law to the non-client . . .” As a result, Opining Counsel should be aware that potential liability exists for knowingly making a false statement in the context of the issuance of a third-party legal opinion.

The Committees believe that the Restatement articulates the standard of care to which Florida lawyers who render third-party legal opinions should be held. In that regard, the Committees believe that their position is consistent with the position on this issue taken in the Customary Practice Statement. The Restatement has not to date been adopted or cited by any Florida court relating to third-party legal opinion practices. However, the standard of care articulated by the Restatement provides valuable insight as to how judges and attorneys in other jurisdictions have addressed the issue of the appropriate standard of care that should be utilized in connection with the preparation and issuance of third-party legal opinions, and reflects the standard of care that the Committees believe will ultimately be adopted in Florida with respect to third-party legal opinions.

F. Use of Terms; Plain English

Wherever possible, the forms of opinions recommended by this Report are written in “plain English” to eliminate legalese, jargon and the repetition of terms that have the same meanings or less inclusive meanings. As a result, in some cases, this Report recommends modification of the traditional language often used in opinion letters so that opinion letters will be clearer and more understandable.

For example, the recommended forms of opinions relating to entity status and organization, authorization to transact business in Florida, entity power, authorization of the Transaction and execution and delivery remove the words “duly” and “validly,” since there is no clear understanding of what these words mean in the context of those opinions. The Committees believe that the use of these words in the context of those opinions has become anachronistic and is no longer necessary. On the other hand, the Committees believe that the continued use of these terms in opinions does not affect the meaning of these opinions or the diligence recommended in order to render these opinions.

G. No Implied Opinions

An Opinion Recipient is not entitled to assume that an express opinion on a particular matter addresses any other matter by implication unless it is unmistakably clear that inclusion of an implied opinion within an express opinion is both essential to the legal conclusion set forth in the express opinion and reasonable under the circumstances and in light of customary practice.

H. Diligence Expectations

This Report describes the diligence or analysis that Opining Counsel is expected to perform in order to render each of the opinions discussed in this Report and where appropriate recites typical factual data on which the Opining Counsel may rely in rendering each particular opinion. Accordingly, the forms of illustrative opinion letters that accompany this Report do not recite these steps. In cases in which an opinion is given that goes beyond the scope of the legal opinions covered by this Report or requires additional factual data, Opining Counsel should consider specifying in the opinion letter the additional diligence, if any, performed or the additional factual data that serves as the basis for the opinion.

I. Negotiating an Opinion

Issues relating to opinions are best solved early in the negotiation of the Transaction to which they relate. The scope and text of the opinion, and the cost and time requirement relating to the opinion, should be negotiated at the same time as the Transaction Documents are negotiated and in the same manner as the material terms of the Transaction are negotiated.

Forms of opinions and factual certificates (to the extent they are to be attached to the opinion) should be reviewed and approved by Recipient's Counsel promptly after they are presented by Opining Counsel, and to the extent that Recipient's Counsel has substantive comments or requests for additional opinions, sufficient time should be allowed to enable Opining Counsel to research applicable legal principles, investigate facts and identify areas of uncertainty, if any, in the interpretation and application of legal principles. Gamesmanship has no place in the relationship between the lawyers representing the parties in the Transaction.

Further, the Committees believe that it is never appropriate for an Opinion Recipient or a Recipient's Counsel (on behalf of their Opinion Recipient client) to impose the business risk of the Transaction on an Opining Counsel by using economic or other leverage to demand inappropriate opinions.

J. Presumption of Continuity and Regularity

Throughout this Report, there are references to a "presumption of continuity and regularity" that allows Opining Counsel to presume the regularity of matters relating to the Client and to assume that the Client has acted with proper corporate or other entity formality. Facts that can be assumed by Opining Counsel by reason of the presumption of continuity and regularity need not be investigated unless Opining Counsel has knowledge that such facts are incorrect or inaccurate or if Opining Counsel is aware of information (red flags) that ought to cause a reasonable Opining Counsel to call such assumptions into question. See "Common Elements of Opinions – Knowledge" for the definition of knowledge. The presumption of continuity and regularity is part of the cost-to-benefit analysis that is inherent in this Report and is part of the customary practice with respect to the opinions covered by this Report. The presumption of continuity and regularity is not a legal doctrine, but rather a practical expedient under the circumstances.

Historically, the presumption of continuity and regularity was considered to be limited to filling in the blanks in corporate records based on a presumption that missing records were kept in the ordinary course. However, over time, the presumption of continuity and regularity has been expanded in a real world sense as third-party legal opinion practice has developed. Today, unless there are particular issues that make reliance on

the presumption of continuity and regularity inappropriate, an Opining Counsel's diligence with respect to a review of the Client's records is generally limited to a review of those documents directly bearing on the particular legal opinion being rendered and allows Opining Counsel to assume that all proceedings leading up to that point are in order, again, unless Opining Counsel knows of facts that call such assumption into question (or unless Opining Counsel is aware of facts (red flags) that ought to call such assumption into question by a reasonable Opining Counsel). In such case, Opining Counsel should not be able to rely on the presumption of continuity and regularity with respect to such underlying factual matters.

Under the presumption of continuity and regularity, unless the parties agree otherwise and expressly so state in the opinion letter, it is generally unnecessary for Opining Counsel to review a Client's entire minute book in connection with the delivery of a third-party legal opinion. Rather, in the view of the Committees, an Opining Counsel who is rendering an opinion with respect to a particular Transaction and the Transaction Documents relating to such Transaction should review the documents recommended to be reviewed under Florida customary practice to render such opinion. For example, an Opining Counsel rendering an opinion that a Transaction has been approved by all necessary corporate action would be expected to review the articles of incorporation and bylaws of the Client, and the resolutions adopted by the Board of Directors (and, if necessary, the shareholders) approving the Transaction and the Transaction Documents, but would be permitted to assume, unless such counsel had knowledge to the contrary (or is aware of facts (red flags) that ought to raise an issue for a reasonable Opining Counsel) that the members of the Board of Directors who voted on and approved the Transaction and the Transaction Documents were properly elected members of the Board of Directors at the time the Transaction Documents were approved. The same presumption applies in the case of proceedings of other entities such as managers or members of a limited liability company or general partners of a partnership.

An example of where "red flags" might be known to Opining Counsel includes a situation where the names of the members of the Board of Directors of a Florida corporation listed on a written consent action of the board with respect to the Transaction are different from the names that are listed on a schedule to one of the Transaction Documents reviewed by Opining Counsel in connection with its work on the Transaction. If any "red flag" is present, or if Opining Counsel knows there are issues with respect to the facts as presented, Opining Counsel should review the problematic issues with the Client and assist the Client to resolve the issues. In many cases, the types of issues that would stop Opining Counsel from relying on the presumption of continuity and regularity can be dealt with by having the Client take necessary corrective actions.

The documents that must be reviewed with respect to the particular opinions to be rendered are generally provided to Opining Counsel by the Client, often through the delivery of a certificate to counsel or a secretary's certificate. Based on the above, unless Opining Counsel has knowledge that raises questions about the documents delivered or makes the facts set forth in such documents unreliable, Opining Counsel is not obligated to look behind the documents delivered in connection with its diligence with respect to a particular legal opinion.

Reliance on the presumption of continuity and regularity is implied in all opinions of Florida counsel as to matters of Florida law and need not be expressly stated in the opinion letter. However, if an Opinion Recipient wants greater comfort with respect to matters implicitly covered under the presumption of continuity and regularity to support a particular opinion and Opining Counsel agrees to provide such greater comfort or to conduct such additional diligence, then such agreed-upon comfort or diligence should be expressly referenced in the opinion letter.

K. Reasonableness; Inappropriate Subjects for Opinions

Some requests for opinions are reasonable under the circumstances and others are not. This Report provides guidance as to what opinions Florida lawyers should and should not be asked to give on particular legal issues. To a great degree, the reasonableness of a requested opinion requires weighing the amount of due diligence required to render the opinion (and the attendant cost of doing such diligence) against the benefits of such opinion to the Opinion Recipient. Accordingly, in setting out the customary diligence that Florida

lawyers are recommended to take to render these opinions, this Report establishes a “comfort level” for Opinion Recipients of opinions rendered in conformity with the customary third-party legal opinion practices of Florida lawyers that are described in this Report.

Certain opinions are viewed by the Committees as being inappropriate subjects to be covered by Florida Opining Counsel for a variety of reasons, and the Committees believe that it is appropriate for a Florida Opining Counsel to refuse to render such opinions. These include the following:

- (i) Opinions that are not Cost Effective. The Opinion Recipient should not request that Opining Counsel provide opinions that would not be cost effective in a typical Transaction, due to the level of due diligence that would be prudently required to be completed to render the opinion. Typically, these types of inappropriate opinion requests are handled through the process of negotiation of the opinion letter in order that the Transaction may be cost effective for all parties.
- (ii) Inappropriate Scope. A number of opinion requests are inappropriate because their scope is virtually unlimited and because the level of diligence that would be required to prudently give such opinions would be unreasonable, expensive and unreasonably time consuming under the circumstances. These include opinions on the following subjects:
 - (a) *that the Client is qualified to do business as a foreign entity in every jurisdiction in which its property or activities require qualification or in which the failure to qualify would have a material adverse effect on the Client;*
 - (b) *that the Client has all necessary permits and licenses to operate its business and to own its properties;*
 - (c) *that the Client is not in violation of any contract, agreement, indenture, or undertaking to which it is a party or by which any of its property is bound;*
 - (d) *that a particular contract to which the Client or any of its property may be bound is “material” or whether a particular violation or breach of a particular contract is “material;” and*
 - (e) *that the Client is not in violation of any federal, state, or local law, regulation or administrative ruling.*

Opining Counsel should appropriately refuse to provide these types of open ended, unlimited opinions. However, asking for several of the foregoing unlimited opinions might constitute a proper opinion request if the unlimited opinion were to be revised to limit the scope of the particular requested opinion in the manner discussed in other sections of this Report.

- (iii) Confirmation of Facts; Negative Assurance. Opining Counsel should generally not be asked to state that he or she lacks knowledge of particular factual matters. Matters such as the absence of prior security interests or the accuracy of the representations and warranties in the Transaction Documents do not require the exercise of professional judgment and are inappropriate subjects for a legal opinion, even when the opinion is limited by a broadly worded disclaimer.

Negative assurance opinions often read as follows:

“Nothing has come to our attention that has led us to believe that the [Transaction Documents] contain an untrue statement of a material fact or omit to state a material fact necessary in order to make the statements therein, in light of the circumstances under which they were made, not misleading;”

or

“Nothing has come to our attention that [certain facts] are not correct.”

Except as described below, the Committees believe that it is inappropriate to request negative assurance opinions or other factual confirmations from Florida Opining Counsel. Further, a request to “just tell me what you know” in the form of a negative assurance is considered inappropriate and should be rejected by Opining Counsel.

There are, however, two generally accepted exceptions to this general rule under Florida opinion practice. These two accepted exceptions are discussed below and elsewhere in this Report.

- (a) Legal Proceedings and No Violations of Judgments, Decrees or Orders. Opining Counsel are often requested to confirm whether, to their knowledge, there are any legal proceedings pending or overtly threatened against the Client or any property of the Client or whether there are any judgments, decrees or orders binding on the Client. Although some legal opinion commentators and state bars have debated whether one or both of these often requested factual confirmations should be eliminated from legal opinions, it remains common practice in Florida for an Opining Counsel to provide these factual confirmations so long as they are limited to the knowledge of the Opining Counsel and are limited to relationship to or conflict with the Transaction or the Transaction Documents. See “No Litigation” for a discussion of the proper formulation of the “no litigation” confirmation and “No Violation and No Breach or Default” for a discussion of the proper formulation of the negative assurance statement regarding judgments, decrees or orders binding on the Client.

Some attorneys prefer to segregate these factual confirmations in a section of the opinion letter that is separate from the “opinions” contained in the opinion letter to highlight that these factual confirmations do not constitute legal “opinions.” However, the responsibility or liability of an Opining Counsel for these confirmations is no different whether such confirmations are segregated from the other opinions being rendered in the opinion letter or remain in the “opinion section” of the opinion letter.

- (b) Negative Assurance – Securities Transactions. In the context of a securities offering, Opining Counsel who has actively participated in the preparation of a disclosure document being used in connection with such offering may be asked to provide “negative assurance” regarding the disclosure document. Such negative assurance generally states that Opining Counsel is not aware of any material misrepresentation or material omissions in the disclosure document relating to the securities offering in question. This statement is typically accompanied by a limitation based upon the level of diligence performed by Opining Counsel with respect to such statement, together with a description of the role played by Opining Counsel in the preparation of the disclosure document. See “Opinions Outside the Scope of this Report – Securities Law Opinions” for a discussion regarding the issuance of this negative assurance statement.
- (iv) Issues of Significant Legal Uncertainty. Consistent with the Golden Rule, the Committees believe that an Opining Counsel should generally not be asked to provide a third-party legal opinion regarding an area of the law or with respect to a legal issue that has a moderate or high degree of legal uncertainty. These types of legal opinions are generally called “reasoned opinions” or “explained opinions.” In a reasoned or explained opinion, Opining Counsel (a) explains the various legal issues presented by such opinion, (b) generally provides a prediction of the holding of a court of competent jurisdiction (in Florida, the Florida Supreme Court) if it were properly presented with the issue, and (c) makes clear in the opinion letter that the opinion is not free from doubt and that potentially differing positions exist with respect to the legal issue in question. Whether the conclusion reached by Opining Counsel in the opinion uses the words “would,” “should,” or “more likely than not” to express Opining Counsel’s prediction, such an opinion constitutes a “reasoned” or “explained” opinion.

In the view of the Committees, the lawyer for the client engaged in the Transaction is generally in the best position to advise its client regarding issues of significant legal uncertainty. As a result, if an issue of significant legal uncertainty exists with respect to a Transaction, it is better practice for the Opinion Recipient to obtain its own Florida counsel to advise it regarding the issue rather than to obtain a “reasoned” or “explained” opinion from Opining Counsel. The Committees’ views regarding this issue are based on the belief that issues of significant legal uncertainty are typically fact sensitive and as a result are not conducive to the standard types of third-party legal opinions generally rendered in connection with the closing of a Transaction and are opinions that are generally not cost effective.

In connection with a request for a reasoned opinion, Opining Counsel often attempt to limit, through negotiations with Opinion Recipient's counsel, the requested opinion so that it does not constitute a "reasoned" or "explained" opinion.

Notwithstanding the foregoing, the Committees believe that there are two specific, recognized exceptions where it is generally permissible under Florida opinion practice for a competent Florida Opining Counsel to render a "reasoned opinion" or "explained opinion:" (i) true sale, substantive consolidation or other insolvency-related opinions, and (ii) choice of law opinions. A discussion regarding the issuance of these opinions is continued below in "Choice of Law" and "Opinions Outside the Scope of this Report – True Sale, Substantive Consolidation and Other Insolvency Related Opinions."

In the view of the Committees, rendering discouraged opinions such as "reasoned" or "explained" opinions or negative assurance confirmations does not, in and of itself, violate Florida customary practice. However, because of the expanded scope of such opinions and the expanded diligence generally required to support such opinions, Opining Counsel should exercise caution in the wording of such opinions and in the conduct of the diligence supporting such opinions.

L. Local Counsel Opinions

Often, Florida attorneys are involved in transactions involving parties located in various states and countries. In some of these cases, Florida attorneys are the primary transaction counsel with respect to the Transaction. In other situations, Florida attorneys may be serving as "local" Florida counsel in connection with the transaction. For example, in connection with a loan to an out-of-state entity that has operations and/or property in Florida, a Florida attorney may be retained to render an opinion letter regarding Florida law issues with respect to the loan transaction. There are special issues that Florida counsel should consider when acting as local counsel. See "Special Issues to Consider When Acting as Local Counsel."

M. Ethical and Professional Issues

Rule 4-2.3 of The Florida Bar's Rules of Professional Conduct (the "RPC"), promulgated by the Florida Supreme Court (Evaluation for Use by Third Persons), applies to the rendering of legal opinions. Rule 4-2.3 provides:

A lawyer may undertake an evaluation of a matter affecting a client for the use of someone other than the client if:

- (i) The lawyer reasonably believes that making the evaluation is compatible with other aspects of the lawyer's relationship with the client; and*
- (ii) The client consents after consultation.*

In reporting the evaluation, the lawyer should indicate any material limitations that were imposed on the scope of the inquiry or on the disclosure of information.

Opinions given on a Client's behalf for use by a third-party Opinion Recipient can create tension between an attorney's obligations to the attorney's own Client and the attorney's obligations to those third-parties whom the attorney knows will rely upon the opinion. A Florida attorney's ethical duties in the rendering of third-party legal opinions should be understood in the following contexts:

1. *Duty of Loyalty*. An attorney owes the attorney's Client a duty of loyalty. So long as a Client's informed consent is obtained, rendering a legal opinion to a third-party Opinion Recipient is not a breach of an attorney's duty of loyalty to the attorney's client. Before Opining Counsel renders a legal opinion, Opining Counsel should consider the advisability of explaining to the attorney's Client the scope of the opinion letter and the requirements and consequences that may arise from the issuance of the opinion

letter, particularly if the Opining Counsel knows or reasonably believes that the delivery of the opinion may affect materially and adversely the Client's interests. For example, an attorney may determine it appropriate to advise the Client that once the attorney's opinion is rendered, it may be more difficult for the Client to argue positions contrary to the legal conclusions expressed in the opinion. The Committees believe that under the RPC, the burden of proving compliance with the duty of loyalty is on Opining Counsel.

The Committees believe that it is not a conflict of the duty of loyalty for a Florida attorney to render an opinion to a third-party in a Transaction. For example, a member of The Florida Bar representing a borrower in a loan transaction may properly render an opinion to the lender that the loan agreement is "enforceable" against the attorney's own Client, provided the attorney reaches that opinion after appropriate diligence and legal analysis, the opinion is subject to appropriate qualifications and limitations and the attorney's client consents to the issuance of the opinion letter. See "Client Consent" below and "The Remedies Opinion." The illustrative form of certificate to counsel that accompanies this Report includes recommended language obtaining the consent of the Client to the issuance of the opinion letter.

2. *Conflict Between an Attorney and the Attorney's Client.* If delivery of a particular opinion letter appears to be in the best interest of the Client (where, for example, the Opinion Recipient will not close a Transaction without the delivery of the opinion), but the attorney is reluctant to deliver the opinion out of concern for the attorney's own potential liability for issuing the opinion (because of uncertainty about a legal issue or for other reasons), a conflict can exist between the "zealous representation" obligation of the attorney and the attorney's own self-interest. In such a situation, the attorney should discuss with the Client the issues that cause the attorney to be unwilling to render the requested opinion and request the Client's support in seeking necessary modifications to the requested opinion or possibly even the elimination of the delivery of the opinion letter as a condition to the closing of the Transaction.
3. *Confidentiality.* The contents of an opinion letter rendered to a third-party are not protected by the attorney-client privilege. Accordingly, if client confidences would be disclosed in the opinion letter, the attorney should consider this before rendering the opinion and confirm that the Client understands this fact and its ramifications. Although closing opinions normally benefit clients and seldom involve the disclosure of information that would work to the client's disadvantage, it is possible for the Opining Counsel to be aware of or to disclose a legal problem that the Client would prefer to keep confidential. This situation illustrates the tension that exists between a lawyer's duty to preserve Client confidences and the Opining Counsel's ethical obligation to communicate honestly with the Opinion Recipient. When confronted with this situation, Opining Counsel should seek to exclude from the opinion letter the information that gives rise to the issue. In some cases, the Recipient's Counsel may agree to this and in other cases the Client may decide that its best interest is served by closing the Transaction and consenting to the issuance of the opinion despite the disclosure of confidential information. If the confidential information cannot be excluded by agreement and the Client does not consent to the disclosure of the confidential information, the information must be kept confidential and Opining Counsel should not render the opinion in question. In the view of the Committees, maintaining confidentiality by declining to render an opinion does not breach an obligation to the Opinion Recipient. However, Opining Counsel should recognize that to hide this type of issue by relying on a standard opinion qualification, exception or exclusion might cause the opinion to be materially misleading to the Opinion Recipient.
4. *Client Consent.* As noted in Rule 4-2.3 of the RPC, the consent of the Client is required before an attorney is permitted to render a third-party legal opinion. Client consent is generally accomplished in one of two ways: (i) by obtaining written consent from the Client (and the illustrative form of certificate to counsel that accompanies this Report contains such an express consent); or (ii) where the Transaction Documents expressly call for delivery of the opinion as a condition to the closing of the Transaction (and the Client executes the Transaction Documents). Although the RPC does not require

that client consent to deliver an opinion letter be obtained in writing, the Committees strongly urge Florida counsel to document in writing the receipt of Client consent to render an opinion through one of the two methods described above.

In a situation where a Florida attorney is acting as local counsel in a multi-jurisdictional transaction, it is often a non-Florida attorney who is acting as the primary transaction counsel for the Client who retains local counsel in Florida to provide an opinion on the Florida issues relating to the Transaction in question. In such a situation, it is often the case that local Florida counsel will never have any direct or indirect contact with the Client, but will interface with respect to the opinion solely through the Client's primary transaction counsel. In this circumstance, it is appropriate for a Florida local counsel to obtain the requisite Client consent to deliver the opinion from the Client's primary legal counsel, because, for this purpose, the primary transaction counsel is acting as the agent for the Client. Further, such consent can be assumed from the opinion request of the Client's primary transaction counsel and need not be in writing. See "Special Issues to Consider When Acting As Local Counsel." Notwithstanding the foregoing, since the Committees believe that the burden of proving client consent to delivery of an opinion letter is on an Opining Counsel under the RPC, Opining Counsel may wish to establish direct contact with the Client in these situations, among other reasons, in order to confirm that client consent to issue the particular opinion letter has been obtained.

5. Good Faith. As articulated above in "The Golden Rule," an attorney should neither ask for, nor advise a Client to demand, opinions that an attorney qualified to render such an opinion would not reasonably be willing to give.
6. Candor. If the Recipient's Counsel involved in the delivery, negotiation or receipt of an opinion has knowledge that the assumptions, information, facts or law upon which the opinion is based are incorrect in any respect that is material to the opinion, then Recipient's Counsel should advise the Opining Counsel of these matters so that they can be appropriately addressed in the opinion. Under these circumstances, Opining Counsel may not rely on the incorrect assumptions, information, facts or law in rendering the particular opinion unless they have the informed consent of the Opinion Recipient. Similarly, if the Opining Counsel concludes that an area of law that otherwise would be excluded from the scope of the opinion clearly affects the legality of the Transaction, Opining Counsel should bring this fact to the attention of Recipient's Counsel. See "Common Elements of Opinions – Limitations to Laws of Specific Jurisdictions or to Substantive Areas of Law; Excluded Areas of Law." In addition, it is generally accepted that an attorney should not render an opinion that is technically correct if the Opining Counsel has knowledge or has concluded that the opinion is reasonably likely to be misleading to the Opinion Recipient in any material respect. Finally, under the RPC, a lawyer may not counsel or assist a client in conduct that the lawyer knows is criminal or fraudulent. If the lawyer learns that the Client is engaged in wrongdoing, the lawyer may not assist or facilitate that behavior. This includes delivering an opinion letter, even one that is technically correct.
7. Securities and Exchange Commission and Sarbanes-Oxley Act of 2002. If a third-party legal opinion is filed with the U.S. Securities and Exchange Commission (the "SEC") as an exhibit to a Client's registration statement, then Opining Counsel should be aware that Opining Counsel is "appearing and practicing" before the SEC and is subject to the SEC's standards of professional conduct. Certain portions of the Sarbanes-Oxley Act of 2002 apply to lawyers who appear and practice before the SEC. Although these laws, rules and regulations are outside the scope of this Report, Counsel should be aware that these laws, rules and regulations may apply to an Opining Counsel delivering a third-party legal opinion in connection with an entity whose securities are publicly traded, to the extent that such activities constitute "appearing and practicing" before the SEC. See "Opinions Outside the Scope of This Report – Securities Law Opinions."

COMMON ELEMENTS OF OPINIONS

A. Date

The date of an opinion letter is usually the date on which it is delivered, which is generally the closing date of the Transaction as to which the opinion letter relates. Unless specifically noted in the opinion letter, the date of the opinion letter is the date as of which the legal conclusions contained in the opinion letter are expressed, and Opining Counsel has no duty to update the opinion letter to a date later than the date of the opinion letter regardless of whether or not there are any subsequent changes in the law upon which the opinion letter was based or whether Opining Counsel subsequently discovers facts unknown to Opining Counsel at the time of the issuance of the opinion letter that would modify the conclusions set forth in the opinion letter. These limitations on the lack of a duty to update an opinion letter are implicit and Opining Counsel need not expressly disclaim such duty in the opinion letter. However, the Committees recommend that Opining Counsel include a statement in the opinion letter expressly stating that the opinions contained in the opinion letter speak as of the date of the opinion letter, and each of the illustrative forms of opinion letters that accompany this Report includes such a statement. The recommended language is as follows:

This opinion letter speaks only as of the date hereof. We assume no obligation to update or supplement this opinion letter if any applicable laws change after the date of this opinion letter or if we become aware after the date of this opinion letter of any facts, whether existing before or first arising after the date hereof, that might change the opinions expressed above.

If Opining Counsel is relying on documents that are dated prior to the date of the opinion letter, this should be specifically noted in the opinion letter.

If Opining Counsel updates an opinion letter, the updated opinion letter should be treated as if it were an entirely new opinion letter given as of the date of the updated opinion letter. Further, an updated opinion letter should only be rendered upon the request of or with the consent of Opining Counsel's Client and not at the sole request of the Opinion Recipient.

B. Addressee(s) and Reliance

Unless otherwise noted in the opinion letter, only the Opinion Recipient, who is generally the addressee of the opinion letter, is entitled to rely upon it. Consequently, it is important that Opining Counsel specifically name the Opinion Recipient(s) – if not individually, at least by a description of a group whose members can be readily ascertained (e.g., the “Lenders set forth on Schedule 1 of the Credit Agreement”). This limitation on reliance and use applies implicitly to opinions rendered by Florida counsel and need not be expressly stated in the opinion letter. However, many times, Opining Counsel in Florida include a statement in their opinion letters substantially similar to the following, in an effort to avoid claims by third parties who are not expressly authorized to rely on the opinion (which statement has been included in each of the illustrative forms of opinion letters that accompany this Report):

This opinion letter is furnished to you solely for your benefit in connection with the [Transaction] and may not be relied upon by any other party without our prior written consent in each instance.

Occasionally, in a syndicated loan transaction or a structured financing arrangement, a rating agency will request the ability to rely on the opinion letter. In such circumstances the following language is often used:

The opinions herein are rendered for the sole benefit of each addressee hereof [and by the Rating Agency rating the certificate, note, participation or security evidencing a direct ownership interest in or secured by the loan] solely in connection with the [Transaction]. This opinion letter may not be relied upon by any other party without our prior written consent in each instance.

Additionally, in syndicated loan transactions, the Opinion Recipient will often request that Opining Counsel permit future lenders and assignees to rely upon the opinion. Many Opining Counsel are reluctant to agree to this request because of concerns: (a) that successors and assigns may not understand customary practice and thereby may not appreciate the assumptions and qualifications that limit the scope of the opinion letter, (b) that the opinion may be deemed reissued as of the date that a new syndicate member acquires its interest in the loan, (c) that claims may arise in multiple jurisdictions or under the laws of multiple jurisdictions, or (d) that claims may be brought by “rogue” or “vulture” lenders or assignees that buy loans with a view to suing the opinion giver, among others. Nevertheless, syndicate lenders often insist that opinions permit successors and assigns to rely upon the opinion to the same extent as the original lenders.

Many Opining Counsel allow successors and assigns permitted under the Transaction Documents to rely upon the opinion. Others permit successors and assigns to rely, but include a condition that reliance by such future lenders must be actual and reasonable under the circumstances existing at the time of assignment. Others only permit reliance if such future lenders become parties to the credit agreement within a specified period of time after closing. Finally, some Opining Counsel refuse to permit successors and assigns to rely at all on the opinion. Generally, careful attention should be given to whether other parties (other than the addressee) should be given the right to rely on the opinion.

Historically, when Opining Counsel have agreed to allow assigns to rely upon their opinions they have done so based on the expectation that the permitted assigns are only permitted to rely upon the opinion to the same extent as, but no greater extent than, the addressee. In Florida, it is common practice in syndicated loan transactions for Opining Counsel to allow assigns to rely upon the opinion if permitted under the Transaction Documents. However, the Committees believe that it is reasonable for Opining Counsel to include limitations on reliance so that it is actual and reasonable under the circumstances. A formulation of language to be added to legal opinion letters to allow reliance by assigns that has gained acceptance over the last few years is as follows:

At your request, we hereby consent to reliance hereon by any future assignee of your interest in the loans under the [Transaction Documents] pursuant to an assignment that is made and consented to in accordance with the express provisions of Section [] of the [Transaction Documents], on the condition and understanding that: (i) this opinion letter speaks only as of the date hereof, (ii) we have no responsibility or obligation to update or supplement this opinion letter, to consider its applicability or correctness to any person other than its addressee(s), or to take into account changes in law, facts or any other developments of which we may later become aware, and (iii) any such reliance by a future assignee must be actual and reasonable under the circumstances existing at the time of assignment, including any changes in law, facts or any other developments known to or reasonably knowable by the assignee at such time.

Some Opinion Recipients may object to qualification (iii) because it limits the scope of the reliance by a future assignee. However, the Committees believe that such qualification is reasonable under the circumstances and ought to be reasonably acceptable to Opinion Recipients.

Occasionally, an Opinion Recipient in a loan transaction will also request that purchasers of loan participation interests be permitted to rely upon an opinion letter. The Committees believe that such request is inappropriate and should be refused.

Finally, in some cases, Opining Counsel may wish not only to limit reliance on the opinion letter to specified parties but also to limit the ability of the Opinion Recipient to provide copies of the opinion letter to third parties. In such cases, language is often added to the opinion letter to prohibit its dissemination. Recommended language for this purpose is as follows:

Copies of this opinion letter may not be furnished to any other party, nor may any portion of this opinion letter be quoted, circulated or referred to in any other document without our prior written consent in each instance.

When this type of prohibition is included in an opinion letter, the Opinion Recipient may request that Opining Counsel authorize it to allow certain parties to see a copy of the opinion letter (but not to rely upon it). Recommended language for this purpose is as follows:

Notwithstanding the foregoing, a named addressee of this opinion letter may furnish a copy of this opinion letter: (i) to any rating agency involved with, or institution providing credit enhancement, liquidity support or reinsurance, in connection with, the Transaction contemplated by the Transaction Documents; (ii) to the independent auditors and lawyers advising such addressee in connection with the Transaction; (iii) to any governmental agency having regulatory authority over such addressee; (iv) to the permitted assigns, participants and successors (both actual and prospective) of such addressee under the Transaction Documents; or (v) pursuant to court order or legal process of any court or governmental agency or as otherwise required by applicable law; provided, however, that none of the foregoing may rely on this opinion letter (unless expressly authorized to do so by this opinion letter) or further circulate, quote or otherwise refer to this opinion letter except with our prior written consent in each instance.

C. Role of Counsel and Relationship with Client

The opening paragraph of the opinion letter will normally identify Opining Counsel as the Client’s counsel and not as counsel to the Opinion Recipient. This typically is accomplished in a single sentence, such as:

We have acted as counsel to _____ (the “Client”) in connection with the transaction contemplated by that certain _____ Agreement dated _____ (the “Agreement”) [a specified Transaction Document] between the Client and _____ (the “Other Party”).

Opining Counsel sometimes designate their role as “general,” “special” or “local” counsel. Although these terms are often understood as a description of the role or relationship that Opining Counsel plays with the Client or the Transaction, they should not be viewed as a substitute for appropriate substantive qualification or limitations attributable to the scope of Opining Counsel’s role in the transaction. Further, the term “general counsel” should not normally be used unless the opinion is rendered by an individual who is inside general counsel for the Client. Where Opining Counsel has represented the Client in a particular Transaction or in a series of Transactions, but not on a continuing basis, the term “special counsel” is often used. Where Opining Counsel’s role is limited to opining on matters of local law and the Opining Counsel is not otherwise representing the Client as primary counsel in the Transaction, the term “local counsel” or “special Florida counsel” is often used.

In all cases, these designations do not limit or affect Opining Counsel’s responsibility for the opinions rendered or the level of diligence required to support them. Accordingly, it is advisable that if Opining Counsel’s limited involvement with the Client warrants a limitation on Opining Counsel’s responsibilities or level of care, then such limitations should be expressly stated in the opinion letter through appropriate qualifications or assumptions relating to the facts upon which the opinion is based.

On a related matter, the Committees believe that there is presently no consensus among Florida lawyers as to whether it is necessary or appropriate for Opining Counsel to disclose in an opinion letter any relationships (other than an attorney-client relationship) between Opining Counsel (or members of Opining Counsel’s law firm) and the Client. For example, a member of the Opining Counsel’s law firm may be a member of the Client’s Board of Directors, or have a significant financial interest in the Client or even, through the Client, in the Transaction to which the opinion letter relates. This Report takes no position on this issue, other than to suggest that Opining Counsel consider such disclosure whenever it may appear that the existence of such relationship: (i) is reasonably likely to be considered material by the Opinion Recipient, or (ii) is reasonably likely to impair Opining Counsel’s independent judgment or otherwise violate Opining Counsel’s obligations as a lawyer under the RPC (and in which case it would probably be appropriate for Opining Counsel to refuse to render the opinion letter). In certain instances, the Opinion Recipient may request that Opining Counsel include an affirmative statement in the opinion to the effect that Opining Counsel has no conflict of interest relating to the Client. However, the Committees believe that such a request is inappropriate. Notwithstanding the foregoing, if Opining Counsel agrees to provide the requested confirmation, which is in the nature of a factual confirmation, Opining Counsel should take such steps as are reasonable under the circumstances to confirm that its response to such request is truthful and accurate. Further, if such confirmation is included in the opinion letter, Opining Counsel may wish to consider qualifying the statement to its “knowledge.”

Further, in certain limited situations, Opining Counsel, after considering and analyzing potential conflicts of interest that arise when representing multiple parties, may agree to render opinions with respect to non-client individuals or legal entities involved in the same Transaction as the Client. For instance, when Opining Counsel is representing the borrower in a loan transaction, the lender may also request opinions regarding the guarantors, the guaranty and other guarantor related documents signed by the guarantors in the opinion letter, and Opining Counsel may agree to render such opinions even though Opining Counsel is not otherwise representing the guarantors. If Opining Counsel agrees to render such opinions, the opinion letter should state that Opining Counsel is representing the non-Client individuals or legal entities involved in the same Transaction as the Client for the limited purpose of rendering the opinions on behalf of such non-Client individuals or legal entities, but not for any other purpose. In such limited circumstances, Florida customary practice applies to the opinions rendered by Opining Counsel on behalf of non-Client individuals or legal entities.

D. Brief Description of Transaction and Request for Opinion Letter

The opinion letter should include a brief description of the Transaction to establish the context in which the opinion letter is being delivered. Opining Counsel should always obtain the Client’s consent prior to the issuance of the opinion letter to a third party and, if the Transaction Documents do not specifically refer to the delivery of the opinion letter, should consider including a statement in the opinion to the effect that the Client has consented to the issuance of the opinion. See “Introductory Matters – Ethical and Professional Issues” for a discussion regarding the need to obtain Client consent. The foregoing is typically accomplished with a statement similar to the following:

This opinion letter is furnished to you pursuant to Section _____ of the [Transaction Documents] at the request and with the consent of the Client.

If the Transaction Documents do not specifically refer to the delivery of the opinion letter, but such delivery is nonetheless required to close the subject Transaction or to otherwise effect the Client’s wishes, language similar to the following can be substituted:

This opinion letter is delivered to you at the request and with the consent of the Client.

If consent is not obtained through the inclusion of the required consent language in the Transaction Documents, it is prudent for Opining Counsel to obtain the Client’s consent to the issuance of the opinion in writing, and the illustrative form of certificate to counsel that accompanies this Report includes an express statement from the Client to this effect.

E. Transaction Documents

In preparing an opinion letter, Opining Counsel generally lists in the opinion letter the Transaction Documents as to which the opinions are being given. The Transaction Documents are the agreements between or among the parties relating to the Transaction. Transaction Documents might include a loan agreement, a security agreement, a mortgage, a promissory note, an asset or stock purchase agreement, or the like. Opining Counsel also generally reviews and often expressly lists in the opinion letter other documents relating to the Transaction that have been reviewed in connection with rendering the opinion letter or are part of the documents required to complete the Transaction (such as UCC financing statements, organizational documents, resolutions, incumbency certificates and the like), but are not contractual in nature. Further, Opining Counsel often reviews closing certificates, affidavits, and other closing deliverables. In drafting an opinion letter, Opining Counsel should be careful to distinguish between Transaction Documents (as to which legal opinions are being rendered) and other documents (which are necessary to complete the Transaction or are required to be delivered at closing pursuant to the Transaction Documents but are not agreements as to which legal opinions are being rendered).

In that regard, Opining Counsel should recognize that the defined term “transaction documents” (or similar defined term) in the agreements between the parties relating to the Transaction is typically overly inclusive. Often the relevant defined term includes non specific reference to the primary documents to be executed at the closing (e.g., all security agreements executed by the Client), which although often appropriate subjects of the legal opinions rendered, should be specifically listed and described in the opinion letter. The defined term for “transaction documents” in the primary documents typically also references generic or specific certificates, affidavits, reports, UCC financing statements and other similar items, and furthermore, is addressing not only existing “transaction documents,” but all replacements, modifications and the like, which do not even exist on the date that the opinion letter is being rendered. It is therefore important in rendering legal opinions that Opining Counsel not simply track in the opinion letter the definition of “transaction documents” given to such term in the Transaction Documents. Instead, Opining Counsel should create a new defined term in the opinion letter that includes only those “transaction documents” that are appropriate subjects of the legal opinions being rendered.

One court in Florida has broadly construed the term “transaction documents” to include the legal opinion letters delivered by the transaction party’s counsel at the closing of a particular transaction. The Committees believe that the opinion letters delivered at the closing of a Transaction pursuant to the requirements of the Transaction Documents are delivered in order to provide comfort to the Opinion Recipient regarding certain legal matters, and that the opinion letters issued in connection with the Transaction are never part of the agreements between the parties, no matter how broadly the term “transaction documents” is expressly defined in the Transaction Documents.

F. Definitions

Terms defined only in the opinion letter should be shown in quotation marks at the place in the opinion letter at which they are defined. Terms that are defined by reference to the Transaction Documents or to one of the Transaction Documents (such as a Loan Agreement) should be defined with a statement similar to the following:

Capitalized terms used but not otherwise defined herein shall have the definitions set forth in the _____ Agreement [a specified Transaction Document].

G. Reliance on Factual Certificates and Representations and Warranties; Assumption of Facts; Scope of Reliance

Opining Counsel often obtain from appropriate persons certificates covering factual matters and upon which Opining Counsel bases its legal conclusions. These matters typically include such matters as the identification of material contracts to which the Client is a party, locations where the Client has offices or employees or maintains inventory or other assets, the existence of liens or judgments affecting the Client’s assets and pending or overtly threatened litigation.

If an opinion is based on facts supplied by the Client, it is best practice to have these facts set forth in a written certificate in an effort to minimize any confusion concerning the facts disclosed in oral discussion. Opining Counsel can face evidentiary challenges if it bases an opinion on oral discussions with the Client or a representative of the Client. More importantly, formal certificates are often more effective than oral discussion or informal methods in eliciting accurate and complete responses to factual questions.

Unless Opining Counsel has knowledge to the contrary, or is aware of facts (red flags) that ought to cause a reasonable Opining Counsel to call such factual statements into question, Opining Counsel may rely on the accuracy and truthfulness of the objective factual statements contained in the representations and warranties made by the Client in the Transaction Documents. However, it is not appropriate for Opining Counsel to rely upon a statement contained in a representation or warranty or in a certificate that constitutes, directly or in practical effect, a legal conclusion, unless such statement is set forth in a public official's document or provided in a legal opinion of other counsel (and such reliance is expressly stated in the opinion letter). Opining Counsel should make sure as part of its diligence with respect to the opinion that all material facts required to support the opinion have been obtained, whether they are obtained through reliance on the representations and warranties contained in the Transaction Documents, contained in a separate certificate from the Client addressed to Opining Counsel, or otherwise obtained.

Opining Counsel should prepare one or more factual certificates for execution by the person or persons who Opining Counsel reasonably expects to have knowledge of the factual matters to be set forth in the certificate. It is recommended that any such certificate include a statement that it is being delivered to Opining Counsel to be relied upon in connection with rendering the opinion letter and, if appropriate, that it supplements the factual statements contained in the underlying Transaction Documents (which factual statements may be relied upon by Opining Counsel without separate written authorization from the Client). Care should be taken so that factual certificates state objective facts (such as "The Client's material agreements are as follows...") rather than legal conclusions (such as "The transaction does not violate the terms of any material agreement" or "The Client does business in States A and B"). However, a factual certificate that includes one or more legal conclusions is not ineffective in its entirety, but remains effective only to the extent of the objective factual statements set forth therein. The legal conclusions in such certificate also serve as a confirmation from the Client that the Client is not aware that the particular statement in the certificate is untrue. Opining Counsel is not obligated to investigate the accuracy of the factual statements contained in a certificate, but Opining Counsel may not rely on any factual statements contained in a certificate that Opining Counsel has knowledge are incorrect or unreliable.

Many Opining Counsel attach the factual certificates upon which they are relying to the opinion letter delivered to the Opinion Recipient. Although such practice is not universal, attaching the certificate to the opinion letter or otherwise providing the certificate to the Opinion Recipient and its counsel can avoid confusion regarding the facts upon which Opining Counsel is relying. In some cases, however, the information contained in the factual certificate will either be proprietary or confidential. If the information in the certificate is proprietary or confidential, the Client will most likely not want Opining Counsel to attach the certificate to the opinion letter (particularly if the opinion letter is to be filed with a governmental agency), but may be willing to give the Opinion Recipient a copy of the certificate on a confidential basis. If the information in the certificate is protected under a claim of privilege (such as Opining Counsel's knowledge of an unasserted claim which is possible of assertion), the disclosure to the Opinion Recipient is likely to waive the privilege.

If the opinion relies on one or more factual certificates, the opinion should state:

We have relied upon, and assumed the accuracy of, the representations and warranties contained in the [Transaction Documents] and in the certificate to counsel supplied to us by the Client with respect to the factual matters set forth therein, [which is attached hereto as ____].

In many circumstances, it may be appropriate to assume in an opinion letter a factual matter required to support a particular legal opinion contained in that opinion letter. Such assumption will never be appropriate if

Opining Counsel has knowledge that the factual matter being assumed is inaccurate or if the Opining Counsel is aware of red flags that ought to cause a reasonable opining counsel to call such factual assumptions into question (unless the Opinion Recipient is aware of the inaccuracy and expressly consents to the assumption of such facts). Further, in certain tax opinions relying on factual assumptions to support an opinion without investigating the facts to determine the accuracy of such facts may not be permissible under Circular 230 issued by the Internal Revenue Service. See “Opinions Outside the Scope of this Report-Tax Opinions.”

An Opinion Recipient is not entitled to rely upon the factual representations contained in a certificate from the Client to the Opining Counsel (and upon which Opining Counsel is relying in issuing its opinion). If the Opinion Recipient were entitled to rely on such factual representations, then the certificate could have the unintended consequence of expanding and/or altering the Client’s representations and warranties contained in the Transaction Documents. In order to avoid any confusion on this issue, Opining Counsel may wish to include an express disclaimer in the opinion letter and/or in the certificate stating that the certificate is being provided solely for the benefit of Opining Counsel in rendering the subject opinion letter and that no party, other than Opining Counsel, shall be entitled to rely upon the factual matters set forth therein. The recommended language is as follows:

The factual matters [upon which this opinion is based/set forth in this certificate of counsel] have been provided to counsel solely for counsel’s benefit in issuing the [this] opinion and no party, other than Opining Counsel, is entitled to rely upon them.

H. Opinions Under Florida or Federal Law; Opinions Under the Laws of Another Jurisdiction

Opining Counsel typically renders an opinion letter covering the laws of a state where it is admitted to practice and applicable federal law and sets forth this limitation in the text of the opinion letter. This is usually addressed in the opinion in the following manner:

We do not express any opinion as to the laws of any jurisdiction other than the State of Florida and the United States of America.

Opining Counsel may also be requested to furnish an opinion on matters governed by the laws of another jurisdiction. Unless the limited nature of the review of another jurisdiction’s law is expressly described in the opinion letter, because Opining Counsel would likely be held to the same duty of care and competence as a lawyer licensed in the other jurisdiction, Opining Counsel should, in most instances, seek the advice and opinion of local counsel in such other jurisdiction.

Nevertheless, there are certain uncomplicated questions under the laws of another state or jurisdiction on which Florida lawyers sometimes render opinions. For example, many Florida lawyers experienced in corporate matters are familiar with Delaware corporate law (including court decisions interpreting that law) and believe themselves competent to render opinions that cover matters related to the incorporation and good standing of a Delaware corporate client, the power of a Delaware corporation to enter into a Transaction, and the authorization of the Transaction by the Delaware corporate client, as well as other routine corporate matters relating to the Client. Similarly, Florida counsel sometimes opine on other routine and uncomplicated matters of foreign law, such as the good standing and qualification of a corporation to do business in a foreign jurisdiction, and base such opinion on a certificate from the officials in such foreign jurisdiction and/or a certificate from the Client. Further, some Florida lawyers also render opinions regarding Delaware limited liability companies and regarding Article 9 of the UCC in various jurisdictions.

Opining Counsel should carefully evaluate its familiarity with the laws of jurisdictions where Opining Counsel is not licensed to practice before rendering an opinion based upon legal principles applicable in such jurisdictions. Even if carefully researched and prepared, an opinion letter covering the laws of a jurisdiction in which Opining Counsel is not admitted to practice could expose Opining Counsel to liability if Opining Counsel fails to meet the standards of a competent local lawyer.

Florida counsel who render opinions regarding Delaware limited liability companies should also be aware that, unlike corporations, limited liability companies are creatures of contract, in that the operating agreement between the parties overrides the default rules contained in the Delaware limited liability company act. As a result, an opinion regarding the status, power and authorization of a transaction of a Delaware limited liability company will be deemed to cover Delaware contract law unless expressly limited by the opinion letter. See “What’s Your Opinion on Delaware Opinions” by Norman M. Powell, 50 Business Lawyer Today, May/June 2007.

Many Florida lawyers who render opinions on the laws of another jurisdiction seek to limit the scope of their opinion to statutory law. To do so, Opining Counsel sometimes include language in the opinion letter similar to the following:

The foregoing opinions concerning _____ law are based solely upon our review of: (i) certified copies of the certificate/articles of organization/incorporation of Client, and good standing certificates as to Client, in each case obtained by us from the _____ Secretary of State, and (ii) [the [identify corporate or other entity] statutory law of the State of _____ (“_____ Law”) as set forth in the LEXIS™ and Westlaw™ online research services in the _____ Code on the State of _____ Official Web Site and not in the text of the _____ Law or in any other source material, any legislative history, the decisions of any federal or state courts, including federal or state courts in the State of _____, or any rules, regulations, guidelines, releases, interpretations or other secondary source material, relating to the _____ Law, and we have assumed that such online research services accurately set forth the provisions of the _____ Law as in effect on the date hereof. Except as described above, we have not examined nor have we expressly opined with respect to _____ law.

This language may also be useful in rendering opinions under the UCC of another jurisdiction. See “Opinions with respect to Collateral under the Uniform Commercial Code – Scope of UCC Opinions; Limitations” for a discussion of limiting the scope of opinions under the UCC of another jurisdiction.

It is always the prerogative of an Opinion Recipient to require an opinion on the laws of another state or jurisdiction to be rendered by a lawyer licensed to practice in that jurisdiction. In determining whether to accept an opinion of Florida counsel on a matter of foreign law, the Opinion Recipient should consider the complexity of the issue, the cost of retaining local counsel and the basis for the expertise of Florida counsel. If Florida counsel renders an opinion on a legal issue under the laws of a foreign jurisdiction, the opinion will be understood to cover the statute and all regulations and judicial decisions interpreting it unless otherwise specified in the opinion letter. In that regard, Florida counsel should always consider whether such Florida counsel has the expertise to render an opinion under the laws of another jurisdiction before agreeing to render such opinion and should not provide an opinion under the laws of another jurisdiction if such Florida counsel concludes that such Florida counsel does not have the requisite expertise.

I. Opinions of Local or Specialist Counsel

If local/specialist counsel (“LSC”) is required to provide an opinion as to matters of local law or on a specialized area of law, two issues arise: (a) the nature of the duty of the principal opining counsel (the “POC”) with respect to the selection of the LSC, and (b) the responsibility of the POC for the legal opinions of the LSC.

1. *The Duty of the POC in selecting the LSC.* The Opinion Recipient has a right to approve or reject any LSC from whom the Opinion Recipient will receive opinions. Obviously, Opinion Recipients should not reject an LSC unless they have a reasonable basis to conclude that such LSC does not have the qualifications necessary to provide the requested opinions. Further, even though the POC often proposes the LSC for the Opinion Recipient’s consideration, the POC does not select the LSC and the POC does not have a duty to participate in the selection of the LSC. If the POC or the POC’s client proposes an LSC for the Opinion Recipient’s consideration, the POC (or the POC’s client) has only an obligation to use reasonable care in making the recommendation.

2. *The Responsibility of the POC for the Opinion of the LSC.* Because the Opinion Recipient has the right to approve or reject the LSC, the Opinion Recipient should accept the LSC’s opinion without looking to the POC for a confirming opinion. The LSC’s opinion should be addressed directly to the Opinion Recipient (rather than to the POC) and the POC should not render an opinion on that subject. The POC should exclude from the scope of the POC’s opinion all matters covered in the opinion of the LSC and should state that these matters are covered by the opinions of the LSC by using language substantially similar to the following:

In rendering the foregoing opinion, we have not expressed an opinion on matters of [state or specialized area] law. These matters are covered by the opinion of [LSC] addressed to you and dated _____.

There may be times when an Opinion Recipient will demand that the POC express an opinion on the matters covered by the opinion letter of the LSC so that the Opinion Recipient can be sure that all matters for which opinions have been requested are covered in a single opinion letter. Although such practice is discouraged, in such instances where the discouraged practice is followed: (i) the LSC’s opinion should be addressed to both the Opinion Recipient and the POC, and (ii) the LSC’s opinion should provide that the POC may rely on it to the extent necessary to render the POC’s opinion without any investigation. In such event, the POC does not have a duty to review the accuracy of the opinion letter on which the POC proposes to rely, unless the POC has knowledge that the opinion or the facts underlying the opinion are incorrect or unreliable. If the POC has such knowledge, the POC should advise the LSC.

The Committees believe that it is unreasonable for an Opinion Recipient to refuse to permit the POC to rely solely on the LSC’s opinion by requiring that the POC independently state that the LSC’s opinion is satisfactory in form and scope, that the POC “concur” in the opinion of the LSC, that the LSC’s opinion is “satisfactory in form and substance,” or that the Opinion Recipient “is justified in relying upon the opinion of the LSC.” If the POC expresses any of these opinions, the POC must perform the diligence and engage in the legal analysis required to render these opinions, which duplicates some or all of the work performed by the LSC. Having two lawyers perform the same due diligence results in marginal value and unnecessary and substantial additional expense. If the POC does not expressly state that it is relying solely on the LSC’s opinions and either gives the opinion or expresses any of the opinions contained in the LSC’s opinion without actually performing the necessary diligence, the POC may be assuming the risk that the LSC’s opinion is incorrect.

Opining Counsel should recognize that the opinions given by the LSC may, under certain circumstances, be predicate or “building block” opinions to one or more of the opinions being given by Opining Counsel. See for example “The Remedies Opinion - Overview of the Remedies Opinion - Related Opinions that are “Building Blocks” for or Necessary to Render the Remedies Opinion.” Under such circumstances, Opining Counsel may rely upon the opinions of the LSC (with the express consent of the LSC) or assume the “building block” opinions required. The Committees recommend that the better practice is for Opining Counsel to assume the “building block” opinions being rendered by the LSC in its opinion letter rather than expressly relying on the opinion of the LSC with respect to such “building block” opinions. However, either method is acceptable.

J. Reliance on Certificates of Public Officials

Opinion letters in Transactions often include legal conclusions based in whole or in part on certificates of public officials. Opinion Recipients routinely accept opinions that are based on certificates of public officials dated as of a reasonably recent date. Because certificates of public officials typically bear a date before the delivery of the opinion letter, Opining Counsel must decide what additional verification, if any, is necessary for purposes of the opinion letter. Although in some instances telephonic updates of certain information can be obtained prior to the closing of the Transaction, this is not always the case. Opining Counsel bears the responsibility of determining whether or not additional verification is necessary based upon its familiarity with the Client and the facts and circumstances of the particular opinion. In general, customary practice does not require updating every certificate of public officials for purposes of rendering an opinion letter. As a matter of

prudence, Opining Counsel should consider making an express assumption in its opinion (such as the following) specifying if it is relying on certificates of public officials of an earlier date without “bring-down” certificates or other “bring down” verification:

We have, with your consent, assumed that certificates of public officials dated _____ [earlier than the date of this opinion letter] remain accurate from such earlier dates through and including the date of this opinion letter.

K. Proposed Legislation

Opining Counsel has a duty to consider all relevant laws which have been enacted, regulations which have been adopted and decisions which have been published prior to the date of the opinion letter, including enacted laws and adopted regulations which have effective dates in the future. In rendering an opinion, Opining Counsel has no duty to investigate whether proposed legislation or regulations will affect the opinion being given, and will not be held to have constructive knowledge of proposed legislation or regulations. However, consistent with an attorney’s overriding duty of good faith, honesty and candor, if Opining Counsel giving substantive attention to a Transaction has actual knowledge that a proposed law or regulation would affect an opinion being given, Opining Counsel should confirm that the Opinion Recipient is aware of the proposal and consider expressly noting same in the opinion letter. Opining Counsel in this circumstance does not, however, have a duty to express an opinion on the effect that the proposed legislation or regulation would have on the opinion if the proposal were adopted.

L. Assumptions

It is customary practice for Opining Counsel to make certain assumptions in an opinion letter. Assumptions underlying the opinion can be implicit or explicit. It is not necessary for Opining Counsel to recite assumptions that are generally accepted under Florida customary practice and, as such, are deemed implicit in opinion letters. These include factual matters that affect the opinion that are too difficult or time consuming to verify and general law-related matters that are discussed in greater detail below. Opining Counsel is not required to refer to the existence of the implicit assumptions in the opinion letter. In accordance with customary practice in Florida, such implicit assumptions are deemed part of the opinion letter regardless of whether or not Opining Counsel refers to their existence in the opinion letter.

Opining Counsel may not make an assumption that it knows to be incorrect or as to which it is aware of facts (red flags) that ought to cause a reasonable Opining Counsel to call such assumptions into question unless: (i) Opining Counsel discloses to the Opinion Recipient that the assumption is not correct or may be unreliable, and (ii) the Opinion Recipient expressly agrees that Opining Counsel may nevertheless make the assumption. Opining Counsel also may not assume a specific legal conclusion as to which Opining Counsel is rendering an opinion.

The Committees believe that the assumptions set forth below are generally accepted under Florida customary practice and need not be explicitly stated in the opinion letter. As a result, the Committees believe that the assumptions are implicitly included in an opinion letter rendered by Florida counsel as to matters of Florida law whether or not this Report is expressly incorporated by reference into the opinion letter and whether or not these assumptions are expressly stated in the opinion letter. Nevertheless, many Florida counsel expressly include one or more of these assumptions in their opinion letters, and, based upon the Committees’ belief (as more particularly discussed below) that it is better to expressly include all such assumptions in the opinion letter, each of the illustrative forms of opinion letters that accompany this Report expressly include all of these assumptions.

The assumptions that are deemed to be implicitly incorporated into opinions rendered by Florida counsel under Florida customary practice are as follows:

In rendering the opinions set forth herein, we have relied, without investigation, on each of the following assumptions:
(a) the legal capacity of each natural person to take all actions required of each such person in connection with the Transaction;

- (b) the legal existence of each party to the Transaction other than the Client;*
- (c) the power of each party to the Transaction, other than the Client, to execute, deliver and perform all Transaction Documents executed and delivered by such party and to do each other act done or to be done by such party;*
- (d) the authorization, execution and delivery by each party, other than the Client, of each Transaction Document executed and delivered or to be executed and delivered by such party;*
- (e) the validity, binding effect and enforceability as to each party, other than the Client, of each Transaction Document executed and delivered or to be executed and delivered by such party and of each other act done or to be done by such party;*
- (f) there have been no undisclosed modifications of any provision of any document reviewed by Opining Counsel in connection with the rendering of the opinion and no undisclosed prior waiver of any right or remedy contained in any of the Transaction Documents;*
- (g) the genuineness of each signature, the completeness of each document submitted to Opining Counsel, the authenticity of each document reviewed by Opining Counsel as an original, the conformity to the original of each document reviewed by Opining Counsel as a copy and the authenticity of the original of each document received by Opining Counsel as a copy;*
- (h) the truthfulness of each statement as to all factual matters otherwise not known to Opining Counsel to be untruthful or unreliable contained in any document encompassed within the diligence review undertaken by Opining Counsel;*
- (i) each certificate or other document issued by a public authority is accurate, complete and authentic as of the date of the opinion letter, and all official public records (including their proper indexing and filing) are accurate and complete;*
- (j) the Opinion Recipient has acted in good faith, without notice of any defense against enforcement of rights created by, or adverse claim to any property or security interest transferred or created as part of, the subject transaction, and has complied with all laws applicable to it that affect the Transaction;*
- (k) the Transaction and the conduct of the parties to the Transaction comply with any requirement of good faith, fair dealing and conscionability;*
- (l) routine procedural matters such as service of process or qualification to do business in the relevant jurisdiction(s) will be satisfied by the parties seeking to enforce the Transaction Documents;*
- (m) agreements (other than the Transaction Documents as to which opinions are being given) and judgments, decrees and orders reviewed in connection with rendering the opinions will be enforced as written;*
- (n) no discretionary action (including a decision not to act) that is permitted in the Transaction Documents will be taken by or on behalf of the Client that might result in a violation of law or constitute a breach of or default under any of the Client's other agreements or under any applicable court order;*

- (o) *there are no agreements or understandings among the parties, written or oral, and there is no usage of trade or course of prior dealing among the parties that would, in either case, define, supplement, modify or qualify the terms of the Transaction Documents or the rights of the parties thereunder;*
- (p) *the payment of all required documentary stamp taxes, intangible taxes and other taxes and fees imposed upon the execution, filing or recording of documents, [except to the extent expressly covered in the opinion letter]; and*
- (q) *with respect to the Transaction and the Transaction Documents, including the inducement of the parties to enter into and perform their respective obligations thereunder, there has been no mutual mistake of fact or undue influence and there exists no fraud or duress.*

Additionally, Opining Counsel may elect to exclude additional matters from the scope of the opinion letter by adding additional assumptions to the opinion letter. Examples of assumptions that are sometimes added to opinion letters of Florida counsel (but are not considered assumptions implicitly included in all opinions of Florida lawyers under Florida customary practice) include the following:

- *All statutes, judicial and administrative decisions, and rules and regulations of governmental agencies constituting the law for which Opining Counsel is assuming responsibility are published (e.g., reported court decisions and the specialized reporting services such as BNA, CCH, and Prentice-Hall) or otherwise generally accessible (e.g., Lexis or Westlaw) in each case in a manner generally available (i.e., in terms of access and distribution following publication) to lawyers practicing in Opining Counsel's judicial circuit within Florida;*
- *The constitutionality and validity of all relevant laws, regulations and agency actions, irrespective of whether a reported case has otherwise held or concern has been expressed by commentators as reflected in materials which lawyers routinely consult; and*
- *The Client will obtain all permits and governmental approvals required in the future, and take all actions similarly required, relevant to the performance of the Transaction Documents.*

The Committees believe that Florida lawyers should expressly include in their opinion letters the entire list of assumptions that are implicitly included under Florida customary practice in opinion letters rendered by Florida counsel, and the forms of illustrative opinion letters that accompany this Report expressly include all such implicitly included assumptions. However, the Committees recognize that some Florida Opining Counsel may include some but not all of the implicitly included assumptions in their opinion letters. The Committees believe that, in such situations, all of the remaining assumptions that are implicitly included in opinions of Florida counsel under Florida customary practice will nevertheless be implied into the opinion letter. Notwithstanding the view of the Committees in that regard, the Committees urge Florida counsel to include the entire list of implied assumptions in their opinion letters. The Committees are concerned that a court which is called upon to interpret an opinion letter rendered by a Florida counsel may determine incorrectly not to follow Florida customary practice (as articulated in this Report) and may instead decide that only those assumptions that are expressly set forth in the opinion letter constitute a part of the opinion letter.

Further, Opining Counsel should recognize that problems can arise if Opining Counsel modifies the list of assumptions in the final opinion letter from the list of assumptions in a previous draft of the opinion letter. For example, in the course of negotiating the form of the opinion letter to be delivered at the closing of the Transaction, Opining Counsel may have included an express list of assumptions in a draft opinion letter tendered to an Opinion Recipient for review, which list expressly includes the assumptions implicitly included in opinions of Florida lawyers under Florida customary practice. If, thereafter, Opining Counsel agrees to remove one or more of these assumptions from the opinion letter, a court interpreting the opinion letter may conclude that Opining Counsel no longer has the benefit of the implicit inclusion in the opinion letter of such removed assumptions. If that is not intended, then in order to eliminate any doubt, Opining Counsel should consider adding language to the opinion letter expressly stating that Opining Counsel is still intending to rely on all customary implicit assumptions.

One of the assumptions included in the list of assumptions impliedly included in all opinions of Florida counsel is the legal capacity of each natural person to take all actions required of such person in connection with the Transaction. Confirmation that a natural person is *sui juris* (has the legal capacity to manage his or her own affairs) is a factual matter that is generally not confirmed by Opining Counsel in a third-party legal opinion. Nevertheless, if Opining Counsel has knowledge that an individual who is a party to a Transaction Document is not legally competent, or is aware of facts (red flags) that ought to cause a reasonable Opining Counsel to call such individual's legal competence into question, then such Opining Counsel cannot ignore that fact. In that regard, some Opining Counsel, whether or not they assume in the opinion letter the legal capacity of a natural person who is a party to the Transaction and the Transaction Documents, obtain identification from such natural person Client to confirm that such natural person is an adult (in order to avoid any question as to whether contracts entered into by the Client may be voidable).

As used above and elsewhere in this Report, unless otherwise stated, the phrase "without investigation" means those matters within the knowledge of Opining Counsel without any inquiry or investigation. The phrase "without inquiry" is synonymous with, and may be used in lieu of, the phrase "without investigation." See "Common Elements of Opinions – Knowledge" below for a discussion of the meaning of "knowledge" in the context of a third-party legal opinion.

Specific assumptions that go beyond or modify assumptions that are generally accepted in practice or otherwise deemed implicit (for example, additional assumptions related to the perfection of a security interest under the UCC) should also be explicitly set out in the opinion letter. See "Opinions with Respect to Collateral Under the UCC" below for a discussion of specific assumptions related to opinions under the UCC.

M. Limitations to Laws of Specific Jurisdictions or to Substantive Areas of Law; Excluded Areas of Law

An opinion rendered by Florida counsel covers laws, rules and regulations that a Florida lawyer exercising customary professional diligence would reasonably be expected to recognize as being applicable to the Client, the Transaction Documents, or the Transaction to which the opinion relates. If the Client's business is regulated, this includes laws, rules and regulations related to such regulated business. The laws, rules and regulations determined to be applicable to the Client, the Transaction Documents and the Transaction (excluding any "Excluded Laws," as defined below) are sometimes referred to in this Report as the "**Applicable Laws.**"

Opining Counsel should usually limit such Opining Counsel's opinions to applicable Florida laws, rules and regulations and United States federal laws, rules and regulations. If Opining Counsel opines on an issue of foreign law (i.e., the laws, rules and regulations of a state other than Florida or of a foreign country or jurisdiction), Opining Counsel is likely holding itself out as competent on that issue of foreign law. See "Opinions of Local or Specialist Counsel" and "Opinions under Florida or Federal Law; Opinions Under the Laws of Another Jurisdiction" above.

Under Florida customary practice, an opinion is deemed not to cover the following federal or Florida laws, rules and regulations (collectively the "**Excluded Laws**"), except to the extent that the opinion letter expressly provides that the opinion covers such laws, rules or regulations:

- (a) securities laws, rules and regulations;
- (b) Federal Reserve Board margin regulations;
- (c) laws, rules and regulations regulating banks and other financial institutions, insurance companies and investment companies;
- (d) pension and employee benefit laws, rules and regulations, such as the Employee Retirement Income Security Act (ERISA);
- (e) labor laws, rules and regulations, including laws on occupational safety and health (OSHA);
- (f) antitrust and unfair competition laws, rules and regulations;
- (g) laws, rules and regulations concerning compliance with fiduciary requirements;

- (h) laws, rules and regulations concerning the creation, attachment, perfection, or priority of any lien or security interest [except to the extent expressly covered in the opinion letter];
- (i) laws, rules and regulations relating to taxation;
- (j) bankruptcy, fraudulent conveyance, fraudulent transfer and other insolvency laws;
- (k) environmental laws, rules and regulations;
- (l) laws, rules and regulations relating to patents, copyrights, trademarks, trade secrets and other intellectual property;
- (m) local laws, administrative decisions, ordinances, rules or regulations, including any zoning, planning, building, occupancy or other similar approval or permit or any other ordinance or regulation of any county, municipality, township or other political subdivision of the State of Florida;
- (n) criminal and state forfeiture laws and any racketeering laws, rules and regulations;
- (o) other statutes of general application to the extent they provide for criminal prosecution (e.g., mail fraud and wire fraud statutes);
- (p) any laws relating to terrorism or money laundering;
- (q) laws, regulations and policies concerning national and local emergency and possible judicial deference to acts of sovereign states;
- (r) filing or consent requirements under any of the Excluded Laws (such as filings required under Hart-Scott Rodino and Exon-Florio); and
- (s) judicial and administrative decisions to the extent that they deal with any of the foregoing Excluded Laws.

The Committees believe that under Florida customary practice the definition of Excluded Laws relating to terrorism and money laundering (see (p) above) includes Executive Order No. 13224, 66 Fed. Reg. 49079 (published September 25, 2001) (the “Terrorism Executive Order”) or any related enabling legislation or any other similar executive order (collectively with the Terrorism Executive Order, the “Executive Orders”), the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001, Pub. L. No. 107-56, as amended from time to time (the “Patriot Act”), any sanctions and regulations promulgated under authority granted by the Trading with the Enemy Act, 50 U.S.C. App. 1-44, as amended from time to time, the International Emergency Economic Powers Act, 50 U.S.C. §§ 1701-06, as amended from time to time, the Iraqi Sanctions Act, Publ. L. No. 101-513; United Nations Participation Act, 22 U.S.C. §287c, as amended from time to time, the International Security and Development Cooperation Act, 22 U.S.C. § 2349 aa-9, as amended from time to time, The Cuban Democracy Act, 22 U.S.C. §§ 6001-10, as amended from time to time, The Cuban Liberty and Democratic Solidarity Act, 18 U.S.C. §§ 2332d and 2339b, as amended from time to time, and The Foreign Narcotics Kingpin Designation Act, Publ. L. No. 106-120, as amended from time to time.

Under Florida customary practice, usury, choice of law and non-competition agreements are covered within the scope of an opinion of Florida counsel unless expressly excluded from the scope of the opinion in the opinion letter. Further, other laws, rules and regulations that Florida lawyers would reasonably be expected to recognize as affecting the Client, the Transaction or the Transaction Documents (such as laws or regulations that are applicable because the Client’s business is regulated) but which are not Excluded Laws, will be covered by the opinion unless the opinion letter expressly states that such laws are excluded from the scope of the opinion letter. Examples include, without limitation, the following:

- state or federal laws, rules and regulations relating to land use and subdivisions of land and any laws, rules and regulations governing the marketing or sale of land, lots, condominiums, timeshares or mobile homes;
- the Communications Act and the rules, regulations and policies of the Federal Communications Commission promulgated thereunder and other federal acts and related rules, regulations and policies;

- matters within the jurisdiction of federal agencies, such as the Federal Trade Commission, that may have jurisdiction over any of the activities of the Client;
- aviation laws, rules and regulations, including regulations promulgated by the Federal Aviation Administration; and
- laws, rules and regulations relating to the pharmaceutical industry, including regulations promulgated by the Food and Drug Administration.

With respect to filing requirements, the list of Excluded Laws excludes filings required under any of the Excluded Laws, but not filings otherwise required under any of the Applicable Laws for the Client to execute and deliver the Transaction Documents and close the Transaction (such as the filing of articles of merger and the like).

Although the Excluded Laws are treated as excluded from opinions of Florida counsel under Florida customary practice, Opining Counsel often include a list of excluded laws (including the Excluded Laws) in such Opining Counsel's opinion letter in order to make sure that the Opinion Recipient understands that the scope of the opinions provided in the opinion letter does not cover the impact of the Excluded Laws on the Client, the Transaction or the Transaction Documents. In that regard, the Committees believe that the express inclusion of the entire list of such implicit Excluded Laws in the opinion letter is the preferred alternative, whether through an express incorporation of the list contained in this Report or by including such list in the opinion letter, and each of the illustrative forms of opinion letters that accompany this Report expressly includes a list of excluded laws that includes the Excluded Laws. However, in the view of the Committees, inclusion or exclusion of a list of Excluded Laws from the opinion does not affect (under Florida customary practice) the implicit exclusion of the Excluded Laws enumerated above from the scope of opinions rendered by Florida counsel.

Also, the Committees recognize that some Florida Opining Counsel may choose to include a list of some, but not all, of the implicitly Excluded Laws in their opinion letters. The Committees believe that, in such situations, all of the remaining Excluded Laws that implicitly limit the scope of opinions of Florida counsel under Florida customary practice will nevertheless be implied into the opinion letter as Excluded Laws. Notwithstanding the view of the Committees in that regard, the Committees urge Florida counsel to include the entire list of implicitly Excluded Laws in Florida counsel's opinion letter. The Committees are concerned that a court which is called upon to interpret an opinion rendered by Florida counsel may determine incorrectly not to follow Florida customary practice (as articulated in this Report) and may instead decide that only those Excluded Laws that are expressly set forth in the opinion letter limit the scope of the opinion letter.

Further, Opining Counsel should recognize that problems can arise if Opining Counsel modifies the list of Excluded Laws set forth in the final opinion letter from the list of Excluded Laws in a previous draft of the opinion letter. For example, in the course of negotiating the form of the opinion letter to be delivered at the closing of the Transaction, Opining Counsel may have included an express list of excluded laws in a draft of the opinion letter that is tendered to the Opinion Recipient for review, which list includes a list of those laws implicitly excluded from the scope of opinions of Florida lawyers under Florida customary practice. If, thereafter, Opining Counsel agrees to remove one or more of these Excluded Laws from the opinion letter, a court interpreting the opinion letter may conclude that Opining Counsel no longer has the benefit of implicit inclusion in the opinion letter of such removed Excluded Laws. If that is not intended, then in order to eliminate any doubt Opining Counsel should consider adding language to the opinion letter expressly stating that Opining Counsel is not excluding the removed Excluded Laws from the opinion letter.

It is generally not beneficial to the Opinion Recipient to receive an opinion from Florida counsel that assumes that Florida law will apply to a contract when the contract expressly provides that another jurisdiction's laws will govern it. However, it is permissible for Florida counsel to give an opinion that hypothesizes that Florida substantive law governs the contract (sometimes called an "as if" opinion), notwithstanding the governing law provision in the contract to the contrary.

Further, although it is not recommended (and its use is discouraged), some Florida counsel render an opinion that hypothesizes that Florida law is identical to the law of another jurisdiction (even if that hypothesis is

known or believed by Opining Counsel not to be correct, provided Opining Counsel advises the Opinion Recipient that the hypothesis is not or may not be correct). This opinion is often rendered in the following form:

We note that the [Agreement] provides that it is governed by the substantive law of the State of _____ (the law stipulated by the [Transaction Documents] to be the law governing its interpretation and enforcement). We have assumed, with your permission, that the substantive law of the State of _____ is identical to the substantive law of the State of Florida in all respects material to our opinion.

Rather than using the preceding form of the “as if” opinion, the Committees recommend instead the use of the following form of “as if” opinion:

We note that Section _____ of the [Agreement] provides that the [Agreement], and all issues arising thereunder, shall be governed by the law of the State of _____, without regard to principles of conflicts of laws. We express no opinion herein as to whether the provisions of such Section _____ are enforceable or as to the law that is applicable to the [Agreement] or the [Transaction] contemplated thereby, and we express no opinion regarding the law of the State of _____. Rather, with your permission, our opinions are given based on what would be the case if a court were to refuse to apply the substantive law of the State of _____ that is set forth in the [Agreement] and instead were to apply the substantive law of the State of Florida to the [Agreement] and the [Transaction] contemplated thereby.

See “Choice of Law” for a discussion of the impact of the governing law provision on the remedies opinion. If a “choice of law” opinion is rendered, the “as if” opinion should be modified to clearly state that the issue of the enforceability of the “choice of law” provision contained in the Transaction Document is excluded from the general enforceability opinion, but rather is addressed separately in the opinion letter.

N. Knowledge

Opining Counsel is required to take all of the steps and make all of the legal and factual investigations that are necessary under Florida customary practice to support each of the opinions in the opinion letter. However, factual investigations are often limited by reference to Opining Counsel’s knowledge. In determining whether or not to limit factual investigations to the Opining Counsel’s knowledge, the costs of the wider investigation must be weighed against the benefits that the Opinion Recipient will obtain from an opinion based on a broader investigation. These limitations take many different forms, although typical phrases usually include the following: “to our knowledge,” “to our current actual knowledge,” “to the best of our knowledge,” “known to us,” “we are not aware of,” or “nothing has come to our attention that.” In order to avoid confusion and to promote consistency among opinions, the Committees recommend that Opining Counsel include the following standard formulation of the knowledge qualification in its opinion letters:

The phrases “to our knowledge,” “known to us,” or the like mean the conscious awareness of the lawyers in the “primary lawyer group” of factual matters such lawyers recognize as being relevant to the opinion or confirmation so qualified. Such phrases do not imply that we have undertaken any independent investigation within the firm, with the Client or with any third party to determine the existence or absence of any facts or circumstances, and no inference should be drawn merely from our past or current representation of the Client. Where any opinion or confirmation contained herein is qualified by the phrase “to our knowledge,” “known to us,” or the like, it means that the lawyers in the “primary lawyer group” are without any actual knowledge or conscious awareness that the opinion or confirmation is untrue in any respect material to the opinion or confirmation. For purposes of this opinion letter, “primary lawyer group” means: (i) the lawyer who signs his or her name or the name of the firm to the opinion letter, (ii) the lawyers currently in the firm who are actively involved in preparing or negotiating the opinion letter, and (iii) the lawyers currently in the firm who are actively involved in negotiating or documenting the Transaction or the Transaction Documents.

This standard formulation of the knowledge qualifier adopts the concepts of “conscious awareness” and “primary lawyer group” as the basis for the qualification. By limiting the scope of the knowledge qualification to the “primary lawyer group,” no additional inquiry should be required beyond the members of that group unless Opining Counsel is requested, and undertakes, to conduct an inquiry of other lawyers in Opining Counsel’s firm. By incorporating the knowledge qualification into the opinion, it will not be necessary for Opining Counsel to undertake an investigation of all other lawyers in the firm or to review all of the firm’s files, nor will it be necessary for Opining Counsel to undertake an investigation with the Client or with any third parties (e.g., searches of governmental databases). The opinion is limited to matters that are within the conscious awareness of the person or persons who fall within the definition of the “primary lawyer group.” This Report recognizes, and the “conscious awareness” concept contemplates, that what is “known” at one time may not be in the mind or may be forgotten altogether at another time.

In some cases, the Opinion Recipient may request that the Opining Counsel expand the “primary lawyer group” to include additional attorneys or classes of attorneys within the group. Such a request might, for example, include attorneys currently at the firm who are handling litigation or administrative actions for the Client, particularly where a no litigation factual confirmation is to be included in the opinion letter. Such a request must be reasonable under the circumstances, and any such expansion of the “primary lawyer group” should be expressly set forth in the opinion letter.

Also, as a matter of prudent practice, in all situations (whether or not the “primary lawyer group” has been expanded as described above), Opining Counsel should consider inquiring with the attorneys within Opining Counsel’s firm who serve as the principal relationship managers for the Client or are handling significant matters (such as a litigation matter) for the Client (regardless of whether or not such attorneys otherwise fall within the purview of the “primary lawyer group”), in order to avoid any claims in the future regarding the diligence undertaken rendering the subject opinion. This is particularly so if Opining Counsel is rendering a no litigation factual confirmation in a situation where the firm is handling one or more litigation matters for the Client. It may also be prudent in certain circumstances to list in the opinion letter the identity of the members of the “primary lawyer group” so there is no ambiguity as to who was involved in the rendering of the opinion. Further, even if the opinion is signed in the name of the firm, it does not modify the “primary lawyer group.” Finally, Opining Counsel should recognize that the “primary lawyer group” may have more or less knowledge about issues that relate to the opinion depending on the role of Opining Counsel in connection with the Client or the Transaction. For example, if Opining Counsel is actively assisting the Client in the preparation of disclosure schedules to one or more of the Transaction Documents, or has actively represented the Client over an extended time period, it is likely that Opining Counsel will know more than in a situation where Opining Counsel’s role with the Client or the Transaction is more limited. Opining Counsel would be prudent to consider what it knows based on the particularities of the situation.

The Committees believe that under Florida customary practice, the use of the phrases “to our knowledge,” “known to us” or the like should be interpreted as having the meaning set forth above regardless of whether or not Opining Counsel includes the recommended standard formulation in the body of the opinion letter. Notwithstanding the foregoing, it is recommended that Opining Counsel include the standard formulation of the meaning of these phrases within the body of the opinion letter in order to avoid having these phrases interpreted as having a broader meaning. Each of the illustrative forms of opinion letters that accompany this Report includes such a formulation.

The phrases “to our knowledge” or “known to us” are recommended over the other common phrases described above in order to avoid confusion and promote consistency. However, regardless of the terminology used by Opining Counsel, all these phrases are to be construed to have the same meaning under Florida customary practice.

The phrase “independent investigation” should be construed to have the same meaning as “investigation.” When Opining Counsel qualifies an opinion or statement with the phrase “without investigation,” or “without

inquiry,” such qualification means that Opining Counsel has not undertaken any investigation with the Client or with any third party with respect to the matter so qualified; however, the use of the phrase “without investigation” or “without inquiry” does not relieve Opining Counsel of the duty to inquire of the “primary lawyer group” described above as to what they know.

The recommended phrases; “to our knowledge” and “known to us” have been interpreted by one court as an affirmative representation that Opining Counsel has knowledge of the matters recited (as opposed to these words being a limitation on the scope of the opinion). See, Nat’l Bank of Canada v. Hale & Dorr, LLP, 17 Mass.L.Rptr. 681, 2004 WL 1049072 (Mass. Super. 2004). This Report rejects this interpretation, as the Committees believe that this language is understood under customary practice in Florida to limit the opinion to matters of which the Opining Counsel has “knowledge.”

O. Opinions of Florida Counsel Are To Be Interpreted Under Florida Customary Practice

The Customary Practice Statement provides that bar reports (such as this Report) are valuable sources of guidance on customary third-party legal opinion practices, and the Committees believe that this Report reflects third-party legal opinion customary practice in Florida. Accordingly, the Committees believe that all opinion letters of Florida counsel with respect to matters under Florida law should be interpreted under Florida customary practice (as articulated in this Report), regardless of whether or not this Report is expressly incorporated by reference into the opinion letter itself and regardless of where the Opinion Recipient is located. Further, the Committees believe that the implicit assumptions, limitations, qualifications and exceptions that are described in this Report are implicitly included in all opinions of Florida counsel under Florida customary practice and need not be expressly set forth in an opinion letter of Florida counsel.

The Customary Practice Statement also provides that customary practice applies to opinion letters whether or not such opinion letters expressly refer to the application of customary practice. The Prior Florida Reports, as was typical of normative opinion standards, contemplated the express incorporation of the Prior Florida Reports into all opinion letters. See “Background of the Report-History of The Florida Bar’s Efforts to Create Opinion Standards for Use by Florida Counsel.” Although this Report recommends the express incorporation of this Report into opinion letters of Florida counsel, the Committees believe that express incorporation is not required for Florida customary practice (as articulated in this Report) to apply to the interpretation of all opinions of Florida counsel as to matters of Florida law.

P. Express Incorporation of the Report into Opinion Letters

Notwithstanding the Committees belief expressed in this Report that Florida customary practice (as articulated in this Report) applies to all opinion letters of Florida counsel whether or not this Report is expressly referred to in the opinion letter, the Committees recommend that Florida counsel consider expressly incorporating this Report into their opinion letters. The express incorporation by reference of this Report into a legal opinion letter has three key benefits: (i) it allows Opining Counsel to expressly incorporate lists of assumptions, limitations, qualifications and exceptions into the opinion letter, thus shortening the opinion letter; (ii) it greatly reduces confusion and/or later disagreements by both Opining Counsel and the Opinion Recipient as to the application and effect of Florida customary practice (as articulated in this Report) with respect to the opinion letter; and (iii) it should lessen the concern that a court which is called upon to interpret the opinion letter may determine, despite the view of the Committees regarding this issue, not to follow Florida customary practice (as articulated in this Report), particularly where the court is located outside of Florida.

If Opining Counsel includes an express incorporation of this Report in a draft of an opinion letter that is tendered to the Opinion Recipient for review, then Opining Counsel must recognize that if, in the course of negotiating the final form of the opinion letter to be delivered in the Transaction, Opining Counsel agrees to remove the express incorporation language and is silent as to whether another customary practice standard shall apply to its interpretation, Opining Counsel may be faced with an argument that Opining Counsel implicitly agreed to waive the applicability of Florida customary practice to the opinion letter. The Committees believe that

any such implication is inappropriate under these circumstances and that the concept of express incorporation by reference of this Report into an opinion letter is, in this context, simply an expression in the opinion letter of what the Committees believe should always be the applicable standard under which an opinion letter of Florida counsel should be interpreted. As a result, the Committees urge courts that are called upon to interpret opinions of Florida counsel as to matters of Florida law to follow Florida customary practice (as articulated in this Report) in interpreting the opinion letter of a Florida Opining Counsel even under these circumstances.

The Committees believe that their view regarding this issue is supported by the following statement in the Customary Practice Statement:

Some closing opinions refer to the application of customary practice. Others do not. Either way, customary practice applies.

If the Report is to be expressly incorporated into an opinion letter, the following language is recommended:

This opinion letter has been prepared and is to be construed in accordance with the “Report on Third-Party Legal Opinion Customary Practice in Florida, dated December 3, 2011” (the “Report”). The Report is incorporated by reference into this opinion letter

Further, whether or not this Report is expressly incorporated into an opinion letter, Florida counsel may wish to provide a copy of this Report to Opinion Recipients represented by non-Florida counsel (such as by e-mailing the link where this Report is posted) to avoid any confusion on the part of the Opinion Recipient regarding customary third-party legal opinion practices in Florida.

Q. Signatures

If Opining Counsel practices as a solo practitioner, Opining Counsel should sign an opinion letter in Opining Counsel’s own name. If Opining Counsel practices through a professional association or signs an opinion letter on behalf of a firm (including a firm that is a professional association), any one of the following is acceptable: “Name of attorney/On behalf of Firm,” “Firm/By name of attorney,” “Firm/Name of Attorney,” “Firm/Name of attorney, a Partner or Officer, as appropriate,” or the signed name of the firm only (provided the firm maintains an internal mechanism to identify the attorney(s) rendering the opinion letter). For multi-state firms with offices in Florida, the attorney who approves an opinion regarding matters of Florida law should be a member of The Florida Bar (regardless of who signs the opinion letter on behalf of the firm). Opinion letters given by inside counsel may be signed in the individual’s name or in counsel’s official capacity. In either case, inside counsel may be held liable for counsel’s own negligence, and the corporation generally will be liable for the authorized act of its agent. See “Introductory Matters – What is Customary Practice and Why it is Important” and “Introductory Matters – Ethical and Professional Issues” above for a discussion of Opining Counsel’s liability for opinions and the standard of care applicable to Florida attorneys who render third-party legal opinions.

R. Opinion

The operative opinions in an opinion letter are customarily presented as separately enumerated paragraphs, with a “lead-in” indicating that they are the opinions of Opining Counsel. The “lead-in” customarily refers to the qualifications and limitations contained in the opinion letter, both before and after the operative opinions. The following is a recommended form of “lead-in” to the opinions:

Based upon and subject to the foregoing, and subject to the assumptions, limitations and qualifications contained herein, I/we am/are of the opinion that:

Some Opining Counsel provide in their opinion letter that their opinions are based expressly on their review of listed Transaction Documents and other documents that are expressly referenced in the opinion letter as having been

reviewed. The scope of such alternative language expressly limits the Transaction Documents that are considered to be within the scope of and covered by the opinion letter. However, such language, by itself, does not limit the scope of the diligence recommended to give any of the particular opinions contained in the opinion letter, since Opining Counsel is required (whichever language is used) to perform the diligence that is required to give each of the particular opinions set forth in the opinion letter (but only with respect to the Transaction Documents enumerated in the opinion letter).

For example, if Opining Counsel renders an opinion regarding perfection of a security interest by filing but does not include the financing statement on the list of documents reviewed, the failure to include the financing statement on the list of documents reviewed does not limit the scope of the diligence recommended to be performed by Opining Counsel to issue such opinion. This is because under Florida customary practice, the recommended diligence for such opinion includes review of the financing statement in order to determine if it is in an acceptable form for filing with the Florida Secured Transaction Registry (or other appropriate filing office). In this example, if Opining Counsel does not want the form of the financing statement to be part of the diligence with respect to this opinion, then Opining Counsel should expressly state in the opinion letter that Opining Counsel has not reviewed the financing statement and is assuming that the financing statement is in proper form for filing. This is because exceptions to Florida customary practice (such as limitations on the scope of diligence that would be less than that contemplated under Florida customary practice) to give a particular opinion need to be explicitly set forth in the opinion letter for such exceptions to effectively limit the scope of an opinion of Florida counsel.

ENTITY STATUS AND ORGANIZATION OF A FLORIDA ENTITY

In an opinion letter for a typical Transaction, Opining Counsel will often be asked to opine with respect to the Client's organization and existence as a business entity under the laws of the jurisdiction where the Client is organized. This section of the Report discusses opinions regarding organization and entity status with respect to Florida for-profit and not-for-profit corporations, Florida limited partnerships, Florida general partnerships, Florida limited liability companies and Florida trusts.

A. Organizational Documents

In rendering many of the opinions discussed in this Report, it will be necessary to review the Client's "Organizational Documents." When reference is made in this Report to the Client's "**Organizational Documents**" it means:

- (i) if the Client entity is a Florida corporation, the articles of incorporation that have been filed with the Florida Department of State (the "**Department**") and the bylaws;
- (ii) if the Client entity is a Florida limited partnership or a Florida limited liability limited partnership, the certificate of limited partnership that has been filed with the Department and the written limited partnership agreement;
- (iii) if the Client entity is a Florida general partnership, the written partnership agreement and, if filed with the Department, the partnership registration statement;
- (iv) if the Client entity is a Florida limited liability partnership, the partnership registration statement, as filed with the Department, the statement of qualification, as filed with the Department, and the written partnership agreement;
- (v) if the Client entity is a Florida limited liability company, the articles of organization, as filed with the Department, and the written operating agreement, and
- (vi) if the Client entity is a trust, the written trust agreement.

In conducting diligence with respect to a Client's Organizational Documents, it is the better practice to obtain such documents as are available from the Department directly from the Department (preferably as certified documents). Organizational Documents with respect to the Client that are not available from the Department should be obtained from the Client. Generally, Opining Counsel should obtain a certificate from the Client attaching copies of the Organizational Documents and certifying to Opining Counsel that the Organizational Documents attached to the certificate are true and correct copies of such documents as amended to date and that such documents have not been further modified, amended or rescinded. Although not required, it is generally preferable that such Client certificate be certified by an officer, partner, manager or member of the Client who is not the officer, partner, manager or member executing the Transaction Documents on behalf of the Client. The illustrative form of certificate to counsel that accompanies this Report includes statements regarding each of these matters.

B. Corporation

Recommended opinion:

The Client is a [corporation] organized under Florida law, and its [corporate] status is active.

1. *The Basic Meaning of the Opinion.* The opinion that "The Client is a corporation organized under Florida law," and "its corporate status" (or "its status") is active or, the equivalent opinion: "The Client is a corporation *duly organized, validly existing* and in *good standing* under the laws of the State of Florida" means that, as of the date of the opinion: (i) articles of incorporation for the corporation have

been filed with the Department, (ii) the corporation has not been dissolved, (iii) the corporation's articles of incorporation have not been revoked or suspended, (iv) the corporation has not been a party to a merger in which the corporation was not the surviving corporation, (v) the corporation has not been converted into a different form of entity, (vi) in the case of a corporation whose term of duration is limited, the term of the corporation has not expired, (vii) the requisite organizational actions (as described in (2) below) have been taken with respect to the corporation, and (viii) the corporation has active status.

2. *Organized.* An opinion that the corporation is "organized" is usually part of the corporate status opinion. Sometimes the word "duly" is added before "organized." However, adding the word "duly" to the opinion does not change the meaning of this opinion or change the diligence recommended in order to render this opinion.

"Organization" is discussed in Section 607.0205 of the Florida Business Corporation Act ("FBCA"). Organization under the FBCA requires the adoption of bylaws and the election of directors and officers. Under the Prior Florida Reports (and under the historical reports of most other state and local bar associations), an opinion regarding the "organization" of a corporation required Opining Counsel to confirm that the corporation was properly organized under the laws in effect at the time of its incorporation. However, the Committees believe that such interpretation has become anachronistic and that, except as set forth below, Florida customary practice no longer requires an Opining Counsel to determine if the proper steps were taken at the time the corporation was formed under the applicable law in effect at the time of such formation. Rather, the Committees believe that today's Florida customary practice uses the term "organization" to address whether the corporation is organized as of the date of the opinion letter. Thus, whether or not the necessary steps to "organization" were completed at the time of the formation of the corporation, Opining Counsel can render the "organization" opinion if Opining Counsel confirms that, at the time of the delivery of the opinion letter, the corporation has adopted bylaws and elected or appointed directors and officers (which are the requirements for proper organization under the FBCA).

Notwithstanding the foregoing, the current status of a corporation's "organization" cannot be relied upon if Opining Counsel knows that the failure of the corporation to have been properly organized at an earlier time will reasonably likely cause adverse consequences to the corporation (or if Opining Counsel is aware of facts (red flags) that ought to cause a reasonable Opining Counsel to conclude that the corporation's failure to have been properly organized at an earlier time will reasonably likely cause adverse consequences to the corporation). In such circumstances, Opining Counsel must consider whether the corporation was "organized" at the earlier time.

Under Section 607.0732 of the FBCA, a corporation with 100 or fewer shareholders can entirely dispense with the requirements of a board of directors in a written agreement adopted by all of the corporation's shareholders. In such a case, it will be the actions of the shareholders rather than the actions of the directors that will govern. If an agreement under Section 607.0732 of the FBCA is in place and such agreement dispenses with requirements for a board of directors, "organization" will instead require the adoption of bylaws, having an agreement in place that conforms with the requirements of Section 607.0732 of the FBCA and the election or appointment of officers.

3. *Incorporated and Existing.* In some cases, Opining Counsel will opine that a corporation is "incorporated" or is "existing" under Florida law. Under Florida customary practice, this opinion can be based solely on the provisions of Section 607.0203 of the FBCA and a certificate from the Department that the corporation's articles of incorporation have been filed by the Department. Section 607.0203 of the FBCA states that the Department's acceptance for filing of the articles of incorporation of a corporation is conclusive proof that the incorporator(s) satisfied all conditions precedent to incorporation, (except in a proceeding brought by the State of Florida to cancel or revoke the incorporation). An opinion that a Florida corporation is "organized" also includes an opinion that the corporation is "incorporated" and is "existing," although the reverse is not true.

Although Section 607.0128(2)(b)(1) of the FBCA uses the phrase “duly incorporated” and some opinions state that the corporation is “duly incorporated” or “validly existing,” the terms “duly” and “validly” are not used in any of the forms of opinion recommended by this Report because, in the view of the Committees, such words do not change the meaning of the opinion or change the diligence recommended in order to give the opinion.

4. De Jure Corporation. Some commentators suggest that using the term “validly existing” may indicate that the corporation is a “*de jure*” as opposed to “*de facto*” corporation. However, because an opinion that a corporation is “organized” and an opinion that a corporation is “incorporated” and/or is “existing” are all supported, in whole or in part, by a certificate from the Department as to the presumed proper filing of the articles of incorporation, the corporation will necessarily be a “*de jure*” corporation.
5. Certificate of Status. Section 607.0128 of the FBCA provides for the Department to issue a “certificate of status” for a corporation that states, among other things, that: (i) the corporation is duly incorporated, (ii) all fees and penalties owed by the corporation to the Department have been paid, (iii) the corporation’s most recently required annual report has been delivered to the Department for filing, and (iv) articles of dissolution of the corporation have not been filed. To ensure that dissolution proceedings have not been commenced, Opining Counsel should obtain a certificate of an officer of the corporation confirming that no steps leading to the corporation’s dissolution have been taken. Alternatively, Opining Counsel may review the records of the corporation to confirm that there are no records indicating that steps leading to the corporation’s dissolution have been taken. If Opining Counsel is aware that resolutions approving the dissolution of the corporation have been adopted, but articles of dissolution have not been filed, counsel may give an active status opinion, but should disclose the adoption of the resolutions in the opinion letter and consider the effect of the adoption of resolutions regarding the dissolution of the corporation on the other opinions being rendered with respect to the Transaction.
6. Active Status vs. Good Standing. The recommended opinion uses the phrase “its corporate status is active” or “its status is active” because the words “active status” are used by the Department in its certificate of status. However, Opining Counsel in Florida are often asked to render (particularly in transactions in which the counsel for the Opinion Recipient is an out-of state attorney) an opinion using the words “good standing.” The Committees believe that the use of the phrase “good standing” in an opinion of Florida counsel with respect to a Florida corporation has the same meaning under Florida customary practice as the phrase “its corporate status is active” or “its status is active.”
7. General Exclusions from Active Status Opinion. An opinion that a corporation’s “status is active” or that its “corporate status is active” merely indicates that the corporation exists and has not been dissolved as of the date of the certificate of status issued by the Department. Because it would be impossible or extremely difficult for Opining Counsel to establish that there are no grounds existing under the statute for involuntary dissolution of the corporation, the active status opinion under Florida customary practice does not mean or imply that there are no grounds existing under the statute for involuntary dissolution (either judicial or administrative) of the corporation. For example, if the corporation’s annual report to the Department has not yet been filed, and is not filed by its due date, the corporation may be subject to administrative dissolution at a later date.
8. Circumstances Affecting the Certificate of Status. As noted above, Opining Counsel may opine that the corporation exists as of the date of the opinion letter in reliance on a certificate of status from the Department, even if circumstances exist that could result in the involuntary dissolution of the corporation with the passage of time. Opining Counsel is not obligated to conduct any investigation regarding this issue. However, if Opining Counsel is aware that circumstances for dissolution exist, Opining Counsel should advise the Client to take the necessary actions to cure those circumstances promptly, since dissolution of the Client will generally constitute a violation of the Transaction Documents. For example, the Department may administratively dissolve a corporation under Section 607.1420(1)(a) of the FBCA if the corporation does not pay any required fee or penalty or file

its required annual report. This same provision permits administrative dissolution by the Department under Section 607.1420(1)(b) of the FBCA if the corporation fails to maintain a registered agent. Opining Counsel should be aware that a resignation by a registered agent becomes effective 31 days after the registered agent files a statement of resignation with the Department. In that regard, a certificate of status issued by the Department under Section 607.0128 of the FBCA is not required to include information regarding the resignation of the corporation's registered agent.

9. Officer's Certificate. In rendering an opinion as to "organization" of a Florida corporation, Opining Counsel may rely upon an officer's certificate whereby an officer of the Corporation certifies that: (i) bylaws have been adopted by the corporation (attaching a copy of the bylaws), (ii) the Transaction has been approved by the corporation's board of directors (and shareholders, if applicable), attaching copies of the resolutions approving the Transaction, and (iii) naming the officers of the corporation who are authorized to execute and deliver the Transaction Documents on behalf of the corporation.

Unless Opining Counsel has knowledge to the contrary (or is aware of facts (red flags) that ought to cause a reasonable Opining Counsel to conclude that such facts are unreliable), Opining Counsel may rely, under the "presumption of continuity and regularity" described in "Introductory Matters – Presumptions of Continuity and Regularity," as to the proper approval of the bylaws by the Board (or the shareholders, if applicable), the proper election of the board of directors by the corporation's shareholders and the proper appointment of the officers by the corporation's board of directors.

The Committees note that the "entity status and organization" opinion is generally not given in a vacuum. Rather, it is generally given with other opinions regarding entity power and authorization of the transaction by the Client entity. As a result, the officer's certificate generally covers more matters than entity status alone. Thus, while not all of the items covered in the officers certificate described above may technically be required to render the entity status opinion, they may be needed to render these other opinions.

10. No Need to Review Share Issuances. It is not necessary for Opining Counsel to confirm that the corporation has issued shares of its stock in order to deliver the "organization" opinion. However, if the Transaction contemplates the issuance of securities by the corporation, Opining Counsel, in rendering opinions regarding the issuance of such securities, will need to consider the matters set forth in "Opinions with Respect to Securities."
11. Foreign Entity. If Opining Counsel determines that Opining Counsel is competent to deliver an opinion regarding the entity organization, existence and status of a foreign corporation and agrees to render such opinion, then with respect to the subject opinion such Opining Counsel will likely be held to the standard of care of a competent lawyer in the jurisdiction of incorporation of the entity that is the subject of the opinion. See "Common Elements of Opinions – Opining Under Florida or Federal Law; Opining Under the Laws of Another Jurisdiction." The diligence involved in rendering an entity organization, existence and status opinion with respect to a corporation organized under the laws of another jurisdiction, and the form of such opinion, are beyond the scope of this Report.

Diligence Checklist – Corporation

In order to render an organization and entity status opinion with respect to a Florida corporation, Opining Counsel should take the following actions:

- Obtain a copy of the corporation's articles of incorporation (preferably a certified copy obtained from the Department) and review the articles of incorporation to ensure that they substantially comply with the requirements of Section 607.0202 of the FBCA.
- Confirm by obtaining a certificate from the Client that at least one director of the corporation has been elected (except in circumstances where the corporation is managed directly by its shareholders pursuant to an agreement that complies with Section 607.0732 of the FBCA and dispenses with the board of directors), that one or more officers have been appointed and that the corporation has adopted bylaws.

- Obtain an “active status” certificate with respect to the corporation from the Department. If the certificate of status indicates that the Client has not yet filed its annual report or paid its annual fee for the current year, the recommended (but not mandatory) practice is to require the Client to make satisfactory arrangements for filing the report and paying the fee before Opining Counsel renders an “active status” opinion regarding the corporation.
- Confirm that no steps leading to the corporation’s dissolution have been taken. The recommended practice is to obtain a certificate to this effect from the Client, and the illustrative form of certificate to counsel that accompanies this Report includes such a statement.

C. Limited Partnership

Recommended opinion:

The Client is a [limited partnership/limited liability limited partnership] organized under Florida law, and its [limited partnership/limited liability limited partnership] status is active.

1. *The Basic Meaning of the Opinion.* The opinion that “*the Client is a limited partnership organized under Florida law, and its limited partnership status is active*” (or “*its status is active*”) or “*the Client is a limited liability limited partnership organized under Florida law, and its limited liability limited partnership status is active*” means that, as of the date of the opinion: (i) the partnership has complied in all material respects with the requirements for the formation of a limited partnership (or a limited liability limited partnership, as appropriate) under applicable law, (ii) government officials have taken all steps required by law to form the limited partnership (or a limited liability limited partnership, as appropriate), (iii) the partnership’s existence began prior to the effective date and time of the opinion letter, (iv) the partnership is organized and is currently in existence, (v) the partnership has not been converted into a different form of entity, and (vi) the partnership has active status. Under Section 620.1201 of the Florida Revised Uniform Limited Partnership Act of 2005 (“**FRULPA**”), a Florida limited partnership is formed at the time a certificate of limited partnership is filed with the Department (or at any later time specified in the certificate of limited partnership) if there has been “substantial compliance” with the requirements of that section.
2. *Organized.* An opinion that a limited partnership or a limited liability limited partnership is properly “organized” is usually part of the partnership status opinion. Sometimes the word “duly” is inserted before “organized.” However, it does not change the meaning of this opinion or the diligence recommended in order to render this opinion.

The “organized” opinion means that Opining Counsel has verified that the Client has filed a certificate of limited partnership as required by Section 620.1201 of FRULPA and has a written and executed limited partnership agreement. Although FRULPA does not require that a limited partnership have a written limited partnership agreement, having such an agreement is such a rudimentary organizational step that in the Committees’ view, Opining Counsel should not opine that a Client limited partnership is “organized” if such partnership does not have a written limited partnership agreement.

Further, in connection with the Transaction, there may be a need to file an amendment to the certificate of limited partnership under Section 620.1202 of FRULPA to reflect the admission or dissociation of a general partner. Although the filing of such amendment is not required to render the “organized” opinion with respect to the partnership, Opining Counsel should consider what amendments are needed to the certificate of limited partnership to reflect the correct state of affairs in connection with the Transaction (and such filing may be necessary to give other requested opinions regarding the Transaction).

3. *Substantial Compliance with Formation Requirements.* The “substantial compliance” provision in Section 620.1201(3) of FRULPA might suggest that a “*de facto*” limited partnership could exist, notwithstanding defects in the certificate of limited partnership. There are, in fact, Florida cases recognizing the existence of “*de facto*” limited partnerships under a previous version of the Florida

limited partnership statute, but in 1986 the Florida Legislature repealed the statutory provisions under which those cases were decided. The Opinion Recipient will expect to do business with a “*de jure*” partnership, rather than a “*de facto*” partnership, and the opinion set forth above regarding limited partnership status should not be given if Opining Counsel concludes that the partnership is merely a “*de facto*” limited partnership and not a “*de jure*” limited partnership.

4. Existence. An opinion that a limited partnership exists under the laws of the State of Florida means only that one or more general partners and one or more limited partners have made an agreement to carry on a business as co-owners for profit, that a certificate of limited partnership has been filed with the Department and that no circumstance exists that would require the dissolution of the partnership and the winding up of the partnership’s business. Although Florida law does not require that a limited partnership have a written limited partnership agreement (partnership agreements can be oral under Florida law), as a practical matter lenders and others doing business with a Florida limited partnership will typically be reluctant to lend money or enter into a Transaction with a business entity that is organized with no more than a handshake, and Opining Counsel should be equally reluctant to opine about the legal existence of a Florida limited partnership if such partnership has no written partnership agreement. If a limited partnership is engaged in a Transaction large enough or important enough to require a third-party legal opinion, then its business affairs are sufficiently complex to warrant a written limited partnership agreement, and, in the view of the Committees, Opining Counsel should not render an opinion that a limited partnership exists if there is no written partnership agreement.
5. Certificate of Status. The Department’s standard form of certificate of status issued under Section 620.1209(1) of FRULPA states that the limited partnership “has paid all fees due this office through December 31, 20__ , and its status is active.” This statement that its status is “active” means that the limited partnership exists (as conclusively established by Section 620.1209(3) of FRULPA) and that it has not been dissolved as of the date of the certificate of status. Section 620.1209(3) of FRULPA provides that, “[s]ubject to any qualifications stated in the certificate, a certificate of status issued by the Department may be relied upon as conclusive evidence that the limited partnership . . . is in existence.” Because it would be impossible or extremely difficult for Opining Counsel to establish that there are no grounds existing under the statute for involuntary dissolution of the limited partnership, the active status opinion under Florida customary practice does not mean or imply that there are no grounds existing under the statute for involuntary dissolution (either judicial or administrative) of the partnership.
6. Active Status vs. Good Standing. The recommended opinion uses the phrase “its limited partnership status is active” or “its status is active” because the words “active status” are used in the certificate of status issued by the Department. However, Opining Counsel in Florida are often asked to render (particularly in transactions in which the Opinion Recipient’s counsel is an out-of-state attorney) an opinion that the limited partnership is in “good standing.” Under customary practice in Florida, the use of the phrase “good standing” in an opinion as to the active status of a limited partnership has the same meaning as the phrase “its limited partnership status is active” or “its status is active.”
7. Circumstances Affecting Active Status. As noted above, Opining Counsel may opine that a limited partnership is in existence as of the date of the opinion letter in reliance on a certificate of status from the Department, even if circumstances exist that could result in the involuntary dissolution of the limited partnership with the passage of time. Opining Counsel is not obligated to conduct any investigation regarding this issue. However, if Opining Counsel is aware that such circumstances for dissolution exist, Opining Counsel should advise the Client to take the necessary actions to cure those circumstances promptly, since dissolution of the Client will generally constitute a violation of the Transaction Documents. For example, the Department may administratively dissolve a limited partnership under Section 620.1809 of FRULPA if the limited partnership does not, within 60 days after the due date, pay any required fee or penalty or file its required annual report. This same provision permits administrative dissolution by the Department if the limited partnership fails to maintain a registered agent. In that regard, under Section 620.1116 of FRULPA, the resignation of a registered agent becomes effective 31 days after

the registered agent files a statement of resignation with the Department, and a certificate of status issued by the Department under Section 620.1209 of FRULPA is not required to include information regarding the resignation of the limited partnership's registered agent.

8. *Involuntary Dissolution – Failure to Maintain General Partner and Limited Partner.* A limited partnership may be involuntarily dissolved by other circumstances, such as failing to maintain at least one general partner and one limited partner as provided in FRULPA. Under previous versions of the Florida limited partnership statute, the death, dissolution, bankruptcy or withdrawal of the last general partner was an event that dissolved the limited partnership unless all of the partners agreed within 90 days to continue the activities of the partnership and to appoint one or more additional general partners. This 90-day grace period provision is continued in Section 620.1801(1)(c) of FRULPA with respect to the dissociation of the last general partner, accompanied by a parallel provision in Section 620.1801(1)(d) of FRULPA for admitting a new limited partner within 90 days after the dissociation of the last limited partner. Failure to admit a replacement partner within the 90-day period results in dissolution and mandatory winding up of the limited partnership, and the partnership must file a certificate of dissolution with the Department. Within the 90-day grace period after the dissociation of the last general partner or the last limited partner, Opining Counsel may technically opine that the limited partnership exists even if a replacement partner has not yet been admitted. However, if Opining Counsel knows (or ought to reasonably know based on the facts (red flags) in such counsel's possession) that such dissociation has occurred, then the Client should be advised to take the necessary curative actions (since the resulting dissolution will often constitute a violation of the provisions of the Transaction Documents). As a practical matter, if a limited partnership has no general partner, it will likely be impossible for Opining Counsel to opine that anyone is authorized to execute and deliver the Transaction Documents on behalf of the limited partnership, so the lack of a general partner will have to be cured in order to complete the Transaction.
9. *LLP Certificate.* A Florida limited partnership may also qualify as a limited liability limited partnership (“**LLP**”) by including a statement to that effect in its certificate of limited partnership, as provided in Section 620.1201(1)(d) of FRULPA. Subsection 620.1404(3) of FRULPA provides that an obligation of a limited partnership incurred while it is an LLP is solely the obligation of the limited partnership, and a general partner is not personally liable for such an obligation solely by reason of being or acting as a general partner. If an opinion is rendered that the Client is a limited liability limited partnership, then an applicable statement must have been filed with the Department as required by such Florida Statute. An amendment to the certificate adding or deleting a statement that the limited partnership is an LLP requires the approval of all of the general partners (Section 620.1406(1)(a) of FRULPA) and must be signed by all of the general partners listed in the certificate of limited partnership (Section 620.1204(1)(b) of FRULPA). Under Section 620.1202(5) of FRULPA, an amendment to the certificate of limited partnership for this or other purposes is effective when filed with the Department, unless a later effective date is specified in accordance with Section 620.1206(3) of FRULPA. The name requirements for a limited liability limited partnership are set forth in Section 620.1108(3) of FRULPA (the name must contain the phrase “limited liability limited partnership” or the abbreviation L.L.L.P. or the designation LLP).
10. *General Exclusions from Opinion.* Unless otherwise expressly stated in the opinion letter, an opinion that a Florida limited partnership (or LLP) is “organized under Florida law and its status is active” does not mean that: (i) the partnership has established any tax, accounting or other records required to commence operating its business, (ii) the partnership maintains at its registered office any of the information required to be maintained under Section 620.1111 of FRULPA, (iii) the limited partner(s) (or general partner(s), in the case of an LLP) of the partnership will not have personal liability, or (iv) the partnership will be treated as a limited partnership for tax purposes.
11. *Foreign Entity.* If Opining Counsel determines that Opining Counsel is competent to deliver an opinion regarding the entity organization, existence and status of a limited partnership or a LLP organized under the laws of another jurisdiction, and agrees to render such opinion, then with respect to the subject opinion such Opining Counsel will likely be held to the standard of care of a competent lawyer

in the jurisdiction of incorporation of the entity that is the subject of the opinion. See “Common Elements of Opinions – Opinions Under Florida or Federal Law; Opinions Under the Laws of Another Jurisdiction.” The diligence involved in giving an organization, existence and status opinion with respect to a foreign limited partnership or a foreign limited liability limited partnership under the laws of another jurisdiction, and the form of such opinion, are beyond the scope of this Report.

Diligence Checklist – Limited Partnership.

In order to render an organization and active status opinion with respect to a Florida limited partnership (or a Florida limited liability limited partnership), Opining Counsel should take the following actions:

- Obtain a copy of the Certificate of Limited Partnership (preferably a certified copy obtained from the Department) and review the certificate to ensure that it substantially complies with the requirements of Section 620.1201 of FRULPA.
- Obtain a copy of the written partnership agreement of the limited partnership, certified by a general partner of the partnership as being a true and complete copy, including all amendments. If there is no written partnership agreement, the Committees believe that Opining Counsel should not render an opinion with respect to the limited partnership and should counsel the Client to reduce their partnership agreement to writing.
- Obtain an “active status” certificate with respect to the limited partnership from the Department. If the certificate of status indicates that the Client has not filed its annual report or paid its annual fee for the current year, then the recommended (but not mandatory) practice is to require the Client to make satisfactory arrangements for filing the report and paying the fee before Opining Counsel renders an “active status” opinion regarding the limited partnership.
- For purposes of the “active status” opinion, Opining Counsel should determine whether the partnership agreement creates a partnership for a definite term or for a particular undertaking (and if so, determine that the term has not expired or the undertaking has not been completed), and whether it contains an agreement to wind up the partnership business upon the occurrence of a specific event (and if so, determine whether or not the specific event has occurred). In most cases, such confirmations will best be obtained in a written certificate from a general partner of the partnership;
- Obtain a certificate from one of the partnership’s general partners establishing that the limited partnership has at least one general partner and at least one limited partner, that no circumstances exist that would trigger dissolution under the partnership agreement or FRULPA, and that no judicial or administrative proceedings have been commenced for the dissolution of the limited partnership. If the partnership’s last general partner or last limited partner has dissociated from the limited partnership, then the “existence” and “good standing” opinions regarding the partnership may be rendered within the statutory 90-day grace period for admission of a replacement partner, however, Opining Counsel should counsel the Client to make satisfactory arrangements for the admission of a replacement partner or partners.
- If any general partner in the limited partnership is a legal or commercial entity rather than an individual, then Opining Counsel must determine that the entity serving as the general partner has registered with the Department as required by Section 620.1201(1)(c) of FRULPA, either as an entity formed under Florida law or as a foreign entity qualified to transact business in Florida, and currently maintains an active registration status as such.
- If the limited partnership is a LLLP, obtain and review a copy of the Certificate of Limited Partnership (preferably a certified copy obtained from the Department) to confirm that the certificate includes a statement that the partnership is a limited liability limited partnership and that the name of the partnership meets the requirements of Section 620.1108(3) of FRULPA; if the statement of limited liability was added to the certificate by amendment, verify that the amendment was signed by all of the general partners named in the certificate as required by Section 620.1204(1)(b) of FRULPA.

D. General Partnership

Recommended opinion:

The Client is a [general partnership or limited liability partnership] organized under Florida law and [has registered the general partnership with the Department under the Florida Revised Uniform Partnership Act / has registered the name of the general partnership with the Department under the Florida Fictitious Name Act].

1. Definition of General Partnership. A general partnership is “an association of two or more persons to carry on as co-owners a business for profit” as defined in Section 620.8101(7) of the Florida Revised Uniform Partnership Act of 1995 (“FRUPA”). This broad definition sweeps many businesses into the Florida partnership laws that might not have intended to form a partnership and that might have little or no organizational documentation. If a partnership’s chief executive office is located in Florida, then Florida law governs the relations among the partners and between the partners and the partnership. In addition, the same Florida laws applicable to general partnerships also govern joint ventures, which are essentially general partnerships of limited scope that are formed for a particular purpose or undertaking. Because a general partnership is the “default” form of business entity, the Florida partnership law requires no written agreement or governmental filing for creation or valid existence of a Florida general partnership.
2. Basic Meaning of this Opinion. An opinion that a general partnership is “organized “ under Florida law means only that two or more general partners have made an agreement to carry on a business as co-owners for profit, and that no circumstance exists that would require the dissolution of the partnership and the winding up of its business. Although Florida law does not require that a partnership have a written agreement (partnership agreements can be oral under Florida law), as a practical matter lenders and others doing business with a Florida general partnership will typically be reluctant to lend money or enter into a Transaction with a business entity that organized with no more than a handshake, and, in the view of the Committees, Opining Counsel should be equally reluctant to opine about the legal existence of a Florida general partnership if such partnership has no written partnership agreement. If a general partnership is engaged in a Transaction large enough or important enough to require a third-party legal opinion, then its business affairs are sufficiently complex to warrant a written partnership agreement, and, in the view of the Committees, Opining Counsel should not opine that a partnership is organized under Florida law if there is no written partnership agreement.

Use of the terms “duly” and “validly” in this opinion does not change the meaning of this opinion nor the diligence recommended in order to render this opinion.
3. Active Status vs. Good Standing. Because there are no governmental filing requirements for the creation or existence of a Florida general partnership, a request for a legal opinion regarding a Florida general partnership’s “good standing” or “active status” is misplaced and as a result such opinions should not be requested nor rendered.
4. Written Partnership Agreement. Although Florida partnership law does not require it, a written partnership agreement is such a rudimentary organizational step that, in the view of the Committees, Opining Counsel should not opine that a general partnership is “organized” if there is no written partnership agreement. Conversely, the “organized” opinion can be given if there is a written partnership agreement alone, since Florida law requires no other organizational document for a general partnership.
5. General Exclusions from Opinion. The “organized” opinion for a general partnership does not mean that: (i) the partnership has established any tax, accounting or other records (other than the partnership agreement) required to commence operating its business, (ii) the partnership maintains books and records at its chief executive office as required under Section 620.8403 of FRUPA, (iii) the partners will not have any personal liability, or (iv) the partnership will be treated as a partnership for tax purposes.

6. Potential Registrations or Filings. There are two possible filings with the Department that a Florida general partnership may choose to make:

- (a) Florida Fictitious Name Act. Under the Florida Fictitious Name Act, Section 865.09, Florida Statutes (the “**Fictitious Name Act**”) a filing registering the general partnership’s name may be required if its business activities in Florida bring the partnership within the scope of that statute. The failure to comply with the Fictitious Name Act does not affect the legal existence of the partnership, impair the validity of any contract, deed, mortgage, security interest, lien or act of the partnership or prevent the partnership from defending actions, suits or proceedings in courts in Florida, but it might subject the partnership to potential criminal liability for failure to comply with the statute and might prevent the partnership from maintaining actions, suits or proceedings in the courts of Florida.

Opining Counsel may opine that the partnership “has registered with the Department under the Florida Fictitious Name Act” based solely on a certificate from the Department confirming that the partnership has so registered.

- (b) Optional Partnership Registration. Under Section 620.8105 of FRUPA, general partnerships have the ability (but not the obligation) to register with the Department. Although this optional registration is not a prerequisite to partnership existence or to a partnership’s power to make binding contracts, registration is often used because it is a simple method of establishing the authority of a partner to bind the partnership. Further, under Section 620.8105(3) of FRUPA, all partners of a registered partnership (as well as any agent appointed by the partnership to maintain a list of partners in lieu of naming all of the partners in the registration statement) that are business entities must be organized or otherwise registered with the Department. Finally, the Fictitious Name Act, Section 865.09(7), Florida Statutes, exempts from compliance any corporation, partnership or other commercial entity that is actively organized or registered with the Department, unless the name under which business is to be conducted differs from the name as registered. In other words, optional registration under FRUPA makes registration of a general partnership’s name under the Fictitious Name Act unnecessary.

Opining Counsel may opine that the Client “has registered with the Department under the Florida Revised Uniform Partnership Act” based solely on a certified copy of the partnership’s registration statement from the Department.

7. Limited Liability Partnership. A Florida general partnership may qualify as a limited liability partnership (“**LLP**”) by filing a “statement of qualification” with the Department under Section 620.9001(3) of FRUPA. If an opinion is to be rendered that the Client is a Florida limited liability partnership, an applicable statement of qualification must have been filed with the Department as required by such statute. The terms and conditions on which a partnership becomes an LLP must be approved by the vote necessary to amend the partnership agreement, or, if the partnership agreement provides for contribution obligations, then approval must be obtained by the vote required to amend those provisions. The statement of qualification requires the appointment of a registered agent for service of process in Florida (under Section 620.9001(3)(c) of FRUPA) and requires (under Section 620.9002 of FRUPA) that the partnership’s name must end with “Registered Limited Liability Partnership,” “Limited Liability Partnership,” “R.L.L.P.,” “L.L.P.,” “RLLP,” or “LLP.” The status of a general partnership as an LLP is effective on the later of the filing date for the statement of qualification or a date specified in the statement, and its status is unaffected by errors or later changes in the information required to be contained in the statement of qualification. Although most of the statutory provisions applicable to LLPs are found in Sections 620.9001 through 620.9105 of FRUPA, the key reason to qualify as an LLP is set forth in Section 620.8306(3) of FRUPA, which provides that an obligation of a partnership incurred while it is a limited liability partnership is solely the obligation of the partnership, and a partner is not personally liable for such an obligation solely by reason of being or acting as a partner.

8. Mandatory Registration of LLP. For a Florida limited liability partnership, the partnership registration procedures under Section 620.8105 of FRUPA are mandatory. Section 620.8105(4) of FRUPA

provides that no statement of qualification under Section 620.9001 of FRUPA can be filed with the Department unless the partnership also files a registration statement. Under Section 620.8105(3) of FRUPA, one key requirement for a partnership registration statement is that all of the partners in a registered partnership (as well as any agent appointed by the partnership to maintain a list of partners, in lieu of naming all the partners in the registration statement) that are business entities must be organized or otherwise registered with the Department. After an LLP has registered with the Department under Section 620.8105 of FRUPA and has also filed a statement of qualification under Section 620.9001 of FRUPA, Opining Counsel should obtain a certificate of active status for the LLP from the Department. Section 620.9001(6) of FRUPA provides that the filing of a statement of qualification with the Department establishes that a partnership has satisfied all conditions precedent to the qualification of the partnership as an LLP.

9. Mandatory Annual Report and Fee for LLP. A limited liability partnership is required under Section 620.9003 of FRUPA to file an annual report and pay an annual filing fee to the Department. Failure to file this report or pay the fee may result in administrative revocation of the partnership's LLP status, but revocation is not an automatic event of dissolution for the partnership. The statute does not provide for revocation of LLP status if the partnership fails to maintain a registered agent for service of process, although the annual LLP report must identify the name and address of the current registered agent. The opinion that the LLP's "status is active" does not mean or imply that there are no grounds existing under the statute for administrative or judicial dissolution of the LLP or revocation of its limited liability status, and Opining Counsel is under no obligation to conduct any investigation regarding this issue. However, if Opining Counsel knows (or ought to reasonably know based on the facts (red flags) in such counsel's possession), that grounds exist to dissolve the entity or to revoke the limited liability partnership/limited liability status, Opining Counsel should advise the Client to take the necessary steps to cure such circumstances, since dissolution of the Client and/or revocation of its status as an LLP will generally constitute a violation of the Transaction Documents.
10. Foreign Entity. If Opining Counsel determines that Opining Counsel is competent to deliver an opinion regarding the organization, existence and status of a general partnership or of a limited liability partnership organized under the laws of a foreign jurisdiction, and agrees to render such opinion, then with respect to the subject opinion such Opining Counsel will likely be held to the standard of care of a competent lawyer in the jurisdiction of organization of the entity that is the subject of the opinion. See "Common Elements of Opinions – Opinions Under Florida or Federal Law; Opinions Under the Laws of Another Jurisdiction." The diligence involved in rendering the organization, existence and status opinion with respect to a foreign general partnership or a foreign limited liability partnership, and the form of such opinion, are beyond the scope of this Report.

Diligence Checklist – General Partnership.

In order to render an organization and entity status opinion with respect to a Florida general partnership, Opining Counsel should take the following actions:

- Obtain and examine a copy of the written partnership agreement, certified by a general partner as being a true and complete copy (including all amendments). If there is no written partnership agreement, in the view of the Committees, Opining Counsel should not give an opinion with respect to the partnership and should counsel the Client to reduce their partnership agreement to writing.
- Opining Counsel should determine whether the partnership agreement creates a partnership for a definite term or for a particular undertaking (and if so, determine that the term has not expired or the undertaking has not been completed), and whether it contains an agreement to wind up the partnership's business upon the occurrence of a specific event (and if so, determine whether or not the specific event has occurred). In most cases, such confirmation will be best obtained through in a written certificate from a general partner of the Client.

- Obtain a factual certificate from one or more of the general partners identifying the present partners (there must be at least two) and verifying the absence of any circumstances that would require the dissolution of the partnership and the winding up of the partnership's business (see Section 620.8801 of FRUPA). The certificate should elaborate the facts that Opining Counsel will assess in rendering the opinion, rather than merely expressing a legal conclusion.
- Determine whether any partnership registration statement or other statements authorized by FRUPA have been filed with the Department with respect to the general partnership, and if so, obtain a copy of such filing(s) (preferably a certified copy obtained from the Department). A filed registration statement provides Opining Counsel a means of verifying the information contained in the factual certificate described in the preceding paragraph, such as the identity of the partners (or the identity of an agent who maintains a list of the partners). A filed statement of partnership authority will also need to be reviewed in connection with Opining Counsel rendering an opinion with respect to the authorization of the Transaction and the Transaction Documents. See "Authorization of the Transaction by a Florida Entity."
- If Opining Counsel is requested to opine with respect to the partnership's registration under Florida's Fictitious Name Act, F.S. Section 865.09, Florida Statutes, or as to optional registration under Section 620.8105 of FRUPA, Opining Counsel should determine that the respective registration requirements have been met by obtaining a copy of the fictitious name registration or the optional registration from the Department (preferably a certified copy from the Department). If the general partnership has filed an optional FRUPA registration statement, then Opining Counsel need not confirm the partnership's registration under the Fictitious Name Act.

Additional Diligence Checklist for a Limited Liability Partnership.

- Obtain and review a copy of the partnership's registration statement (preferably a certified copy obtained from the Department) to confirm it meets all of the requirements of Section 620.8105 of FRUPA, including the requirement that all partners (and any agent appointed under Section 620.8105(1)(c)(2) of FRUPA to maintain a list of partners) that are business entities must be organized or otherwise registered with the Department.
- Obtain and review a copy of the filed statement of qualification (preferably a certified copy obtained from the Department) to confirm it meets all of the requirements of Section 620.9001(3) of FRUPA and the name requirements of Section 620.9002 of FRUPA, and to confirm that the effective date of its status as a limited liability partnership is prior to the effective date and time of the opinion letter.
- Obtain an "active status" certificate for the limited liability partnership from the Department. If the certificate indicates that the partnership's registration statement or its LLP qualification statement has been voluntarily cancelled under Section 620.8105(7) of FRUPA, Opining Counsel should not opine that the partnership is a limited liability partnership.
- If the "active status" certificate indicates that the partnership has not filed its annual report or paid its annual fee for the current year, then the recommended (but not mandatory) practice is to require the Client to make satisfactory arrangements for filing the report and paying the fee before Opining Counsel renders an opinion that the partnership is a limited liability partnership.

E. Limited Liability Company

Recommended opinion:

The Client is a [limited liability company] organized under Florida law, and its [limited liability company] status is active.

1. *Basic Meaning of this Opinion.* A Florida limited liability company (“LLC”) is governed by Chapter 608 of the Florida Statutes, which is called the Florida Limited Liability Company Act (“FLLCA”). The opinion that a company “is a limited liability company organized under Florida law, and its limited liability company status is active” (or “its status is active”) means that: (i) the company has complied in all material respects with the requirements for the formation of an LLC under the FLLCA, (ii) governmental officials have taken all steps required by law to form the company as an LLC, (iii) the company’s existence began prior to the effective date and time of the opinion letter, (iv) the company is currently in existence and its status is active, and (v) the company has not been converted into a different form of entity. Under Section 608.409 of the FLLCA, a Florida LLC is formed at the time when the articles of organization are filed with the Department (or on such earlier date as specified in the articles of organization, if such date is within five business days prior to the date of filing, or at any later date specified in the articles of organization). Section 608.409(3) of the FLLCA provides that the Department’s filing of an LLC’s articles of organization “is conclusive proof that all conditions precedent to organization have been satisfied except in a proceeding by the state to cancel or revoke the organization or to administratively dissolve the organization.”
2. *Organized.* An opinion that an LLC is properly organized is usually part of the LLC status opinion. This opinion means that Opining Counsel has verified that: (i) the LLC has articles of organization executed by at least one member (or an authorized representative of the member), (ii) the articles of organization comply with the requirements set forth in Section 608.407 of the FLLCA, (iii) the articles of organization have been filed with the Department, (iv) the Client has at least one member, (v) a written operating agreement has been adopted by the member(s) of the LLC, (vi) if the articles of organization or operating agreement provide that the LLC is a manager-managed company, then one or more managers have been appointed by the members, and (vii) the LLC has active status.

Sometimes the word “duly” is added before the word “organized.” However, the addition of the word “duly” to the opinion does not change the meaning of this opinion or change the diligence recommended in order to render this opinion.

Generally speaking, the articles of organization for a Florida LLC rarely contain more than the minimum information required under the FLLCA, although its filing constitutes notice of all facts that are set forth in the articles of organization. The operating agreement of the LLC is generally more substantive and by definition sets forth the provisions adopted for the management and regulation of the affairs of the LLC and sets forth the relationships of the members, managers (if the LLC is manager-managed) and the LLC. The statute provides that an operating agreement may be oral, but, as in the case of an oral partnership agreement, in the view of the Committees Opining Counsel should not opine that an LLC is “organized” if the LLC has not adopted a written operating agreement.

3. *Active Status vs. Good Standing.* The opinion that an LLC’s status is “active” means that as of the date of the opinion letter the company is a limited liability company and is current with all filings and fees then due to the State of Florida. This opinion should be based on a certificate of active status issued by the Department. Unlike the FBCA and FRULPA, the FLLCA does not specify the contents of a certificate of status for an LLC or state that its issuance may be relied upon as conclusive evidence of the existence of the LLC. Section 608.702 of the FLLCA does provide, however, that “[a] certificate under the seal of the Department, as to the existence or nonexistence of the facts relating to a limited liability company or foreign limited liability company, shall be taken and received in all courts, public offices, and official bodies as prima facie evidence of the existence or nonexistence of the facts therein stated.”

This opinion uses the term “its status is active” or “its limited liability company status is active” since the “active status” language is used in the certificate provided by the Department. However, Opining Counsel in Florida are often asked to render an opinion that an LLC is in “good standing,” particularly if the Opinion Recipient is represented by out-of-state counsel. Under customary practice in Florida, the use of the phrase “good standing” in an opinion as to the active status of an LLC has the same meaning as “its limited liability company status is active” or “its status is active.”

4. General Exclusions for Opinion. Unless otherwise expressly stated in the opinion letter, an opinion that an LLC’s status is “active” does not mean that: (i) the LLC has established any tax, accounting or other records required to commence operating its business, (ii) the LLC maintains at its registered office any of the information required to be maintained under Section 608.4101 of the FLLCA, (iii) the members of the LLC will not have personal liability, or (iv) the LLC will be treated as a partnership for tax purposes.
5. Involuntary Dissolution. An opinion that an LLC’s “status is active” merely indicates that the LLC exists and has not been dissolved as of the date of the certificate of status issued by the Department. Because it would be impossible or extremely difficult for Opining Counsel to establish that there are no grounds existing under the statute for involuntary dissolution of the LLC, this opinion does not mean or imply that there are no grounds existing under the statute for involuntary dissolution of the LLC. The circumstances under which an LLC may be administratively dissolved by the Department are set forth in Section 608.448 of the FLLCA and the grounds for judicial dissolution are specified in Section 608.449 of the FLLCA. Opining Counsel may opine that the LLC exists on the date of the opinion in reliance on a certificate of status from the Department, even if circumstances exist that could result in involuntary dissolution with the passage of time. Opining Counsel is not obligated to conduct any investigation regarding this issue. However, if Opining Counsel knows (or ought to reasonably know based on the facts (red flags) in such counsel’s possession) that such circumstances for dissolution exist, Opining Counsel should advise the Client to take the necessary actions to cure those circumstances promptly, since dissolution of the LLC will generally constitute a violation of the Transaction Documents. For example, the Department may administratively dissolve an LLC under Section 608.448(1)(b) of the FLLCA if the company is without a registered agent for 30 days or more, and, under Section 608.416(2) of the FLLCA, the resignation of a registered agent becomes effective 31 days after the registered agent files a statement of resignation with the Department.
6. Foreign Entity. If Opining Counsel determines that Opining Counsel is competent to deliver an opinion regarding the organization, existence and status of an LLC organized under the laws of a jurisdiction other than Florida, and agrees to render such opinion, then with respect to the subject opinion such Opining Counsel will likely be held to the standard of care of a competent lawyer in the jurisdiction of organization of the entity that is the subject of the opinion. See “Common Elements of Opinions – Opinions Under Florida or Federal Law; Opinions Under the Laws of Another Jurisdiction.” The diligence involved in giving an opinion regarding the organization, existence and status of a foreign limited liability company, and the form of such opinion, are beyond the scope of this Report.

Diligence Checklist – Limited Liability Company. In order to render an entity status and organization opinion with respect to a Florida LLC, Opining Counsel should take the following actions:

- Obtain a copy of the LLC’s articles of organization (preferably a certified copy obtained from the Department) and review the articles of organization to ensure that they substantially comply with the requirements of Section 608.407 of the FLLCA.
- Obtain an “active status” certificate for the LLC from the Department. If the certificate of status indicates that the LLC has not filed its annual report or paid its annual fee for the current year, then the recommended (but not mandatory) practice is to require the Client to make satisfactory arrangements for filing the report and paying the fee before Opining Counsel renders an “active status” opinion regarding the LLC.

- Obtain and examine a copy of the LLC’s operating agreement, certified by a manager of the LLC (if manager-managed), by a member of the LLC (if member-managed), or by an officer of the LLC (if officers have been appointed by the members or the managers, as applicable, under the LLC’s operating agreement), as being a true and complete copy, including all amendments. In the view of the Committees, if there is no written LLC operating agreement, Opining Counsel should not render an opinion with respect to the LLC and should counsel the Client to reduce its operating agreement to writing.
- Determine from reviewing the operating agreement and the articles of organization whether the LLC is a member-managed company or a manager-managed company; if the latter, determine whether a manager or managers have been appointed in accordance with the requirements of those documents (generally through obtaining a written certificate from the Client).
- Obtain a current factual certificate from a manager of the LLC (if manager-managed), from a member of the LLC (if member-managed), or from an officer (if officers have been appointed) certifying that there is at least one member, that no circumstances exist which would trigger dissolution under the articles of organization or operating agreement, and that no proceedings have commenced for dissolution of the LLC.

F. Trusts

1. In General.

Opining Counsel may be asked to render an opinion concerning the status of a Florida trust. Unlike Florida corporations, partnerships or LLCs, a Florida trust is not a separate statutory entity under Florida law. Rather, a Florida trust is a fiduciary relationship with respect to property (whether real property, personal property or both) subjecting the person or persons by whom the title to the property is held (known as the “trustee” or “trustees”) to equitable duties to deal with the property for the benefit of another person or persons (known as the beneficiary or beneficiaries), all of which arises as a result of a manifestation of an intention to create a trust arrangement. Thus, for purposes of rendering an opinion regarding a Florida trust, the Client is really not the trust itself, but rather the person or persons serving as the trustee or trustees of the trust for the benefit of the beneficiaries. As such, the proper status inquiry in the context of a trust should be based on whether the trustee or trustees is or are properly organized and existing and has or have active status.

Thus, if Florida counsel is asked to render an opinion concerning the status of a Florida trust, the Opinion Recipient should want to know whether the Client(s) is or are the trustee(s) of the trust. For this reason, the recommended forms of opinion state that the Client(s) is or are the trustee(s) of the trust and go on to specify the legal basis for such designation.

2. Trusts Other than Florida Land Trusts.

(a) Trusts with Written Trust Agreements.

In the context of most Florida trusts, with the possible exception of Florida land trusts arising strictly by operation of Section 689.071, Florida Statutes (referred to as a “**Florida Land Trust**”), the designation of the trustee occurs pursuant to the provisions of a written trust agreement.

In this context, the recommended opinion is as follows:

The Client(s) [is/are] the trustee(s) of a trust pursuant to the provisions of that certain trust agreement dated _____.

When the foregoing recommended form of opinion is to be rendered, Opining Counsel should obtain a copy of the current trust agreement governing the trust. The trust agreement needs to be reviewed by Opining Counsel in order for Opining Counsel to render any opinions with respect to the trust and, in particular, in order to determine who is designated as the trustee(s) of the trust.

(b) *Trusts Without Written Trust Agreements*

If the Transaction is large enough or important enough to require a third-party legal opinion, then the trust's affairs are sufficiently complex to require a written trust agreement. Accordingly, in this context, the Committees believe that Opining Counsel should not opine with respect to a trust if there is no written trust agreement, other than in the limited circumstances described below with respect to a Florida Land Trust.

(c) *Trustees that are Entities.*

If the trustee or one of the trustees is an entity, then in connection with rendering this opinion Opining Counsel should obtain a certificate of status from the Department with respect to such entity and complete the diligence required with respect to the organization and entity status of such entity (see discussions above with respect to Florida corporations, Florida partnerships and Florida LLCs).

3. **Trusts Owning Real Estate.**

(a) *Generally*

In Florida, trusts whose trustee(s) hold title to Florida real estate under the trust arrangement generally fall into one of two general categories. The first category are trustees of Florida Land Trusts. These trusts must satisfy the statutory requirements of Section 689.071, Florida Statutes, to qualify as a Florida Land Trust. The second category are trustees who hold title to Florida real estate under a trust arrangement that does not qualify as a Florida Land Trust. Opinions concerning this second category of trusts are governed by the same customary practice that is applicable with respect to other trusts in Florida.

(b) *Florida Land Trusts Without a Written Trust Agreement*

A Florida Land Trust that falls into the first category described above arises pursuant to Section 689.071, Florida Statutes, but only in circumstances in which a deed or other recorded instrument naming the trustee as grantee or transferee sets forth the trustee's powers, as required by that statute. Technically, in the context of a Florida Land Trust where the deed of conveyance meets the requirements of Section 689.071, Florida Statutes, there arises a presumption of a valid Florida Land Trust.

The recommended form of opinion with respect to a Florida Land Trust that meets the requirements of Section 689.071, Florida Statutes, is as follows:

The Client(s) [is/are] the trustee(s) of a Florida land trust pursuant to Section 689.071, Florida Statutes.

If the trust satisfies the requirements of Section 689.071, Florida Statutes, it is possible for Opining Counsel to render the trust status opinion even if there is no separate trust agreement governing the trust relationship. However, because the customary practice in dealing with most opinions involving trusts is to refrain from rendering an opinion unless a written trust agreement exists, the exception from this general rule should be applied only in very limited circumstances. For the limited exception to apply, the following three requirements must all be satisfied:

(i) The property that is the subject of the Transaction Documents must be limited to an interest in real property;

(ii) The trust must satisfy the requirements of Section 689.071, Florida Statutes, and particularly, the trustee must be designated as trustee in the recorded instrument and the recorded instrument must expressly confer on the trustee any one or more of the following powers: the power and authority to

protect, to conserve, to sell, to lease, to encumber, or otherwise to manage and dispose of the real property or interest in real property described in the recorded instrument; and

(iii) Opining Counsel must be satisfied that no separate trust agreement or other agreement governing the trust relationship exists. To be satisfied in this regard, Opining Counsel should secure a written certificate or affidavit signed by at least the trustee, and preferably also by all of the beneficiaries of the trust, confirming that no separate trust agreement or other agreement governing the trust relationship exists. This certificate or affidavit should not be recorded in the public records if the benefits of Section 689.071, Florida Statutes, are to be retained because any such recordation might be deemed to constitute an addendum to the declaration of trust for purposes of the Florida Land Trust statute.

(c) *Florida Land Trusts with Written Trust Agreements.*

In the case of a Florida Land Trust, if Opining Counsel is unable to confirm that there is no separate trust agreement governing the trust relationship or if Opining Counsel has knowledge that a written trust agreement exists, Opining Counsel should not render the status opinion with respect to the trust unless Opining Counsel, in addition to addressing the requirements set forth in the recorded instrument, is provided with a copy of the trust agreement and engages in the diligence that is required with respect to other trusts in Florida as set forth above in “Trusts Other than Florida Land Trusts.”

Notwithstanding the recommendations set forth herein that Opining Counsel review any underlying trust agreement that may exist, such recommendation is not intended to modify or affect the protections afforded to third parties by Section 689.071, Florida Statutes.

4. **Successor Trustee.**

In rendering an opinion concerning a Florida trust, because such opinion focuses on the trustee, and in particular may address the entity status of the trustee, the power of the trustee, and whether the trustee has properly authorized the Transaction, Opining Counsel first needs to determine that the party purporting to be the trustee of the trust is the current trustee. This determination can be complicated where the party purporting to be the trustee is a successor trustee and can be further complicated where the Transaction involves the ownership of and/or a mortgage against real estate (and particularly where the real estate is held in a Florida Land Trust).

If the named trustee of the trust is no longer serving because of death, incapacity, termination, or resignation, then Opining Counsel’s diligence must focus on the entity status of the successor trustee, the power of the successor trustee, and whether the successor trustee properly authorized the Transaction. In the real estate context, it is not uncommon for the real estate records to continue to reflect the original trustee as the named owner or the named mortgagor, as the case may be. Thus, where real estate is involved, Opining Counsel’s diligence must first extend to establishing that the real estate records have been properly updated to reflect the change in the designated trustee.

(A) *Trusts Other than Florida Land Trusts.*

In the context of trusts other than Florida Land Trusts and presumably where a written trust agreement is in existence, the trust agreement hopefully names either the successor trustee, or if not, then sets forth a method for determining the successor trustee (in which case the trust agreement will be determinative of the procedure for establishing a successor trustee). Opining Counsel should review the trust agreement from this perspective, addressing the appropriate situation, as follows:

- (i) If the trustee has resigned, or has become incapable of serving due to death or incapacity, then in circumstances where real estate is not involved, Opining Counsel should, at a minimum, secure a certificate from the successor trustee certifying that the prior trustee resigned or is incapable of serving due to death or incapacity, as the case may be, and that such successor trustee is the then current trustee of the trust.

(ii) In the real estate context, the parties must have taken additional actions. In particular, if the trustee has resigned, then a trustee's declaration of appointment of successor trustee reciting such trustee's name, address and its resignation, the appointment of the successor trustee by name and address and the successor's acceptance of appointment should be signed by both the prior trustee and the successor trustee, should be witnessed and acknowledged in the manner as provided for acknowledgment of deeds and should be recorded in the office of the recorder in the county where the trust property is located. The declaration should have attached to it each of the following: (a) the first page of the trust agreement, (b) the successor trustee page of the trust agreement, (c) the powers page(s) of the trust agreement, (d) the signature page of the trust agreement, and (e) the legal description of the trust property.

(iii) In the real estate context, if the trustee has become incapable of serving due to death or incapacity, then a declaration of appointment of successor trustee reciting such trustee's name, address and the reason for the failure to serve (attach a death certificate if due to death), the appointment of the successor trustee by name and address and the successor's acceptance of appointment should be signed by the successor trustee, should be witnessed and acknowledged in the manner as provided for acknowledgment of deeds and should be recorded in the office of the recorder in the county where the trust property is located. The declaration should have attached to it each of the following: (a) the first page of the trust agreement, (b) the successor trustee page of the trust agreement, (c) the powers page(s) of the trust agreement, (d) the signature page of the trust agreement, and (e) the legal description of the trust property.

(B) Florida Land Trusts. In the case of a Florida Land Trust, where no successor trustee is named in the recorded instrument and a trust agreement exists, Section 689.071(9), Florida Statutes, shall be followed as the procedure whereby one or more persons or entities having the power of direction of the land trust agreement may appoint a successor trustee or trustees of the land trust by filing a declaration of appointment of a successor trustee or trustees in the office of the recorder of deeds in the county in which the trust property is located. The declaration must be signed by a beneficiary or beneficiaries of the trust and by each successor trustee, must be acknowledged in the manner provided for acknowledgment of deeds, and must contain: (a) the legal description of the trust property, (b) the name and address of the former trustee, (c) the name and address of the successor trustee, and (d) a statement that each successor trustee has been appointed by one or more persons or entities having the power of direction of the land trust, together with an acceptance of appointment by each successor trustee.

5. **Diligence Concerning Beneficiaries.** Although Opining Counsel may need to consider whether the beneficiaries of the trust have approved the Transaction in connection with rendering an opinion that the Transaction has been approved by all requisite formality, such inquiry concerning actions of the beneficiaries is not necessary in addressing the status opinion relating to a trust (see "Authorization of the Transaction by a Florida Entity"), since the status opinion relating to a Florida trust focuses solely on the status of the trustee.
6. **Use of Different Language.** Notwithstanding the lack of statutory entity status for the trust itself and the need to focus on the proper designation of the trustee(s) in rendering the opinion, the Committees recognize that some Florida practitioners include language in their opinions that appears to assume that the Florida trust to which the opinion relates is a separate statutory entity under Florida law. Thus, it is not uncommon for Florida practitioners to render a status opinion involving a trust to the effect that "The Client is a trust formed under Florida law," that "The Client is a trust duly formed under Florida law," or words to similar effect. Under customary practice in Florida, an Opining Counsel who renders the opinion in one of these alternative forms is effectively giving an opinion that has the same meaning (and is subject to the same recommended diligence) as the recommended opinion, and is confirming that a trustee or trustees has/have been designated for the trust either pursuant to the provisions of a trust agreement or, in the case of a statutory Florida Land Trust, pursuant to Section 689.071, Florida Statutes.

7. **Effect of Presumption Arising Under Section 689.07, Florida Statutes.** Section 689.07, Florida Statutes is separate and apart from Section 689.071, Florida Statutes, and the two should not be confused.

Under Section 689.07, Florida Statutes, a deed by which real property is conveyed to a person or entity simply “as trustee,” without setting forth any of the powers required to avail the trustee of the benefit of the Florida land trust presumption arising under Section 698.071, Florida Statutes, grants an absolute fee simple estate in the real property to the “trustee,” individually, including both legal and equitable title, provided the other requirements of Section 689.07, Florida Statutes, are met. In such case, a Florida Land Trust is not created, the recital of trust status is disregarded as a matter of law, and it would not be appropriate for Opining Counsel to render the recommended trust opinion. Indeed, in such case, the owner of the real property is not the trustee of a trust and no special form of opinion on trust status is pertinent. In such case, the entity opinion should be an opinion concerning the direct entity status of the entity designated as the trustee.

Nevertheless, before proceeding in this fashion, because the subject deed indicated that the putative “trustee” was acquiring title in a trust capacity, Opining Counsel should ask for and require a certificate from the “trustee” regarding whether the “trustee” has made a declaration of trust and, if so, whether any written trust instrument or instruments relating to such declaration exists. If a trust agreement actually exists, then Opining Counsel should review the trust agreement and determine whether further inquiries need to be made and/or whether any corrective instruments are required before any entity opinions can be rendered.

Diligence Checklist - Trusts, including Florida Land Trusts

- If the trustee is a corporation, partnership, or limited liability company, confirm that the trustee that is an entity is properly organized and/or exists, and has active status (or in good standing in the state of its incorporation) and, if it is a foreign entity required to obtain a certificate of authority to transact business in Florida, it has obtained such a certificate of authority from the Department.
- If the deed or other instrument of conveyance is dated prior to July 3, 1992, and the trustee is a corporation, confirm that the corporation has trust powers. As of July 2, 1992, those portions of Section 660.41, Florida Statutes, which mandated that corporate trustees have trust powers were repealed. Thus, if the deed or other instrument of conveyance is dated after July 2, 1992, and the trustee is a corporation, it is unnecessary to confirm the existence of trust powers. See Fund Title Note 31.02.06 (2001). The existence of trust powers for state chartered institutions may be confirmed by obtaining a Certificate from the Department of Banking and Finance, and the existence of such powers for federally chartered institutions may be obtained from the Comptroller of the Currency, at the following respective addresses:

Director, Division of Banking Department of Banking and Finance The Capitol Building Tallahassee, Florida 32399-0350	Comptroller of the Currency Southeastern District Peachtree-Cain Tower, Suite 2700 229 Peachtree Street, N.E. Atlanta, Georgia 30303
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- In order to opine that the Client is the trustee of a Florida land trust that is in compliance with the provisions of Section 689.071, Florida Statutes, Opining Counsel should examine the deed or other instrument of conveyance naming the trustee as grantee or transferee for compliance with the requirements set forth in Section 689.071, Florida Statutes.

- If the trust satisfies the requirements set forth in Section 689.071, Florida Statutes, secure a written certificate or affidavit signed by at least the trustee, and preferably also by all of the beneficiaries of the trust, confirming that no separate trust agreement or other agreement governing the trust relationship exists. If the trust satisfies the requirements set forth in Section 689.071, Florida Statutes, but Opining Counsel has knowledge that a trust agreement governing the trust relationship exists, Opining Counsel should secure a copy of the written trust agreement governing the trust and such trust agreement needs to be reviewed by Opining Counsel in order for Opining Counsel to render opinions with respect to the trust and, in particular, in order to determine who is designated as the trustee(s) of the trust.
- If the trust does not satisfy the requirements set forth in Section 689.071, Florida Statutes, Opining Counsel should secure a copy of the written trust agreement governing the trust and such trust agreement needs to be reviewed by Opining Counsel in order for Opining Counsel to render opinions with respect to the trust and, in particular, in order to determine who is designated as the trustee(s) of the trust.

G. Not-For-Profit Corporation

Florida's not-for-profit statute (Chapter 617, Florida Statutes) sets forth the requirements regarding the organization and existence of a Florida not-for-profit corporation. These requirements are similar to those for a Florida for-profit corporation. As a result, requirements comparable to those described in "Corporation" above should be followed in connection with rendering an opinion with respect to the organization and entity status of a Florida not-for-profit corporation.

H. Florida Lawyers Acting As Registered Agents

Although not strictly a legal opinion issue, Florida lawyers should consider the application of the registered agent provisions in the FBCA in determining whether to act as the registered agent for their Clients. Under Section 607.0505(4) of the FBCA, a Florida or foreign corporation that designates an attorney as its registered agent is deemed to have waived the attorney-client privilege that might otherwise attach to communications between such corporations, the agent and the beneficial owners of the corporation, at least with respect to the information that a registered agent is obligated to have in its possession under Section 607.0505(2) of the FBCA. Because of the broad language in Section 607.0505 of the FBCA, although these provisions are not contained in Florida's other entity statutes, these provisions are likely to apply to other types of Florida entities.

It should be noted that Section 607.0505(4) of the FBCA was added to Florida's corporate statute in 1984 in connection with the adoption of the Florida RICO Act, which sought to give law enforcement agencies expanded powers to fight organized crime, and the above-described provisions are sometimes called the "RICO Agent" provisions.

AUTHORITY TO TRANSACT BUSINESS IN FLORIDA

A. Qualification of a Foreign Entity to Transact Business in Florida

Opining Counsel representing a foreign corporation, a foreign limited partnership, a foreign general partnership, a foreign limited liability partnership or a foreign limited liability company with respect to a Florida Transaction may be requested to render a legal opinion as to whether the foreign entity Client is required to apply for and obtain a certificate of authority from the Department to transact business in Florida. In addressing this legal issue, Opining Counsel will need to determine whether the Client's activities in Florida are substantial enough to require that such foreign entity file an application with the Department seeking to obtain a certificate of authority to transact business in Florida.

If the foreign entity Client merely owns or mortgages real property or personal property located in Florida, without more, the "safe-harbor" provisions of each of Florida's business entity statutes provide that the Client entity will not be required to obtain a certificate of authority to transact business in Florida. On the other hand, the widely held view is that if the Client foreign entity's activities in Florida are more regular, systematic or extensive than the listed "safe-harbor" activities, including the ownership of income-producing real or tangible personal property in Florida, the foreign entity will be required to obtain a certificate of authority to transact business in Florida.

Opinion Recipients sometimes request an opinion that the Client is authorized to transact business as a foreign entity in every jurisdiction in which the Client's property or activities requires qualification or where the failure to qualify would have a material adverse effect on the Client. This is an inappropriate opinion to request. See "Introductory Matters – Reasonableness; Inappropriate Subjects for Opinions." However, it is common practice in Florida for an Opinion Recipient to request an opinion from a Florida Opining Counsel as to whether Opining Counsel's foreign entity Client is authorized to transact business in Florida, either together with or separate from an opinion as to whether Opining Counsel's foreign entity Client is required to obtain such authorization. An opinion that a particular foreign entity client is authorized to transact business in Florida may be rendered based solely on the receipt of a certificate of status issued by the Department. In particular, under Florida customary practice, in rendering this opinion Opining Counsel need not review the information provided by the Client to the Department in its application to obtain a certificate of authority to transact business in Florida.

An opinion that the Client is authorized to transact business in Florida is premised on the foreign entity Client being properly organized and in good standing as an entity under the laws of its jurisdiction of organization. Accordingly, unless Opining Counsel is rendering an opinion as to the Client foreign entity's organization and status in its jurisdiction of organization, the foreign entity's status under the laws of such foreign jurisdiction will be implicitly assumed into the opinion letter under Florida customary practice, even if such assumption is not expressly stated in the opinion letter. However, since the active status or good standing of the foreign entity Client in its jurisdiction of organization will always be required in connection with the Transaction, it is strongly recommended that Opining Counsel take appropriate steps to confirm that its foreign entity Client has active status or good standing in its jurisdiction of organization.

Sometimes an opinion regarding "authority to transact business" in Florida will use the words "qualified to do business" instead of "authorized to transact business." The words "authorized to transact business" are recommended because they are contained in the statutes governing foreign entities transacting business in Florida (the FBCA, the FLLCA, FRULPA and FRUPA). However, whichever words are used, they are deemed to have the same meaning under Florida customary practice.

In circumstances where Florida counsel is consulted concerning authorization of a foreign entity to transact business in Florida and gives advice that such authorization may be required, but such foreign entity nevertheless has not obtained a certificate of authority, Florida counsel to the foreign entity should consider advising its Client about the consequences of failing to obtain a certificate of authority to transact business in Florida. Such consequences include fees that may be due to the Department for failure to obtain a certificate of authority and the inability of the Client to prosecute litigation in Florida if the Client does not hold a certificate of authority. However, the foreign entity Client will be permitted to defend litigation brought against the Client in Florida whether or not the Client has obtained a certificate of authority to transact business in Florida. The applicable

sections of Florida’s entity statutes that reflect the administrative penalties for failing to obtain a certificate of authority to transact business in Florida are contained in Section 607.1502 of the FBCA, Section 620.1907 of FRULPA, Section 620.9103 of FRUPA and Section 608.5135 of the FLLCA. At the same time, Opining Counsel should consider advising its foreign entity Client as to the ancillary consequences of obtaining a certificate of authority to transact business in Florida, such as the application of the Florida corporate income tax under Chapter 220 of the Florida Statutes to a foreign corporation that obtains a certificate of authority to transact business in Florida.

1. Foreign Corporation

Recommended opinion:

Based solely on a certificate of status from the Department dated _____, 20____, the Client is authorized to transact business as a [foreign corporation] in the State of Florida, and its [corporate] status in Florida is active.

If a foreign corporation has obtained a certificate of authority to transact business in the State of Florida, then the diligence required to render the recommended opinion is simple. In such circumstances, Opining Counsel should obtain an “active status” certificate from the Department and under customary practice in Florida, may rely on such certificate in issuing an opinion that the Client foreign corporation is authorized to transact business in Florida and has active status in Florida. Section 607.0128(3) of the FBCA provides that, “[s]ubject to any qualification stated in the certificate, a certificate of status or authority issued by the department may be relied upon as conclusive evidence that the domestic or foreign corporation is in existence or is authorized to transact business in this state.”

To obtain a certificate of authority, a foreign corporation must comply with the requirements of Section 607.1503 of the FBCA. Further, the name of the foreign corporation must comply with the requirements of Section 607.1506 of the FBCA.

If Opining Counsel is asked to opine as to whether or not a certificate of authority must be obtained for a foreign corporation, Opining Counsel must evaluate whether such authorization is required. In carrying out the evaluation, Opining Counsel should obtain a factual certificate from a responsible officer of the Client describing fully the scope of the foreign corporation’s business activities in Florida. Opining Counsel should then review Section 607.1501(2) of the FBCA, which lists certain “safe harbor” activities in Florida that do not require a foreign corporation to obtain a certificate of authority to transact business. If the safe harbor exemptions do not expressly apply, it is the widely held view among Florida lawyers that under such circumstances, the foreign corporation will need to obtain a certificate of authority from the Department. If such qualification appears to be required, Opining Counsel should not render a legal opinion regarding the foreign corporation’s authority to transact business in Florida unless a certificate of authority has been obtained and the foreign entity has active status in Florida.

The circumstances under which a foreign corporation’s certificate of authority may be administratively revoked by the Department are set forth in Section 607.1530 of the FBCA, such as the foreign corporation’s failure for 30 days or more to maintain a registered agent in Florida, or its failure to file the required annual report or pay the required fees. Even if circumstances exist that could result in administrative revocation of the foreign corporation’s certificate of authority with the passage of time, Opining Counsel may opine that a foreign corporation Client is authorized to transact business in Florida, and the opinion is not an affirmation that no such circumstances then exist. However, if Opining Counsel has knowledge that circumstances for the future revocation of the Client’s certificate of authority exist at the time the opinion is rendered (or if Opining Counsel is aware of facts (red flags) that ought to cause a reasonable Opining Counsel to know of such circumstances), the recommended (but not mandatory) practice is for Opining Counsel to require the Client to take the necessary actions to cure the violation, since revocation of the Client’s certificate of authority will generally constitute a violation of the Transaction Documents and will also preclude the Client from maintaining any legal proceedings in a Florida court.

Even if a foreign corporation is not deemed to be transacting business in Florida requiring registration with the Department, a registered office and a registered agent (a so-called “RICO” agent) will need to be appointed pursuant to Section 607.0505 of the FBCA if: (a) the foreign corporation (or alien business organization) owns an interest in Florida real property, or (b) the foreign corporation (or alien business organization) owns a mortgage on Florida real property (and is not otherwise exempt from this requirement because it is a “financial institution,” as that term is defined in Section 607.0505(11) of the FBCA).

2. Foreign Limited Partnership

Recommended opinion:

Based solely on a certificate of status from the Department dated _____, 20____, the Client is authorized to transact business as a [foreign limited partnership] in the State of Florida, and its [limited partnership] status in Florida is active.

FRULPA provides, in Section 620.1903(1), a “safe harbor” list of activities by a limited partnership that do not constitute transacting business in Florida, which list is similar to the safe harbor lists for foreign business entities contained in the FBCA and FLLCA. One noteworthy distinction is that Section 620.1903(3) of FRULPA expressly provides that “the ownership in this state of income-producing real property or tangible personal property,” other than property excluded under the safe harbor list in subsection (1), constitutes transacting business in the State of Florida. The widely held view among Florida lawyers is that all foreign business entities that own income-producing property in Florida are required to obtain a certificate of authority to transact business in Florida.

One notable safe harbor activity in Florida is a foreign business entity’s ownership of a limited partnership interest in a limited partnership that is doing business in Florida, unless such foreign business entity limited partner manages or controls the partnership or exercises the powers and duties of a general partner. See Section 607.1501(2)(l) of the FBCA, Section 608.501(2)(l) of the FLLCA, Section 620.1903(1)(l) of FRULPA and Section 620.9104(1)(l) of FRUPA. Conversely, FRULPA requires, as a condition to the Department filing of a Florida certificate of limited partnership or a certificate of authority for a foreign limited partnership, that any general partner that is not an individual must be organized under Florida law or otherwise authorized to transact business in Florida. See Sections 620.1201(1)(c) and 620.1902(1)(e) of FRULPA.

In order to assess whether a Florida certificate of authority is required for a foreign limited partnership, Opining Counsel should obtain a factual certificate from a general partner of the Client describing fully the scope of the foreign limited partnership’s business activities in Florida. Opining Counsel should then determine whether those activities go beyond the safe harbor exemptions listed in Section 620.1903(1) of FRULPA. In virtually all cases not expressly covered by the safe harbor, it is the widely held view among Florida lawyers that it will be necessary for the foreign limited partnership to obtain a certificate of authority to transact business in Florida.

If Opining Counsel is requested to render the recommended “authorized to transact business” opinion for a foreign limited partnership, Opining Counsel should obtain a certificate of status for the limited partnership from the Department under 620.1209(2) of FRULPA. However, if the foreign limited partnership has not obtained a certificate of authority from the Department, the Department cannot issue a certificate of active status. In such circumstance, Opining Counsel will need to assist the limited partnership in obtaining a certificate of authority in accordance with the requirements of Section 620.1902 of FRULPA before Opining Counsel will be in a position to render this opinion.

To obtain a certificate of authority, a foreign limited partnership must comply with the name requirements set forth in Section 620.1108(2) of FRULPA (i.e., the name must contain the phrase “limited partnership” or “limited” or the abbreviation “L.P.” or “Ltd.” or the designation “LP”) or adopt an alternate complying name under Section 620.1905 of FRULPA. Further, under Section 620.1902(1)(e) of FRULPA, the Department will not issue a certificate of authority for a foreign limited partnership unless all general partners that are business entities are either organized under Florida law or are authorized to transact business in Florida.

After a foreign limited partnership has obtained a certificate of authority to transact business in Florida, Opining Counsel can then obtain a certificate of active status for that foreign limited partnership from the Department under Section 620.1209(2) of FRULPA. Subsection (3) of that statute provides that, “[s]ubject to any qualifications stated in the certificate, a certificate of status issued by the Department may be relied upon as conclusive evidence that the ... foreign limited partnership ... is authorized to transact business in this state.” Under customary practice in Florida, Opining Counsel may rely solely on the certificate of active status issued by the Department in rendering the recommended opinion.

The circumstances under which a foreign limited partnership’s certificate of authority may be administratively revoked by the Department are set forth in Section 620.1906 of FRULPA, such as the foreign limited partnership’s failure to maintain a registered agent in Florida or its failure to file the required annual report or to pay the required fees. Even if circumstances exist that could result in administrative revocation of the foreign limited partnership’s certificate of authority with the passage of time, Opining Counsel may opine that a foreign limited partnership is authorized to transact business in Florida, and the opinion is not an affirmation that no such circumstances then exist. However, if Opining Counsel has knowledge that circumstances for future revocation of the Client’s certificate of authority exist at the time the opinion is rendered (or if Opining Counsel is aware of fact (red flags) that ought to cause a reasonable Opining Counsel to know of such circumstances), the recommended (but not mandatory) practice is for Opining Counsel to require the Client to take the necessary actions to cure the violation, since revocation of the Client’s certificate of authority will generally constitute a violation of the Transaction Documents and will also preclude the Client from maintaining any legal proceeding in a Florida court.

When dealing with foreign limited partnerships, the history of the RICO agent provisions are peculiar and a potential trap for the unwary. In 2005, when FRULPA was enacted, the RICO agent provisions previously contained in Florida’s limited partnership statute were removed from Florida’s limited partnership statute. However, even if a foreign limited partnership is not deemed to be transacting business in Florida requiring that such foreign limited partnership obtain a certificate of authority from the Department, such entity may still be required to have a registered office and appoint a registered agent for service of process if it owns an interest in Florida real property or a mortgage on Florida real property (and is not otherwise exempt from this requirement because it is a “financial institution”). Although FRULPA does not contain provisions similar to those contained in Section 607.0505 of the FBCA, the broad language of Section 607.0505 of the FBCA (covering alien business organizations as well as foreign corporations) may bring other entities such as foreign limited partnerships under the requirements of that statute. See “Foreign Corporation” above.

3. Foreign General Partnership

Except to the extent that the Florida Fictitious Name Act (Section 865.09, Florida Statutes) might apply, there are no statutory requirements that a foreign general partnership obtain a certificate of authority to transact business in Florida. Thus, it is never appropriate for Opining Counsel to render an opinion that a foreign general partnership has obtained a certificate of authority from the Department and is thereby authorized to transact business as a foreign general partnership in Florida.

If Opining Counsel agrees to render an opinion that a foreign general partnership does not need to obtain a certificate of authority to transact business in Florida, the recommended opinion language is as follows:

The Client is not required to obtain a certificate of authority from the Department to transact business in Florida.

The optional partnership registration system under FRUPA is available to foreign general partnerships, and Section 620.8105(4) of FRUPA provides that a certified copy of a partnership registration statement filed in another jurisdiction may be filed in Florida in lieu of an original statement. If a foreign general partnership has filed an optional FRUPA registration statement in Florida, then the foreign general partnership is exempt from the registration requirements of the Florida Fictitious Name Act. On the other hand, a foreign general partnership that is transacting business in Florida and has not elected to register under the optional partnership registration provisions of FRUPA, may be required to register its name under the Florida Fictitious Name Act.

See “Entity Status and Organization of a Florida Entity – Florida General Partnership.” Compliance with the Florida Fictitious Name Act or with the optional partnership registration system under FRUPA is different from a requirement to apply for and obtain a certificate of authority to transact business in Florida.

Even though a foreign general partnership is not obligated to obtain a certificate of authority from the Department to transact business in Florida, such entity may still be required to have a registered office and appoint a registered agent for service of process if it owns an interest in Florida real property or a mortgage on Florida real property (and is not otherwise exempt from this requirement because it is a “financial institution”). Although FRUPA does not contain provisions similar to those contained in Section 607.0505 of the FBCA, the broad language of Section 607.0505 of the FBCA (covering alien business organizations as well as foreign corporations) may bring entities other than foreign corporations under the requirements of that statute. See “Foreign Corporation” above.

4. Foreign Limited Liability Partnership

Recommended opinion:

Based solely on a certificate of status from the Department dated _____, 20____, the Client is authorized to transact business as a [foreign limited liability partnership] in the State of Florida, and its [limited liability partnership] status in Florida is active.

Sections 620.9001 through 620.9105 of FRUPA include a provision whereby a foreign LLP may file a “statement of foreign qualification” to transact business in Florida, and a provision (i.e., Section 601.9104(1) of FRUPA) setting forth a “safe harbor” list of activities by a foreign LLP that do not constitute transacting business in Florida (which list parallels the safe-harbor list contained in FRULPA). Like Section 620.1903(3) of FRULPA, Section 620.9104(2) of FRUPA expressly provides that “the ownership in this state of income-producing real property or tangible personal property,” other than property excluded under the safe harbor list in Section 620.9104(1) of FRUPA, constitutes transacting business in the State of Florida. The widely held view among Florida lawyers is that Section 620.9104(2) of FRUPA requires all foreign limited liability partnerships that own income-producing property in Florida to obtain a certificate of authority to transact business in Florida.

Because the safe-harbor lists in FRULPA and FRUPA are nearly identical, the diligence required to render the “authorized to transact business” opinion for a foreign LLP is similar to that required for a foreign limited partnership. In order to assess whether a Florida statement of authority is required for a foreign LLP, Opining Counsel should obtain a factual certificate from a general partner of the Client describing fully the scope of the foreign LLP’s business activities in Florida. Opining Counsel should then determine whether those activities go beyond the safe harbor exceptions listed in Section 620.9104(1) of FRUPA. However, it is the widely held view among Florida lawyers that in virtually all cases not expressly covered by the safe harbor, a foreign LLP will need to obtain a certificate of authority from the Department.

If Opining Counsel is requested to render the recommended “authorized to transact business” opinion for a foreign LLP, Opining Counsel must obtain a certificate of active status for that LLP from the Department. However, if the foreign LLP has not obtained a certificate of authority from the Department, the Department cannot issue a certificate of active status. In such circumstances, Opining Counsel will need to assist the Client in obtaining a certificate of authority in accordance with the filing procedures set forth in Section 620.9102 of FRUPA before Opining Counsel will be in a position to render this opinion.

The statement of foreign qualification under Section 620.9102 of FRUPA requires the appointment of a registered agent for service of process in Florida and requires that the name of the foreign limited liability partnership must end with “Registered Limited Liability Partnership,” “Limited Liability Partnership,” “R.L.L.P.,” “L.L.P.,” “RLLP” or “LLP.” An application to obtain a certificate of authority for a foreign LLP cannot be filed, however, unless the partnership also files a partnership registration statement with the Department in accordance with the requirements of Section 620.8105 of FRUPA. Under Section 620.8105(3) of FRUPA, one key requirement for a partnership registration statement is that all of the partners in the registered partnership that are business entities (as well as any agent appointed by the

partnership to maintain a list of partners, in lieu of naming all the partners in the registration statement) must be organized in Florida or otherwise hold a certificate of authority from the Department to transact business in Florida.

After the foreign LLP has registered with the Department under Section 620.8105 of FRUPA and has obtained its certificate of authority under Section 620.9102 of FRUPA, Opining Counsel can then obtain a certificate of active status for the LLP from the Department. Unlike the FBCA and FRULPA, the LLP provisions of FRUPA do not contain a provision expressly stating that a certificate of status issued by the Department is “conclusive evidence” of the foreign LLP’s qualification. However, as a diligence matter a certificate of status obtained from the Department with respect to a foreign LLP is the functional equivalent of the conclusive certificates issued by the Department with respect to foreign corporations and foreign limited partnerships, and under Florida customary practice, Opining Counsel may rely solely on such certificate of status when rendering the recommended opinion.

A foreign LLP is required under Section 620.9003 of FRUPA to file an annual report and to pay an annual filing fee to the Department. Failure to file the annual report or to pay the required fee may result in administrative revocation of the partnership’s status as a LLP, but revocation is generally not an event of dissolution for the LLP unless the partnership agreement so provides. The statute does not provide for revocation of LLP status if the partnership fails to maintain a registered agent for service of process, although the annual LLP report must identify the name and address of the current registered agent. Neither the opinion that the foreign LLP is “authorized to transact business” or the opinion that “its status is active” means or implies that there are no grounds existing under the statute for administrative revocation of such foreign LLP’s limited liability status. However, if Opining Counsel has knowledge that circumstances for future revocation of the Client’s certificate of authority exists at the time the opinion is rendered (or if Opining Counsel is aware of facts (red flags) that ought to cause a reasonable Opining Counsel to know of such circumstances), the recommended (but not mandatory) practice is for Opining Counsel to require the Client to take the necessary actions to cure the violation, since revocation of the Client’s certificate of authority will generally cause a violation of the Transaction Documents and will also preclude the Client from maintaining any legal proceeding in a Florida court.

Even if a foreign LLP is not deemed to be transacting business in Florida requiring that such entity obtain a certificate of authority from the Department, such entity may still be required to have a registered office and appoint a registered agent for service of process if it owns an interest in Florida real property or a mortgage on Florida real property (and is not otherwise exempt from this requirement because it is a “financial institution”). Although FRUPA does not contain RICO agent provisions similar to those contained in Section 607.0505 of the FBCA, the broad language of Section 607.0505 of the FBCA (covering alien business organizations as well as foreign corporations) may bring other entities such as foreign LLPs under the requirements of that statute. See “Foreign Corporation” above.

5. Foreign Limited Liability Company

Recommended opinion:

Based solely on a certificate of status from the Department dated _____, 20____, the Client is authorized to transact business as a [foreign limited liability company] in the State of Florida, and its [limited liability company] status in Florida is active.

Section 608.501(1) of the FLLCA requires a foreign limited liability company to obtain a certificate of authority from the Department prior to transacting business in Florida. Section 608.501(2) of the FLLCA provides a “safe harbor” list of activities in Florida by a foreign LLC that do not constitute transacting business, which list is substantially the same as the lists contained in Section 607.1501(2) of the FBCA and Section 620.1903(1) of FRULPA.

If a foreign LLC has obtained a certificate of authority to transact business in the State of Florida, Opining Counsel should obtain an “active status” certificate from the Department. Unlike the FBCA and FRULPA, the FLLCA does not contain a provision expressly stating that a certificate of status issued by the Department is “conclusive evidence” of the LLC’s existence or authorization to transact business. The

closest analogous provision is Section 608.505(1) of the FLLCA, which provides that “[a] certificate of authority authorizes the foreign limited liability company to which it is issued to transact business in this state subject, however, to the right of the Department to suspend or revoke the certificate as provided in this chapter.” However, a certificate of status obtained from the Department with respect to a foreign LLC is the functional equivalent of the conclusive certificates issued by the Department with respect to foreign corporations and foreign limited partnerships, and under Florida customary practice Opining Counsel may rely solely upon such certificate of status when rendering an opinion that a foreign LLC is authorized to transact business in Florida.

If Opining Counsel is asked to opine as to whether or not a foreign LLC must obtain a certificate of authority in Florida, Opining Counsel must evaluate whether such authorization is required. In carrying out that evaluation, Opining Counsel should obtain a factual certificate from a manager of the Client (if manager-managed), from a member of the Client (if member-managed), or from an officer of the Client (if officers have been appointed under the LLC’s operating agreement) describing fully the scope of the foreign LLC’s business activities in Florida. Opining Counsel should then determine whether those activities fall within the safe harbor provisions of Section 608.501(2) of the FLLCA. It is the widely held view of Florida lawyers that if the safe harbor exemptions do not expressly apply, the foreign LLC will need to obtain a certificate of authority from the Department.

A foreign LLC may not obtain a certificate of authority to transact business in Florida unless its name satisfies the same requirements applicable to domestic limited liability companies under Section 608.406 of the FLLCA (i.e., its name must end with the words “limited liability company” or “limited company” or the abbreviations “L.L.C.” or “L.C.” or the designations “LLC” or “LC”).

The circumstances under which a foreign LLC’s certificate of authority may be administratively revoked by the Department are set forth in Section 608.512 of the FLLCA, such as the foreign LLC’s failure for 30 days or more to maintain a registered agent, or its failure to file the required annual report or to pay the required fees. Even if circumstances exist that could result in administrative revocation of the LLC’s certificate of authority with the passage of time, Opining Counsel may opine that a foreign LLC is authorized to transact business in Florida, and the opinion is not an affirmation that no such circumstances then exist. However, if Opining Counsel has knowledge that circumstances for future revocation of the Client’s certificate of authority exist at the time the opinion is rendered (or if Opining Counsel is aware of facts (red flags) that ought to cause a reasonable Opining Counsel to know of such circumstances), the recommended (but not mandatory) practice is for Opining Counsel to require the Client to take the necessary actions to cure the violation, since revocation of the Client’s certificate of authority will generally constitute a violation of the Transaction Documents and will also preclude the Client from maintaining any legal proceeding in a Florida court.

Even if a foreign LLC is not deemed to be transacting business in Florida requiring that such LLC obtain a certificate of authority from the Department, such entity may still be required to have a registered office and appoint a registered agent for service of process if it owns an interest in Florida real property or a mortgage on Florida real property (and is not otherwise exempt from this requirement because it is a “financial institution”). Although the FLLCA does not contain RICO agent provisions similar to those contained in Section 607.0505 of the FBCA, the broad language of Section 607.0505 of the FBCA (covering alien business organizations as well as foreign corporations) may bring other entities such as foreign LLCs under the requirements of that statute. See “Foreign Corporation” above.

6. Trust with a Foreign Trustee

There is no statutory requirement that an individual non-resident of Florida serving as the trustee of a trust owning Florida real property obtain a certificate of authority to transact business in Florida prior to transacting business in Florida. This is true whether or not the trustee is entitled to the benefits of Section 689.071, Florida Statutes (the Florida Land Trust Act). Additionally, there is no statutory requirement that a foreign corporation or other foreign business entity serving as the trustee of a trust owning Florida real property obtain a certificate of authority to transact business in Florida merely because of such entity’s status as a trustee. Opining Counsel should be aware, however, that the Florida statutes

applicable to foreign entities may cause such entity to be required to obtain a certificate of authority to transact business in Florida because of the scope of its activities in Florida, including its status as a trustee of a trust.

7. Not-For-Profit Corporation

Florida's not-for-profit statute (Chapter 617, Florida Statutes) has provisions that require a foreign not-for-profit corporation to obtain a certificate of authority to transact business in Florida if such entity conducts its affairs or holds income producing property in Florida. The requirements described in "Foreign Corporation" above should be followed in connection with rendering an opinion that a foreign not-for-profit corporation is authorized to transact business in Florida.

B. Foreign Lender Not Required to Obtain a Certificate of Authority from the Department to Make a Loan

When representing a Client in connection with a loan transaction, Florida Opining Counsel may be asked to opine as to whether an out-of-state lender is required to be authorized to transact business in Florida in order to make a loan to a Florida entity or to make a loan secured by Florida property. Each of the Florida business entity statutes (for corporations, limited liability companies and general and limited partnerships) includes the following activities in its safe harbor list of activities that do not require a lender to become authorized to transact business in Florida: (i) creating or acquiring indebtedness, mortgages, or security interests in real or personal property; and (ii) securing or collecting debts or enforcing mortgages or other security interests in property securing the debts. See Sections 607.1501(2)(g) and (h) of the FBCA, Sections 608.501(2)(g) and (h) of the FLLCA, Sections 620.1903(1)(g) and (h) of FRULPA, and Sections 620.9104(1)(g) and (h) of FRUPA. For foreign limited partnerships and foreign limited liability partnerships, the following additional phrase appears at the end of Section 620.1903(1)(h) of FRULPA and Section 620.9104(1)(h) of FRUPA: "and holding, maintaining and protecting the property so acquired."

However, if a foreign lender participates in any activity not specified within the safe harbor list, the foreign lender may be required to obtain a certificate of authority from the Department to transact business in Florida. These other activities could include having physical premises in Florida, having loan officers in Florida, and operating a business on property that has been foreclosed, and could even include making a number of loans to Florida entities or making a number of loans secured by Florida property.

Regardless of its activities in the State of Florida, an entity possessing a national or federal charter, such as a national bank, will not be subject to the requirement under Florida law for obtaining a certificate of authority to transact business because of principles of federal preemption.

If this opinion is requested by an out-of-state lender, the recommended form of opinion is as follows:

Neither the making of the [Loan], nor the securing of the [Loan] with collateral, nor the ownership of the [Notes], will, solely as the result of any such action, require the [Lender] to obtain a certificate of authority to transact business as a foreign [corporation/limited partnership/general partnership/limited liability partnership/limited liability company] in the State of Florida.

The following language may be added to the opinion by Opining Counsel if Opining Counsel wishes to state explicitly that no other activities are contemplated by this opinion:

However, we express no opinion with respect to the effect upon the [Lender] of engaging in any other activities in the State of Florida (including the making of additional loans in the State of Florida) or the effect upon the [Lender] of having a physical presence, if any, in the State of Florida.

This opinion does not mean (among other things) that: (i) the lender is not subject to personal jurisdiction in Florida, (ii) the lender may not be served with process in Florida, or (iii) the lender will not be subject to Florida taxes in connection with the loan.

If the Opinion Recipient requires a broader opinion which extends to otherwise requiring qualification or registration of the lender in the State of Florida, or which extends to the act of seeking to enforce the Transaction Documents in the State of Florida, and Opining Counsel agrees to give such an expanded opinion, Opining Counsel should consider the possible applicability of the registration requirements of Section 607.0505, Florida Statutes, and the requirements governing mortgage lenders at Part III, Chapter 494, Florida Statutes. In such circumstances where an expanded opinion is given, unless the applicability or non-applicability of the requirements is clear, the Opinion Recipient should be prepared to accept a qualification to the opinion such as the following:

... except that (i) if [Lender] is not a “financial institution” as defined in Section 607.0505, Florida Statutes (which definition includes, but is not limited to, state and national banks and state and federal savings associations, insurance companies licensed or regulated by the United States or a state, and licensed Florida mortgage lenders), [Lender] may be required to maintain a registered office and a registered agent in the State of Florida and file a notice thereof with the Department of State under Section 607.0505, Florida Statutes, (ii) upon [Lender’s] taking of title to any of the collateral or the operation of the facilities thereon located within the State of Florida, [Lender] may be subject to doing business and registration requirements under Sections 607.0505 and 607.1501, Florida Statutes, (iii) [Lender] may be required to be licensed as a Florida mortgage lender unless [Lender] makes only nonresidential mortgage loans and sells loans only to institutional investors within the meaning of Chapter 494, Florida Statutes, or unless [Lender] is a state or federally chartered bank, trust company, savings and loan association, savings bank or credit union, bank holding company regulated under the laws of any state or the United States, or insurance company if the insurance company is duly licensed in Florida, or is a wholly owned bank holding company subsidiary or a wholly owned savings and loan association holding company subsidiary that is formed and regulated under the laws of any state or the United States and that is approved or certified by the Department of Housing and Urban Development, the Veterans Administration, the Federal National Mortgage Association, or the Federal Home Loan Mortgage Corporation, or is otherwise exempt.

In some cases, the Opinion Recipient may ask that Opining Counsel describe the repercussions of the failure of an out-of-state lender to become authorized to transact business under Section 607.1501, Florida Statutes, or to register under Section 607.0505, Florida Statutes. In such cases, the following may be included in the opinion:

Failure to become authorized to transact business under Section 607.1501, Florida Statutes, if required, will result in the inability of the entity to bring suit in the State of Florida (until qualified), but will not prevent the entity from defending itself in a lawsuit in Florida, and will entitle the Department (under Section 607.1502, Florida Statutes) to impose the fees and taxes that would have been charged if the entity had been qualified together with a civil money penalty of not less than \$500 or more than \$1,000 for each year or part thereof during which the entity transacted business without qualifying. Failure to register under Section 607.0505, Florida Statutes, if required, will not result in the inability of the entity to either bring suit or defend itself in a suit in the State of Florida, but will entitle the Department (under Section 607.0505(5), Florida Statutes) to impose a civil money penalty in the amount of \$500 for each year or part thereof during which the entity should have been registered. Such liability will be forgiven in full upon the compliance by the entity with the registration requirements. Additional penalties and consequences, including the filing of a lis pendens, could result from any proceedings brought by the Florida Department of Legal Affairs to enforce the registration provisions of Section 607.1501, Florida Statutes. However, the failure of an entity to become authorized to transact business under Section 607.1501, Florida Statutes, or the entity’s failure to register under Section 607.0505, Florida Statutes, if required, does not adversely affect the creation or perfection of liens in favor of the entity.

C. Opinions regarding Qualification of a Florida Entity under the Laws of another Jurisdiction

Florida counsel are sometimes asked to opine as to whether a Florida entity is authorized (or qualified) to transact business in one or more other states.

A blanket request that an opinion be provided that the Client is authorized to transact business as a foreign corporation in every jurisdiction in which its property or activities requires qualification or in which the failure to qualify would have a material adverse effect on the Client is an inappropriate opinion request. See “Introductory Matters – Reasonableness; Inappropriate Subjects for Opinions.”

In a multi-state transaction involving a Florida business entity, an opinion may be requested as to whether a Florida entity is required to be qualified in a particular state where the entity engages in a particular activity in that other state. If such a request is made, Opining Counsel will need to determine whether it is competent to render such opinion, which is an opinion under the laws of another jurisdiction. Florida counsel who render such an opinion will be held to the standard of care of a competent lawyer in the jurisdiction on whose laws it is opining. See “Common Elements of Opinions – Opinions Under Florida or Federal Law; Opinions Under the Laws of Another Jurisdiction.” The form of such opinion and the diligence required to give such opinion are beyond the scope of this Report.

However, although opinions on authorization to transact business under the laws of states other than Florida are outside the scope of this Report, Florida counsel are often requested to render an opinion that a Florida entity (or an entity organized in another jurisdiction such as Delaware) is authorized (or qualified) to transact business in one or more states based solely on a “good standing” or “active status” certificate from the governmental agencies in such other states. Although technically such an opinion is considered an opinion under the laws of another jurisdiction, this opinion conveys to the Opinion Recipient the comfort that Opining Counsel has confirmed with authorities in such other state or states that the particular entity that is the subject of the opinion letter is in fact registered or qualified to transact business in such other state or states. On the other hand, it is not unreasonable to insist that an Opinion Recipient forgo requesting this opinion because the Opinion Recipient will usually be obtaining, and can rely directly on, the certificates of status from the governmental authorities in each state where the entity is qualified to do business. However, if Opining Counsel elects to render this opinion, Opining Counsel will have no obligation to evaluate the requirements of the laws of the other jurisdiction as to whether the requirements of that jurisdiction have been met, other than to obtain a “good standing” or “active status” certificate from the particular state’s equivalent of the Department.

If this opinion is rendered, the recommended form is as follows:

Based solely on a [certificate of good standing/active status] from the _____ [the governmental authority in the state in which the Client is authorized to transact business], the Client is qualified [registered] to transact business as a foreign [corporation/limited partnership/limited liability partnership/limited liability limited partnership/limited liability company] in the State of _____ .

In all states, “good standing” or “active status” certificates are available from the Secretary of State, Department of Corporations, or other equivalent authorities that oversee entity formation and operation. In some states, but not in Florida, “good standing” certificates are also available from state taxing authorities. If Florida counsel renders an opinion that a Florida entity is authorized to transact business in another jurisdiction based solely on certificates of “good standing” or “active status” from the respective governmental authorities that oversee entity formation and operation in the states where the Client engages in business activities, Opining Counsel has no obligation to determine whether tax status certificates are also available in those states and has no obligation to obtain any such tax status certificates in rendering this opinion. Under Florida customary practice, an opinion on the good standing or active status of a Florida entity under the laws of another jurisdiction should not be viewed as implying that any tax status certificate has been obtained or that the Florida entity is in “good standing” from the perspective of its tax status in such foreign jurisdiction.

ENTITY POWER OF A FLORIDA ENTITY

An opinion regarding “entity power” addresses the capacity of the Client entity under the Florida law governing such entity’s organization and existence and under such entity’s Organizational Documents to execute and deliver the Transaction Documents and to perform its obligations thereunder. The “entity power” opinion expresses Opining Counsel’s judgment that the Transaction will not be enjoined or challenged as being beyond the Client’s statutory powers and beyond the powers granted to the Client by the Client’s Organizational Documents.

Although the words “power and authority” were both historically used in this opinion, the use of the term “authority” is believed by the Committees to be superfluous. Additionally, the Committees believe that the use of the word “authority” in this opinion is often misunderstood to relate to opinions regarding authorization of a Transaction. See “Authorization of the Transaction by a Florida Entity.” Accordingly, the term “authority” has been omitted from the form of entity power opinion recommended by this Report. However, in the view of the Committees, if the term “authority” is used in the entity power opinion (along with the word “power”), it does not change the scope or meaning of the opinion. Further, it is unnecessary to state in the entity power opinion that an entity has “full,” “all” or “all necessary” entity power. Use of these terms do not add to the opinion and do not change the scope or meaning of the opinion in any manner.

In the context of this opinion, an entity’s power to “perform” its obligations under the Transaction Documents means that the entity has the power under the governing law in the jurisdiction where the entity was organized and under the Organizational Documents, as of the date of the opinion and under the circumstances then presented, to fulfill its obligations under the Transaction Documents. It does not mean that the entity’s performance of its obligations under the Transaction Documents will withstand all challenges from all parties, but rather, only challenges under the entity’s governing law and the entity’s Organizational Documents on the grounds that the entity’s actions are *ultra vires* or in breach of the entity’s Organizational Documents. This opinion is different from an opinion that the entity’s entering into the Transaction will not violate laws or agreements applicable to the entity or a remedies opinion regarding the enforceability against the entity of the Transaction Documents. See “No Violation and No Breach or Default” and “The Remedies Opinion.” Further, an entity power opinion does not address the effect on an entity’s powers under laws other than the law under which the entity was organized. In particular, this opinion does not address: (i) laws of any jurisdiction in which the entity is or should be qualified to do business as a foreign entity, (ii) laws that govern the activities of an entity that is in a regulated business, or (iii) laws that could create or restrict the exercise of entity power or purpose, such as the Hart-Scott-Rodino Antitrust Improvements Act of 1976, as amended.

In rendering an entity power opinion, some Opining Counsel refer to the entity’s “entering into” or “consummating” the Transaction or the Transaction Documents (or the main agreement among the Transaction Documents) rather than to the entity’s “performance” under the Transaction Documents. There is a difference between these two concepts: (i) “consummation” refers to the acts up until the closing of the Transaction; and (ii) “performance” relates to the entity’s post-closing performance of its obligations under the Transaction Documents). With respect to an entity power opinion of a Florida Opining Counsel, the Committees believe that under Florida customary practice the scope of the entity power opinion covers both the “consummation” (or words to that effect) of the Transaction and the “performance” (or words to that effect) of the Florida entity of its obligations under the Transaction Documents, even if the words used in the entity power opinion are expressly limited to the “consummation” of the Transaction.

In certain situations, an entity’s power may be limited by the entity’s Organizational Documents to a particular project or business. Further in some instances, an entity’s Organizational Documents may include “special purpose entity” (“SPE”) provisions. See “Limitations on Power and Special Purpose Entities” below for a description of such provisions. In connection with the entity power opinion, Opining Counsel should carefully review the Organizational Documents of the entity to determine if any such limiting provisions or SPE provisions are contained in the entity’s Organizational Documents and, if so, whether such provisions affect the entity’s power to engage in the Transaction or perform its obligations under the Transaction Documents.

The entity power opinion is premised on the Client entity being in existence. If an opinion on the entity status of the Client is not being rendered by Opining Counsel, then in order to give an entity power opinion the Client's entity status should be expressly assumed in the opinion letter. Further, just as in the case of an opinion regarding entity status and organization, an Opining Counsel rendering an entity power opinion should determine whether the entity has taken steps to dissolve. See "Entity Status and Organization of a Florida Entity." If the entity has taken steps to dissolve, the actions proposed to be taken in the Transaction and pursuant to the Transaction Documents may exceed the powers of a dissolved entity to wind up its affairs.

The entity power opinion does not mean that the persons acting on behalf of the entity with respect to the Transaction or the Transaction Documents are in compliance with their respective fiduciary duties with respect to the Transaction.

An entity power opinion is not an opinion that the Client's business is being operated in a lawful manner and does not mean that Opining Counsel has evaluated how the Client entity is conducting its business. Further, such opinion does not address whether the Client has good title to its properties, possesses all required governmental licenses or has all required approvals from those governmental bodies that regulate the Client entity. Additionally, no diligence as to the manner in which the Client entity is actually operating its business is required in order to render the entity power opinion.

In that regard, it is implicitly assumed in an opinion of Florida counsel on entity power that the Client entity is being operated in a lawful manner unless Opining Counsel has knowledge to the contrary (or is aware of facts (red flags) that ought to cause a reasonable Opining Counsel to have such contrary knowledge). If Opining Counsel knows or should know that the Client entity is being operated in an unlawful manner, Opining Counsel should consider Opining Counsel's ethical obligations under the circumstances. See "Introductory Matters-Ethical and Professional Issues."

Often, a request for an entity power opinion will include a request for an opinion that the entity has the power to conduct its business as it is currently being conducted and to own its properties. This opinion was often historically rendered as part of the entity power opinion, and continues to this day to be rendered from time to time by Florida counsel. However, in the view of the Committees, the giving or requiring of this opinion is discouraged because of the expansive interpretation which might be given to this opinion and because of the extensive diligence that would be required to render this opinion if it were to be interpreted expansively.

In that regard, the Committees believe that under Florida customary practice, if an opinion is rendered that an entity has the power to own its properties and conduct its business as it is currently being conducted, the scope of such opinion should be interpreted as being limited to the laws under which the entity was organized and to no other laws. For example, unless this interpretation is followed, if the entity were to be engaged in a regulated business (such as the banking business), reference might be necessary to other governing laws in order to determine whether the entity is in compliance with such laws. The Committees believe that an expansion of the entity power opinion beyond the governing law of the entity in question is inappropriate based on a cost-benefit analysis of this opinion.

A. Corporation

Recommended opinion:

The Client has the corporate power to execute and deliver the [Transaction Documents] and to perform its obligations thereunder.

Corporate power of a Florida corporation is derived from the FBCA and the corporation's articles of incorporation. To render a corporate power opinion, Opining Counsel should review the FBCA. Under Section 607.0301 of the FBCA, a corporation may be organized for any lawful purpose or purposes. Section 607.0302 of the FBCA then gives the corporation powers to act as if it were an individual, except to the extent of any limitations set forth in the corporation's articles of incorporation. Accordingly, Opining Counsel should examine the powers (and limits, if any) stated in the corporation's articles of incorporation to confirm that the corporation has the corporate power to execute and deliver the Transaction Documents and perform its obligations thereunder.

Under Section 607.0302 of the FCBA, only a corporation's articles of incorporation define its corporate power. Notwithstanding the foregoing, the Committees recommend that Opining Counsel also review the corporation's bylaws to determine whether the bylaws limit the powers of the corporation in any manner.

In most situations, the corporation's articles of incorporation will authorize the corporation to engage in any legal activity. However, there are exceptions to this general rule and Opining Counsel should be aware that the articles of incorporation of some corporations may expressly limit the freedom and power of the corporation to engage in certain transactions or may include SPE provisions that limit the power of the corporation in certain circumstances or in a certain manner. See "Limitations on Power and Special Purpose Entities" below. In any such case, Opining Counsel should carefully review the Organizational Documents of the corporation to determine whether any such provisions preclude or otherwise limit the corporation from having the power to enter into the Transaction and perform its obligations under the Transaction Documents.

B. Limited Partnership

Recommended opinion:

The Client has the limited partnership power to execute and deliver the [Transaction Documents] and to perform its obligations thereunder.

A limited partnership derives its power to transact business from the governing statute (FRULPA), its certificate of limited partnership and its limited partnership agreement. Section 620.1104(2) of FRULPA provides that a limited partnership may be organized under FRULPA for any lawful purpose. Section 620.1105 of FRULPA provides that a limited partnership has the power "to do all things necessary or convenient to carry on its activities, including the power to sue, be sued, and defend in its own name and to maintain an action against a partner for harm caused to the limited partnership by a breach of the partnership agreement or violation of a duty to the partnership." Given this broad empowerment by FRULPA, Opining Counsel should obtain a copy of the certificate of limited partnership and the limited partnership agreement from the Client (certified as true and correct by a general partner) and should review such documents to confirm that there are no provisions in such documents that limit the partnership's ability to enter into the Transaction and perform its obligations under the Transaction Documents. If the Client limited partnership does not have a written limited partnership agreement, the Committees believe that Opining Counsel should not issue an entity power opinion with respect to such limited partnership.

C. General Partnership

Recommended opinion:

The Client has the partnership power to execute and deliver the [Transaction Documents] and to perform its obligations thereunder.

A general partnership derives its power to transact business from the governing statute (FRUPA) and its partnership agreement. Opining Counsel should obtain a copy of the partnership agreement from a partner (certified as true and correct by a partner) and should review the partnership agreement to determine whether the proposed Transaction is permitted (or not prohibited) by its terms. If the Client general partnership does not have a written partnership agreement, the Committees believe that Opining Counsel should not issue an entity power opinion with respect to such partnership.

In many cases, the general partnership agreement will state that the partnership may engage in any lawful business. However, in some cases, such as a joint venture or a general partnership for a particular undertaking, the partnership agreement may expressly limit the scope of permissible business activities to one particular enterprise or project, thereby restricting both the power of the partnership to enter into the proposed Transaction and the authority of the partners to bind the partnership to the Transaction Documents. In addition to reviewing the partnership agreement for such limitations, Opining Counsel should review any partnership statements that have been filed with the Department under Sections 620.8105, 620.8303 or 620.8304 of FRUPA which might also set forth limitations on the activities of the partnership and the authority of the partners.

D. Limited Liability Company

Recommended opinion:

The Client has the limited liability company power to execute and deliver the [Transaction Documents] and to perform its obligations thereunder.

A Florida limited liability company derives its entity power from the governing statute (FLLCA), from its articles of organization, and from the operating agreement adopted by the members of the LLC. Opining Counsel should obtain copies of the LLC's Organizational Documents together with a certificate pursuant to which such documents are certified as true and correct by a manager of the LLC (if manager-managed), by a managing member or other member of the LLC (if member-managed), or by an officer of the LLC (if officers have been appointed by the LLC pursuant to the LLC's operating agreement). If the Client does not have a written operating agreement, the Committees believe that Opining Counsel should not issue an entity power opinion with respect to the Client. Unless the Client's articles of organization or operating agreement provide otherwise, each Florida limited liability company has the requisite entity power to engage in any lawful activity, and Section 608.404 of the FLLCA provides that an LLC has the same powers as an individual to do all things necessary to carry out its business and affairs, including a non-exclusive list of permitted actions enumerated in such section.

In most cases, an LLC's operating agreement (and sometimes the LLC's articles of organization) empowers the LLC to engage in any legal activity. However, Opining Counsel should carefully examine the LLC's Organizational Documents to determine whether they contain provisions limiting the power of the LLC to engage in certain types of transactions or include any SPE provisions. If any such limitations are included in the LLC's Organizational Documents, Opining Counsel will need to determine whether any such provisions preclude or otherwise limit the LLC from having the power to enter into the Transaction or perform its obligations under the Transaction Documents. See "Limitations on Power and Special Purpose Entities" below.

E. Trusts

Recommended opinion:

The Client(s), as trustee(s) of the trust, has/have the trust power to execute and deliver the [Transaction Documents] and to perform the Client(s)' obligations thereunder.

1. General

Because a trust is not a separate statutory entity under Florida law (see “Entity Status and Organization of a Florida Entity – Trusts”), the trust power is not derived from the trust itself. Rather, the trust power is derived from the power of the trustee(s) to act on behalf of the trust. Accordingly, in addressing trust power, Opining Counsel must make two key inquiries: (i) first, whether a trustee that is an entity rather than an individual has the power to engage in the Transaction based on the trustee’s Organizational Documents and the Florida law governing such entity’s organization and existence, and (ii) second, whether the trustee has the power to engage in the Transaction under the trust agreement, and in connection with a Florida Land Trust without a written trust agreement, whether the trustee has the power to engage in the Transaction pursuant to a recorded instrument that qualifies the arrangement as a Florida Land Trust under Section 689.071, Florida Statutes.

(a) Trustee as Business Entity. If the trustee is a Florida corporation, partnership or LLC, Opining Counsel should first inquire as to the entity power of that particular entity. Generally, this analysis will be exactly the same as the analysis set forth above relative to the steps to be taken to determine whether that business entity, in its own capacity, has the power to engage in the Transaction and deal with trust property, and therefore has the power to execute and deliver the Transaction Documents and perform its obligations under such documents on behalf of the trust beneficiaries. This will primarily involve review of the entity’s Organizational Documents and the Florida law governing such entity’s organization and existence.

(b) Trustee Power. The extent of the second inquiry is dependent upon: (i) whether the trust relationship satisfies the requirements of Section 689.071, Florida Statutes and therefore qualifies as a Florida Land Trust, (ii) whether, in the context of a Transaction involving real property, the provisions of Section 689.07, Florida Statutes, are applicable because the real property has been conveyed to a person or entity simply “as trustee,” without setting forth any of the powers required to avail the trustee of the benefit of the presumption arising under Section 689.071, Florida Statutes, (iii) whether a separate written trust document or other agreement governing the trust relationship exists, and (iv) whether the beneficiaries of the trust need to consent to the execution, delivery and performance of the Transaction Documents in order for the trustee to have the power to take the required actions. If a written trust document or other agreement governing the trust relationship is in existence, then, even if the trust relationship is a Florida Land Trust created pursuant to Section 689.071, Florida Statutes, or the real property has been conveyed to a person or entity simply “as trustee,” a review of the trust document or other agreement governing the trust relationship must be made by Opining Counsel in order to render the opinion.

2. Florida Trusts Other than Florida Land Trusts

(a) Trusts with Written Trust Agreements.

In most cases, each trustee of a Florida trust derives the power to own and deal with trust property and to transact business, and thus to execute and deliver the Transaction Documents and to perform his, her or its obligations under such documents, from the terms of the trust agreement or other agreement governing the trust.

Except in the limited situations described below, Opining Counsel cannot render an opinion regarding the trust unless Opining Counsel is provided with a copy of the trust agreement or other agreement governing the trust relationship and engages in the following further diligence. In this regard, Opining Counsel should: (i) review the trust agreement or other agreement governing the trust relationship to determine whether any trust beneficiaries and/or other parties hold the power of direction over the actions of the trustee and, if so, to determine which trust beneficiaries and/or other parties hold such power of direction; (ii) review any other

agreement that may have been made among the trust beneficiaries regarding their direction of the trustee, to determine compliance with any approval requirements in any such other agreement; and (iii) determine that the appropriate trust beneficiaries and/or other parties (or any required majority, if not required to be unanimous) have executed a written direction to the trustee with respect to the action to be taken.

(b) Trusts Without Written Trust Agreements

If the Transaction is large enough or important enough to require a third-party legal opinion, then the trust's affairs are sufficiently complex to require a written trust agreement. Accordingly, in this context, Opining Counsel should not opine with respect to any trust (other than possibly with respect to a Florida Land Trust) if Opining Counsel confirms that there is no written trust agreement.

(c) Passive Trusts – Powers of Beneficiaries

If Opining Counsel determines that the trust is “passive,” that is, that the trustee has no active managerial or decision-making authority, then the beneficiaries, as well as the trustee, should execute all necessary Transaction Documents. The beneficiaries also need to execute all necessary Transaction Documents or provide a written consent or similar written instrument in circumstances where the trust agreement requires such execution or fails to extend clear express power to the trustee(s).

(d) Trusts Where Title to Real Property is Held by Trustee

This analysis is particularly true in the case of a trust in which title to real property is held by a trustee, whether or not the trustee has the benefit of any statutory presumption concerning the organization of the trust and his, her or its authority to deal with the real property. See Fund Title Note 31.03.03 (2001). Furthermore, in the case of a trust in which title to real property is held by a trustee, Opining Counsel should cause to be recorded in the public real estate records either: (i) the unrecorded trust instrument (to which the Client may object), or (ii) an affidavit by the trustee or the trustee's counsel establishing the identity of the trustee, the execution of the trust instrument, the power of the trustee to act under the trust instrument, and that the trustee's power has not been revoked and remains in full force and effect.

(e) Consents from Trustee and Beneficiaries

Additionally, in order to render the foregoing opinion, Opining Counsel must obtain properly executed certificates of consent or similar written instruments from the trustee and each beneficiary of the trust who has a power to direct the activities of the trust under the trust agreement, confirming the trust's power to enter into and perform the Transaction Documents and as to the trustee's power to execute and deliver the Transaction Documents on behalf of the trust. In such certificates: (i) all such beneficiaries, as well as the holders of any security interests in their beneficial interests, should be identified and (ii) the trustee should be directed to consummate the Transaction and execute and deliver the Transaction Documents. If any holders of security interests are identified, Opining Counsel should confirm that all such holders have consented to the Transaction.

3. Effect of Presumption Arising Under Section 689.071, Florida Statutes

(a) Generally

A Florida Land Trust arises under Section 689.071, Florida Statutes, when a deed or other recorded instrument naming the trustee as grantee or transferee sets forth the trustee's powers, as required by that statute. The trustee of a Florida Land Trust derives his, her, or its power or capacity to transact business on behalf of the trustee from Section 689.071, Florida Statutes, and the deed or other instrument of conveyance naming the trustee as grantee or transferee. In such case, third parties dealing with the trustee who do not have actual or constructive notice of the terms of a trust agreement may be entitled to the benefit of Section 689.071, Florida Statutes, if the conveyance into the trust qualifies under such statute. In that case, trust powers exist to the extent specified in the deed or other instrument of conveyance into the trustee.

(b) Florida Land Trusts Without Written Trust Agreements

If the trust satisfies the requirements of Section 689.071, Florida Statutes, it is possible for Opining Counsel to render the trust power opinion even if there is no separate written trust agreement governing the trust relationship. However, because the customary practice in dealing with most opinions involving trusts is to refrain from rendering an opinion unless a written trust agreement exists, the exception from this rule should only be applied in limited circumstances. For the exception to apply, the three requirements set forth in “Entity Status and Organization of a Florida Entry – Trusts – Trusts Owning Real Estate – Florida Land Trust without Written Trust Agreements” must all be satisfied.

If all three requirements are satisfied, then Opining Counsel must review the recorded instrument and determine whether the express language set forth in the recorded instrument confers on the trustee the power to execute, deliver and perform the Transaction Documents without any power of direction by the trust beneficiaries or any other parties.

In the case of a Florida Land Trust, should there be no trust agreement or other agreement governing the trust relationship, but nevertheless the express language set forth in the recorded instrument creating the Florida Land Trust establishes that there are trust beneficiaries or other parties who hold a power of direction over the actions of the trustee, then Opining Counsel must additionally: (i) review any documents that may have been executed by the designated trust beneficiaries or other parties regarding their direction of the trustee, (ii) determine compliance with any approval requirements in any such recorded instrument, and (iii) determine that such trust beneficiaries or other parties (or any required majority, if not required to be unanimous) have executed a written direction to the trustee with respect to the action to be taken.

(c) Florida Land Trusts with Written Trust Agreements.

In the case of a Florida Land Trust, if Opining Counsel is unable to confirm that there is no separate written trust agreement or other agreement governing the trust relationship, Opining Counsel should not render the opinion unless Opining Counsel, in addition to addressing the requirements set forth in the recorded instrument, is provided a copy of the trust agreement and engages in the following further diligence: (i) Opining Counsel should review the trust agreement or other agreement governing the trust relationship to determine whether any trust beneficiaries and/or other parties hold the power of direction over the actions of the trustee and, if so, to determine which trust beneficiaries and/or other parties hold such power of direction; (ii) Opining Counsel should review any other agreement that may have been made among the trust beneficiaries regarding their direction of the trustee in order to determine compliance with any approval requirements in any such other agreement; and (iii) Opining Counsel should determine that the appropriate trust beneficiaries and/or other parties (or any required majority, if not required to be unanimous) have executed a written direction to the trustee with respect to the action to be taken. Moreover, if the terms of the trust agreement or other agreement governing the trust relationship are inconsistent with the powers set forth in the recorded instrument, the terms in the trust agreement or other agreement governing the trust relationship will generally prevail over the powers set forth in the recorded instrument.

Notwithstanding the requirement set forth herein that Opining Counsel review any underlying trust agreement that may exist, such requirement is not intended to modify or affect the protection of third parties set forth in Section 689.071, Florida Statutes.

4. Effect of Presumption Arising Under Section 689.07, Florida Statutes

Under Section 689.07, Florida Statutes, a deed by which real property is conveyed to a person or entity simply “as trustee,” without setting forth any of the powers required to avail the trustee of the benefit of the presumption arising under Section 689.071, Florida Statutes, grants an absolute fee simple estate in the real property to the “trustee,” individually, including both legal and equitable title, provided the other requirements of Section 689.07, Florida Statutes, are met. In such case, a Florida land trust is not created, the recital of trust status is disregarded as a matter of law, and Opining Counsel should ensure that the “trustee” executes the Transaction

Documents in his, her or its individual capacity. In such case, the owner of the real property is not the trustee of a trust and no special form of opinion is necessary. In addition, if the “trustee” is an entity, Opining Counsel must determine whether such entity has the entity power, in its own right, to own and deal with such property and to execute and deliver the Transaction Documents and perform its obligations thereunder.

Nevertheless, because the deed indicated that the putative “trustee” was acquiring title in a trust capacity, Opining Counsel should obtain a certificate from the “trustee” regarding whether he, she or it has made a declaration of trust and, if so, whether any written trust instrument or instruments exist. If a trust instrument actually exists, then Opining Counsel should secure a copy of the written trust instrument or instruments and carry out the diligence requirements set forth above in “Florida Trusts Other than Florida Land Trusts.”

F. Florida Not-For-Profit Corporation

Florida’s not-for-profit statute (Chapter 617, Florida Statutes) sets forth the entity power of a Florida not-for-profit corporation. In opining with respect to the entity powers of a Florida not-for-profit corporation, requirements comparable to those described in “Corporation” above should be followed.

G. Limitations on Power and Special Purpose Entities

There may be situations in which an entity’s Organizational Documents will limit the entity’s power to a particular project or business. Further, if the entity has been organized as an SPE there may be further limitations on the power of the entity to act in certain circumstances or to act in a certain manner.

SPE provisions are often encountered in real or personal property financing transactions where the lender desires to isolate the assets being purchased with the financing from the assets and liabilities of an affiliated parent entity. SPE provisions are also encountered where a pool of loans are being sold to investors as part of a “securitized” financing (whether the pool contains residential or commercial mortgages, auto loans or leases, trade receivables, commercial loans, equipment loans or other types of financial assets).

In connection with the formation of SPEs, it is likely that the lender or investors will require that the entity’s Organization Documents include SPE provisions. These provisions generally purport, among other things, to deprive the SPE of the capacity to take certain actions (such as engaging in activities other than those specifically authorized) without consent.

If the Organizational Documents of the entity limit the power of the entity to a particular project or business, or if the Organizational Documents of the entity contain SPE provisions, Opining Counsel must carefully review the Organizational Documents of the entity to determine whether such provisions affect the entity power of the entity to undertake the Transaction. If such provisions preclude or otherwise limit the entity’s ability to engage in the Transaction and enter into the Transaction Documents, and this lack of entity power cannot be resolved (for example, by elimination of the limitations from the Organizational Documents in accordance with the amendment provisions of the entity’s Organizational Documents), an opinion regarding the power of the entity to enter into the Transaction and perform its obligations under the Transaction Documents should not be rendered.

AUTHORIZATION OF THE TRANSACTION BY A FLORIDA ENTITY

In connection with a Transaction, Opining Counsel will often be requested to opine that the entity entering into the Transaction has properly authorized the execution and delivery of the Transaction Documents and the performance by the entity of its obligations under the Transaction Documents. In order to render the “authorization” opinion, Opining Counsel should review the applicable governing statute and the entity’s Organizational Documents to identify the persons or entities whose approval is required, as a matter of entity governance, to authorize the entity to enter into the Transaction at issue. Then Opining Counsel should obtain written evidence that all required approval actions have been taken by those persons or entities. Care should be taken to state the authorization opinion narrowly to comprise only the approvals required for entity governance purposes, in contrast to any approvals that might be required from a governmental authority or pursuant to a prior agreement of the entity.

A. Corporation

Recommended opinion:

The Client has authorized the execution, delivery and performance of the [Transaction Documents] by all necessary corporate action.

An Opinion Recipient expects that Opining Counsel will confirm that the person(s) acting on behalf of the corporation have the proper authority to do so and that all necessary approvals by the board of directors and shareholders (if shareholder approval is required) have been taken or obtained. In rendering an opinion regarding approval of a Transaction or the Transaction Documents, Opining Counsel should rely on the affirmative acts of the corporation and its directors, officers and agents as the basis for the opinion and not on principles of estoppel, apparent authority, waiver and the like.

To determine whether a corporation has authorized a transaction by all necessary corporate action, Opining Counsel should review: (i) the governing statute (the FBCA), (ii) the corporation’s articles of incorporation and bylaws, (iii) the minutes of the meeting(s) at which (or other corporate actions by which) the board of directors adopted the resolutions relating to the Transaction and the Transaction Documents, and, if required, by which the shareholders of the corporation adopted similar resolutions, and (iv) any shareholder agreement, voting trust agreement or other agreement between or among shareholders of the corporation of which the corporation or Opining Counsel is aware that may affect the authorization of the Transaction and the Transaction Documents. Opining Counsel should obtain and rely on a certificate from an officer of the corporation stating that the articles of incorporation, bylaws, corporate resolutions and agreements made available to Opining Counsel (including any shareholders agreements or voting trust agreements) constitute all of the documents which affect or could have an impact on what is required to authorize the Transaction and the Transaction Documents (and that these documents are true and correct and have not been rescinded or repealed). Opining Counsel may rely on such certificate unless it has knowledge that the factual information contained in the certificate is incorrect (or unless Opining Counsel is aware of facts (red flags) that ought to reasonably cause such counsel to conclude that the factual information contained in the certificate is unreliable).

With respect to shareholders agreements, voting trust agreements and the like, the officer’s certificate should confirm that there are no shareholders agreements, voting trust agreements or other agreements between or among shareholders of the corporation that affect corporate authorization (or should identify the applicable agreements and specify that there are no others) and should not be phrased simply as a statement from the Client that there are no agreements (other than those identified) that affect the authorization of the Transaction. Opining Counsel should review any such identified agreements and make the legal judgment as to whether or not such agreements contain any limitations on or require any special approvals with respect to the authorization of the Transaction and the Transaction Documents by the corporation.

In theory, rendering an authorization opinion requires verification that all the steps in the chain of the elections of directors, transfers of shares (to determine current share ownership), all amendments to the bylaws, and all comparable matters since the corporation’s formation were performed in accordance with the corporate law in effect when the actions were taken. However, under Florida customary practice, unless Opining Counsel

has knowledge to the contrary (or unless Opining Counsel is aware of facts (red flags) that ought to make such belief unreliable to a reasonable Opining Counsel), Opining Counsel may rely on the “presumption of continuity and regularity” as the basis for concluding that all such actions were properly taken, including all steps in the chain of the election of the directors presently in office. Similarly, unless Opining Counsel has knowledge to the contrary (or is aware of facts (red flags) that ought to make such belief unreliable to a reasonable Opining Counsel), Opining Counsel may rely on a certificate from a corporate officer about resolutions adopted at a board of directors or shareholders meeting called to consider the proposed Transaction (or in a written consent action executed by the requisite percentage of the directors or shareholders required for approval) without having to go behind the particulars of any such meeting or written consent. See “Introductory Matters – Presumption of Continuity and Regularity.” In that regard, under Florida customary practice the fact that Opining Counsel is relying on the “presumption of continuity and regularity” with respect to these types of matters need not be expressly stated in the opinion letter.

However, Opining Counsel may not rely on the “presumption of continuity and regularity” if Opining Counsel becomes aware, such as through its review of the corporate documents authorizing the Transaction, or its review of the articles of incorporation, bylaws, certificates, or any other documents furnished to Opining Counsel by the Client, or otherwise, that there appears to be a problem with the facts upon which Opining Counsel proposes to rely (for example, questions about the presence of a quorum at a particular meeting, the completeness of meeting notices, the votes taken on the election of directors by the shareholders, or other historic activities). These issues, if identified, can often be resolved through ratification of the prior acts of the corporation. Similarly, Opining Counsel may not assume facts that missing documents would customarily show if Opining Counsel has reason to believe that the missing records would show something contrary to the assumed facts. See “Introductory Matters – Ethical and Professional Issues.”

As noted above, the Committees recommend that in connection with rendering the “authorization” opinion Opining Counsel should review any shareholder agreement, voting trust agreement or other agreement between or among shareholders of the corporation of which the corporation or Opining Counsel is aware that may affect the authorization of the Transaction or the Transaction Documents. It can be argued that other than in a situation where the corporation has a shareholders agreement in place under Section 607.0732, Florida Statutes, which changes the norms of corporate governance with respect to a particular corporation, the contents of a shareholder agreement, voting trust agreement or other agreement between or among the shareholders and/or the corporation should not affect the steps required to approve a Transaction for purposes of the “authorization” opinion. However, the Committees believe that agreements among shareholders are closely related to the governance of the corporation and therefore if they exist, such agreements should be considered by Opining Counsel in connection with rendering the “authorization” opinion. The Committees note that such agreement(s) may also need to be considered in connection with rendering a “no breach or default of agreements” opinion. See “No Violation and No Breach or Default-No Breach of or Default under Agreements.”

If a corporation was formed as an SPE or if the corporation’s Organizational Documents already contain SPE provisions, it may limit the corporation’s ability to authorize the Transaction. See “Limitations on Authority and Special Purpose Entities” below for a further discussion regarding this issue.

The authorization opinion does not mean that the directors and officers of the corporation are in compliance with their respective fiduciary duties with respect to the Transaction and the Transaction Documents.

B. Limited Partnership

Recommended opinion:

The Client has authorized the execution, delivery and performance of the [Transaction Documents] by all necessary limited partnership action.

The reasonable expectation of the Opinion Recipient is that Opining Counsel will confirm that any and all required approvals by the partners have been taken or obtained and that the partner(s) acting on behalf of the limited partnership have proper and actual authority, and not merely apparent authority, to do so. In particular, in order to determine who needs to approve the Transaction and the Transaction Documents on behalf of the limited partnership and who has the authority to bind the limited partnership, Opining Counsel should review: (i) the

governing statute (FRULPA), (ii) the certificate of limited partnership, and (iii) the limited partnership agreement. The Committees believe that no third-party legal opinion with respect to the authorization of a transaction by a Florida limited partnership should be rendered unless the limited partnership has a written partnership agreement.

As more particularly described below, the governance provisions under FRULPA provide broad authority to any general partner of a Florida limited partnership to approve a Transaction and Transaction Documents and to bind the limited partnership. However, in addition to the governance provisions set forth in FRULPA, a limited partnership agreement or a certificate of limited partnership may limit that authority by providing that certain specified transactions require: (i) in cases where there is more than one general partner, the approval of one or more designated general partners or a specified number, percentage or group of the general partners, and/or (ii) in some cases, the approval of one or more designated limited partners or a specified number, percentage or group of limited partners. Thus, Opining Counsel must carefully review the limited partnership agreement and the certificate of limited partnership to determine which partners' approval is required for the Transaction, and then ascertain whether the requisite approvals (including any required written consents) of those partners have been obtained. In cases where there is more than one general partner, it is not uncommon (as a matter of prudent practice) for Opining Counsel to secure, as a basis for the "authorization" opinion, a written consent signed by all or a majority of the general partners approving the Transaction, even if such approval is not technically required by the governing documents.

In rendering an opinion regarding approval of the Transaction and the Transaction Documents, Opining Counsel should rely on the affirmative acts of the limited partnership and its partners as the basis for the opinion and not on principles of estoppel, apparent authority, waiver and the like. In particular, although certificates, affidavits, and statements of partnership authority are estoppel devices upon which third parties without contrary knowledge may rely, they are generally not sufficient support (standing alone) under Florida customary practice for an opinion regarding authorization of a Transaction or Transaction Documents.

Under Section 620.1402(1) of FRULPA, each general partner is an agent of the limited partnership for the purposes of its activities and the limited partnership is bound by a general partner's acts, including the execution of an instrument in the partnership's name, "for apparently carrying on in the ordinary course the limited partnership's activities or activities of the kind carried on by the limited partnership," unless the general partner did not have authority and the person with whom the general partner was dealing knew, or had received a notification, or had "notice" under Section 620.1103(4) of FRULPA that the general partner lacked authority. Section 620.1103(4)(f) of FRULPA provides that a person has notice of a limitation on the general partner's authority if the limitation is set forth in the initial limited partnership certificate, although a limitation that is later added by amendment or restatement of the certificate does not constitute notice until 90 days after the effective date of the amendment or restatement. However, this same subsection contains an overriding proviso stating that a limitation on the authority of a general partner to transfer real property held in the name of the limited partnership is not notice to a person (other than a partner) unless the limitation appears in an affidavit, certificate or other instrument that bears the name of the limited partnership and is recorded in the public records of the county where the real property is located. Such an affidavit may be recorded under the provisions of Section 689.045(3) of the Florida Statutes. See "General Partnership" below.

Conversely, Section 620.1402(2) of FRULPA provides that if the general partner's act is apparently not for carrying on the limited partnership's activities in the ordinary course or activities of the kind carried on by the limited partnership, then the limited partnership is bound only if the act was approved by the other partners as provided in Section 620.1406 of FRULPA. This latter section provides that each general partner has equal rights in the management and conduct of the limited partnership's activities, and any matter relating to its activities may be exclusively decided by the general partner or, if there is more than one general partner, by a majority of the general partners, except that certain actions listed in Section 620.1406(1) of FRULPA require the approval of all the general partners. Among those actions requiring unanimous general partner approval under Section 620.1406(1)(i) is "[s]elling, leasing, exchanging or otherwise disposing of all, or substantially all, of the limited partnership's property, with or without good will, other than in the usual and regular course of the limited partnership's activities." Further, under Section 620.1406(5) of FRULPA, unless otherwise provided in the

limited partnership agreement or the certificate of limited partnership, this action also requires the approval of limited partners owning a majority of the rights to receive distributions as limited partners at the time the consent is to be effective.

Generally speaking, a limited partnership's certificate of limited partnership or its partnership agreement empowers the partnership to engage in any legal activity. However, there are exceptions to this general rule. Opining Counsel should be aware that some partnerships may have expressly limited the freedom and power of the partnership to engage in certain types of transactions by express provisions in the partnership agreement or in the certificate of limited partnership. Further, the partnership agreement or the certificate of limited partnership may expressly include SPE provisions. See "Limitations on Authority and Special Purpose Entities" below.

An opinion given with respect to a limited partnership may require Opining Counsel to look at the authorization of the Transaction by entities other than the Client limited partnership that is the party to the Transaction and the Transaction Documents. Opining Counsel should examine the structure of the limited partnership in relation to the opinion, paying particular attention to entities that are partners. Opining Counsel rendering an authorization opinion with respect to a limited partnership should review the authorization of the Transaction by these other entities that are partners to a level where such counsel is comfortable, based on the particular facts and circumstances, that the requisite approval of the limited partnership entering into the Transaction and the Transaction Documents has, in fact, been obtained.

Opining Counsel should recognize that it is Opining Counsel's responsibility to become comfortable, based on the particular facts and circumstances, that the requisite approval of the other entities that are partners in the limited partnership entering into the Transaction and the Transaction Documents has been obtained. If Opining Counsel cannot satisfy themselves in that regard, Opining Counsel should expressly set forth in the opinion letter any limitations on the scope of Opining Counsel's opinion as a result of not having been able to satisfy themselves regarding necessary approvals by other entities that are partners of the limited partnership.

This authorization opinion does not mean that the general partners of the limited partnership are in compliance with their respective fiduciary duties with respect to the Transaction and the Transaction Documents.

C. General Partnership

Recommended opinion:

The Client has authorized the execution, delivery and performance of the [Transaction Documents] by all necessary partnership action.

Opining Counsel rendering the authorization opinion must determine whether the partnership has authorized the Transaction in accordance with the governing statute (FRUPA) and the partnership agreement and whether the general partner executing the Transaction Documents on behalf of the partnership is, in fact, authorized by the partnership agreement or by the other general partners to bind the partnership to the Transaction Documents. An opinion on general partnership authorization reflects Opining Counsel's judgment that the partnership has properly approved the Transaction and the Transaction Documents and that the partner signing the Transaction Documents on behalf of the partnership has the actual authority to do so. The Committees believe that no third-party legal opinion with respect to the authorization of a transaction by a Florida general partnership should be rendered unless the partnership has a written partnership agreement.

The authority of a general partner to bind a Florida general partnership to agreements is a function of the provisions of FRUPA and the partnership agreement. Under Section 620.8301 of FRUPA, all general partners are agents of the partnership and the partnership is bound by any partner's act, including the execution of an instrument in the partnership's name, "for apparently carrying on in the ordinary course of partnership business or business of the kind carried on by the partnership, in the geographic area where the partnership operates,"

unless the partner had no authority and the other contracting party knew or had received a notification that the partner lacked authority. Section 620.8101(2) of FRUPA defines “business” as “any trade, occupation, profession or investment activity.” Conversely, if the partner’s act does not meet the partnership business test, then the partnership is bound only if the act is authorized by all of the partners or is authorized by the terms of a written partnership agreement. These statutory provisions regarding a partner’s authority, however, are subject to the effect of a statement of partnership authority filed with the Department under Section 620.8303 of FRUPA.

In determining whether the partnership has authorized the Transaction, if the approval of all general partners of the partnership (or all partners of a particular group or class) is required by the terms of the partnership agreement in order for the partnership to borrow money or to mortgage or convey its real property, then Opining Counsel should obtain a copy of the written approval of all those partners, certified as being true and correct by a general partner (preferably one other than the partner who signs the Transaction Documents). Opining Counsel may be able to avoid unnecessary duplication by preparing the original of this written approval in the form of a recordable affidavit contemplated by Section 689.045(3) of the Florida Statutes or in the form of a statement of partnership authority to be filed and recorded under Section 620.8303 of FRUPA. On the other hand, no further approval is required if the partnership agreement expressly authorizes a specific general partner to bind the partnership in transactions of the type contemplated (preferably, the copy of the partnership agreement upon which Opining Counsel will rely in connection with rendering the opinion should be certified to Opining Counsel by a partner other than the partner signing the Transaction Documents). Additionally, Opining Counsel should obtain and review a copy of any partnership statements filed with the Department and, if the Transaction relates to Florida real estate, any statements recorded in the real estate records of the county where the real property is located, in order to discover any limitations or inconsistencies concerning partner authority. Even if third parties are not deemed to have notice of any such limitations, if an authorization issue arises by reason of Opining Counsel’s review of such statements, Opining Counsel should resolve such issue before opining that the Transaction and the Transaction Documents have been authorized by the partnership.

In rendering an opinion regarding authorization of the Transaction and the Transaction Documents, Opining Counsel should rely on the affirmative acts of the partnership and its partners as the basis for the opinion, and not on principles of estoppel, apparent authority, waiver and the like. In particular, although certificates, affidavits, and statements of partnership authority are estoppel devices upon which third parties without contrary knowledge may rely, they are generally not sufficient support (standing alone) under Florida customary practice for an opinion regarding authorization of a Transaction or Transaction Documents.

Some partnership agreements empower the partnership to engage in any lawful activity, Others include provisions that expressly limit the power of the partnership to engage in certain types of transactions. See “Limitations on Authority and Special Purpose Entities” below.

If a partnership has filed an optional registration statement with the Department under Section 620.8303 of FRUPA, then the partnership may file a statement of partnership authority with the Department executed by at least two general partners and specifying the authority of some or all of the partners to transfer real property held in the name of the partnership. The statement may also specify the authority, or limitations on the authority, of some or all of the partners to enter into other transactions on behalf of the partnership. Unless earlier canceled, the statement of partnership authority is valid for five years after its filing or its most recent amendment. The partnership or a partner may also file a statement of denial with the Department under Section 620.8304 of FRUPA, which acts as a limitation on the statement of authority. A certified copy of the partnership statement of authority as filed with the Department may be recorded in the public records of the county in which real property owned by the partnership is located.

The effect of the statement filing system under Sections 620.8303 and 620.8304 of FRUPA is to supplement the authority of a partner when dealing with third parties. In the case of a transfer (including a mortgage) of partnership real property, a grant of authority contained in a recorded statement of partnership authority is conclusive in favor of a third party who gives value without knowledge to the contrary, except and to the extent

that a recorded statement containing a limitation on authority (such as a statement of denial) is filed of record in the county where the real property is located. Conversely, a third party is deemed to know of a limitation on the authority of a partner to transfer partnership real property contained in a statement of partnership authority or denial recorded in that county. In matters other than real property transfers, a filed statement of partnership authority (even if unrecorded) is conclusive in favor of a third party giving value without knowledge to the contrary, subject to the effect of any filed statement containing a limitation on authority. In matters of real property transfer, however, third parties are not deemed to have knowledge of a limitation on authority contained in a statement filed with the Department but not recorded in the county public records.

The FRUPA statement system requires some advance transaction planning and some additional filing expenses. Only certified copies of filed partnership authority statements can be recorded in the county real estate records in order to have the desirable conclusive effect set forth in Section 620.8303 of FRUPA (these certified copies are available only from the Department and require payment of a fee). In addition, the Department will not file a statement of partnership authority for a partnership that does not also file a registration statement under Section 620.8105 of FRUPA, although the Department will accept both statements for filing concurrently. Because a general partnership that files a statement of qualification as an LLP under Section 620.9001 of FRUPA must also file the partnership registration statement, the marginal expense of also filing and recording a statement of partnership authority is not significant.

When transaction timing and budgets do not permit the recordation of a statement of partnership authority with the Department under Section 620.8303 of FRUPA, another alternative for establishing a partner's conclusive authority to transfer partnership real property is the execution and recordation of a partnership affidavit as contemplated in Section 689.045(3), Florida Statutes, which subsection provides as follows:

(3) When title to real property is held in the name of a limited partnership or a general partnership, one of the general partners may execute and record, in the public records of the county in which such partnership's real property is located, an affidavit stating the names of the general partners then existing and the authority of any general partner to execute a conveyance, encumbrance, or other instrument affecting such partnership's real property. The affidavit shall be conclusive as to the facts therein stated as to purchasers without notice.

With respect to the authorization of partnership conveyances or mortgages, partnership affidavits recorded pursuant to Section 689.045(3), Florida Statutes, work equally well for both limited partnerships and general partnerships. However, a statement of partnership authority under Section 620.8303 of FRUPA only supports authorization with respect to a general partnership and not with respect to a limited partnership.

An opinion given with respect to a general partnership may require Opining Counsel to look at the authorization of the Transaction by entities other than the general partnership that is a party to the Transaction and the Transaction Documents. Opining Counsel should examine the structure of the partnership to determine what entities have to approve the Transaction and the Transaction Documents for the partnership. In reviewing the authorization of the Transaction and the Transaction Documents by the partnership, Opining Counsel should examine the structure of the general partnership in relation to the Transaction, paying particular attention to entities that are partners. Opining Counsel rendering an authorization opinion for a general partnership should review the authorization by those other entities to a level where such counsel feels comfortable that the requisite approval of the general partnership entering into the Transaction and the Transaction Documents has, in fact, been obtained.

Opining Counsel should recognize that it is Opining Counsel's responsibility to become comfortable, based on the particular facts and circumstances, that the requisite approval of the other entities that are partners in the partnership entering into the Transaction and the Transaction Documents has been obtained. If Opining Counsel cannot satisfy themselves in that regard, Opining Counsel should expressly set forth in the opinion letter any limitations on the scope of Opining Counsel's opinion as a result of not having been able to satisfy themselves regarding necessary approvals by other entities that are partners of the partnership.

The authorization opinion does not mean that the general partners of the partnership are in compliance with their respective fiduciary duties with respect to the Transaction and the Transaction Documents.

D. Limited Liability Company

Recommended opinion:

The Client has authorized the execution, delivery and performance of the [Transaction Documents] by all necessary limited liability company action.

To render an authorization opinion, Opining Counsel must determine whether its LLC Client has authorized the Transaction in accordance with Florida law under the governing statute (the FLLCA), the LLC's articles of organization and the LLC's operating agreement, and whether the member, manager or officer executing the Transaction Documents on behalf of the LLC is authorized to bind the LLC to the Transaction Documents. The Committees believe that no third-party legal opinion with respect to the authorization of a transaction by a Florida LLC should be rendered unless the LLC has a written operating agreement.

In most cases, the operating agreement of the LLC provides that the LLC is empowered to engage in any lawful activity. Sometimes, however, the operating agreement will include provisions that expressly limit the power and capacity of the LLC to authorize a particular transaction or a particular type of transaction or will include SPE provisions. See "Limitations on Power and Special Purpose Entities" below.

The threshold question for Opining Counsel in determining which persons have authority to bind the LLC is whether the LLC is a member-managed company or a manager-managed company. Sections 608.402(22) and 608.422 of the FLLCA both provide that a Florida LLC is a member-managed company by default unless the articles of organization or the operating agreement provide that it is a manager-managed company (before its amendment in 2002, under Section 608.407(1) of the FLLCA this manager-managed designation needed to be set forth in the articles of organization to avoid the application of the default rule). The distinction between the two management models with respect to the authority of members and managers of an LLC is discussed below. However, in both cases, Opining Counsel must review the articles of organization and operating agreement of the LLC in order to opine with respect to the authorization of actions to be taken by the LLC.

Section 608.407(4) of the FLLCA permits the articles of organization to include an optional statement that the LLC is to be a manager-managed company, and Section 608.407(6) of the FLLCA permits the articles of organization to include a notice of any limitations on the authority of a manager or managing member. If either of these provisions are added or changed by an amendment or restatement of the articles of organization, then Section 608.407(5) of the FLLCA provides that the amended and restated articles of organization do not constitute notice of the addition or change until 90 days after the effective date of the amendment or restatement. Further, as amended in 2005, Section 608.407(6) of the FLLCA provides that a provision in an LLC's articles of organization limiting the authority of a manager or managing member to transfer real property held in the name of the LLC is not notice of the limitation to any person (except to a member or manager) unless such limitation appears in an affidavit, certificate or other instrument that bears the name of the LLC and is recorded in the public records of the county where the real property is located.

In rendering an opinion regarding approval of the Transaction and the Transaction Documents, Opining Counsel should rely on an affirmative act of the LLC, its members and/or managers, as applicable, as the basis for the opinion and not on principles of estoppel, apparent authority, waiver and the like. In particular, although certificates and affidavits of authority are estoppel devices upon which third parties without contrary knowledge may rely, they are generally not sufficient support (standing alone) under Florida customary practice for an opinion regarding authorization of a Transaction or Transaction Documents.

The following sections reflect certain matters to consider in determining whether an LLC has properly authorized a Transaction.

1. Member-Managed. Under Section 608.422(2) of the FLLCA, unless otherwise provided in the articles of organization or operating agreement, the management of a member-managed LLC is vested in its members in proportion to the then-current percentage or other interest of members in the profits of the LLC owned by all of the members. Except as otherwise provided in the articles of organization or operating agreement, in a member-managed LLC the decision of a majority-in-interest of the members is controlling. Under Section 608.4231 of the FLLCA, the articles of organization or operating agreement may provide for classes or groups of members having such relative rights, powers, and duties as the articles of organization or operating agreement may provide. The articles of organization or operating agreement may also provide for the taking of an action, including the amendment of the articles of organization or operating agreement, without the vote or approval of any member or class or group of members. Further, the articles of organization or operating agreement may provide that any member or class or group of members shall have no voting rights, may grant to all or certain identified members or a specified class or group of the members the right to vote separately or with all or any class or group of the members or manager on any matter. Similarly, voting by members may be on a per capita, number, financial interest, class, group, or any other basis. Unless otherwise provided in the articles of organization or operating agreement, on any matter that is to be voted on by members, the members may take such action without a meeting, without prior notice, and without a vote if a consent or consents in writing, setting forth the action so taken, are signed by the members having not less than the minimum number of votes that would be necessary to authorize or take such action at a meeting, but in no event by a vote of less than a majority-in-interest of the members that would be necessary to authorize or take such action at a meeting. However, within 10 days after obtaining such authorization by written consent, notice must be given to those members who have not consented in writing or who are not entitled to vote on the action.

With respect to the agency authority of members, Section 608.4235(1) of the FLLCA provides that, in a member-managed LLC, each member is an agent of the LLC for the purpose of its business, and an act of a member, including the signing of an instrument in the company's name, for apparently carrying on in the ordinary course the company's business or business of the kind carried on by the company, binds the company unless the member had no authority to act for the company in the particular matter and the person with whom the member was dealing knew or had notice that the member lacks authority. An act of a member which is not apparently for carrying on in the ordinary course the company's business or business of the kind carried on by the company binds the company only if the act was authorized by appropriate vote of the other members. As noted in (3) below, however, the real estate rule set forth in Section 608.4235(3) of the FLLCA overrides these agency and authority rules for member-managed companies.

To render an opinion that a member-managed LLC has approved a Transaction and the Transaction Documents by all necessary action, Opining Counsel should review the articles of organization and operating agreement of the LLC (which documents should be certified to the Opining Counsel as being a true and correct copy by a member or an officer (if officers have been appointed) of the LLC). Opining Counsel should then obtain evidence as to the approval by the requisite members required to approve the Transaction and the Transaction Documents (which approval should be documented in writing). Opining Counsel should also review the FLLCA to determine whether authorization of the members is required with respect to the particular Transaction even if not otherwise required in the LLC's articles of organization or operating agreement.

2. Manager-Managed. Under Section 608.422(4) of the FLLCA, in a manager-managed LLC, the management of the company is vested in a manager or managers, and each manager has equal rights in the management and conduct of the company's business. Except as otherwise provided in FLLCA, in a manager-managed LLC any matter relating to the business of the company may be exclusively decided by the manager or, if there is more than one manager, by a majority of the managers. Similarly, Section 608.4231(6) of the FLLCA provides that, except as otherwise provided in the articles of

organization or the operating agreement, if the members have appointed more than one manager to manage the business of the LLC, then decisions of the managers shall be made by majority vote of the managers at a meeting or by unanimous written consent. Section 608.422(4)(c) of the FLLCA provides that, in a manager-managed LLC, a manager: (i) must be designated, appointed, elected, removed, or replaced by a vote, approval, or consent of a majority-in-interest of the members; and (ii) holds office until a successor has been elected and qualified, unless the manager sooner resigns or is removed. The manager or managers may also hold the offices and have such other responsibilities accorded to them by the members and set out in the articles of organization or the operating agreement of the LLC.

With respect to the agency authority of members in a manager-managed LLC, Section 608.4235(2) of the FLLCA provides that in a manager-managed LLC, a member is not an agent of the company for the purpose of its business solely by reason of being a member. In a manager-managed LLC, each manager is an agent of the company for the purpose of its business, and an act of a manager, including the signing of an instrument in the company's name, for apparently carrying on in the ordinary course the company's business or business of the kind carried on by the company binds the company, unless the manager had no authority to act for the company in the particular matter and the person with whom the manager was dealing knew or had notice that the manager lacks authority. An act of a manager which is not apparently for carrying on in the ordinary course the company's business or business of the kind carried on by the company binds the company only if the act was authorized under Section 608.422 of the FLLCA. As noted in (3) below, however, the real estate rule set forth in Section 608.4235(3) of the FLLCA overrides these agency and authority rules for manager-managed companies.

To render an opinion that a manager-managed LLC has approved a Transaction, Opining Counsel should review the articles of organization and the operating agreement of the LLC, determine the requisite vote of managers (and, if applicable, the requisite vote of members) to approve the Transaction and then obtain evidence as to the approval by such requisite vote of managers (and, if applicable, members). Each requisite vote should be documented in writing. Additionally, Opining Counsel should review the FLLCA to determine whether the action to be taken by the manager-managed LLC nevertheless requires the LLC to obtain member approval for the particular Transaction even if not otherwise required by the operating agreement.

3. General Real Estate Rule. As an overriding rule applicable to real property held by an LLC, Section 608.4235(3) of the FLLCA provides that, unless the articles of organization or operating agreement limit the authority of a member or manager, any member of a member-managed LLC or manager of a manager-managed LLC may sign and deliver any instrument transferring or affecting the LLC's interest in its real property. The transfer instrument is conclusive in favor of a person who gives value without knowledge of the lack of the authority of the person signing and delivering the instrument. This provision in Section 608.4235(3) of the FLLCA expressly trumps the agency rules in other parts of Section 608.4235 of the FLLCA that are discussed above. However, the Committees recommend that, for opinion purposes, Opining Counsel should obtain and review the documents set forth in (1) above (for a member-managed LLC) or in (2) above (for a manager-managed LLC) before issuing an opinion regarding authorization of the Transaction by an LLC.
4. Authority. An opinion with respect to the authorization of a Transaction by an LLC reflects Opining Counsel's judgment that the persons or entities signing for the LLC have authority to execute the Transaction Documents. Although apparent authority may protect third parties who rely on the signature of a member or manager of the LLC, the Committees believe that it should not be the sole support relied upon by Opining Counsel in rendering an opinion on the authorization of a Transaction.
5. Other Entities. An opinion given with respect to an LLC may require Opining Counsel to look at the authorization of the Transaction by entities other than the LLC that is a party to the Transaction and the Transaction Documents. Opining Counsel should examine the structure of the LLC to determine what members or managers who have to approve the Transaction are entities. In reviewing authorization by the

LLC, Opining Counsel should also review the authorization by these other entities to a level where such Opining Counsel is comfortable, based on the particular facts and circumstances, that the requisite approval of the LLC entering into the Transaction and the Transaction Documents has, in fact, been obtained.

Opining Counsel should recognize that it is Opining Counsel's responsibility to become comfortable, based on the particular facts and circumstances, that the requisite approval of the other entities that are members and/or or managers of the LLC entering into the Transaction and the Transaction Documents has been obtained. If Opining Counsel cannot satisfy themselves in that regard, Opining Counsel should expressly set forth in the opinion letter any limitations on the scope of Opining Counsel's opinion as a result of not having been able to satisfy themselves regarding necessary approvals by other entities that are members and/or managers of the LLC.

6. Fiduciary Duties. The authorization opinion does not mean that the managers or the managing members, as applicable, of the LLC are in compliance with their fiduciary duties with respect to the Transaction and the Transaction Documents.

E. Trusts

Recommended opinion:

The Client, as trustee of the trust, has authorized the execution, delivery and performance of the [Transaction Documents] by all necessary action.

1. General

In the context of a trust, because it is not a separate statutory entity but rather a fiduciary relationship with respect to property, the authorization of the execution, delivery and performance of the Transaction Documents by the trustee on behalf of the trust requires not only basic diligence with respect to actions taken by the trustee but also certain additional diligence similar to the diligence required to determine entity power with respect to the trustee on behalf of the trust. Accordingly, there are likely to be two separate key inquiries required for Opining Counsel to render the recommended opinion.

A. Entity as Trustee. If the trustee is a corporation, partnership or LLC, Opining Counsel should first inquire as to what authorizations are required by that entity in order for that entity to have been authorized to serve as trustee and to take the actions necessary, in its capacity as trustee, to authorize the execution, delivery and performance of the Transaction Documents. In most cases, this analysis will be exactly the same as the analysis set forth above concerning steps that need to be taken for that type of entity, in its own capacity, to authorize such actions. This may involve, for example, adoption of resolutions at meetings of governing bodies of the entity or written consents in lieu of such meetings.

B. Trust Authorization. The second inquiry overlaps with the required inquiries described in the entity power discussion. The extent of the required inquiry is dependent upon: (i) whether the trust relationship is a Florida Land Trust that satisfies the requirements of Section 689.071, Florida Statutes, (ii) whether a separate written trust document or other agreement governing the trust relationship exists, and (iii) whether the beneficiaries of the trust need to consent to the execution, delivery and performance of the Transaction Documents in order for the trustee to have proper authorization to take such actions. If a trust document or other agreement governing the trust relationship is in existence, then even if the trust relationship is created pursuant to Section 689.071, Florida Statutes, a review of the trust document or other agreement governing the trust relationship should be made by Opining Counsel in order to render the opinion.

2. Florida Land Trust

(a) Florida Land Trusts Without Written Trust Agreements

If the trust satisfies the requirements of Section 689.071, Florida Statutes, it is possible for Opining Counsel to render the opinion even if there is no separate trust agreement governing the trust relationship. However,

because the customary practice in dealing with most opinions involving trusts is to refrain from rendering an opinion unless a written trust agreement exists, the exception from this general rule should be applied only in limited circumstances. For the exception to apply, the three requirements set forth in “Entity Status and Organization of a Florida Entity – Trusts – Trusts Owning Real Estate – Florida Land Trusts without Written Trust Agreements” must all be satisfied.

If all three requirements are satisfied, then Opining Counsel must review the recorded instrument and determine whether the express language set forth in the recorded instrument confers on the trustee the power to execute, deliver and perform the Transaction Documents without any power of direction by the trust beneficiaries or any other parties.

In the case of a Florida Land Trust, should there be no trust agreement or other agreement governing the trust relationships but nevertheless the express language set forth in the recorded instrument creating the Florida Land Trust establishes that there are trust beneficiaries or other parties who hold a power of direction over the actions of the trustee, then Opining Counsel should additionally: (i) review any documents that may have been executed by the designated trust beneficiaries or other parties regarding their direction of the trustee, (ii) determine compliance with any approval requirements in any such recorded instrument, and (iii) determine that such trust beneficiaries or other parties (or any required majority, if not required to be unanimous) have executed a written direction to the trustee with respect to the action to be taken.

(b) Florida Land Trusts with Written Trust Agreements.

In the case of a Florida Land Trust, if Opining Counsel is unable to confirm that there is no separate trust agreement or other agreement governing the trust relationship, Opining Counsel should not render the opinion unless Opining Counsel, in addition to addressing the requirements set forth in the recorded instrument, is provided with a copy of the trust agreement and engages in the following further diligence: (i) Opining Counsel should review the trust agreement or other agreement governing the trust relationship to determine whether any trust beneficiaries and/or other parties hold the power of direction over the actions of the trustee and, if so, to determine which trust beneficiaries and/or other parties hold such power of direction, (ii) Opining Counsel should review any other agreement that may have been made among the trust beneficiaries regarding their direction of the trustee, to determine compliance with any approval requirements in any such other agreement, and (iii) Opining Counsel should determine that the appropriate trust beneficiaries and/or other parties (or any required majority, if not required to be unanimous) have executed a written direction to the trustee with respect to the action to be taken. Moreover, if the terms of the trust agreement or other agreement governing the trust relationship are inconsistent with the powers set forth in the recorded instrument, the terms in the trust agreement or other agreement governing the trust relationship will generally prevail over the powers set forth in the recorded instrument.

Notwithstanding the recommendations set forth herein that Opining Counsel review any underlying trust agreement that may exist, such recommendation is not intended to modify or affect the protections afforded to third parties under Section 689.071, Florida Statutes.

3. Florida Trusts other than Florida Land Trusts

(a) Trusts with Written Trust Agreements

If the trust does not satisfy the requirements of Section 689.071, Florida Statutes, Opining Counsel similarly cannot render the opinion unless Opining Counsel is provided a copy of the trust agreement or other agreement governing the trust relationship and engages in the following further diligence: (i) Opining Counsel should review the trust agreement or other agreement governing the trust relationship to determine whether any trust beneficiaries and/or other parties hold the power of direction over the actions of the trustee and, if so, to determine which trust beneficiaries and/or other parties hold such power of direction; (ii) Opining Counsel should review any other agreement that may have been made among the trust beneficiaries regarding their direction of the trustee, to determine compliance with any approval requirements in any such other agreement; and (iii) Opining Counsel should determine that the appropriate

trust beneficiaries and/or other parties (or any required majority, if not required to be unanimous) have executed a written direction to the trustee with respect to the action to be taken.

(b) Trusts Without Written Trust Agreements

If the Transaction is large enough or important enough to require a third-party legal opinion, then the trust's affairs are sufficiently complex to require a written trust agreement. Accordingly, in this context, it is the Committees' belief that Opining Counsel should not opine with respect to any trust, other than possibly with respect to a Florida Land Trust in the limited circumstances set forth above, if there is no written trust agreement.

F. Not-For-Profit Corporation

In connection with the issuance of an opinion regarding the authorization of a Transaction or Transaction Documents by a Florida not-for-profit corporation, Opining Counsel should follow requirements comparable to those described in "Corporation" above.

G. Limitations on Authority and Special Purpose Entities

In a manner similar to limitations of entity power, the ability of a Florida entity to authorize a Transaction may be limited by the entity's Organizational Documents. This includes limitations in the scope of the activities that the entity can engage in or the potential impact of SPE provisions. See "Entity Power of a Florida Entity."

Opining Counsel should carefully review the Organizational Documents of its Florida entity Client to determine whether they contain any such limitations and whether any such limitations preclude the entity from authorizing the proposed Transaction. For example, there might be a limitation in the Organizational Documents that requires a consent in certain circumstances of an "independent" director who is unrelated to the owners of the entity or its affiliates. If the limiting provisions preclude the entity from authorizing the Transaction or require a consent from an "independent" director, and such preclusion or consent is not appropriately resolved or obtained, an opinion regarding the authorization of the Transaction by the entity should not be rendered.

EXECUTION AND DELIVERY

Contract formation requires (among other steps) that the Transaction Document be executed and delivered by the Client. In connection with a Transaction, Opining Counsel will often be asked to opine that the individual or entity Client entering into the Transaction has “executed and delivered” the Transaction Documents. The “execution and delivery” opinion, along with opinions on entity status and organization, authority to transact business in Florida, entity power, authorization of the transaction, no violation of laws and no required government consents, are the “building block” opinions leading to an enforceable agreement. See “The Remedies Opinion.”

An opinion that “the Transaction Documents have been executed and delivered by the Client” means:

- As to “execution,” (i) if the Client is an individual, that the Client has executed the Transaction Documents; (ii) if the Client is an entity, that the person(s) signing the Transaction Documents on behalf of the Client were the person(s) authorized to execute the Transaction Documents on behalf of the Client; and (iii) in both cases, that Opining Counsel has no knowledge that the signatures by or on behalf of the Client on the Transaction Documents are not genuine (and Opining Counsel is not aware of any facts (red flags) that ought to reasonably cause such Opining Counsel to question the genuineness of the Client’s signatures). The terms “executed” or “duly executed” have the same meaning, and the addition of the word “duly” does not affect the meaning of the opinion or the level of diligence required to render the opinion.
- As to “delivery,” that the Client has given in some fashion the executed Transaction Documents to the Opinion Recipient intending to create a legally binding contract. The terms “delivered” or “duly delivered” have the same meaning, and the addition of the word “duly” does not affect the meaning of the opinion or the level of diligence required to give the opinion.

An opinion regarding execution and delivery covers only the execution and delivery of the Transaction Documents by the Client and not by any other parties to the Transaction Documents. In Florida, it is customary practice for Opining Counsel to assume “execution and delivery” with respect to all parties signing the Transaction Documents other than the Client. See “Common Elements of Opinions – Assumptions.” Further, the “execution and delivery” opinion does not speak to the enforceability of the Transaction Documents or as to whether all of the formal requisites of contract formation have been completed.

The recommended opinion is as follows:

The [Transaction Documents] have been executed and delivered by the Client.

In rendering the “executed” portion of this opinion, Opining Counsel may rely upon a certificate from the Client certifying the identity of the officers, managers, members, partners or other individuals who have executed the Transaction Documents on behalf of the Client, which information should allow Opining Counsel to assess whether such person(s) are the person(s) authorized by the Client entity to execute the Transaction Documents on its behalf. See “Authorization of the Transaction by a Florida Entity.” When the authorized persons are the officers, managers, members or partners of the Client, Florida customary practice allows Opining Counsel to rely upon the “presumption of continuity and regularity” as to the proper election or appointment of such persons to their respective offices.

In rendering both the “executed” and “delivered” portions of the opinion, Opining Counsel or a member of Opining Counsel’s firm should ideally be present at the execution and delivery of the Transaction Documents or should have otherwise satisfied themselves regarding the Client’s signing and the actual delivery of the Transaction Documents. Alternatively, Opining Counsel often confirms the facts regarding “execution” and “delivery” through a closing escrow instruction letter, a certificate to counsel, a document transmittal letter or, with respect to delivery, through the use of other delivery procedures satisfactory to Opining Counsel to confirm delivery of the executed Transaction Documents. If the Client is confirming execution and delivery through a

certificate to counsel, the certificate should address the factual components of execution and delivery rather than the legal conclusion that execution and delivery has occurred, and might include language to the effect that the Transaction Documents have been signed by a particular person holding a particular office of the Client (i.e., President, Vice President, Manager or General Partner), so that Opining Counsel can then review whether such person is the officer, manager, partner or representative authorized to execute the Transaction Documents on behalf of the Client and that the Transaction Documents have been left in the possession of the Opinion Recipient or its counsel without reservation, escrow, or condition and with the intent of creating a binding agreement on the part of the Client. The form of illustrative certificate to counsel that accompanies this Report includes factual statements to this effect.

Notwithstanding, the foregoing, if a certificate to counsel with respect to matters of execution and delivery includes both facts and legal conclusions, Opining Counsel may rely on the factual information contained in the certificate in rendering the “execution and delivery” opinion. Further, such certificate to counsel also serves as a confirmation from the Client that it is not aware that such legal conclusions are incorrect. However, in such circumstances Opining Counsel is not entitled, under Florida customary practice, to rely on the legal conclusions contained in the certificate to counsel in rendering the “execution and delivery” opinion. See “Common Elements of Opinions—Reliance on Factual Certificates and Representations and Warranties; Assumption of Facts; Scope of Reliance.”

With respect to the “execution and delivery” opinion in the context of a Florida real estate transaction, some Florida cases hold that in connection with the delivery of a deed or mortgage, the recordation of an instrument is equivalent to a formal delivery in the absence of any showing of fraud on the part of the delivering party. However, other Florida cases hold that the recordation of an instrument merely creates the “presumption” of delivery.

In many cases today, the execution and delivery of the Transaction Documents does not occur in one location with all signatories to the Transaction Documents physically present for a “closing.” Rather, it has become common practice for signature pages to be sent by overnight mail, scanned e-mail or facsimile from a number of locations to a central location for assembly of counterpart signatures for the closing of the Transaction. Accordingly, Opining Counsel is often not physically present or represented when the Client executes and/or delivers the Transaction Documents.

When giving the “execution and delivery” opinion in this type of situation, Opining Counsel needs to determine to Opining Counsel’s satisfaction that execution and delivery has taken place through means other than being present at the location where execution and delivery is taking place. However, although Opining Counsel must review copies of the Client’s signature pages for each of the Transaction Documents being opined upon to confirm that the Transaction Documents reflect what purports to be a signature by the Client, Opining Counsel does not need to compare the Client’s signatures on the Transaction Documents to the Client’s signatures contained in a certificate of incumbency provided as part of the closing of the Transaction or included in the certificate of counsel. Rather, Opining Counsel may assume the genuineness of the signature of the individuals who signed the Transaction Documents as the Client or on behalf of a Client that is an entity unless Opining Counsel has knowledge to the contrary (or unless Opining Counsel is aware of facts (red flags) that ought to reasonably cause Opining Counsel to question the genuineness of such signatures).

Under Florida customary practice, an assumption to this effect is implicitly included in an “execution and delivery” opinion rendered by Florida counsel, whether or not such assumption is expressly stated in the opinion letter. Opining Counsel may also (in an abundance of caution) include in the certificate to counsel a confirming statement that execution of the Transaction Documents by specified individuals has taken place; however, the failure to obtain a certificate to this effect is not fatal. If Opining Counsel has knowledge that the Client’s signatures on the executed Transaction Documents are not genuine (or unless Opining Counsel is aware of facts (red flags) that would make such assumption unreliable to a reasonable Opining Counsel), Opining Counsel should consider its ethical obligations under the circumstances, cannot rely on the assumption that the Client’s signatures are genuine and should not render any opinion with respect to the Transaction. See “Introductory Matters – Ethical and Professional Issues.”

In order to alert an Opinion Recipient that Opining Counsel was not physically present to witness execution and delivery of the Transaction Documents, Opining Counsel may decide to include the following statement in the opinion letter:

Please note that we did not physically witness the execution and delivery of the Transaction Documents, and our opinion herein regarding the execution and delivery of the Transaction Documents is based, in part, on [our review of the certificate to counsel in which the Client confirmed certain facts to us with respect to the execution and delivery of the Transaction Documents / our review of copies of executed signature pages for such Transaction Documents provided to us (electronically or otherwise)].

However, failure to include a statement to this effect in the opinion letter is not fatal if Opining Counsel has otherwise determined to Opining Counsel's satisfaction that the execution and delivery of the Transaction Documents by the Client has occurred.

In a Transaction involving real estate, the "execution and delivery" opinion is sometimes combined with the opinion regarding whether the Transaction Documents are in a form suitable for recordation and filing. See "Opinions Particular to Real Estate Transactions – Requirements for Recording Instruments Affecting Real Estate."

THE REMEDIES OPINION

A. Overview of the Remedies Opinion

The “remedies opinion” addresses the enforceability of the Transaction Documents against the Client. Broadly speaking, enforceability with respect to a document means the ability to obtain relief from a court of competent jurisdiction in accordance with the terms of such document and with the law. Therefore, the remedies opinion requires Opining Counsel to determine whether a court, applying the law of the jurisdiction covered by the opinion letter (which may or may not be the same as the law governing the Transaction Documents), should give effect to the Client’s obligations under the Transaction Documents. See “Introductory Matters – Purpose of Third-Party Legal Opinions.” Although this opinion is sometimes referred to as the “enforceability opinion” rather than the “remedies opinion,” the terms refer to the same type of opinion.

1. The Standard Formulation of the Remedies Opinion

The standard formulation of the remedies opinion, before setting forth any applicable qualifications, is as follows:

The [Transaction Documents] are valid and binding obligations of the Client, enforceable against the Client in accordance with their terms.

The remedies opinion is understood to have the same meaning so long as it contains one or both of the operative words, “binding” and “enforceable.” Although this Report recommends the specific language above, verbatim recitation is not required. For instance, some formulations of the remedies opinion include the word “legal” (usually before the word “valid”). Others omit one or both of the words “valid” or “binding.” However, neither the inclusion of the word “legal” nor any of these omissions expands or limits the generally understood meaning of the remedies opinion. Even where Opining Counsel omits the phrase “enforceable against the Client in accordance with its terms,” substitutes the phrase “enforceable against the Client under the laws of Florida,” or simply states that the “Transaction Documents are enforceable against the Client” or that the Transaction Documents are “binding on the Client,” the opinion is understood to have the same meaning as an opinion using the language provided above.

Consistent with customary practice, the remedies opinion must be expressly stated in an opinion letter. It may not be implied from the issuance of building block or other related opinions or the inclusion of qualifications in the opinion letter (regardless of whether such qualifications address matters that would typically apply only to a remedies opinion). However, there are circumstances in which an Opining Counsel rendering an opinion in the context of a mortgage on real property or a security interest in personal property may imply within such opinion an enforceable contract and thereby implicitly provide a remedies opinion. See “Opinions with Respect to Collateral Under the Uniform Commercial Code – Scope of UCC Opinions; Limitations” and “Opinions Particular to Real Estate Transactions – Creation of a Mortgage Lien.”

Conversely, however, the issuance of a remedies opinion does imply the issuance of the building block opinions described below, and, if Opining Counsel does not intend to render each of these opinions, then Opining Counsel should expressly assume the particular opinion(s) that Opining Counsel is not rendering (and/or expressly specify the opinion(s) of another Opining Counsel on which Opining Counsel is relying). The following paragraphs describe the relationship between the remedies opinion and certain other opinions.

2. Related Opinions that are Building Blocks For or Necessary to Render the Remedies Opinion

An opinion on the enforceability of an agreement is predicated on contract law principles. Opining Counsel must be confident before giving a remedies opinion that all of the requisite elements of contract formation (including entity status, entity power, the taking of requisite entity action to approve entry into the contract, offer

and acceptance, consideration, execution, delivery and mutuality) exist. As a result, the following related opinions that are addressed elsewhere in this Report are building blocks for and are necessary prerequisites to rendering the remedies opinion: (i) opinions regarding the Client's existence and organization, entity power, authorization of the Transaction, and execution and delivery of the Transaction Documents, and (ii) opinions that there are no violations of law resulting from the Client entering into and performing its obligations under the Transaction Documents that would make the Transaction Documents invalid. These opinions are vital in their own right because if, for example, the Transaction Documents have not been properly authorized, executed or delivered, then a contract may not have been formed. Similarly, if the contract violates a law that renders it invalid, it may not be enforceable. However, even though certain building block and other opinions may relate to similar issues, and even though, as a practical matter, all of these building block opinions are often included in the same opinion letter that includes a remedies opinion, they are nonetheless separate opinions from the remedies opinion.

Where the building block opinions are *not* specifically included in an opinion letter that includes a remedies opinion, Opining Counsel will be deemed to have given the building block opinions (unless such building block opinions are not otherwise expressly assumed away in the opinion letter). Therefore, it is essential that Opining Counsel perform the necessary diligence associated with each building block opinion or expressly assume in the opinion that the building block opinions have otherwise been satisfactorily addressed. For instance, where the existence of a corporation is determined by laws other than the laws of the State of Florida and no opinion is being rendered on entity status, Opining Counsel must expressly assume in its opinion the existence and active status of such entity to avoid implicitly giving that opinion as part of Opining Counsel's remedies opinion.

However, not every related opinion is assumed to be implicit in a remedies opinion. Only the building block opinions listed above should be implied from the issuance of a remedies opinion. Further, as set forth above, the remedies opinion does not include an opinion relating to the non-Client party or parties to the contract or to matters under the UCC or other applicable law as to the validity, creation, attachment, perfection, or priority of any security interests, mortgage liens or other liens that may be the subject of the Transaction Documents. If such opinions are required, they must be separately stated in the opinion letter. Notwithstanding the foregoing, it is important to remember that the inverse connection may exist; an opinion on these other issues may implicitly include a remedies opinion.

3. *The Meaning of the Remedies Opinion; Two Sides of a National Debate on Customary Practice; Florida's View*

Like other opinions described in this Report, the meaning of the remedies opinion and the diligence that Opining Counsel should undertake to support it are based on Florida customary practice. Except in the case of real estate transactions that generally follow a nationally-prescribed format, the Committees believe that, in non-real estate commercial transactions, the meaning of the remedies opinion is determined on a state-by-state basis, rather than at a national level, and that the meaning of the remedies opinion as described in this Report reflects Florida's view on these issues. That is not to say that Florida's view is significantly different than the view taken in many other states, but rather that the view taken in other states does not necessarily represent Florida's view or Florida customary practice. Further, the meaning of the remedies opinion is impacted by the qualifications to the remedies opinion that are included in the opinion letter, either expressly or implicitly. These qualifications exclude from the coverage of the remedies opinion certain of the rights, remedies and undertakings contained in the Transaction Documents (or otherwise limit the scope of the remedies opinion).

There are, however, at a national level two highly influential and, at least on a cursory level, contradictory views regarding the appropriate scope of the remedies opinion. One is generally known as the "TriBar view" and the second is generally known as the "California view." Each is described in more detail below.

The "TriBar view" is the position adopted by the TriBar Opinion Committee in the TriBar Report. The Tri-Bar view construes the remedies opinion to address the enforceability of "each and every" right, remedy and

undertaking in the Transaction Documents. This view is considered customary practice in many jurisdictions, and is the customary practice generally expected by Opinion Recipients in transactions involving many New York based financial institutions and investment banks. However, many practitioners are troubled by the breadth of the TriBar view, because they believe that it is not always feasible, cost-effective, or necessary for Opining Counsel to dedicate the time and resources needed to review the enforceability of each and every promise, covenant and other undertaking made in today's increasingly complex and lengthy Transaction Documents. Thus, in order to utilize the TriBar view in a more efficient manner, attorneys (including many attorneys who practice in New York) have developed and include in those opinion letters that contain a remedies opinion extensive lists of specific and general qualifications, assumptions, and clear exclusionary statements as to which such attorneys provide no remedies opinion coverage and/or as to those matters where the coverage of the remedies opinion is expressly limited.

Under the "California view," regardless of whether Opining Counsel expressly provides any specific or general qualifications, the remedies opinion is considered to address the enforceability of only the "essential" provisions of a Transaction Document. The California Remedies Report states that the customary diligence for the remedies opinions is essentially the same whether Opining Counsel subscribes to the TriBar view or the California view. It also provides that the ultimate breadth and scope of the remedies opinion under the California view can end up being the same as under the Tri Bar view if, in following the TriBar view, Opining Counsel effectively includes certain customary qualifications to the remedies opinion in Opining Counsel's opinion letter.

A well understood example of the "essential" provisions view can be found in the "material breach" version of the "generic" qualification included in the Real Estate Report, which is based on the ACREL "All Inclusive Opinion." It states that, although certain provisions of the Transaction Documents may or may not be enforceable, such enforceability will neither render the Transaction Documents "invalid as a whole" nor preclude judicial enforcement of repayment, acceleration of the note and foreclosure of the collateral in the event of a material breach of a payment obligation or in the event of a material default in any other material provision of the Transaction Documents. Some versions of the "generic" qualification limit the coverage of the remedies opinion to the enforceability of specific remedies enumerated in the opinion letter, while other versions cover enforceability of "material" remedies within the scope of the remedies opinion.

Another example of the "essential provisions" approach is contemplated by another "generic" qualification, which is typically called the "practical realization" qualification. The "practical realization" qualification provides that, although certain provisions of the Transaction Documents may not be enforceable, such unenforceability does not affect the overall validity of the Transaction Documents and does not interfere with the substantial (or practical) realization of the principal benefits (or security) purported to be provided by the Transaction Documents.

In light of the differences between the TriBar view and the California view, the Committees believe that the current Florida practice environment necessitates that attorneys understand the meaning of the remedies opinion under both the TriBar view and the California view, so that they can appropriately limit the scope of their remedies opinions through the inclusion of appropriate qualifications. In this regard, Opining Counsel should consider the basic remedies language and each of the standard qualifications recommended by this Report as building blocks which, when included in an opinion letter premised upon either of these views as to the scope of the remedies opinion, will result in an opinion that is effectively the same under both of these views of customary practice. Flexibility and skill in navigating between competing views of customary practice is particularly essential in the context of multi-state transactions because, on the one hand, Florida attorneys are frequently involved in transactions (either as lead counsel or as local counsel) that involve lenders or buyers from New York and other states which have adopted the TriBar view, and because, on the other hand, the Florida market features a significant number of intellectual property, biotechnology and cross-border transactions that often include a nexus with parties represented by counsel in states that typically follow the California view. In this diverse practice climate, Florida attorneys will inevitably find themselves asked to deliver a remedies opinions to an Opinion Recipient who will expect to receive such opinion interpreted under one of these views of customary practice.

The Committees believe that customary practice in Florida has historically been and continues to be that the scope of a remedies opinion rendered by Florida counsel as to the matters of Florida law covers only the “essential provisions” of the Transaction Documents and not each and every right, remedy and undertaking contained in the Transaction Documents. As a result, the Committees believe that the scope of a remedies opinion rendered by Florida counsel as to matters of Florida law is implicitly limited under Florida customary practice to the “essential provisions” of the Transaction Documents, even if the opinion letter that contains such remedies opinion does not expressly include sufficient qualifications to limit the scope of such remedies opinion to coverage of only the “essential provisions” of the Transaction Documents. The Committees believe that this represents the right approach to the cost-to-benefit analysis that should be applied to third-party legal opinion practices.

Notwithstanding the foregoing, in order to make sure that an Opinion Recipient who receives an opinion letter from Florida counsel that contains a remedies opinion clearly understands that such remedies opinion is limited in scope to the “essential provisions” of the Transaction Documents, the Committees believe that it is advisable and preferable for such opinion letter to expressly include a “generic” qualification and also a list of qualifications setting forth certain provisions of the Transaction Documents that might not be enforceable under Florida law. In the view of the Committees, when taken together, such qualifications clearly limit the scope of the remedies opinion regarding the Transaction Documents to the “essential provisions” of such documents. The concern here is that, if such qualifications are not expressly included in the opinion letter, it is possible that a judge reviewing the opinion letter may determine, contrary to the approach taken in this Report, that the remedies opinion included in the opinion letter covers within its scope the enforceability of each and every right, remedy and undertaking contained in the Transaction Documents (subject only to a bankruptcy exception, an equitable principles limitation and any specific qualifications to the remedies opinion that are expressly included in the opinion letter). Given this view and recommendation, the Committees have included all such qualifications in the illustrative forms of opinion letters that accompany this Report.

Florida lawyers who render third-party legal opinions that include a remedies opinion should resist efforts by Opinion Recipients to remove from their opinion letters the qualifications to the remedies opinion recommended by this Report. However, the Committees believe that rendering an opinion letter that does not expressly include all of the qualifications recommended by this Report does not, in and of itself, violate Florida customary practice, although Opining Counsel should be aware that an opinion letter containing a remedies opinion that does not expressly include the recommended qualifications may create greater risk for Opining Counsel (because such opinion may be interpreted, even though wrongly so, as having an expanded scope).

In the view of the Committees, the scope of a remedies opinion rendered by Florida counsel (as set forth in this Report) as to matters of Florida law should be interpreted under Florida customary practice regardless of where the Opinion Recipient is located. See “Common Elements of Opinions – Opinions of Florida Counsel Are To Be Interpreted Under Florida Customary Practice.” However, Opining Counsel participating in multi-state transactions should recognize that Opining Counsel’s opinion may ultimately end up being subject to interpretation in a court in a different jurisdiction that may be more familiar with, or be inclined to another view as to, the scope of the remedies opinion under customary practice. Although the Committees believe that a court (whether such court is located in Florida or in another jurisdiction) should follow Florida’s view (as set forth in this Report) in interpreting a remedies opinion of a Florida counsel on issues of Florida law, such courts are not required to do so. Therefore, in an effort to make sure that a Florida Opining Counsel’s remedies opinion is interpreted properly, the Committees recommend that all opinion letters that contain a remedies opinion expressly include the qualifications recommended by this Report. The Committees believe that, if all of the qualifications recommended by this Report are expressly included in an opinion letter that contains a remedies opinion, the scope of the remedies opinion contained in such opinion letter will be interpreted in the same manner under the TriBar view, the California view and the Florida view.

B. Analysis of the Foundational Building Block: The Meaning of the Basic Remedies Opinion

1. Legal Issues Covered by the Remedies Opinion

In connection with issuing a remedies opinion, Opining Counsel should read the Transaction Documents in their entirety and carefully consider the enforceability of the Client's promises, covenants and undertakings in the Transaction Documents, as well as each remedy expressly provided in respect of breaches thereof. In the course of this review, Opining Counsel should bear in mind that the remedies opinion is deemed to set forth three distinct but related legal opinions, in each case *subject to such qualifications* as are, under Florida customary practice, implicitly included in the opinion letter to limit the scope of the coverage of the remedies opinion to the "essential provisions" of the Transaction Documents.

Opining Counsel should ensure that the remedies opinion is not given in respect of Transaction Documents that do not contain any promise or undertaking and therefore cannot give rise to a breach or default. Generally speaking, UCC financing statements, closing certificates, affidavits, and many other closing deliverables do not give rise to remedies outside of the remedies arising under the primary documents (such as under a promissory note, a loan agreement, a security agreement or an asset or stock purchase agreement), and are therefore not appropriate subjects for a remedies opinion to be requested or given. See "Common Elements of Opinions – Transaction Documents."

As a starting point, the remedies opinion confirms that the contracts that constitute the Transaction Documents have been formed. Although certain of the predicate opinions also address contract formation, in the context of a remedies opinion the focus is on the requirements under the law governing the Transaction Documents to make the agreements binding upon the Client. In contrast, the "execution and delivery" opinion, which is one of the predicate opinions, focuses on whether the person with the power and authority to bind him or her or an entity, as applicable, entered into the Transaction Documents so as to bind him or her individually or an entity, as applicable, by signing the Transaction Documents and delivering the signed documents to the Opinion Recipient (or its designee) with the intent to be bound thereby. In this regard, Opining Counsel should be sure to review relevant laws and statutes bearing upon whether a contract has been formed under the law governing the contract and whether the actions or approvals necessary to bind the Client have in fact been taken or obtained.

The second distinct component of a remedies opinion confirms that the remedies specified in the Transaction Documents can be expected to be given effect by courts in the event of breaches by the Client of the undertakings contained in the Transaction Documents. As discussed in greater detail below, qualifications are required if: (i) under the law governing the Transaction Documents the Opinion Recipient will not have a remedy for any such breach, or (ii) a particular remedy specified in the Transaction Document for any such breach will not be given effect under the circumstances contemplated. Accordingly, in terms of diligence, Opining Counsel should review each of the specified remedies and determine whether each such remedy will be available (to the extent that the remedies opinion is not otherwise limited by customarily implied or expressly stated qualifications that limit which particular remedies are covered by or excluded from the scope of the particular remedies opinion).

As a general matter, Florida customary practice requires that Opining Counsel consider bodies of law that lawyers who render legal opinions with respect to the type of transaction involved would reasonably recognize as being applicable to: (i) transactions of the nature covered by the Transaction Documents; and (ii) the role of the Client in the Transaction (for example, a borrower or a seller). The analysis required in (i) and (ii) is complex. Under Florida customary practice, an issue is deemed to be covered by the remedies opinion only when it is both: (i) essential to the particular conclusion expressed; and (ii) reasonable under the circumstances for the Opinion Recipient to conclude that it was intended to be covered. Further, if the business of the Client is regulated, the laws relating to such regulated business may be within the laws required to be considered in rendering the remedies opinion.

Some laws, however, are implicitly excluded from the scope of an opinion of Florida counsel (and thereby from the scope of any remedies opinion that is included in such Opining Counsel's opinion letter) unless such laws are specifically addressed in the opinion letter. See "Common Elements of Opinions – Limitations to Laws

of Specific Jurisdictions or to Substantive Areas of Law; Excluded Areas of Law” for a list of laws that are not covered under Florida customary practice by an opinion issued by Florida counsel unless coverage of such laws is expressly addressed in the opinion letter. Furthermore, Opining Counsel may wish to exclude other areas of law from the scope of Opining Counsel’s opinion letters by expressly excluding such areas of law in the opinion letter. See “Examples of Specific Limitations to the Remedies Opinions (Additional Qualifications)” below.

An Opinion Recipient should consider whether under the Opinion Recipient’s particular circumstances the Opinion Recipient wants to request coverage in an opinion letter as to the impact of any one or more of the Excluded Laws on the enforceability of the Transaction Documents. However, an Opinion Recipient should be mindful only to ask for comfort regarding such Excluded Laws as are reasonable under the circumstances. From the perspective of Opining Counsel, if an Opining Counsel agrees to address one or more Excluded Laws, such counsel should exercise diligence and do what is reasonably necessary to provide coverage of such expressly addressed Excluded Laws. In cases where Opining Counsel does not otherwise have the expertise to render such opinions, Opining Counsel will need to consult with lawyers with the relevant experience or expertise as appropriate. However, an Opinion Recipient should generally not ask an Opining Counsel to opine on or seek guidance on every specialized area of law that might be implicated by the provisions of the Transaction Documents, because such an effort (in the view of the Committees) would never be cost-justified (even in very large transactions). See “Common Elements of Opinions – Opinions of Local or Specialist Counsel.”

Notwithstanding the foregoing, a remedies opinion rendered by a Florida Opining Counsel as to matters of Florida law *does* cover such matters as choice of law, usury, covenants not to compete and indemnification provisions, unless: (i) such matters are excluded from the scope of the remedies opinion by express language in the opinion letter, (ii) such opinions are separately addressed in the opinion letter and thus should be considered limited to the extent separately addressed, or (iii) such opinions are expressly assumed away by Opining Counsel in the opinion letter. Accordingly, under Florida customary practice, if a separate opinion is expressly included in the opinion letter on issues such as choice of law or usury, then the scope of the remedies opinion with respect to such issue(s) will be limited to the scope of the separate opinion(s).

Additionally, because many Transaction Documents provide that they will be specifically enforced against a party, in the absence of proper qualifications, a remedies opinion as to such a Transaction Document means that the specified remedy will be available. However, as discussed more fully below, because a remedies opinion is always limited in coverage under Florida customary practice to its “essential provisions,” the remedies opinion should generally be understood to mean that a court would *consider* whether to provide specific performance or any other specified remedy, but would not be viewed as opining that the Transaction Documents would or should be specifically enforced.

The third distinct component of a remedies opinion describes the extent to which courts can be expected to enforce the provisions of the Transaction Documents that are *undertakings*, regardless of whether such undertakings are linked to the concept of breach. The remedies opinion does not apply to provisions that are not undertakings – even where such provisions can be breached by the Client. For example, the representations and warranties contained in the Transaction Documents are not undertakings and, therefore, any breach of the truthfulness, completeness and accuracy of any such representation or warranty is not covered by the scope of a remedies opinion. However, the breach of any such representation or warranty, if material, may trigger the enforcement of remedies that are the subject of a remedies opinion.

The following section discusses the various types of undertakings that are customarily addressed in a remedies opinion, as well as those that are customarily excluded.

2. Types of Undertakings

The expansive reach of the remedies opinion can best be understood by considering the myriad types of undertakings to which it relates.

First, some provisions in a Transaction Document obligate the Client to perform some affirmative act, but remain silent with respect to what will happen if the Client fails to perform. For example, the Transaction Documents may require that the Client provide certain accounts and reports on a regular basis. For these provisions, the remedies opinion means that a court should either require the Client to fulfill its undertakings as written or grant damages or some other remedy in the event of a breach.

Second, many, if not most, Transaction Documents contain provisions which specify a remedy to be applied if the Client fails to carry out particular undertakings. For provisions of this sort, the remedies opinion means that a court should give effect to the specified remedies as written. Accordingly, Opining Counsel should review each such provision in the Transaction Documents and determine the nature and validity of the stated remedy. Remedies provisions may be implied from the nature of certain affirmative undertakings (for example, a requirement to pay liquidated damages). More often, however, they take the form of a grant to the other party of a right to take action (for example, to accelerate the maturity of a loan). A Transaction Document may specify a remedy that the courts in the governing law jurisdiction would be unlikely to enforce, such as forced entry to a debtor's premises to recover assets without judicial order. In respect of provisions of this sort, a general or specific qualification to the remedies opinion should be taken (in particular, such an undertaking would be excluded from the scope of a remedies opinion if the opinion letter included either version of the "generic" qualification or if the opinion letter included the broad list of other common qualifications set forth below). However, in those instances where Opining Counsel concludes that a court would enforce a stated remedy, but that such enforcement will be subject to equitable principles, no additional qualifications need to be taken other than the customary limitations concerning the application of equitable principles.

Finally, other commonly utilized provisions in Transaction Documents establish ground rules for interpreting or administering the Transaction Documents and settling disputes under them. Provisions of this sort may establish the law by which each Transaction Document is to be governed, indicate how each Transaction Document is to be amended, designate the forum in which disputes are to be resolved (for example, arbitration or the courts of a particular state), or waive certain rights (such as the right to a jury trial). Although each of these provisions is typically expressed as a declaration, each provision constitutes an undertaking of a party to another party. In many cases, unless expressly excluded from the remedies opinion, Opining Counsel should assume that these provisions are covered by the scope of the remedies opinion, which is understood to mean that a court should enforce the provision as written and require the Client to abide by its terms.

C. A Note on Transaction-Specific Diligence

It is important to note that the nature of the diligence required to be performed by Opining Counsel will depend in large part upon the nature of the transactions contemplated by the Transaction Documents. For instance, Transaction Documents in respect of commercial financing transactions should be carefully reviewed for provisions that may be prohibited under the UCC. Similarly, noncompetition agreements are by their nature restrictive and tend to be carefully scrutinized in judicial tribunals. Because in Florida restrictive covenants are valid and enforceable only if they are supported by adequate consideration, are reasonable, protect legitimate business interests and do not conflict with statutory restrictions or with public policy, each of these matters should be considered by Opining Counsel. In particular, the safe harbor rules and presumptions under Section 542.335, Florida Statutes, regarding the enforceability of non-competition agreements under certain circumstances should also be considered. Alternatively, consideration should be given to excluding non-competition agreements (or the non-competition provisions of other agreements such as an employment agreement) from the coverage of a remedies opinion with respect to the Transaction Documents.

D. Qualifications For Narrowing the Scope of the Remedies Opinion

Although under Florida customary practice the scope of a remedies opinion is implicitly limited to the "essential provisions" of the Transaction Documents, the Committees believe that it is advisable and preferable for Opining Counsel to expressly set forth in the opinion letter Opining Counsel's qualifications to the remedies opinion. Thus, if Opining Counsel wants to be sure that Opining Counsel's remedies opinion will not be

interpreted to cover the enforceability of each and every right, remedy and undertaking of the Client in the Transaction Documents, the recommended approach is for the opinion letter to unambiguously state Opining Counsel's limitations to the scope of the opinion through the inclusion of appropriate qualifications. This includes the inclusion of a "generic" qualification, which generally (in and of itself) limits the scope of the remedies opinion to "essential provisions" and, whether or not necessary, the inclusion of specific qualifications dealing with the possible unenforceability of one or more specific provisions of the Transaction Documents. Further, even if a "generic" qualification is included in the opinion letter, Opining Counsel would be well advised to add one or more specific qualifications. For example, if Opining Counsel concludes that a particular remedy specified in the Transaction Documents, such as an indemnification provision, is unlikely to be given legal effect, Opining Counsel should consider including a specific qualification with respect to that provision in the opinion letter so as to avoid a later argument by the Opinion Recipient that this specific remedy was "material" (and thus not excluded from the scope of the remedies opinion by a "practical realization" qualification).

The Committees believe that in a perfect world where the cost of such a diligence exercise was not an issue, it would be best practice for Opining Counsel to carefully review the Transaction Documents to determine the particular qualifications to be expressly included in the opinion letter. Qualifications should be, wherever possible, precisely tailored to the specific undertakings covered by the opinion. For example, when considering the enforceability of an acquisition agreement, Opining Counsel should give special attention to "lock-up" options and "no shop" and "non-competition" clauses, among others, as well as provisions relating to the resolution of disputes (such as choice of forum, waiver of *forum non conveniens* and provisions addressing subject matter jurisdiction). As an additional example, when foreign Clients are involved, some Opining Counsel expressly exclude from the remedies opinion any judicial deference to acts of foreign sovereign states. However, notwithstanding that "comity" (i.e., deference to the laws of other jurisdictions) is viewed as an integral part of United States law, because the law of comity is of general application and broadly understood, comity is included as an implied exception in opinions of Florida counsel and, as such, an express exception in the opinion letter is not required.

Notwithstanding the foregoing, while it might be best practice to precisely tailor qualifications to the specific rights, remedies and undertakings contained in particular Transaction Documents, the time required to support this level of diligence is often cost prohibitive in today's modern opinions world. As a result, many Florida Opining Counsel simply include in their opinion letters that contain a remedies opinion a "generic" qualification and/or an extensive list of specific qualifications and do not engage in the above-described specific analysis. In the view of the Committees, this approach to opinion practice is quite acceptable and does not, in and of itself, violate Florida customary practice.

E. The Bankruptcy Exception and the Equitable Principles Limitation

Two uniformly accepted qualifications to the remedies opinion are the bankruptcy exception and the equitable principles limitation. They are usually stated together. Sometimes these qualifications are placed within or immediately following the remedies opinion in the opinion letter while in other opinion letters these qualifications are placed in a separate qualifications section of the opinion letter. In those cases where these qualifications appear in a separate section, there may or may not be a specific reference stating that they apply only to the remedies opinion.

The recommended form of this Qualification is as follows:

. . . except as may be limited by bankruptcy, insolvency, reorganization, moratorium, fraudulent conveyance or transfer, or other similar laws affecting the rights and remedies of creditors generally and general principles of equity, regardless of whether such enforceability is considered in a proceeding at law or in equity.

or

The opinion contained in [paragraph __] of this opinion letter is limited by bankruptcy, insolvency, reorganization, moratorium, fraudulent conveyance and transfer, and similar laws affecting the rights and remedies of creditors generally and general principles of equity, regardless of whether such enforceability is considered in a proceeding at law or in equity.

The bankruptcy exception and the equitable principles limitation are implicit qualifications to every remedies opinion rendered by Florida counsel. However, Opining Counsel should recognize that Opining Counsel (in Florida and elsewhere) typically expressly include the bankruptcy exception and equitable principles limitation qualifications in an opinion letter containing a remedies opinion, and each of the illustrative forms of opinion letters that accompany this Report expressly includes a bankruptcy exception and an equitable principles limitation.

Similarly, if opinions are rendered in the opinion letter that relate to security interests granted under the Florida UCC (as defined below) or to opinions regarding Florida mortgages, the bankruptcy exception and the equitable principles limitation will also implicitly qualify such opinions. See “Opinions with Respect to Collateral Under the Uniform Commercial Code – Scope of UCC Opinions; Limitations – Bankruptcy and Equitable Principles Not Included.” Nevertheless, for the same reasons that Opining Counsel should expressly include the bankruptcy exception and the equitable principles limitation in the opinion letter relating to the remedies opinion, the Committees recommend that Opining Counsel include similar express qualifications in the security interest opinions or in the qualifications to the security interest opinions if those two qualifications are not otherwise included with respect to the enforceability of the security documents.

The following describes the scope of the bankruptcy exception and the equitable principles limitation.

1. *The Bankruptcy Exception*

The bankruptcy exception, which is sometimes referred to as the insolvency exception, excludes from the scope of the remedies opinion the effect of bankruptcy and similar creditors rights laws. It also excludes the effect of such laws on matters such as non-consolidation of entities, fraudulent conveyances and transfers, true sale matters and preferences. The foregoing matters do not address the enforceability of a Transaction Document. Instead, they address the applicability of particular principles of bankruptcy and similar creditor rights law. As a consequence, the effects of these items are excluded from the scope of the remedies opinion by the bankruptcy exception. However, the use of the word “similar” in the recommended opinion language provided above is intended to denote that the bankruptcy exception does not operate to exclude from the scope of the opinion those laws affecting creditors’ rights generally that are unrelated to laws grounded in insolvency, such as usury laws. Notwithstanding the foregoing, in the view of the Committees, the omission of the word “similar” does not have the effect of broadening the scope of the bankruptcy exception.

Sometimes the recommended bankruptcy qualification language is preceded by the words “except as *enforcement* may be limited by bankruptcy, insolvency...” However, use of the word “enforcement” is not intended, and should not be construed, to restrict the bankruptcy exception to matters relating to enforcement of contract provisions. Any narrowing of the bankruptcy exception requires unambiguous language rather than reliance on a single word.

The bankruptcy exception relates to a body of law rather than to a particular proceeding. Thus, the exception will have application, for example, to a fraudulent conveyance or transfer, even if the Client never becomes subject to a bankruptcy or insolvency proceeding. For example, the bankruptcy of another person or entity may affect the Client. Similarly, a bankruptcy court may not permit the enforcement of certain obligations of a party in a bankruptcy proceeding if such enforcement could disrupt the proceedings.

The bankruptcy exception is also an “insolvency law exception” in that it covers not only the U.S. Bankruptcy Code but also any other similar insolvency laws (state or federal) of general applicability. Insolvency is included in the bankruptcy exception even if the word “insolvency” is excluded. The “bankruptcy exception” tells the Opinion Recipient that a specific body of law has been excluded from the scope of coverage in the remedies opinion. The exception refers to all situations (whether involving insolvency proceedings or not) to which insolvency principles apply, including state and federal fraudulent conveyance and transfer laws. Sometimes the exception explicitly refers to those laws (often after the word “insolvency”). If not, they are assumed to be included in the phrase “other similar laws.” Some lawyers choose to expressly include in the bankruptcy exception references to reorganization

and moratorium laws, and each of the illustrative forms of opinion letters that accompany this Report reflects the inclusion of this language. However, both moratorium and “reorganization” (a term that is integral to the Bankruptcy Code) are within the scope of the bankruptcy exception even if they are not expressly mentioned in the opinion letter.

2. The Equitable Principles Limitation

Opining Counsel may conclude that particular provisions of a Transaction Document are binding and yet, under certain circumstances, may not be given effect by a court, particularly a court sitting or acting in equity. Thus, the equitable principles limitation serves as the basis for qualifying the enforcement of a remedy under a Transaction Document from an equitable perspective.

The equitable principles limitation does not address equitable matters that may have preceded or otherwise affected the initial formation of a contract. For example, if before rendering the remedies opinion, Opining Counsel believes that coercion, duress or other inequitable conduct has or is likely to have prevented the formation of a Transaction Document, Opining Counsel should not render the remedies opinion on such Transaction Document (or should disclose Opining Counsel’s concerns if the Client consents to such disclosure). On the other hand, to the extent Opining Counsel has no knowledge to the contrary (and is not aware of facts (red flags) that would make such assumption unreliable to a reasonable Opining Counsel), Opining Counsel is entitled to assume, without so stating, the absence of conduct so egregious as to preclude formation of a contract.

The equitable principles limitation relates to those principles courts apply when, in light of facts or events that occur after the effectiveness of a Transaction Document, courts decline in the interest of equity to give effect to particular provisions in such Transaction Document (or otherwise limit the application of such provisions). For example, a court may determine that, in certain circumstances, a provision in a Transaction Document specifying a certain notice period sets forth a period that is too short, or the withholding of a consent is unreasonable even though the Transaction Document provides that consent may be given or withheld in a party’s sole and absolute discretion. These determinations obviously affect the availability of a particular remedy that would normally be addressed by the remedies opinion. The equitable principles limitation addresses circumstances where court determinations are grounded in the belief that literal enforcement of the contract would be inequitable in the context in which the dispute has arisen.

However, Opining Counsel should recognize that if, in the example above, the notice provision would in all circumstances be held to be too short or if the withholding of consent would in all circumstances be improper, the equitable principles limitation may not have the effect of qualifying the remedies opinion as to those provisions. In these examples, relief would be expected to be denied because of the invalidity of the provision as a legal matter rather than because of the application of equitable principles.

In addition, the equitable principles limitation covers those situations in which a court may decline to give effect to a contractual provision because the enforcing party has not been significantly harmed. For example, such would be the case where an alleged breach is not material and has not resulted in any meaningful damage to the party seeking enforcement.

In light of the foregoing, the equitable principles limitation should be understood to address not only the availability of traditional equitable remedies (such as specific performance or injunctive relief) but also defenses rooted in equity that result from the enforcing party’s lack of good faith and fair dealing, unreasonableness of conduct (including coercion, duress, unconscionability, undue influence, and in some cases, estoppel), or undue delay (such as laches). However, because a court’s interest in justice and its broad equitable discretion can lead to a broad range of outcomes, it is impossible to define with precision the limits of the equitable principles limitation. Thus, language purporting to narrow the equitable principles limitation should not be requested or provided. Even an opinion that a specific remedy in a Transaction Document will be given effect as written is subject to the equitable principles limitation.

Sometimes the recommended equitable principles qualification language is preceded by the words “except as *enforcement* may be limited by ... general principles of equity.” However, use of the word “enforcement” is not intended, and should not be construed, to restrict the equitable principles limitation to matters relating to enforcement of particular contract provisions. Any narrowing of the equitable principles limitation requires unambiguous language rather than reliance on a single word.

F. The “Generic” Qualification

1. General Language to Express the “Generic” Qualification

Although qualifications to the remedies opinion ordinarily identify with specificity the provision(s) of the Transaction Document which may not be enforceable, both versions of the “generic” qualification take an entirely different approach. Under the “practical realization” qualification, the remedies opinion should be understood to mean that a contract has been formed and that, if inconsistent or legally defective remedies are set forth in a Transaction Document, the remedial provisions taken as a whole will nevertheless provide the Opinion Recipient, in the event of a material default by the Client, the benefit of its bargained-for ability to realize upon security or leased property or to realize the benefits of the Transaction, as the case may be, and to pursue a claim for damages. On the other hand, the “material breach” qualification (which is often included in opinion letters relating to loan transactions) reduces the scope of the remedies opinion to the Opinion Recipient’s ability: (i) to obtain judicial enforcement of the Client’s principal obligations under the Transaction Documents (such as the Client’s obligation to repay the principal and interest of a loan), (ii) to accelerate the particular obligation (i.e., to pay principal and interest) in the event of a material default under the Transaction Documents, and (iii) to foreclose on any security under such circumstances.

Opining Counsel most often use a “generic” qualification to limit the scope of their opinions on the enforceability of Transaction Documents that contain many specific remedies, some of which may be unenforceable as written or may be mutually inconsistent but are stated to be nonexclusive. By using a “generic” qualification, Opining Counsel seek to avoid the time and cost of analyzing each remedial provision in the Transaction Documents and its relationship with the other provisions of the Transaction Documents and reduce the need to take numerous, specific opinion qualifications. This approach is an effective way to limit the amount of time and resources spent by Opining Counsel on the remedies opinion.

In that regard, in many financing Transactions, the bulk of the negotiation regarding the Transaction Documents relates to the business terms between the parties (the representations and warranties, covenants and default provisions of the Transaction Documents), but not to the remedies provisions of the Transaction Documents (which are often quite extensive but are generally not negotiable). In the view of the Committees, in such Transactions it makes little sense for Opining Counsel to be required to spend the time analyzing remedies provisions generally drafted by the Opinion Recipient’s counsel. On the other hand, in other types of Transactions, such as in a merger or acquisition Transaction, the remedies provisions contained in the Transaction Documents (for example, the indemnification provisions) may be heavily negotiated.

Many Opinion Recipients and Recipient’s Counsel are receptive to the inclusion of a “generic” qualification in the opinion letter because they have drafted the Transaction Document in question and are already advising their own client(s) regarding the enforceability of particular rights, remedies and undertakings provided for in the Transaction Documents. However, some Opinion Recipients and Recipient’s Counsel view both versions of the “generic” qualification as depriving the Opinion Recipient of appropriate guidance from Opining Counsel concerning the availability of particular rights, remedies and undertakings. Despite their inherent ambiguities and limitations, the “practical realization” qualification and the “material breach” qualification are used frequently in remedies opinions on many types of transactions, and it is common and widely accepted practice in Florida to include one of them in an opinion letter that contains a remedies opinion. See “Overview of the Remedies Opinion” above.

Finally, in the view of the Committees, if a “generic” qualification is included in an opinion letter, it limits the scope of the remedies opinion with respect to all provisions of the Transaction Documents and not just the security interest provisions contained within the Transaction Documents.

Like the remedies opinion itself, a reference to the “practical realization” qualification or “material breach” qualification should always be understood to be subject to the bankruptcy exception and the equitable principles limitation and to any other specifically stated exceptions and qualifications contained in the opinion letter. For the avoidance of doubt, Opining Counsel may wish to state expressly in the opinion letter that the exception is in addition to and not intended to limit the scope of the standard bankruptcy exception, equitable principles limitation, and any other specifically stated qualifications, and the recommended “generic” qualification language described below makes this clear. In the view of the Committees, it is inappropriate to request that a “practical realization” qualification or a “material breach” qualification override the bankruptcy exception and/or the equitable principles limitation, and such an overriding opinion should never be requested or given.

2. *The “Practical Realization” Qualification*

The “practical realization” qualification is often expressed as follows:

In addition, certain of the provisions in the [Transaction Documents] might not be enforceable; nevertheless, subject to the bankruptcy exception and the equitable principles limitation, such unenforceability: (i) will not render the [Transaction Documents] invalid as a whole, or (ii) substantially interfere with the practical realization of the principal benefits (or security) purported to be provided by the [Transaction Documents].

The “practical realization” qualification is sometimes criticized for being overly broad, inasmuch as the parties may have conflicting understandings of the meanings of the words “practical realization” and “principal benefits.” The “practical realization” qualification is also sometimes criticized for exposing Opining Counsel to potential liability because of the possibility of a court concluding that, because of the level of damage caused by a breach of an agreement, any invalidity of a contractual provision (no matter which contractual provision is violated and no matter how material or immaterial such provision may be) must rise to the level of a violation of the “practical realization” of the “principal benefits” of such agreement.

The Committees believe that, under Florida customary practice, the words, “practical realization” and “principal benefits,” are to be interpreted under a commercially reasonable standard (i.e., what would a reasonable Opinion Recipient, who is acting in a reasonably commercial manner, expect to be the “principal benefits”). The Committees urge courts which are called upon to determine whether a lawyer rendering a remedies opinion containing a “practical realization” qualification has met an applicable standard of care to recognize that it is the assessment of what are the “principal benefits” expected to be received by a reasonable Opinion Recipient under the agreement (and not the scope of the damages caused by a breach of the agreement, no matter how immaterial the breach) that should be considered when assessing whether the lawyer has met the applicable standard of care under the circumstances.

3. The “Material Breach” Qualification

In negotiating real estate loan transactions, it has become widely accepted customary practice in Florida (and elsewhere around the United States) to limit the remedies opinion so that it covers only enumerated essential remedies; that is, repayment of the loan, acceleration of the maturity of the loan, and foreclosure upon the real and personal property subject to the foreclosure provisions of the Transaction Documents. To this end, most real estate practitioners throughout the United States favor the approach taken in the Real Estate Report and the ACREL “All Inclusive Opinion,” which recommends the use of a “material breach” qualification; that is, that certain provisions of the loan documents may be unenforceable, but that such unenforceability will neither render the Transaction Documents “invalid as a whole” nor preclude judicial enforcement of repayment, acceleration of the note or foreclosure of liens in collateral in the event of a material breach of a payment obligation or other material provision of the Transaction Documents. The following is the suggested language for using this approach in a real estate financing transaction:

In addition, certain remedies, waivers and other provisions of the Transaction Documents might not be enforceable; nevertheless, subject to the bankruptcy exception and the equitable principles limitation, such unenforceability will not render the Transaction Documents invalid as a whole or preclude: (i) the judicial enforcement of the obligation of the Client to repay the principal, together with interest thereon (to the extent not deemed a penalty), as provided in the [Transaction Documents/Note], (ii) the acceleration of the obligation of the Client to repay such principal, together with such interest, upon a material default by the Client in the payment of such principal or interest [or upon a material default in any other material provision of the Transaction Documents,] or (iii) the foreclosure in accordance with [applicable laws] of the lien on and security interest in the [collateral] created by the Security Documents upon maturity or upon acceleration pursuant to (ii) above.

The “material default in any other material provision of the Transaction Documents” language is often added at the request of the Opinion Recipient, but arguably suffers from the same interpretive issue that is associated with the “practical realization” qualification. When such language is included in the “material breach” qualification, it should be interpreted under Florida customary practice to define “material provisions” and “material defaults” based upon a commercially reasonable standard (i.e., what would a reasonable Opinion Recipient, who is acting in a reasonably commercial manner, expect to be a “material default” of a “material provision” of the Transaction Documents).

Accordingly, given the customary use of a “generic” qualification, and in light of the broad equitable principles limitation generally included in opinions, an opinion with respect to a real estate loan generally does not require the inclusion of additional specific qualifications. In fact, Opining Counsel need only utilize additional qualifications with respect to: (i) matters that are not adequately addressed by the bankruptcy exception, equitable principles limitation and/or the “generic” qualification, (ii) matters that may be of special importance to the Opinion Recipient, such as unusual limitations on judicial or non-judicial remedies of which an out-of-state lender may not be aware, or (iii) in certain instances, provisions in the Transaction Documents that were particularly contentious during negotiations. Notwithstanding the foregoing, the Committees recommend (based on a cost-benefit analysis) that Florida counsel rendering an opinion letter containing a remedies opinion include an extensive list of specific remedies excluded from coverage of the remedies opinion, and the illustrative forms of opinion letters that accompany this Report include such a list of qualifications.

There is increasing use of a “material breach” qualification similar to the ACREL “All Inclusive Opinion” in opinion letters regarding non-real estate financing transactions. In such cases, the following version of the “material breach” qualification to the remedies opinion has become common:

In addition, certain remedies, waivers and other provisions of the Transaction Documents might not be enforceable; nevertheless, subject to the bankruptcy exception and the equitable principles limitation, such unenforceability will not render the Transaction Documents invalid as a whole or preclude: (i) the judicial enforcement of the obligation of the Client to [repay the principal, together with the interest thereon (to the extent not deemed a penalty),] as provided in the [Transaction Documents/Note], (ii) the acceleration of the obligation of the Client to [repay such principal, together with such interest,] upon a material default by the Client in the payment of such principal or interest [or upon a material default in any other material provision of the Transaction Documents], or (iii) [the foreclosure in accordance with [applicable laws] of the security interest in the [collateral] created by the [Transaction Documents], upon maturity or upon acceleration pursuant to (ii) above].

The Committees believe that inclusion of a “material breach” qualification in a remedies opinion rendered by Florida Opining Counsel in a non real estate loan transaction has become a common and widely accepted practice in Florida. Further, the Committees recommend that an opinion letter with respect to a commercial loan transaction that contains a remedies opinion should include a “material breach” qualification.

G. Examples of Specific Limitations to the Remedies Opinion (Additional Qualifications)

1. *Regulatory Issues*

(a) Regulatory Issues Involving the Client’s Status or Activities Are Covered

The nature of the business conducted by the Client may affect the extent of the remedies opinion. Opining Counsel may be called upon to advise whether the Client has complied with regulatory statutes applicable to such Client because of the nature of the Client’s business to the extent that non-compliance impairs enforceability. For example, if Opining Counsel is representing a pharmaceutical company or an airline, Opining Counsel, in issuing a remedies opinion with respect to such Client, would need to consider the effect of food and drug laws, rules and regulations overseen by the U.S. Food and Drug Administration or the laws, rules and regulations governing the operation of an airline overseen by the U.S. Federal Aviation Administration, respectively.

In determining whether to render an opinion regarding regulatory issues, Opining Counsel should consider whether Opining Counsel is competent to render such opinion. If Opining Counsel is not competent in that regard, Opining Counsel should consider excluding the laws, rules and regulations of the particular regulated industry from the scope of the opinion or obtaining specialist counsel knowledgeable about such regulatory issues to separately render the opinion directly to the Opinion Recipient. See “Common Elements of Opinions – Opinions of Local or Specialist Counsel.”

(b) Regulatory Issues Involving Other Parties Are Not Covered

A remedies opinion, as a matter of Florida customary practice, does not cover and should not be read to cover regulatory statutes that govern the Opinion Recipient. Thus, for example, in rendering a remedies opinion in a bank lending transaction, Opining Counsel in its representation of the borrower is not required to opine on whether the loan contravenes the bank’s lending limit, whether the bank has obtained any required governmental approvals or the impact of other state or federal regulatory laws on the bank. However, in the context of a loan transaction, some Opinion Recipients may request an opinion regarding whether they will be required to register to transact business in Florida in order to make the loan. See “Authorization to Transact Business – Lender Not Required to Register As a Foreign Corporation in Florida to Make a Loan.”

(c) Regulatory Issues Involving Both Parties Are Sometimes Covered

Some regulatory issues affect both the Client and the Opinion Recipient. For example, Federal Reserve Board's margin regulations, may be germane to both parties in a loan transaction, since application of these regulations may render a loan void. However, such margin requirements are unusually complex and, as a result, are excluded from the scope of an opinion of Florida counsel (including a remedies opinion) under customary practice in Florida unless specifically included in the opinion letter. See "Common Elements of Opinions – Limitations to Laws of Specific Jurisdictions or to Substantive Areas of Law; Excluded Areas of Law." Under such circumstances, an Opinion Recipient may wish to ask for a specific opinion with respect to this issue.

2. Implicit Assumption As to Discharge or Disclosure of Fiduciary Obligations

Opining Counsel will generally obtain certificates or other evidence of the various entity approvals required to render an opinion. The certificate or other evidence is often to the effect that the required approvals have been obtained and, if necessary, that a meeting was held and proper notice was given. Because of the fundamentally factual nature of these matters, such a certificate is understood as not addressing: (i) whether those voting were sufficiently informed about the matter on which they voted, and (ii) whether those voting were doing so improperly because, for example, they had not disclosed an interest in the Transaction or had violated a fiduciary responsibility.

As for the first of those questions, Opining Counsel may assume without disclosure and without investigation (subject to customary limits on unstated assumptions) that the facts required to be presented to obtain an effective approval have been provided. Any assessment of the adequacy of factual disclosure (for instance, in proxy statements) is a significant task and one that is customarily not undertaken in order to render a third-party legal opinion. Similarly, Opining Counsel is not required, as a matter of customary diligence, to inquire into whether those approving the Transaction have violated their fiduciary obligations or have an interest they failed to make known, unless the opinion letter explicitly covers those issues. The remedies opinion is based on the assumption, usually tacit, that those who have approved a Transaction Document have satisfied their fiduciary obligations and appropriately disclosed any interest therein. See "Authorization of the Transaction by a Florida Entity."

3. Other Common Qualifications

Often, Opining Counsel expressly include specific exceptions and/or qualifications to a remedies opinion in the opinion letter. The purpose of using these specific exceptions is to bring limitations as to the scope of the remedies opinion to the attention of the Opinion Recipient. If a "practical realization" qualification or a "material breach" qualification is included in the opinion letter, then many or all of these specific exceptions may not be necessary. However, many counsel, in an abundance of caution, nevertheless choose to include in their opinion letter a list of specific qualifications to the remedies opinion.

Under Florida customary practice, if a particular opinion letter includes specific exceptions and/or qualifications to the remedies opinion in addition to including a "practical realization" qualification or a "material breach" qualification, then the inclusion of such specific exceptions and/or qualifications has the effect of further limiting the scope of the remedies opinion rather than in any way overriding the interpretation of the remedies opinion that results from the inclusion in the opinion letter of either version of the "generic" qualification. This follows even though there may be some overlap between the scope of the remedies opinion that follows from including the "generic" qualification and the scope of the remedies opinion as limited only by the list of express exceptions and qualifications contained in the opinion letter. Moreover, even if specific exceptions and/or qualifications to the remedies opinion apply to only one or more particular provisions in the Transaction Documents, as opposed to applying to all provisions in the Transaction Documents, the overall applicability of any "generic" qualification to the remedies opinion is not changed by the inclusion of such a list. Rather, the list of specific exceptions and/or qualifications must be read as being additional, not alternative, exceptions and qualifications to the remedies opinion relative to those particular provisions.

If a “generic” qualification is not included in an opinion letter, or if Opining Counsel wishes to expressly make clear that not all rights, remedies and undertakings in an agreement are necessarily enforceable, Opining Counsel would be wise to include in the opinion letter a list of provisions contained in the Transaction Documents as to which the opinion relates that might not be enforceable in accordance with their terms.

The following list of qualifications to the scope of the remedies opinion is not exclusive, but rather is intended to reflect an illustrative list of qualifications that Opining Counsel may wish to include in the opinion letter. Opining Counsel may also wish to add other qualifications to the remedies opinion to the extent appropriate. Similarly, counsel for the Opinion Recipient may wish to request coverage in the opinion letter as to the enforceability of one or more of the specific provisions in the Transaction Documents.

Some provisions that Opining Counsel may wish to expressly exclude from the scope of Opining Counsel’s remedies opinion through inclusion of a specific exception in the opinion letter include any provision in the Transaction Documents that:

- (a) purports to excuse a party from liability for the party’s own acts;
- (b) purports to make void any act done in contravention thereof;
- (c) purports to authorize a party to act in the party’s sole discretion or purports to provide that determination by a party is conclusive;
- (d) requires waivers or amendments to be made only in writing;
- (e) purports to effect waivers of: (i) constitutional, statutory or equitable rights, (ii) the effect of applicable laws, (iii) any statute of limitations, (iv) broadly or vaguely stated rights, (v) unknown future defenses, or (vi) rights to damages;
- (f) imposes or permits: (i) liquidated damages, (ii) the appointment of a receiver, (iii) penalties, (iv) indemnification for gross negligence, willful misconduct or other wrongdoing, (v) confession of judgment, or (vi) rights of self-help or forfeiture;
- (g) purports to limit or alter laws requiring mitigation of damages;
- (h) concerns choice of forum, consent or submission to the personal or subject matter jurisdiction of courts, venue of actions, means of service of process, waivers of rights to jury trials, and agreements requiring arbitration;
- (i) purports to reconstitute the terms thereof as necessary to avoid a claim or defense of usury;
- (j) purports to require a party thereto to pay or reimburse attorneys’ fees incurred by another party, or to indemnify another party therefor, which provisions may be limited by applicable statutes and decisions relating to the collection and award of attorneys’ fees;
- (k) relates to the evidentiary standards or other standards by which the Transaction Documents are to be construed, including, but not limited to, provisions that attempt to change or waive rules of evidence or fix the method or quantum of proof to be applied in litigation or similar proceedings;
- (l) prohibits or unreasonably restricts: (i) competition, (ii) the solicitation or acceptance of customers, business relationships or employees, (iii) the use or disclosure of information, (iv) the ability of any person to transfer any property, or (v) activities in restraint of trade;
- (m) enumerates that remedies are not exclusive or that a party has the right to pursue multiple remedies without regard to other remedies elected or that all remedies are cumulative;

- (n) constitutes severability provisions;
- (o) permits the exercise, under certain circumstances, of rights without notice or without providing opportunity to cure failures to perform;
- (p) purports to create rights to setoff otherwise than in accordance with applicable law;
- (q) contains a blanket prohibition on assignments or a specific prohibition on assignment of payments due or to come due; or
- (r) purports to entitle any party to specific performance of any provision thereof.

Further, when opining as to the enforceability of a shareholders' agreement under Florida law, Opining Counsel should consider the enforceability under Florida law of various portions of the shareholders' agreement, including voting agreements, drag-along and tag-along rights and special mandatory conversion (often called "pay-to-play") provisions. Depending on who Opining Counsel is representing in the Transaction, the enforceability of these provisions may be called into question. Thus, because the enforceability of these provisions under Florida law may be unclear, in rendering a remedies opinion under Florida law regarding a shareholders' agreement, the following additional qualification to the remedies opinion might be appropriate:

This opinion is qualified by, and we give no opinion with respect to, or as to the effect of, any provisions imposing obligations to vote the [Seller's] capital stock in a certain manner, to comply with any drag-along and tag-along provisions or to comply with certain special mandatory conversion provisions, including without limitation those provisions set forth in the Transaction Documents.

It is also noted that there are other assumptions that are implicitly included in every opinion of Florida counsel that may affect the scope of the remedies opinion. See "Common Elements of Opinions – Assumptions."

4. Inappropriate Modifications to the "Practical Realization" Language

Sometimes an Opinion Recipient, faced with numerous opinion exceptions which significantly diminish the coverage of the remedies opinion, will respond with a request that the "practical realization" language discussed above be modified to include the following: "Notwithstanding the exceptions noted above, the Opinion Recipient will achieve the practical realization of the benefits intended to be conferred by the Transaction Documents." This broad "practical realization" language is wholly different from the more limited versions described above. Unlike the more limited versions, which are subject to the bankruptcy exception and the equitable principles limitation, this version of the "practical realization" qualification seeks to override *all* qualifications, requiring Opining Counsel to conclude that qualifications will not prevent the Opinion Recipient from enjoying the "benefits" of the Transaction Document(s). In the view of the Committees, this opinion request is inappropriate and should not be requested or given.

H. Remedies Opinions and Arbitration

1. Opinions with Respect to Arbitration Provisions

An arbitration provision in a Transaction Document constitutes an "undertaking," a promise by each party to the other, concerning the forum for resolution of disputes. Unless expressly excluded, the remedies opinion covers arbitration provisions just as it covers other undertakings. Remedies opinions with respect to Transaction Documents containing arbitration clauses customarily do not indicate when disputes arising under the Transaction Document are subject to arbitration, nor do they attempt to describe the differences between the resolution of disputes through litigation and arbitration.

Public policy sometimes requires that a dispute be resolved in a judicial forum instead of in arbitration. Public policy may also preclude the submission to arbitration of certain issues. For example, some courts will not give effect to an arbitration clause that provides that arbitration can only be initiated by one party to a Transaction Document. Accordingly, if Opining Counsel is unable to conclude that the arbitration provision will be given effect in all respects (other than possibly in bankruptcy or insolvency proceedings or where giving effect thereto would be inequitable such that those circumstances come within the bankruptcy exception and/or the equitable principles limitation), Opining Counsel should consider including in the opinion letter an exception to the remedies opinion. The recommended language is as follows:

We express no opinion with respect to the provision in the Transaction Document requiring arbitration as to matters of _____

Additionally, an additional qualification is appropriate with respect to provisions that provide other problematic undertakings. For instance, some arbitration provisions provide for judicial review of the merits of an arbitration award in violation of applicable statutory provisions, and therefore such provisions may or may not be enforceable.

2. *Rules of Arbitral Tribunals Not Covered by Remedies Opinion*

Transaction Documents that contain arbitration provisions usually incorporate by reference the rules of an arbitral tribunal, such as the Commercial Arbitration Rules of the American Arbitration Association. Although a remedies opinion addresses the enforceability of an arbitration provision to require arbitration, the Committees believe that, under Florida customary practice, the remedies opinion should not be understood to address the enforceability of the rules of the arbitral tribunal.

I. Enforceability as of the Date of an Opinion Letter and in the Future

Opining Counsel must bear in mind that the remedies opinion calls on Opining Counsel to consider whether provisions of the Transaction Documents would be given effect by a court on the date of the opinion letter and also whether they would be given effect by a court in the future in various circumstances. In that regard, a remedies opinion should be evaluated based on the law in effect on the date of the opinion letter and based on the facts and possible future events that can be considered as reasonably possible under the facts as they exist on the date of the opinion letter, and does not include facts unknown and uncontemplatable at the time the opinion letter is issued. See “Common Elements of Opinions – Date.” For this reason, Opining Counsel must review the Transaction Documents with particular attention given to any contingencies that can reasonably be expected to alter the circumstances in which a particular remedy or, in more general terms, enforceability would be sought by a party.

NO VIOLATION AND NO BREACH OR DEFAULT

The function of a “no violation and no breach or default” opinion, which is also sometimes referred to as the “no contravention” opinion, is to provide assurance to the Opinion Recipient that the Client’s execution, delivery and performance of the Transaction Documents does not: (i) violate the Client’s Organizational Documents, (ii) trigger a breach of or constitute a default under one or more of the Client’s contractual requirements or under any judgments, decrees or orders applicable to the Client, (iii) result in the creation of a security interest in or a lien on the assets of the entity, except as set forth in the Transaction Documents, or (iv) violate any of the Applicable Laws. It is not an opinion that no adverse consequences will result to the Client if the Client enters into the Transaction. The individual components of the “no violation and no breach or default” opinion are discussed below.

The following is the recommended formulation of the “no violation and no breach or default” opinion:

The execution and delivery by the Client of the [Transaction Documents] and the performance by the Client of its obligations under the [Transaction Documents] do not: (i) violate the Client’s Organizational Documents, (ii) constitute a breach of or a default under, or result in the creation of a security interest or a lien on the assets of the Client under, any of the Client’s [“identified” agreements listed in _____ (for example, a schedule to one of the Transaction Documents, a public securities filing, or a list of other agreements set forth in the opinion letter or in a certificate to counsel) / material agreements that are known to us], (iii) violate any judgment, decree or order of any court or administrative tribunal applicable to the Client that is [listed in _____ (for example, a schedule to one of the Transaction Documents, or a list of judgments, decrees and orders set forth in the opinion letter or in a certificate to counsel) / known to us], or (iv) violate any of the Applicable Laws.

The suggested form of this opinion addresses both the execution and delivery of the Transaction Documents by the Client and the “performance by the Client of its obligations” under the Transaction Documents. There is a distinction between these terms. Reference to “execution and delivery” or words of similar import relates to the creation of an enforceable agreement. Reference to the “performance” by the Client of the Client’s obligations under the “Transaction Documents” includes both performance of the Client’s obligations up to and including the closing under the Transaction Documents and the Client’s performance of its post-closing obligations under the Transaction Documents.

To the extent that this opinion addresses future conduct, the opinion is limited only to conduct expressly required by the Transaction Documents or necessary in order to consummate the Transaction set forth in the Transaction Documents in accordance with its terms under the Applicable Laws as in effect on the date of the opinion. Under some circumstances it might be difficult or unduly time-consuming for Opining Counsel to conduct the due diligence required for evaluating the effect of the Client’s performance of its obligations under the Transaction Documents, such as in circumstances when the Transaction Documents contain numerous covenants and where the other agreements to be examined are massive or complex. For example, in the case of an opinion addressing a loan transaction, some Opining Counsel replace the language regarding “performance by the Client of the Client’s obligations under the Transaction Documents” with “performance by the Client of its payment obligations under the Transaction Documents and the granting by the Client of the security interests and liens therein.”

Opining Counsel may also assume that the Client will take no future discretionary action (including a decision not to act) that would result in the violation of a law and that the Client will obtain all permits and governmental approvals required in the future under relevant statutes or regulations. Although these assumptions are often expressly included in opinion letters, such assumptions and limitations are deemed to be implicit as a matter of customary practice in Florida and thus need not be expressly set forth in the opinion letter. See “Common Elements of Opinions – Assumptions.”

A. No Violation of Organizational Documents

The “no violation” opinion with respect to a Client’s Organizational Documents provides the Opinion Recipient with comfort that neither the execution nor the delivery by the Client of the Transaction Documents, nor the performance by the Client of its obligations under the Transaction Documents, will violate any of the

Client's Organizational Documents. Because the Client's Organizational Documents govern its activities, this opinion addresses the Client's organic ability to enter into and perform the Transaction contemplated in the Transaction Documents.

To render a "no violation" opinion with respect to the Client's Organizational Documents, Opining Counsel should review: (i) the Transaction Documents, and (ii) the Client's Organizational Documents. Based on this review, Opining Counsel should determine whether the Organizational Documents are violated by the Transaction contemplated in the Transaction Documents. See "Entity Status and Organization of a Florida Entity – Organizational Documents" for the definition of Organizational Documents.

B. No Breach of or Default under Agreements

Historically the "no breach of or default under agreements" opinion was rendered to the knowledge of Opining Counsel, with Opining Counsel having first to determine what agreements of the Client Opining Counsel was aware of and second to determine whether any of those agreements were violated by the Client's execution, delivery and performance of the Transaction Documents. Further, this opinion generally presumed that Opining Counsel had a regular attorney-client relationship with the Client over a period of years and knew about the Client's agreements, which might or might not have been the case. Although the historic "no breach of or default under agreements" opinion is still given regularly by Florida counsel, it is much less in favor today.

Unless limited in scope, the "no breach of or default under agreements" opinion could be construed to cover every agreement to which the Client is a party. This result would be excessively onerous from both a diligence and cost standpoint. As a result, the Committees believe that it is inappropriate for an Opinion Recipient to request, and Opining Counsel (even if Opining Counsel is the Client's regular outside counsel) should resist the giving of, a "no breach of or default under agreements" opinion unless the scope of such opinion is limited in some fashion to either "identified" agreements or to agreements known to Opining Counsel where a definition of what is a "material" agreement covered by the opinion has been agreed to in advance between the Opining Counsel and the Opinion Recipient. See "Introductory Matters – Reasonableness; Inappropriate Subjects for Opinions."

In rendering the "no breach of or default under agreements" opinion, Opining Counsel should determine at an early date the nature and extent of those agreements as to which the Opinion Recipient is reasonably concerned and which are to be reviewed. For example, in a real estate transaction, agreements recorded in the public records of the jurisdiction in which the real property is located may be of particular importance to the Opinion Recipient. Examples of ways that agreements might be identified include:

1. agreements identified and set forth: (a) on a schedule attached to the opinion, (b) in a certificate from the Client or from the Client's officers, partners, managers or members, as applicable, or (c) in the representations and warranties of the Client contained in the Transaction Documents or in one or more identified schedules to the Transaction Documents; or
2. agreements identified by the Client as being "material" in its most recent filings with the SEC (if the Client is a reporting company under federal securities laws).

The Committees believe that the responsibility for identifying which agreements should be reviewed by Opining Counsel in order to render the "no breach of or default under agreements" opinion ought to lie with the Client and/or the Opinion Recipient, and not with Opining Counsel. Further, even if Opining Counsel takes on the responsibility of determining which agreements of the Client need to be reviewed in order to render this opinion, Opining Counsel should seek an understanding with the Opinion Recipient as to what constitutes an agreement to be reviewed, both with respect to the type and size of the transactions described in the other agreements and documents. That way, the list of agreements to be reviewed with respect to the rendering of this opinion may be appropriately limited in light of the circumstances of a particular Transaction, taking into account the type and size of the Transaction, the diligence requirements to render the opinion, the timetable for closing the Transaction, and other relevant factors. If the opinion letter limits the opinion to "material" agreements, but there is no agreement as to "materiality" between the Opining Counsel and the Opinion Recipient, then the Committees believe that, under

Florida customary practice, the Client's agreements that are to be reviewed in order to render this opinion shall be those agreements that would be considered "material" under a commercially reasonable standard (i.e., what would a reasonable Opinion Recipient expect to be a "material" agreement under these circumstances).

If the "no breach of or default under agreements" opinion is simply rendered as to "material" agreements of the Client (without identification as to which agreements of the Client are covered), such opinion should only cover "material" agreements known to such Opining Counsel. However, if the Opinion Recipient agrees to allow coverage of the "no breach of or default under agreements" opinion to be limited in scope to a list of "identified" other agreements of the Client, such opinion should not be limited to Opining Counsel's knowledge.

Further, if the "no breach of or default under agreements" opinion is rendered with respect to "material agreements" known to Opining Counsel, Opining Counsel should be considered as only having knowledge of agreements that Opining Counsel knows exist. See "Common Elements of Opinions – Knowledge" for information as to the definition of knowledge and the scope of the "primary lawyer-group" whose knowledge regarding other agreements of the Client is the subject of Opining Counsel's "no breach of or default under agreements" opinion. The fact that Opining Counsel is aware that, because of the nature of the Client's business, the Client must have various types of agreements does not mean that Opining Counsel has knowledge of any such agreements. Opining Counsel has no duty to inquire or investigate the agreements as to which the Client is a party in order to render this opinion, unless Opining Counsel expressly agrees to conduct diligence with respect to this issue. On the other hand, Opining Counsel is deemed to be aware of agreements that Opining Counsel has become aware of during the course of its representation of the Client, even if Opining Counsel did not represent the Client with respect to such other agreement or has not previously reviewed a copy of such other agreement. For example, if Opining Counsel has previously reviewed the Client's financial statement and is aware that a prior loan transaction exists, Opining Counsel would be obligated to review the loan agreement with respect to such transaction.

Notwithstanding the foregoing, unless it would cause the opinion to be misleading, if the "no breach of or default under agreements" opinion is rendered with respect to "identified" agreements, then under Florida customary practice Opining Counsel's knowledge regarding other agreements of the Client that might be affected by the Client's entering into the Transaction and performing its obligations under the Transaction Documents does not need to be considered or taken into account by Opining Counsel.

Once the other agreements as to which the "no breach of or default under agreements" opinion is being given have been identified, Opining Counsel should review the other agreements (either the "identified" agreements or the "material" agreements known to such Opining Counsel, as the case may be) in order to confirm that no breach of or default under such other agreements would result thereunder from the Client's execution, delivery and/or performance of the Transaction Documents. In reviewing such other agreements, Opining Counsel may assume that each of the Client's other agreements being reviewed for purposes of rendering this opinion will be interpreted in accordance with their terms. Under customary practice in Florida, a "no breach of or default under agreements" opinion regarding other agreements is only meant to address violations that are readily ascertainable from the face of the agreement(s).

Unless the opinion letter clearly indicates otherwise, this opinion is not meant to address primarily factual matters (such as whether or not there are breaches or defaults in respect of ratios and other financial covenants, the effect on the question of whether a material breach or default will occur under provisions such as permitted "baskets" or other limitations on liens and indebtedness, or other covenants, representations and warranties or other provisions of material agreements that involve factual issues that are not readily apparent from Opining Counsel's review of the identified material agreement itself). This limitation would include matters that depend upon financial statements and reports or conclusions of other professionals (e.g., financial, accounting, appraisal or valuation reports or conclusions). In some cases, Opining Counsel adds to the opinion letter an express qualification to this effect. A recommended form of such qualification is as follows:

We express no opinion as to compliance or non-compliance with provisions in other agreements that require financial calculations or determinations to ascertain compliance or relating to any other aspect of the financial condition or results of operations of the Client.

Further, in many instances, the Client's agreements may be governed by the laws of states other than Florida. In those instances, Opining Counsel is entitled to assume that the law of the other state is the same as the law of Florida.

Under customary practice in Florida, the "no breach of or default under agreements" opinion regarding other agreements does not constitute any legal opinion with respect to the substance of any of such other agreements and, particularly, is not a remedies opinion as to the enforceability of any such other agreements.

When an opinion is sought regarding whether preemptive rights (or similar rights) arise under a contract, the Opinion Recipient is seeking guidance as to whether, under the Client's other agreements, third parties will have preemptive rights (or similar rights) to acquire securities in the Client as a result of the Transaction. For a discussion of statutory preemptive rights and preemptive rights arising under the Client's articles of incorporation, see "Opinions with respect to Securities-Corporations-No Preemptive Rights."

The Committees believe that it is not appropriate for an Opinion Recipient to request a "no breach of or default under agreements" opinion from Florida Opining Counsel that has had little or no prior involvement with the Client. This is particularly so, for example, when Florida counsel is acting as local counsel.

C. Creation of Security Interests or Liens

An opinion that the execution and delivery of the Transaction Documents will not result in the creation or imposition of a lien on the Client's properties or assets, is limited solely to liens that may be created as a result of entering into and performing the Transaction Documents and does not cover any liens arising by operation of law, regardless of whether or not the opinion letter expressly excludes liens arising by operation of law. It also does not cover the creation, attachment, perfection or priority of a lien created under the Transaction Documents. See "Opinions With Respect to Collateral Under the UCC" and "Opinions Particular to Real Estate Transactions."

Some counsel expressly exclude from the scope of their opinion letters liens arising by operation of law. Such liens include, for example, liens arising under tax laws, liens arising under mechanics lien laws and liens arising under environmental laws. A recommended form of qualification that excludes from the scope of the "no creation of security interests or liens" opinion those liens arising by operation of law is as follows:

We express no opinion regarding liens arising by operation of law.

To render this opinion, Opining Counsel should review the other agreements that are referred to in the discussion above in "No Breach of or Default under Agreements" and determine whether a security interest or lien arises as a result of the Client executing and delivering the Transaction Documents or performing its obligations under the Transaction Documents (such as a springing lien that arises by reason of the breach of a negative covenant contained in another agreement).

D. No Violation of Judgments, Decrees or Orders

Rendering a "no violation of judgments, decrees or orders" opinion poses the same types of diligence issues as does the rendering of a "no breach of or default under agreements" opinion. The materiality and the scope of investigation with respect to judgments, decrees or orders should, if at all possible, be agreed on by Opining Counsel and Opinion Recipient. Unless specifically agreed otherwise and expressly set forth in the opinion letter, under customary practice in Florida Opining Counsel is not required to conduct any independent investigation regarding judgments, decrees or orders that apply to the Client (such as performing a lawsuit and judgment search of the court docket or public records or reviewing all litigation files of the Opining Counsel's firm). Further, if the Opinion Recipient agrees, Opining Counsel in rendering this opinion may rely on a certificate from the Client regarding the identification of any outstanding judgments, decrees or orders that are applicable to the Client or on a listing of any such judgments, decrees or orders applicable to the Client listed in a Transaction Document or in a schedule to a Transaction Document.

If the "no violation of judgments, decrees or orders" opinion is limited to identified judgments, orders and decrees, or if Opining Counsel knows of a judgment, decree or order applicable to the Client, Opining Counsel must review each such judgment, decree or order identified or known, as the case may be, to determine whether it is violated by the Client's executing, delivering and performing any of the Transaction Documents. In that regard,

in rendering this opinion Opining Counsel is not permitted to rely on the legal conclusion contained in a certificate or Transaction Document in which the Client represents and warrants the effect of any such judgments, decrees or orders on the Client. Further, if an investigation as to any of these matters is performed by Opining Counsel, the scope of that investigation should be specifically noted in the opinion letter (for example, if the Opining Counsel agrees to perform a judgment and litigation search in one or more jurisdictions where the Client does business). Similarly, to the extent that Opining Counsel has knowledge that one or more parties to a Transaction (or their counsel) have conducted any judgment, decree or order searches in respect of the Client, Opining Counsel should request copies of such searches and review the documents identified on such search reports for any violation of such documents that would result from the Client's execution, delivery and performance of the Transaction Documents.

In the view of the Committees, unless the "no violation of judgments, decrees or order" opinion is limited to specifically "identified" judgments, decrees or orders, the "no violation of judgments, decrees or orders" opinion should cover only judgments, decrees or orders known to Opining Counsel. See discussion above in "No Breach of or Default under Agreements" for factors to consider regarding Opining Counsel's "knowledge" with respect to this opinion.

E. No Violation of Laws

The "no violation of laws" opinion means that the Client's execution and delivery of, and its performance of its obligations under, the Transaction Documents will not expose the Client to sanctions for violating any Applicable Laws. This opinion only covers violations of law by the Client and not violations of law by any other parties to the Transaction Documents (such as a lender's violation of its lending limits in connection with its loan to the Client).

The standard formulation of the "no violation of laws" opinion is limited to Applicable Laws, which are defined as the laws that a Florida lawyer exercising customary professional diligence would reasonably be expected to recognize as being applicable to the Client, the Transaction Documents or the Transaction to which the opinion relates, including laws relating to the Client if the Client is in a regulated industry (such as a bank), but excluding from the coverage of such opinion any of the Excluded Laws. See "Common Elements of Opinions – Limitations to Laws of Specific Jurisdictions or to Substantive Areas of Law; Excluded Areas of Law" for the definitions of Applicable Laws and Excluded Laws. In that regard, it is understood under Florida customary practice that each of the Excluded Laws are excluded from the scope of opinions issued by Florida counsel unless the opinion letter expressly states that one or more of such laws are covered by the opinion letter. Among the laws that are within the definition of Excluded Laws are local laws (ordinances, rules and regulations adopted by counties and municipalities).

If the standard formulation of the "no violation of laws" opinion is followed and therefore the "no violation of laws" opinion is limited to Applicable Laws, a definition of Applicable Laws should be included in the opinion letter (or if such definition is not otherwise included in the opinion letter, the definition of "Applicable Laws" should be expressly crafted into the "no violation of laws" opinion). The recommended language is as follows:

When used in this opinion letter, the term "Applicable Laws" means the federal and Florida laws, rules and regulations that a Florida counsel exercising customary professional diligence would reasonably be expected to recognize as being applicable to the Client, the Transaction Documents or the Transaction to which the opinion relates but excluding those areas of law that are expressly excluded from the scope of the opinion in this opinion letter [or are otherwise excluded from opinions of Florida counsel under customary opinion practice in Florida].

However, if the opinion on "no violation of laws" instead refers to "federal or Florida laws, rules and regulations" instead of the defined term, "Applicable Laws," it shall be understood as a matter of Florida customary practice to mean the same thing as the defined term "Applicable Laws." Further, even if the bracketed language from the recommended version of this definition above is excluded, the Committees believe that under customary practice in Florida, all Excluded Laws are implicitly excluded from coverage in all opinions of Florida counsel whether or not such exclusion is expressly stated in the opinion letter. See "Common Elements of Opinions – Limitations to Laws of Specific Jurisdictions or to Substantive Areas of Law; Excluded Areas of Law."

The “no violation of laws” opinion should not be interpreted to cover common law doctrines, such as those of contract or tort, that have not been enacted by a legislature. Further, although it may be appropriate in certain circumstances to request an opinion on certain specific local or excluded laws applicable to the subject Transaction (e.g., an opinion on zoning restrictions in a particular real estate transaction when such opinion is particularly relevant), the cost of preparing an opinion addressing all local laws would not be justified, and the Committees believe that it is inappropriate for an Opinion Recipient to request such an opinion.

Opining Counsel might also be asked for an opinion that the Client is in compliance with applicable laws generally. Although in many circumstances it may be appropriate for the Client to make a representation or warranty in the Transaction Documents to this effect, this form of opinion is too broad and is an inappropriate opinion to request. To render an opinion regarding compliance with applicable laws would require Opining Counsel to have extensive knowledge of the Client’s past and present operations, and would require comprehensive and costly research. As a result, the Committees believe that the costs of rendering this opinion substantially outweigh the benefits of this opinion to the Opinion Recipient in all circumstances.

From a diligence perspective, in issuing a “no violation of laws” opinion, Opining Counsel must be familiar with the laws, rules, and regulations covered by the opinion letter (the Applicable Laws) that affect the Client, the Transaction and the Transaction Documents (and the case law interpreting such laws, rules and regulations) and the Client’s business related to the Transaction Documents. Opining Counsel should consider in that regard Opining Counsel’s ethical obligation to be knowledgeable in the law of the area to which the Transaction Documents relate before rendering an opinion or representing the Client with respect to the Transaction. See Section 4-1.1 of the RPC in that regard, which defines the concepts of competent representation and requires that a lawyer have the legal knowledge, skill, thoroughness and preparation reasonably necessary for the particular representation. In appropriate circumstances, specialist counsel with expertise in the areas of law relating to the Transaction or the Transaction Documents or the activities of the Client should be brought in. See “Common Elements of Opinions – Opinions of Local or Specialist Counsel.”

Florida attorneys need to be aware that, under Section 193.1556, Florida Statutes, when Florida real property is transferred or when there is a change of control of, or majority ownership of, an entity that owns Florida real property, the property appraiser in the Florida county where the real property is located must be notified. For a further discussion regarding this requirement, see “Opinions Particular to Real Estate Transactions – Requirements for Recording Instruments Affecting Real Estate – Change of Control or Change of Ownership.”

F. No Conflict

Frequently an opinion request for a “no violation and no breach or default” opinion will also request a “no conflict” opinion. The concept of “no conflict” is much broader than “no violation or no breach or default” and could be interpreted to include implicit or indirect conflicts, and include conflicts as to future performance requirements. It will usually be difficult for Opining Counsel to make a determination as to whether there is a conflict between the provisions of the Transaction Documents and any identified or material agreements, particularly if each provides numerous performance covenants, each expressed in a different way. As a result, the Committees believe that it is unreasonable for the Opinion Recipient to insist that the “no violation and no breach or default” opinion be expanded to include a “no conflict” opinion.

G. Material Adverse Effect

Sometimes, an Opinion Recipient will try to expand the “no violation and no breach or default” opinion by removing the scope limitations described above and inserting (in order to argue to the Opining Counsel that Opining Counsel’s opinion is being limited) the concept that such violation would not “materially and adversely affect the Client,” or words to that effect. Although this type of request may be reasonable when requesting representations and warranties from the Client, it is not an appropriate construct for an opinion letter.

NO REQUIRED GOVERNMENTAL CONSENTS OR APPROVALS

A. Meaning of the Opinion

The “no required governmental consents or approvals” opinion means that the Client can bind itself to the Transaction Documents without obtaining the consent, approval, authorization or other action by, or making any filing or registration with, any governmental authority of the State of Florida or of the federal government. If the “no required governmental consents or approvals” opinion is being provided and if any such consents or approvals, authorizations, actions, filings or registrations are actually required in order for the Client to execute and deliver the Transaction Documents and effectively close the Transaction, such items should be identified as exceptions in the opinion letter. Further, the opinion letter should specify whether such consents, approvals, authorizations, actions, filings or registrations have been made or have been obtained. The “no required governmental consents or approvals” opinion addresses only those consents, approvals, authorizations, filings or registrations that must be obtained or made in order to make effective both the Client’s execution and delivery of the Transaction Documents and the closing of the Transaction.

This opinion is not an opinion that the Client has all governmental consents and approvals required to conduct its business. A request for an opinion covering this issue is inappropriate. See “Introductory Matters – Reasonableness; Inappropriate Subjects for Opinions.”

Some Opining Counsel seek to limit the “no required governmental consents or approvals” opinion to Opining Counsel’s knowledge. However, because this opinion expresses solely a conclusion as to an issue of law, a knowledge qualifier, if included, will not have the effect of limiting this opinion in any manner. As a result, under Florida customary practice, if this opinion is limited to the knowledge of Opining Counsel, it has the same meaning and requires the same diligence as if this opinion were not limited to the knowledge of the Opining Counsel.

The recommended form of the opinion is as follows:

No consent, approval, authorization or other action by, or filing or registration with, any governmental authority of the United States or the State of Florida is required by or on behalf of the Client to execute and deliver the [Transaction Documents] and to close the Transaction contemplated by the Transaction Documents, other than [_____] / those consents, approvals, authorizations, actions, filings and registrations as to which the requisite consents, approvals or authorizations have been obtained, the requisite actions have been taken and the requisite filings and registrations have been accomplished].

B. Exceptions

Unless expressly stated in the opinion letter, under customary practice in Florida the “no required governmental consents or approvals” opinion does not include: (i) any consents, approvals, authorizations, actions, filings or registrations that may be required for performance of the Client’s post-closing obligations under the Transaction Documents, (ii) any consents, approvals, authorizations, filings or registrations by or with any local governmental authority or a political subdivision of a state, such as a county or municipality, that may be necessary to run the Client’s business or to own and operate the Client’s property, or (iii) any consents required under any of the Excluded Laws.

In addition, this opinion does not cover filings required to perfect a security interest or grant a lien pursuant to the Transaction Documents. Any opinion regarding these types of matters should be explicitly stated in the opinion letter. For information regarding opinions on these issues, see “Opinions with Respect to Collateral Under the Uniform Commercial Code” and “Opinions Particular to Real Estate Transactions.”

Under Florida customary practice, if this opinion, instead of using the words “to close the Transaction contemplated by the Transmission Documents” uses the words “performance by the Client of its obligations under the Transaction Documents,” it shall be deemed to cover only the pre-closing performance of the Client under the Transaction Documents, unless the opinion letter expressly states that it covers the post-closing obligations of the Client under the Transaction Documents.

Although the “no required governmental consents or approvals” opinion does not cover consents, approvals, authorizations, actions, filings or registrations required to operate the client’s business or own its properties, some Opining Counsel, in an abundance of caution, expressly set forth this exception in their opinion letter using a qualification similar to the following recommended language:

Except as expressly provided in this opinion, we express no opinion as to any consent, approval, authorization or other action or filing necessary for the ongoing operation of the Client’s business [or with respect to the Client’s ownership of its property or the Collateral].

However, this qualification is generally not necessary, since the scope of this opinion under Florida customary practice does not cover these types of governmental consents or approvals.

While the scope of this opinion does not cover consents required under any of the Excluded Laws, if Opining Counsel has knowledge of any required consent under any of the Excluded Laws, Opining Counsel should consider Opining Counsel’s obligations not to issue a misleading opinion in deciding whether or not to disclose such required consent to the Opinion Recipient. See “Common Elements of Opinions – Knowledge.”

C. Consents of Third Parties

Often, Opinion Recipients will request that the opinion address whether consents and/or approvals of third parties other than governmental entities are required to be obtained with respect to the Transaction. Requests for this opinion are not appropriate. However, Opining Counsel should be aware that, if a “no breach or default” opinion of “identified” or “material” agreements is being rendered, then such opinion would nevertheless cover whether any consents and/or approvals of the other third parties to the “identified” or “material” agreements must be obtained under such “identified” or “material” agreements.

Sometimes, the Opinion Recipient will request a broader opinion covering such non-governmental consents and approvals, but limited to consents and approvals that, if not obtained, would have a material adverse effect on the Client or its business. Although it may be reasonable to request that the Client provide this type of comfort in its representations and warranties, it is not an appropriate opinion request.

D. Execution, Delivery and Pre-Closing Performance

In the context of the “no required governmental consents or approvals” opinion, the Opining Counsel must consider both the execution and delivery of the Transaction Documents as well as such elements of performance as are required to close the Transaction (where execution and delivery of one or more of the Transaction Documents precedes the closing of the Transaction). However, unless expressly covered in the opinion, the “no required governmental consents or approvals” opinion does not cover any post-closing “performance” by the Client of the Client’s obligations under the Transaction Documents.

E. Certificate of Client and Review of Applicable Laws

To render the “no required governmental consents or approvals” opinion, Opining Counsel often obtains a certificate from an officer, partner, manager or member, as applicable, of the Client which: (i) contains a general description of the type of business in which the Client is engaged, (ii) specifies those governmental authorities or agencies that regulate the Client and/or that regulate the Client’s businesses or assets, (iii) notes whether the Client is subject to any judgments, orders or decrees that may affect the Client or its business, and (iv) states

whether such officer, partner, manager or member is aware of any governmental filings that must be made or governmental consents or approvals that must be obtained in connection with the Client's execution and delivery of the Transaction Documents and the closing of the Transaction.

Opining Counsel should then review Applicable Laws in light of the information described above to determine, based on the information contained in the Client's certificate or otherwise known to such Opining Counsel, what governmental consents, approvals, permits or actions by, and what filings or registrations with governmental authorities may be required in connection with the execution and delivery of the Transaction Documents and the closing of the Transaction. If the Client conducts its business in multiple jurisdictions or operates in a regulated industry, Opining Counsel should consider obtaining opinions of local or specialized counsel with respect to those laws with which the Opining Counsel is unfamiliar, or expressly excluding such laws, rules and regulations from the scope of the opinion letter. In negotiating the form of the "no required governmental consents or approvals" opinion, the parties should consider the additional expense of engaging separate counsel and whether the costs of such opinion would justify any benefits received by the Opinion Recipient from such opinion. Further, the opinion is deemed to exclude coverage of consents required under any of the Excluded Laws, unless the application of such laws are specifically covered in the opinion letter. See "Common Elements of Opinions – Limitations to Laws of Specific Jurisdictions or to Substantive Areas of Law; Excluded Areas of Law" for the definitions of Applicable Laws and Excluded Laws.

Florida attorneys need to be aware that, under Section 193.1556, Florida Statutes, when Florida real property is transferred or when there is a change of control of, or majority ownership of, an entity that owns Florida real property, the property appraiser in the Florida county where the real property is located must be notified. For a further discussion regarding this requirement, see "Opinions Particular to Real Estate Transactions – Requirements for Recording Instruments Affecting Real Estate – Change of Control or Change of Ownership."

NO LITIGATION

A. Nature and Purpose of the “No Litigation” Confirmation

The statement of “no litigation” is a factual confirmation that is in the nature of a negative assurance statement. It is not a legal opinion requiring legal analysis and legal conclusions. For this reason, the statement is often set forth in a separate, unnumbered paragraph in an opinion letter, although its placement as part of the “opinions” section of an opinion letter does not change its meaning or the fact that it is a factual confirmation and not a legal opinion. See “Introductory Matters – Reasonableness; Inappropriate Subjects for Opinions.” The statement of “no litigation” is not intended, nor should it be ever be construed, as reflecting the anticipated results that are likely to be obtained in any of the Client’s litigation matters.

Customary practice regarding the “no litigation” confirmation is in a state of flux. For many years, the “no litigation” confirmation was requested and given as a matter of course in virtually all third-party legal opinions. Generally, its use was based on the assumption that Opining Counsel regularly represented the Client and had knowledge about the Client’s legal affairs. The “no litigation” confirmation historically provided comfort to the Opinion Recipient that there was no material pending or threatened litigation or proceedings against the Client or affecting the Transaction except as disclosed.

In the Prior Florida Reports, the scope of the “no litigation” confirmation was limited in several important respects. First, it was limited to the “knowledge” of the “primary lawyer group.” See “Common Elements of Opinions – Knowledge.” Second, the determination of whether pending or threatened litigation was “material” was deemed in the Prior Florida Reports to be a subject for determination by the Client and the Opinion Recipient (and not the Opining Counsel), and the confirmation provided was that, to the knowledge of the Opining Counsel, there were no litigation matters pending or threatened that met objective criteria as to materiality other than those identified (such as those listed in a schedule to one of the Transaction Documents or in a certificate to counsel). See “No Violation and No Breach or Default” for a discussion on determining an appropriate standard as to materiality. Third, with respect to “overtly” threatened litigation (where the potential claimant has manifested an awareness of and a present intention to assert a claim), the “no litigation” confirmation was limited to overtly threatened litigation that was threatened in writing.

In December 2004, the Business Law Session of the Massachusetts Superior Court, following a bench trial, found a Boston law firm liable to the recipient of a closing opinion (the acquiring company in an acquisition) for more than \$9 million in damages and costs. Dean Foods v. Pappathanasi, 18 Mass.L.Rptr. 598, 2004 WL 3019442 (Mass. Super. December 3, 2004). The basis of liability was negligent misrepresentation stemming from the firm’s giving a no litigation confirmation without disclosing in the opinion letter a matter that the court found the firm should have disclosed. The Dean Foods case received widespread attention from lawyers around the country and has been the subject of extensive commentary. See Glazer and Field, “*No Litigation Opinions Can Be Risky Business*,” Vol. 14, No. 6. Business Law Today, July/August 2005 and the discussion of the Dean Foods case below in “Selected Issues.”

Following the decision in the Dean Foods case, several bar associations (or sections of bar associations) took positions regarding the “no litigation” confirmation to try to limit its scope. Some argued that the “no litigation” confirmation should be eliminated from third-party closing opinions altogether. Others sought to modify the confirmation by limiting its coverage. From this dialogue, three additional versions of the “no litigation” confirmation have emerged:

- a “no litigation” confirmation that is limited only to pending litigation or governmental proceedings or to litigation or governmental proceedings that have been overtly threatened in writing affecting the Transaction;
- a “no litigation” confirmation that is limited to disclosure of matters that the firm giving the opinion is handling; and
- a “no litigation” confirmation that combines both of these more limited versions of the “no litigation” confirmation.

B. The “No Litigation” Confirmation

The Committees believe that rendering a “no litigation” confirmation remains a common practice in Florida. Consequently, in the view of the Committees, it would be appropriate for an Opinion Recipient to request a “no litigation” confirmation except in those cases where Opining Counsel does not regularly represent the Client or is acting as local counsel or is otherwise only engaged with respect to a limited aspect of the Transaction.

The Committees also believe that the traditional form of the “no litigation” confirmation contained in the Prior Florida Reports is no longer the “no litigation” confirmation that Florida counsel usually provide. In fact, opinion practice today embodies a cost/benefit analysis that will often suggest that a more limited version of the “no litigation” confirmation will be more reasonable and appropriate under the circumstances (and each of the illustrative forms of opinion letters that accompany this Report include one of these more limited versions).

Below are three versions of the “no litigation” confirmation that are often seen in Florida opinion practice. Opining Counsel and Opinion Recipients should negotiate the appropriate scope of the “no litigation” confirmation based on the circumstances of the particular Transaction (including the size of the Transaction) and the relationship of Opining Counsel to the Client.

If the “no litigation” confirmation is to be limited to disclosure regarding pending or overtly threatened litigation or governmental proceedings affecting the Transaction that are known to the Opining Counsel, the following form is appropriate:

To our knowledge, there is no action, suit or proceeding, at law or in equity, or by or before any governmental agency, now pending or overtly threatened in writing against the Client that challenges the validity or enforceability of, seeks to enjoin the performance of, or seeks damages with respect to, the Transaction Documents or the Transaction, except: [_____ / as listed in _____ (for example, in a schedule to one of the Transaction Documents or in a certificate to counsel)]. For avoidance of doubt, please be advised that in rendering this confirmation we have made no independent investigation, including, without limitation, any search of court records, the files of our firm or the files of our Client.

Opining Counsel rendering this confirmation should generally obtain a certificate from the Client confirming the accuracy of this factual statement to the knowledge of the Client (see discussion below in that regard). Further, in light of the holding in the Dean Foods case and notwithstanding the view that customary practice in Florida does not require any search of the firm’s files, prudence suggests that Opining Counsel in Florida might want to consider conducting some level of diligence within Opining Counsel’s firm before rendering this confirmation. See “Selected Issues – Knowledge” below.

The above version of the “no litigation” confirmation is the version included in each of the illustrative forms of opinion letters that accompany this Report that contain a “no litigation” confirmation. The Committees believe that this version of the “no litigation” confirmation is the version that should be appropriate in most circumstances.

If the “no litigation” confirmation is to be limited only to disclosure of matters as to which Opining Counsel represents the Client, the following form is appropriate.

We do not represent the Client in any action, suit or proceeding, now pending at law or in equity, or by or before any governmental instrumentality or agency or arbitral body, or overtly threatened in writing against the Client, except: [_____ / as listed in _____ (for example, in a schedule to one of the Transaction Documents or in a certificate to counsel)].

This is the only version of the “no litigation” confirmation that is not given to the knowledge of Opining Counsel, since it reflects a recitation of matters as to which the firm rendering the opinion is representing the Client. An even more limited form of this version of the “no litigation” confirmation narrows the scope of the disclosed litigation matters and governmental proceedings to only those litigation matters and governmental proceedings being handled by Opining Counsel’s firm that are pending or have been overtly threatened in writing and that challenge the validity or enforceability of, or seek to enjoin the performance of, or to obtain damages with respect to, the Transaction or the Transaction Documents.

Finally, if Opining Counsel agrees to provide the form of “no litigation” confirmation that is consistent with historic Florida practice as articulated in the Prior Florida Reports, the following form is appropriate:

To our knowledge, there are no [material (as that term is defined in _____)] actions, suits or proceedings, now pending at law or in equity, or by or before any governmental instrumentality or agency or arbitral body, or overtly threatened in writing against the Client, except: [_____/ as listed in _____ (for example, in a schedule to one of the Transaction Documents or in a certificate to counsel). For avoidance of doubt, please be advised that in rendering this confirmation we have made no independent investigation, including, without limitation, any search of court records, the files of our firm or the files of our Client.

If this traditional version of the “no litigation” confirmation is rendered, Opining Counsel should undertake all of the diligence steps described below. This version of the “no litigation” confirmation requires more diligence and involves greater risk than the other versions of the “no litigation” confirmation that are described above.

This broader formulation of the “no litigation” confirmation usually references a disclosure schedule or an officer’s certificate to identify the relevant pending or overtly threatened litigation matters or governmental proceedings. By referencing all such proceedings in this manner, Opining Counsel avoids the necessity of determining the materiality of any particular proceeding. The disadvantage of the disclosure schedule or the officer’s certificate is that it may become cumbersome. If this occurs, then the Opinion Recipient and the Opining Counsel should agree on objective criteria for materiality. If that cannot be done (for example, with regard to equitable proceedings), then generally the scope of the required “no litigation” confirmation should be more limited.

Under Florida customary practice, the rendering of a no litigation confirmation does not require an inquiry into court or other third-party records, unless the parties agree otherwise and unless such searches are expressly referenced in the opinion letter.

Apart from obtaining an officer’s certificate, the Opining Counsel should not be required to inquire of the Client about pending or overtly threatened litigation or governmental proceedings regardless of the version of the “no litigation” confirmation rendered by Opining Counsel. Opining Counsel is not an auditor and Opining Counsel should not be required to speculate as to who within the Client organization has personal knowledge about litigation and governmental proceedings to which the Client is a party. Therefore, Opining Counsel should be permitted to rely on information provided in the Transaction Documents or in a certificate to counsel absent information known to Opining Counsel (or unless Opining Counsel is aware of facts (red flags) that make such information unreliable to a reasonable Opining Counsel) that would prevent Opining Counsel from justifiably relying on such information.

Notwithstanding the foregoing, in circumstances where Opining Counsel is working on the Transaction (as is regularly the case), Opining Counsel may be separately called upon to make a broader investigation and inquire of the appropriate Client representatives such as for the purpose of determining what is to be included in the disclosure schedules to the representations and warranties contained in the Transaction Documents. In such a case, the scope of Opining Counsel’s knowledge with respect to pending or threatened claims or governmental proceedings may actually be greater than that which might ordinarily be provided in a certificate to counsel delivered by the Client to Opining Counsel to support an opinion letter.

As mentioned above, the proper scope of diligence for a “no litigation” confirmation will depend on the form of “no litigation” confirmation that is to be delivered. However, Opining Counsel should be mindful that a “no litigation” confirmation (even though not an opinion) is nevertheless subject to the general prohibition against rendering misleading opinions. See “Introductory Matters – Ethical and Professional Issues – Candor.”

C. Selected Issues

The following issues should be considered in issuing a “no litigation” confirmation:

1. *No Action, Suit or Proceeding at Law or in Equity.* The phrase “no action, suit or proceeding at law or in equity” encompasses all legal proceedings regardless of whether the requested relief is of an equitable or legal nature. The language of the confirmation, regardless of the version of the “no litigation” confirmation rendered by Opining Counsel, is limited to legal proceedings before bodies that can render binding results on the parties to such legal proceedings. As a result, a dispute that is the subject of non-binding arbitration or mediation would not be required to be disclosed.
2. *Pending or Overtly Threatened Litigation or Governmental Procedures.* The phrase “overtly threatened” in the recommended form of no litigation confirmation is intended only to include claims in which the potential claimant has manifested an awareness of and a present intention to assert a claim. This phrase is not intended to include unasserted claims that might arise from existing facts known to the Client or to Opining Counsel. However, if Opining Counsel is aware of unasserted claims as to which litigation has not been overtly threatened as of the date of the opinion letter, Opining Counsel should consider discussing with the Client whether the Client should make disclosure of such unasserted claims to the other party to the Transaction in order to avoid potentially misleading the Opinion Recipient (thereby potentially exposing Opining Counsel to a claim for negligent misrepresentation). If the Client refuses to allow such disclosure, Opining Counsel should also consider its ethical obligations under the circumstances. See “Introductory Matters – Ethical and Professional Issues.”

The recommended form of no litigation confirmation also further limits the overtly threatened claims that must be reported in the “no litigation” confirmation to those that have been “overtly threatened in writing.” For the same reasons that are described above with respect to unasserted claims, Opining Counsel should consider its ethical obligations if the Client is unwilling to disclose a threatened claim that has been overtly threatened, but has not yet been asserted in writing.

3. *Diligence.* Opining Counsel often obtains a certificate from an officer of the Client to support the “no litigation” confirmation. Unless expressly agreed otherwise and expressly set forth in the opinion letter, no searches of public records are required or expected to be performed to render this factual confirmation regardless of which version of the “no litigation” confirmation is given by Opining Counsel. The purpose of requesting the confirmation is to confirm Opining Counsel’s understanding of the facts regarding pending or overtly threatened litigation already known to Opining Counsel and not to elicit factual information that might be uncovered by outside research. It is unnecessary to include an express statement in the opinion letter that makes clear that no investigation has been undertaken. However, many counsel include an express statement in the opinion letter that no investigation has been undertaken by Opining Counsel, and each of the illustrative forms of opinion letters that accompany this Report and that contain a “no litigation” confirmation expressly include such a statement.
4. *Knowledge.* Except in the limited circumstances noted above, a “no litigation” confirmation is always given to the knowledge of Opining Counsel. The Committees believe that the knowledge qualifier emphasizes that the statement is fact-based and establishes the scope of the inquiry necessary to meet the diligence obligations of the Opining Counsel. In this context, “knowledge” means the “knowledge” of the “primary lawyer group.” See “Common Elements of Opinions – Knowledge.” In many cases, the Opinion Recipient may request that Opining Counsel expand the group within the Opining Counsel’s law firm whose knowledge is to be considered. Any such agreed-upon expansion of the knowledge

group should be expressly described in the opinion letter. Nevertheless, even if the group as to whose knowledge this confirmation is given is expressly limited to the “primary lawyer group,” in light of the holding in the Dean Foods case, prudence may dictate that Opining Counsel in some manner poll the lawyers in the Opining Counsel’s firm who are known to be providing legal services to the Client (i.e., by reviewing recent time records) to determine if any of these other lawyers know about any litigation matters or governmental proceedings with respect to the Client. Although Dean Foods has no precedential value in Florida, it illustrates a potential approach that a Florida court might take when considering this particular issue.

5. Limitations on Evaluation of Merits. A “no litigation” confirmation does not provide an assessment of the merits of any particular pending or overtly threatened litigation matter or governmental proceeding. The Committees believe that it is inappropriate to request such an evaluation from Opining Counsel. Similarly, except in the context of a response to an auditors’ request for information where counsel has concluded that the outcome of a particular matter is either “probable” or “remote,” the Committees believe that it is inappropriate for a third-party Opinion Recipient to request an evaluation of the possible outcome of a pending or threatened litigation matter or government proceeding. See ABA Statement of Policy Regarding Lawyer’s Responses to Auditor Requests for Information, 31 Bus. Law. 1709 (1976) for guidance regarding attorney responses to auditors’ requests for information. Such assessments are better left to the Opinion Recipient and its counsel in connection with the diligence they are performing with respect to the Client in connection with the Transaction.

Disclosure of information about pending or overtly threatened litigation or governmental proceedings may cause a waiver of the attorney-client privilege or work product privilege and may require disclosure of confidential information. See “Introductory Matters – Ethical and Professional Issues.”

OPINIONS WITH RESPECT TO SECURITIES

In Transactions in which a Florida corporation is issuing equity securities, Opining Counsel may be asked to render opinions regarding the Client's equity securities. Below are examples of those opinions, together with a discussion of the opinion language and the diligence recommended with respect to each opinion.

This Report only addresses opinions regarding issuances of common stock by Florida corporations. This Report does not address opinions regarding issuances of securities by limited partnerships, general partnerships or limited liability companies, or issuances of preferred shares by Florida corporations. The Committees plan on covering these opinion topics in one or more future supplements to this Report.

The TriBar Preferred Stock Report and the TriBar LLC Membership Interest Report address opinions regarding the issuance of preferred stock and the issuance of LLC membership interests, respectively. Although these reports of the TriBar Opinion Committee do not necessarily reflect customary practice in Florida, the guidance contained in these reports may be helpful to Florida lawyers who are called upon to deliver opinions regarding the issuance of preferred shares or regarding the issuance of LLC membership interests, respectively.

A. Corporations – Authorized Capitalization

Recommended opinion:

The Client's authorized capitalization consists of _____ shares of common stock, \$ _____ par value per share.

The authorized capitalization opinion means that, as of the date of the opinion, the Client is authorized to issue the number of shares of capital stock set forth in its articles of incorporation filed with the Department, as amended to the date of the opinion letter. Pursuant to Section 607.01401(25) of the FBCA, the term "shares" means the units into which the proprietary interests in a corporation are divided.

Section 607.0202(1)(c) of the FBCA requires a corporation organized in Florida to set forth in its articles of incorporation the number of shares that it is authorized to issue. A Florida corporation does not have the legal authority to issue more shares than the number of shares set forth in its articles of incorporation. Section 607.0601 of the FBCA also requires the corporation to set forth in its articles of incorporation the classes of shares and the number of shares of each class of shares that it is authorized to issue. If more than one class of shares is authorized, the articles of incorporation must set forth a distinguishing designation for each class and, prior to the issuance of shares of a class, the preferences, limitations and relative rights of that class.

A corporation organized in Florida may increase or decrease its authorized capitalization by amending its articles of incorporation pursuant to Section 607.1006 of the FBCA. As a result, if a corporation has amended its articles of incorporation, Opining Counsel should review all articles of amendment to the corporation's articles of incorporation in order to determine the current authorized capitalization.

The authorized capitalization opinion does not mean that Opining Counsel has reviewed the organization of the corporation, which is a matter covered by the "entity status and organization" opinion. See "Entity Status and Organization of a Florida Entity." However, because a corporation must have been organized and be active to authorize the issuance of shares, Opining Counsel should not render the authorized capitalization opinion, or any other opinion regarding issuances of the corporation's securities, unless Opining Counsel has confirmed (or expressly assumed in the opinion letter) that the corporation has been organized and is active. Because opinions regarding securities of Florida corporations are usually given at the same time as opinions on the entity status and organization of Florida corporations, this should rarely be an issue. Further, the authorized capitalization opinion does not mean that Opining Counsel has reviewed the documents with respect to the actions taken to approve a previous amendment to the articles of incorporation (or previously adopted amended and restated articles of incorporation). For purposes of rendering the authorized capitalization opinion, absent knowledge to the contrary (or knowledge of facts (red flags) that ought to cause a reasonable Opining Counsel to call the underlying assumptions into question), Opining Counsel may assume that each previous amendment to the Client's articles of incorporation was properly proposed and adopted based upon the acceptance of such filings by the Department.

Diligence Checklist – Corporation. To render the “authorized capitalization” opinion with respect to a Florida corporation, Opining Counsel should take the following actions:

- Obtain a copy of the corporation’s articles of incorporation, as amended (preferably a certified copy obtained from the Department).
- Review the articles of incorporation (or, if applicable, the most recent restated articles of incorporation) to determine the classes of shares and the number of shares authorized for each class as set forth therein.
- If the articles of incorporation have been amended since the date of the initially filed articles of incorporation (or, if applicable, since the date of the most recent restated articles of incorporation), review all such amendments to determine the current classes of shares and the current number of shares authorized for each class as set forth therein.

B. Corporations – Number of Shares Outstanding

An opinion regarding the number of outstanding shares of a corporation is a factual confirmation. Often, a corporation will make a representation and warranty in the Transaction Documents regarding the number of its outstanding shares. However, Opinion Recipients often request an opinion on this issue in an effort to obtain further assurance.

The recommended form of opinion is as follows:

Based solely on a certificate of _____, the Client has _____ shares of its [common] stock outstanding.

The Committees believe that this opinion should generally be rendered based solely on a certificate from the Client’s transfer agent and/or on a certificate from the Client. Although some Opining Counsel may elect to review the corporation’s stock register and any other stock records contained in the corporation’s minute book, such diligence is not necessary under Florida customary practice in order to render the opinion in its recommended form.

Notwithstanding the foregoing, if Opining Counsel engages in further diligence to support this opinion, the limitation contained in the recommended opinion should be expanded to describe whatever further diligence has been conducted. Further, Opining Counsel should be aware that, if, contrary to the position stated above, this opinion is rendered without the “based solely on” qualifying language, the Opinion Recipient may reasonably expect that the opinion was rendered based on a complete review by Opining Counsel of the corporation’s stock register and the corporation’s other stock records.

C. Corporations – Reservation of Shares

The “reserved shares” opinion addresses the fact that certain securities of the corporation have been reserved for future issuance upon some future event, such as the conversion of convertible securities or the exercise of derivative securities (e.g., options or warrants to purchase shares of common stock). This opinion means that the corporation has taken the necessary corporate actions to reserve a portion of its authorized shares for future issuance.

The FBCA does not specifically address reservation of shares or provide any legal effect to this “reservation” by the board of directors of the corporation. If the “reserved shares” opinion is rendered, it means that: (i) sufficient additional shares have been authorized for issuance in the future on the exercise of the convertible or derivative securities, but are not yet issued, (ii) the board of directors has adopted a resolution to designate and reserve such authorized, but unissued, shares for future issuance, and (iii) such resolution of the

board of directors has not been revoked as of the date of the opinion letter. After confirming the number of authorized shares of the corporation from a review of the corporation's articles of incorporation as amended to date, Opining Counsel may rely upon an officer's certificate confirming the factual issues described in clauses (i), (ii) and (iii) above as the basis of this opinion.

The recommended form of opinion is as follows:

The Client has reserved _____ shares of its [common stock] for issuance upon [describe the triggering event with specificity, such as the conversion of convertible securities or the exercise of derivative securities].

The "reserved shares" opinion does not confirm the absence of anti-dilution provisions in any convertible securities, options or warrants issued by the corporation that in the future could cause the number of shares reserved to be inadequate. In addition, the "reserved shares" opinion does not provide absolute assurance that such shares will be available for issuance at the time the shares are to be issued or converted, because the corporation's board of directors has the legal ability to revoke the reservation of shares and authorize the issuance of those shares in the future for a entirely different purpose. Accordingly, as with each of the other opinions that are being given, the "reserved shares" opinion speaks only as of the date of the opinion letter.

To provide greater assurance to the Opinion Recipient that the shares reserved will continue to be available for issuance in the future upon the designated triggering event, the Opinion Recipient should consider obtaining a contractual covenant from the corporation in a Transaction Document or in some other document that obligates the corporation to continue to reserve the appropriate number of authorized but unissued shares.

D. Corporations – Issuances of Shares

The following opinions relate to the validity of the particular issuances of shares that are contemplated by the Transaction Documents.

Recommended opinion:

The [shares] have been duly authorized and [the shares], when delivered and paid for in accordance with the [Transaction Documents], will be validly issued, fully paid and nonassessable.

1. Duly Authorized.

Under Florida customary practice, this opinion means that: (a) the issuance of the shares has been authorized by all necessary corporate action in compliance with the FBCA and the articles of incorporation and bylaws of the corporation, and (b) the number of shares that have been issued (together with any additional shares proposed to be issued) are not in excess of the number of shares of the particular class or classes authorized by the articles of incorporation, as amended to date. This opinion does not mean that any previously issued and outstanding shares were properly issued and, in rendering this opinion, Opining Counsel is not expected to take any steps to confirm whether any previously issued and outstanding shares were properly issued. See "Corporations – Outstanding Equity Securities" below.

In determining the number of shares available for issuance, Opining Counsel may rely on the information contained in the corporation's financial statements, on a statement from the corporation's transfer agent or on a statement from the Client, unless Opining Counsel has knowledge that the information being relied upon is not correct or unless Opining Counsel is aware of other facts (red flags) that call into question the reliability of such information. See "Common Elements of Opinions—Knowledge."

The board of directors (or the shareholders, if such power is reserved to the shareholders in the articles of incorporation) may approve the issuance of shares of stock for consideration consisting of any tangible or intangible property or benefit to the corporation, including cash, promissory notes, services performed, promises

to perform services evidenced by a written contract, or other securities of the corporation. Before the corporation issues any shares, the board of directors of the corporation (or the shareholders, if such power is reserved to them) must determine that the consideration received or to be received for the shares to be issued is adequate.

Under Section 607.0825(1)(e) of the FBCA, although the board of directors of a Florida corporation cannot delegate authority to authorize or approve the issuance or sale or contract for the sale of shares, it can give a committee (or a senior executive officer of the corporation) the power to authorize or approve the issuance or sale or contract for the sale of shares so long as such issuance, sale or contract for sale is within limits specifically prescribed by the board of directors in the authorizing resolutions.

An opinion that shares have been “duly authorized” does not address whether the creation of such shares violates or breaches any agreement to which the corporation is a party, such as a shareholders’ agreement. In addition, the “duly authorized” opinion does not address whether any fiduciary duty has been violated in connection with the creation or authorization of such shares.

Diligence Checklist – Corporation. To render the “duly authorized” portion of this opinion, Opining Counsel should take the following actions:

- Assuming that Opining Counsel is also opining on the authorized capital of the corporation and has performed the diligence necessary to render that opinion (see “Corporations-Authorized Capitalization” above), Opining Counsel should review the articles of incorporation, as amended (preferably a certified copy obtained from the Department) to determine whether the right to authorize the issuance of shares of stock is reserved to the shareholders.
- Opining Counsel should confirm that the issuance of the shares has been approved by the board of directors of the corporation (or the shareholders, if the articles of incorporation reserve this power to the shareholders) in accordance with the FBCA and the corporation’s articles of incorporation and bylaws.
- If any aspects of the issuance of the shares was delegated to a committee of the board of directors (or to a senior executive officer), Opining Counsel should confirm that the authority delegated to the committee (or to a senior executive officer) was permitted under the FBCA, and that the committee (or such senior executive officer) properly acted within that authority. In this regard, Section 607.0825 of the FBCA provides that no committee of the board of directors of a corporation shall have the authority to authorize or approve the issuance or sale or contract for the sale of shares, or determine the designation and relative rights, preferences, and limitations of a voting group, except that the board of directors may authorize a committee (or a senior executive officer) to do so within limits specifically prescribed by the board of directors. Opining Counsel should also verify that any actions taken by the committee (or such senior executive officer) with respect to the issuance of the shares were taken in accordance with the FBCA and the corporation’s articles of incorporation and bylaws.
- Opining Counsel should obtain a factual certificate from the Client providing Opining Counsel with copies of the resolutions (or written consents) adopted with respect to the share issuance. Unless Opining Counsel has notice that such facts are inaccurate (or is aware of other facts (red flags) that reasonably call into question the reliability of such facts), Opining Counsel may assume under Florida customary practice that: (i) in authorizing the issuance of the shares, the board of directors (or shareholders, committee or a senior executive officer) acted at a properly called and held meeting (or by written consent, provided that taking such action by written consent is not prohibited by the articles of incorporation or bylaws), and (ii) the authorizing resolution received the requisite votes in accordance with the FBCA, the articles of incorporation and the bylaws.
- Opining Counsel should examine the authorizing resolution(s) to confirm that the board of directors (or shareholders and/or committee and/or a senior executive officer): (a) approved the issuance of the shares, (b) recited the consideration for which the shares were to be issued, and (c) determined in such resolution that the consideration received or to be received for the shares was adequate.

2. Validly Issued.

This opinion means that the shares have been issued in accordance with the FBCA, the corporation's articles of incorporation and bylaws and any resolution of the board of directors or shareholders (or committee or a senior executive officer) of the corporation which authorized such issuance. The "validly issued" opinion should not be rendered by Opining Counsel unless the shares are: (i) included within the authorized capitalization of the corporation, (ii) have been duly authorized, (iii) are fully paid and are nonassessable (see below), and (iv) comply with any applicable statutory preemptive rights or any applicable preemptive rights contained in the corporation's articles of incorporation.

The corporation may issue the number of shares of each class or series authorized by its articles of incorporation pursuant to Section 607.0603 of the FBCA. A corporation may also issue fractional shares pursuant to Section 607.0604 of the FBCA. Before a corporation issues shares, the board of directors (or shareholders, if the power to issue shares has been reserved to the shareholders in the articles of incorporation) must determine that the consideration received or to be received for the shares to be issued is adequate pursuant to Section 607.0621(3) of the FBCA, which defines broadly the consideration for which shares may be issued. If the shares are to be issued pursuant to a written subscription agreement approved by the Board of Directors in the authorizing resolutions (which subscription agreement sets forth the terms of the share purchase), the shares will not be deemed to have been validly issued until the consideration for the issuance of such shares has been paid as required by such subscription agreement. Opining Counsel should confirm that payment was received by the corporation by obtaining an officer's certificate confirming such payment or by some other method reasonably acceptable to Opining Counsel.

Pursuant to Section 607.0625(1) of the FBCA, shares may, but need not be, represented by certificates. However, if shares are represented by a certificate or certificates, then, at a minimum, each share certificate must state on its face the following information:

- (a) the name of the corporation and that the corporation is organized under the laws of the State of Florida;
- (b) the name of the person to whom the shares are issued; and
- (c) the number and class of shares and the designation of the series, if any, the certificate represents.

In addition, as required by Section 607.0625(3) of the FBCA, if the corporation is authorized to issue different classes of shares or different series within a class, the designations, relative rights, preferences, and limitations applicable to each class and the variations in rights, preferences and limitations determined for each series (and the authority of the board of directors to determine variations for future series) must be summarized on the front or back of each certificate. Alternatively, each certificate may state conspicuously on its front or back that the corporation will furnish the shareholder with a full statement of this information on request and without charge.

Finally, pursuant to Section 607.0625(4)(a) of the FBCA, each share certificate must be signed (either manually or in facsimile) by an officer or officers designated in the bylaws or designated by the board of directors.

An opinion that shares are validly issued subsumes within it an opinion that the certificates issued representing the shares are in proper form (or if uncertificated securities (see below), that such securities have been properly issued). A separate opinion as to whether the certificates representing the shares being issued are in proper form is sometimes requested and given. See "Corporations – Stock Certificates in Proper Form" below.

Pursuant to Section 607.0626 of the FBCA, unless the articles of incorporation or the bylaws provide otherwise, the board of directors of the corporation may authorize the issuance of some or all of the shares without certificates. If the shares are not evidenced by certificates, then, within a reasonable time after the issue or transfer of the shares without certificates, the corporation shall send the shareholder a written statement of the

information required by Section 607.0625(2) and (3) of the FBCA (if applicable) and Section 607.0627 of the FBCA regarding restrictions on transfer of shares (if applicable). However, the failure of the corporation to deliver the written statement described in Section 607.0626 of the FBCA after the shares without certificates are issued does not affect an opinion regarding whether the shares were validly issued. It is recommended (but not required) that Opining Counsel obtain a certificate from the Client confirming that the Client has complied with such requirement or an undertaking from the Client that it will in the future comply with the Client's obligations under this statute.

In rendering the "valid issuance" opinion, Opining Counsel should also consider whether the contemplated issuance of shares violates a preemptive right contained in the FBCA or in the corporation's articles of incorporation. See "Corporations-No Preemptive Rights" below. If such preemptive rights exist, Opining Counsel should make certain that such rights have been properly extended and addressed, or waived, before issuing an opinion that such shares are validly issued.

An opinion that shares have been "validly issued" does not address whether the issuance of such shares violates or breaches any agreement to which the corporation is a party, such as a shareholders' agreement. In addition, the "validly issued" opinion does not address whether any fiduciary duty has been violated in connection with the issuance of such shares. However, if Opining Counsel is aware that a particular issuance of shares violates a shareholders' agreement, Opining Counsel should consider advising the Opinion Recipient of such fact so as to avoid a potential claim that the opinion is misleading.

Diligence Checklist – Corporation. To render the "validly issued" portion of this opinion, Opining Counsel should take the following actions:

- Confirm that the shares to be issued are duly authorized (see discussion above).
- Obtain a copy of the corporation's articles of incorporation, as amended, (preferably a certified copy obtained from the Department) and review such articles to verify compliance with any specified minimum amount or form of consideration.
- Review the corporation's bylaws (a copy certified as true and correct by an officer) to verify compliance with any specified minimum amount or form of consideration.
- Obtain all subscription agreements, if any, whether pre-incorporation or post-incorporation, if applicable, referred to in the authorizing resolutions, confirming the consideration to be received by the corporation.
- Review resolutions of the board of directors, committee and/or a senior executive officer (a copy certified as true and correct by an officer) confirming the consideration to be received for the issuance of the shares and the adequacy thereof under the FBCA and the articles of incorporation and bylaws.
- Confirm that the share certificates are in proper form or, if the shares are to be uncertificated, that the statutory requirements with respect to uncertificated securities have been (or are being) followed.

3. **Fully Paid and Nonassessable.**

This opinion means that the corporation has received the required consideration (except in the case of stock dividends, where no consideration is required) for the shares being issued and that the corporation cannot call for any additional consideration to be paid by the holder of such shares.

- (a) **Fully Paid.** This opinion means that the consideration, as specified in the authorizing resolutions or in a subscription agreement, has been received in full and the requirements, if any, in the corporation's articles of incorporation and bylaws, have been satisfied. Pursuant to Section 607.0621(2) of the

FBCA, such consideration may consist of any tangible or intangible property or benefit to the corporation, including cash, promissory notes, services performed, promises to perform services evidenced by a written contract, or other securities of the corporation. Opining Counsel may rely on a certificate from the client regarding the receipt of such consideration unless Opining Counsel is aware of facts that would make such reliance unreasonable or unreliable under the circumstances.

The determination by the corporation's board of directors (or shareholders, if such power is reserved to the shareholders) is conclusive insofar as the adequacy of consideration for the issuance of the shares, and this opinion is based on an unstated assumption regarding compliance by the directors with their fiduciary obligations in determining the adequacy of consideration. Although Florida eliminated par value in 1990 as it relates to share issuances, some companies continue to use par value in order to minimize out-of-state taxes or fees. Unless the corporation's articles of incorporation provide otherwise, shares with par value may be issued for less than their stated value. Further, under Section 607.0623(1) of the FBCA, shares of a corporation's stock issued as a dividend may be issued without consideration unless the articles of incorporation otherwise provide.

- (b) **Nonassessable.** Nonassessable means that, once the corporation has received the specified consideration, it cannot call for any additional consideration. Under Section 607.0621(4) of the FBCA, consideration in the form of a promise to pay money or perform services is deemed received by the corporation at the time of the making of the promise, unless the agreement otherwise provides.

Since this opinion is rendered under the FBCA, it does not address whether shares might be assessable under another statute or under an agreement. This is important because, for example, in contrast to corporations organized under the FBCA, shares of a Florida banking corporation organized under Chapter 658 of the Florida Statutes must have a specified par value and shares cannot be issued at a price less than par value.

Similarly, this opinion does not mean that shareholders will not be subject to liability for receipt of an unlawful dividend or, as to a controlling shareholder, if the corporate veil is pierced.

Diligence Checklist – Corporation. To render the “fully paid and non-assessable” portion of this opinion, Opining Counsel should take the following actions:

- Confirm that the shares are duly authorized and validly issued (see discussions above).
- Obtain an officer's certificate confirming receipt of the consideration required by the authorizing resolutions and/or confirming that no consideration for the shares remains unpaid.

E. Corporations – No Preemptive Rights

Recommended opinion:

The issuance of the [shares] will not give rise to any preemptive rights under the Florida Business Corporation Act or the Client's Articles of Incorporation.

This opinion means that existing shareholders of a corporation do not have a right under the FBCA or the corporation's articles of incorporation to maintain their percentage ownership of the corporation by buying a proportional number of shares of any future issuance of shares. Existing shareholders with preemptive rights have the right, but not the obligation, to purchase as many shares of the newly issued stock as are necessary to maintain their proportional ownership interest in the corporation before the corporation sells the shares to persons outside of the shareholder group that holds the preemptive rights.

Prior to 1976, Florida's general business corporation statute mandated preemptive rights unless the articles of incorporation provided otherwise. For corporations formed on or after January 1, 1976, no statutory preemptive rights exist unless they are expressly provided for in the articles of incorporation. Thus, in 1976,

Florida changed from a statutory “opt-out” state to a statutory “opt-in” state. The opt-in approach recognizes that preemptive rights may be inconvenient and severely impair a corporation’s ability to raise capital through future equity issuances. Therefore, Florida corporations formed on or after January 1, 1976 do not have statutory preemptive rights unless specifically stated in their articles of incorporation, but Florida corporations formed prior to January 1, 1976 continue to have preemptive rights unless their articles of incorporation expressly provide that the corporation’s shareholders do not have preemptive rights.

Regardless of whether a corporation grants or denies preemptive rights in its articles of incorporation, a corporation may, by contract or otherwise, grant a shareholder the equivalent of preemptive rights or some other right to purchase shares from the corporation. The recommended form of opinion regarding preemptive rights does not cover contractual preemptive rights. However, although such confirmation is discouraged, a factual confirmation that Opining Counsel is not aware of any contractual preemptive rights that have been granted to other shareholders of the corporation is sometimes requested and given. See “No Violation and No Breach or Default – No Breach of or Default under Agreements” for a discussion of opinions regarding contractual preemptive rights. Further, if Opining Counsel is aware that a particular issuance of shares violates a contractual preemptive right contained in a particular agreement under circumstances where Opining Counsel is not rendering an opinion regarding “no breach of or default under agreements” with respect to that particular agreement, Opining Counsel should consider advising the Opinion Recipient of such fact so as to avoid a potential claim that the opinion is misleading.

Diligence Checklist – Corporation Incorporated On or After January 1, 1976.

- When issuing this opinion for a corporation formed on or after January 1, 1976, Opining Counsel should review the corporation’s articles of incorporation, as amended (preferably a certified copy obtained from the Department), to ascertain if such articles of incorporation grant preemptive rights to shareholders.
- If the articles of incorporation grant preemptive rights to shareholders, Opining Counsel should ascertain whether the share issuance in question triggers the granting of preemptive rights as described in the articles of incorporation.
- If the share issuance in question triggers the grant of preemptive rights under the articles of incorporation, Opining Counsel should determine if shareholders have waived their preemptive rights or whether the shareholders holding preemptive rights have already been properly given the opportunity to exercise their preemptive rights. Pursuant to Section 607.0630(2)(b) of the FBCA, “[a] shareholder may waive his or her preemptive right,” and a waiver “evidenced by a writing is irrevocable even though it is not supported by consideration.” If all shareholders with preemptive rights have not waived them, or if such preemptive rights have not been provided in accordance with the FBCA, this opinion should not be rendered.

Diligence Checklist – Corporation Incorporated Prior to 1976.

- When issuing this opinion for a corporation formed prior to 1976, Opining Counsel should review the corporation’s articles of incorporation to determine if they expressly deny preemptive rights to shareholders. If such articles of incorporation do not specifically provide that they deny preemptive rights, Opining Counsel should determine if shareholders have waived their preemptive rights. Because current Section 607.0630(2)(b) of the FBCA, which statutorily provides for the waiver of preemptive rights, does not apply to corporations incorporated prior to January 1, 1976, a waiver must be noted on the shareholders’ stock certificates to be effective. This opinion should not be given unless all shareholders have expressly waived their preemptive rights.

F. Corporations – Stock Certificates in Proper Form

Recommended opinion:

The stock certificate(s) representing the [shares] comply in all material respects with the Florida Business Corporation Act and the Client’s Articles of Incorporation and bylaws.

This opinion means that, as of the date of the opinion, each stock certificate: (i) includes on its face the name of the issuing corporation, a statement that the corporation is organized under the laws of the State of Florida, the name of a person designated as the person to whom the shares are issued, the number and class of shares the stock certificate represents and the designation of the series, if any, the stock certificate represents, and (ii) is signed, either manually or by facsimile, by an officer or officers designated in the bylaws or designated in resolutions of the board (whether or not such person is still an officer when the certificate is issued) or by a person or persons who purport to be an officer or officers of the corporation. In addition, this opinion means that, as of the date of the opinion, each stock certificate either: (i) includes on its face or back language relating to: (a) any designations, relative rights, preferences, and limitations applicable to each class, and (b) any variations in rights, preferences, and limitations for each series (and the authority of the board to determine variations for future series), or (ii) if any such designations, relative rights, preferences, and/or limitations are applicable and/or any such variations in rights, preferences and/or limitations are applicable, states conspicuously on its face or back that the corporation will furnish the shareholder with a full statement of the information required by Section 607.0625(3) of the FBCA upon request and without charge. Although a stock certificate may bear an actual or facsimile corporate seal, this opinion means that the stock certificate bears a corporate seal only if the corporation’s articles of incorporation and/or bylaws requires that the corporation’s stock certificates bear a corporate seal.

This opinion does not address whether the stock certificates contain legends that may be required by contract or may be required or advisable under applicable federal or state securities laws (such as customary private placement legends). If the Transaction Documents require the stock certificates to contain legends and Opining Counsel is asked for an opinion that the stock certificates also comply with the specific requirements as set forth in the Transactions Documents, Opining Counsel may give that opinion if such information is correct. However, any such coverage should be expressly set forth in the opinion letter.

G. Outstanding Equity Securities.

Sometimes, an Opinion Recipient will request an opinion that *all outstanding equity securities that have previously been issued by the corporation* were duly authorized and that all such securities were validly issued and are fully paid and nonassessable. The Committees believe that such an opinion should be resisted because such an opinion would require Opinion Counsel to look at each historic issuance of shares by the corporation to determine if each such issuance was proper at the time of each such issuance. As a result, except in very limited circumstances, such as in connection with a secondary public sale of such securities, the Committees believe that the value of this opinion will almost never justify the cost of providing it. See “Introductory Matters – Reasonableness; Inappropriate Subjects for Opinions.”

**OPINIONS WITH RESPECT TO COLLATERAL
UNDER THE UNIFORM COMMERCIAL CODE**

A. Introduction

Effective January 1, 2002, Florida adopted a new version of Article 9 (“**Article 9**”) of the UCC. This revised version, which was based largely on the 1999 revisions to the UCC promulgated by the American Law Institute and the National Conference of Commissioners on Uniform State Laws, broadened the scope of the previous version of Article 9, covering, for the first time:

- (a) sales of accounts (defined more broadly than under the previous version of Article 9);
- (b) sales of payment intangibles and promissory notes;
- (c) security interests in deposit accounts; and
- (d) security interests in commercial tort claims.

Additionally, Article 9 as revised simplified the process for filing a financing statement to perfect security interests and made clarifications and changes to several other aspects of the law governing the filing and perfection of security interests.

Article 9, as revised, contains detailed rules regarding the creation, attachment, scope, perfection, priority and enforcement of security interests, and opinions on secured transactions generally depend upon an understanding and correct application of these rules. This section provides guidance to Opining Counsel by:

- (a) defining the opinion’s scope and seeking to eliminate from the opinion unnecessary qualifications and limitations;
- (b) recognizing the practical limits on what is generally addressed in a typical opinion concerning security interests;
- (c) providing the detailed reasoning, analysis, explanation and qualifications that carry over from one opinion to the next, so that the suggested form of opinion is concise and focused on the core opinions that Opinion Recipients seek; and
- (d) providing a form of secured transaction opinion that can readily be incorporated, as appropriate, into opinion letters.

Article 9 contains complex rules that make rendering opinions involving Article 9 (and to the extent applicable, Article 8) a potential trap for the unwary. This Report recommends that Article 9 opinions be given only by practitioners who are thoroughly familiar with such rules.

There are three categories of security interest opinions. The first is a series of opinions regarding the creation and attachment of a security interest in the collateral described in the document granting the security interest (such as a security agreement, pledge agreement or collateral assignment; collectively referred to hereinafter as a “**security agreement**”). These opinions provide the Opinion Recipient with comfort that a security interest has been created and that such security interest has “attached” to the particular collateral described in the security agreement (and as to when such security interest will have been considered to be “attached”). The second category of opinions relates to the perfection of the security interest. This opinion provides that a security interest has been “perfected” with respect to particular collateral (and as to when such attached and perfected security interests will be considered to have been “perfected”). The third category of opinions deals with the priority of a granted security interest against the interests of other creditors of the debtor. The scope of and limitations on each of these opinions under Florida customary practice and under the UCC in effect in the State of Florida (the “**Florida UCC**”) are described below.

B. Scope of UCC Opinions; Limitations

1. *The UCC Scope Limitation.* Opining Counsel should include appropriate limitations in the opinion letter as to the scope of its security interest opinions under the UCC (the “**UCC Opinion Scope Limitation**”). In particular, the scope of a UCC security interest opinion should be limited to security interests created under Article 9 of the UCC. In addition, Opining Counsel should take care to delineate the type of property addressed by the security interest opinions that it renders. By including an appropriate UCC Opinion Scope Limitation, Opining Counsel draws a line that recognizes the practical difficulty of analyzing all of the types of collateral for a secured transaction and all applicable law that might affect such secured transaction. Given this practical difficulty, it has become customary practice in Florida for Opining Counsel to include, and for an Opinion Recipient to accept, a UCC Opinion Scope Limitation expressed as follows:

Our opinions set forth in paragraphs _____ and _____ are limited to Article 9 [and, to the extent applicable, Article 8] of the Uniform Commercial Code as enacted in the State of Florida (the “Florida UCC”). We express no opinion with respect to: (i) except as expressly set forth in paragraph _____ above, the creation, attachment or perfection of any security interest or lien, (ii) the priority of any security interest or lien, (iii) under Article 9 of the Florida UCC, what other Florida law or law of another state governs the perfection or the effect of perfection or non-perfection of the security interest of the [Lender] in any particular item or items of the [collateral], and (iv) any [collateral] not subject to Article 9 of the Florida UCC.

Although not strictly speaking a scope limitation, it is common for Opining Counsel rendering a security interest opinion to disclaim any opinion with respect to the Debtor’s title to or interests or rights in the collateral, or alternatively, to assume that the Debtor has title to or interests and rights in the collateral. The illustrative form of opinion letter for a commercial loan transaction accompanying this Report (Form “A”) contains such a disclaimer. See “Creation and Attachment Opinions” below.

2. *A Remedies Opinion Does Not Include Any Security Interest Opinions.* Unless specifically set forth in the opinion itself, under Florida customary practice, a remedies opinion as to the enforceability of a security agreement that includes the grant of a security interest in identified assets (generally referred to as the “**collateral**”) as security for an obligation does not express any judgment regarding the security interest granted in the security agreement. See “The Remedies Opinion” for a discussion of the scope of the remedies opinion. A remedies opinion addresses the contractual enforceability of the agreement granting the security interest and does not deal with the effectiveness of the security interest granted by such agreement. In contrast, a UCC security interest opinion addresses whether the secured party has effectively complied with the Florida UCC requirements with respect to the creation, attachment and perfection of the security interest and, if a priority opinion is given, with respect to the rights of one creditor (i.e., the Opinion Recipient) against certain other creditors of the debtor.

Notwithstanding this distinction, there is significant overlap in the building blocks for the remedies opinion and for UCC security interest opinions. For example, both the remedies opinion and the UCC security interest opinion require the support of predicate opinions regarding entity status and organization, entity power, authorization of the transaction, and execution and delivery of the Transaction Documents. Further, in order to give an opinion regarding the creation of a security interest, there must be an enforceable contract. As a result, although issuance of a remedies opinion regarding an agreement granting a security interest does not include an opinion with respect to the security interest granted therein, issuance of an opinion as to the creation of a security interest included in a security agreement impliedly includes an opinion regarding the enforceability of the subject agreement (but only to the extent necessary to create a security interest), unless the opinion letter expressly provides otherwise. However, such opinion does not address the enforceability of any other provisions of the security agreement.

3. *Bankruptcy and Equitable Principles Not Included.* UCC security interest opinions implicitly address the rights of a secured party holding a perfected security interest against a bankruptcy trustee under Section 544(a) of the United States Bankruptcy Code. The bankruptcy trustee inherits a hypothetical lien creditor's relative priority under the Florida UCC as of the case's commencement. Sections 679.3171 and 679.322 of the Florida UCC provide that a holder of a perfected security interest (but not most unperfected security interests) has a claim to the collateral that is superior to the claim of a judgment lien creditor who becomes a lien creditor after the security interest is perfected or certain other acts are taken. A trustee in bankruptcy has the power, under Bankruptcy Code Section 544(a), to avoid a security interest in personal property that is voidable as of the commencement of the case by a judgment lien creditor. Thus, the bankruptcy trustee may set aside under that section most unperfected security interests, but not a perfected security interest. An opinion that addresses perfection under the Florida UCC provides the Opinion Recipient with the basis it needs to conclude that its security interest in the collateral cannot be avoided by a bankruptcy trustee under Bankruptcy Code Section 544(a).

Except with respect to this one issue, a UCC security interest opinion is not an opinion on the effect of bankruptcy, fraudulent transfer or other insolvency laws and does not address the effect on the security interest of a bankruptcy filing and the United States Bankruptcy Code, including such matters as the effect of the automatic stay (Section 362), application of the security interest to proceeds of property acquired post-petition (Section 552), avoiding powers relating to preferential transfers and fraudulent transfers (Sections 547 and 548), a sale free and clear of liens under certain circumstances (Section 363), and cram down powers in a plan of reorganization (Section 1129(b)). Further, a UCC security interest opinion does not address the effect of equitable principles on the security interest. Under Florida customary practice, the inclusion of bankruptcy and equitable principles qualifications in a UCC security interest opinion is implicit, and Opining Counsel is therefore not required to include an express qualification related to these principles in the opinion letter, although many practitioners include such qualification in their opinion letters that contain security interest opinions and such qualification is included in each of the illustrative forms of opinion letters that accompany this Report that contain security interest opinions.

4. *A UCC Security Interest Opinion Does not Substitute for Either a "No Breach of or Default under Agreements" Opinion or a "No Violation of Laws" Opinion.* The standard opinions concerning "no breach of or default under agreements" and "no violation of laws" are addressed separately. See "No Violation and No Breach or Default." A UCC security interest opinion does not address whether the debtor's grant of a security interest in the security agreement constitutes a violation of law or a contractual breach or default.
5. *Limited Opinions on the UCC of Other Jurisdictions.* Even if the debtor is located in Florida, another state's law may govern the attachment and perfection of a security interest if the choice of law provision in the security agreement specifies that the law of another state governs, or another state's law will govern perfection if the applicable Article 9 choice of law rules so indicate. See "Common Elements of Opinions —Opinions Under Florida or Federal Law; Opinions under the Laws of Another Jurisdiction" for a further discussion of opinions under the laws of another jurisdiction. Although it may be appropriate for Opining Counsel to agree to render an opinion on another state's UCC, it is inappropriate for an Opinion Recipient to require it from Opining Counsel. If the Opinion Recipient requires an opinion under the law of another state, it may be necessary to retain counsel in that state to render the requested opinion.

The most common approach used by Opining Counsel who are requested to render a security interest opinion on documents governed by another state's UCC, and the one recommended by this Report, is for Opining Counsel to expressly assume that creation and attachment of the security interest has occurred under the laws of the other state, and then proceed to render the perfection opinion under Florida law (if Florida law governs perfection). However, where there is a question as to whether or not a Florida court will respect the choice of law provisions in the security agreement and instead apply Florida law with respect to issues of creation and attachment, Opining Counsel may assume that

Florida law governs the creation and attachment of the security interest. The following recommended opinion language contains the assumption discussed in the preceding sentence:

We note that Section _____ of the [Security Agreement] provides that the [Security Agreement] and all issues arising thereunder shall be governed by the law of the State of _____, without regard to principles of conflicts of laws. We express no opinion as to whether the provisions of such Section _____ are enforceable or as to the law that is applicable to the [Security Agreement] or the transactions contemplated thereby, including the creation of any security interest provided for in the [Security Agreement], and we express no opinion regarding the law of the State of _____. Rather, with your permission, our opinions are based on what would be the case if a court were to refuse to apply the substantive law of the state that is set forth in the [Security Agreement] and instead were to apply the substantive law of the State of Florida to the [Security Agreement] and the transactions contemplated thereby, including the creation or attachment of any security interest thereunder.

Although this Report recommends against giving opinions under the laws of states in which Opining Counsel is not licensed to practice, in some circumstances Opining Counsel who are familiar with the UCC may be willing to render a perfection opinion applying the laws of the specified state, specifically limiting Opining Counsel’s review of such laws to the text of the specified state’s UCC as it appears in the official statutory compilation or other recognized reporting service. See “Common Elements of Opinions – Opinions Under Florida or Federal Law; Opinions under the Laws of Another Jurisdiction,” which includes recommended opinion language limiting the scope of what was reviewed in providing this opinion. This limitation makes clear that Opining Counsel has not reviewed case law or otherwise conducted the same review that would be conducted by lawyers who regularly opine on the law of the state whose law governs perfection of the security interest. This departure from the general policy of limiting opinions to Florida and federal law is sometimes justified because Article 9 has been enacted in substantially similar form in all states. However, since there are differences from state-to-state in the UCC, if Opining Counsel agrees to deliver such an opinion, Opining Counsel should review the applicable law in such other state before rendering the opinion.

6. *Property Not in Existence on the Date the Opinion is Delivered.* Even though after-acquired property is not in existence when an opinion under Article 9 is delivered, security interest opinions commonly are understood to address this property (opinions typically address all “collateral,” which in most cases is defined broadly in the security agreement to include after-acquired property). Even though attachment is delayed, the creation, perfection and priority opinions are understood to address after-acquired collateral to the extent perfected by filing, because no further action is required by the secured party. However, an opinion should not be considered to address possessory after-acquired collateral, because the predicate for the “perfection opinion” and the “priority opinion,” namely possession, does not exist on the date of the opinion letter and the opinion is rendered as of the date thereof. Further, priority dates from the date possession is achieved and therefore cannot be determined on the date of the opinion letter.
7. *Proceeds.* A perfection and priority opinion regarding collateral does not automatically extend to proceeds unless proceeds are after-acquired property included in the Article 9 collateral covered by the opinion. In most cases, the collateral description will expressly include proceeds, although a security interest in proceeds may not be perfected through the same means. A qualification that a security interest in proceeds is subject to Section 679.3151 of the Florida UCC (including the limitation that proceeds must be identifiable) should be expressly stated in the opinion.

C. Article 9 Opinions Generally

1. *Florida Non-Uniform Modifications to Article 9.* As a preliminary matter, Opining Counsel should recognize that the Florida Legislature adopted certain modifications to the uniform version of revised Article 9. As a result, Opining Counsel should review and understand the provisions of Article 9 as

revised and any applicable departures from the text of the uniform version of Article 9 when rendering an opinion under the Florida version of revised Article 9. For information about the non-uniform provisions of Article 9 as adopted in Florida effective January 1, 2002, see Report on the Florida Non-Uniform Modifications to Revised Article 9, as enacted in HB 579/Chapter 2001-198, Laws of Florida (published in June 2001 by the Business Law Section).

D. Creation and Attachment Opinions

1. *Creation of a Security Interest in Personal Property under Article 9 of the Florida UCC.* As previously discussed, an opinion on creation and attachment is a separate opinion and, if not explicitly stated, may not be inferred by the Opinion Recipient from the delivery of a remedies opinion. A secured party that wants to receive an opinion with respect to issues under Article 9 should expressly require it, and the absence of an express Article 9 opinion means that none was given. The recommended form of opinion for the creation of a security interest in personal property under Article 9 of the Florida UCC is as follows:

The [Security Agreement] is effective to create in favor of the [Secured Party] [, as security for the Obligations,] a security interest (the “Article 9 Security Interest”) in such portion of the [collateral] described in the [Security Agreement] in which a security interest may be created under Article 9 of the Florida UCC (the “Article 9 Collateral”).

2. *Enforceability of Security Interests.* Section 679.2031 of the Florida UCC sets forth the requirements for the enforceability of a security interest. Section 679.2031(1) of the Florida UCC states that a security interest “attaches” to the collateral when it becomes enforceable, and Section 679.2031(2) of the Florida UCC provides that it is enforceable only if: (a) value has been given; (b) the debtor has rights (or the power to transfer rights) in the collateral; and (c) one of the conditions of Section 679.2031(2)(c) of the Florida UCC is satisfied. The secured party does not need to sign the security agreement. Opining Counsel should consider each of these requirements in rendering an opinion under Article 9.
 - (a) *Value.* A security interest cannot attach unless the debtor has received value. “Value,” as defined in Section 671.211 of the Florida UCC, includes any consideration that would support a contract, including a commitment to extend credit (whether or not credit is extended), security for antecedent debts and other benefits. Unless expressly excluded in the opinion letter, a security interest opinion implicitly includes an assumption that value (whether in the form of a loan commitment, receipt of goods or otherwise) has been given, whether or not Opining Counsel is in a position to confirm the giving of such value (typically, Opining Counsel is in no better position than the parties themselves to make such a confirmation of factual circumstances). Although not necessary, many opining counsel expressly assume in their opinion letters that value has been given, and the forms of illustrative opinion letters that accompany this Report include this assumption.
 - (b) *Rights in the Collateral.* A security interest cannot attach until the debtor has rights in, or the right to transfer rights in, the collateral. Unless expressly provided otherwise in the opinion, a security interest opinion implicitly includes the assumption that the debtor has rights in the collateral. Although not necessary, many opinion letters include an express assumption that the debtor has rights in the collateral, and the illustrative forms of opinion letters that accompany this Report expressly include this assumption.
 - (c) *Other Attachment Considerations.* In addition to the giving of value and establishment of the debtor’s rights in the collateral, Opining Counsel must also confirm the existence of one of the following additional conditions in order to opine that the security interest has attached to the collateral: (i) the debtor has authenticated a security agreement that provides a description of the collateral and, if the security interest covers timber to be cut, a description of the land concerned,

(ii) if the collateral is not a certificated security, it is in the possession of the secured party under Section 679.3131 of the Florida UCC pursuant to the debtor's security agreement, (iii) if the collateral is a certificated security in registered form, it has been delivered (or is deemed to have been delivered) to the secured party within the meaning of Section 678.3011 of the Florida UCC pursuant to the debtor's security agreement (see "Article 8 Opinions" below), or (iv) if the collateral is deposit accounts, electronic chattel paper, investment property or letter-of-credit rights, the secured party has control under Sections 679.1041, 679.1051, 679.1061 or 679.1071 of the Florida UCC, as applicable, pursuant to the debtor's security agreement. An authenticated security agreement includes, inter alia, a written security agreement signed by the debtor. However, the phrase "pursuant to the debtor's security agreement" in clauses (ii), (iii) and (iv) above does not require that the security agreement be in writing or be authenticated. See UCC Section 9-203, Official Comment 4. Nevertheless, the Committees believe that Opining Counsel should not render an opinion on a security interest in the absence of a written security agreement (called an "authenticated record" in Article 9). However, if such an opinion is given, Opining Counsel should satisfy itself that the requirements of Section 679.2031(2)(c) of the Florida UCC have been satisfied.

3. Description of Collateral. The security agreement must sufficiently describe the collateral. Section 679.1081(1) of the Florida UCC provides that the description will be sufficient if it "reasonably identifies" the collateral, and Section 679.1081(2) of the Florida UCC provides examples of reasonable identification. It is important to note that Section 679.1081(3) of the Florida UCC states that super-generic descriptions of collateral contained in a *security agreement* (as opposed to the description of the collateral in a *financing statement*, which is governed by Section 679.5041 of the Florida UCC), such as "all assets" of the debtor, do not reasonably describe the collateral.

Unless expressly provided otherwise in the opinion, a security interest opinion implicitly includes an assumption that the description of the collateral contained in the security agreement sufficiently identifies the collateral intended to be identified. Although not necessary, many opinion letters contain an express assumption as part of the qualifications that the description of the collateral contained in the security agreement sufficiently identifies the collateral intended to be identified, and the forms of illustrative opinion letters that accompany this Report expressly include this assumption. In any event, the opinion addresses only whether the description is legally sufficient, not whether the description is factually correct. For example, if the collateral is described as a "three carat diamond," Opining Counsel is not rendering an opinion as to whether the collateral in question is an actual diamond or cubic zirconium or weighs at least three carats.

4. Identification of Secured Obligations. Many requests for opinions on creation of a security interest seek to have Opining Counsel include a specific reference to the obligations secured by the security interest. Others do not. In those cases where the opinion requests inclusion of such a specific reference to the obligations secured and where Opining Counsel is willing to include such a reference in the opinion, the diligence obligation of Opining Counsel is increased. In such cases, Opining Counsel will need to review the security agreement carefully to assure that the term to be used in the opinion to reference the obligations secured accurately describes all of the obligations secured (or at least an appropriate subset of the obligations secured). At the same time, Opining Counsel will need to focus on the party or parties to whom the security interest is granted in order to make certain that the security interest has indeed been granted to all of the necessary persons to whom the particular obligations are owed. To the extent that there is any such disconnect, Opining Counsel would need to include an appropriate exception in the opinion.

This type of disconnect may arise, for example, in a syndicated loan transaction where the defined term "obligations" often includes both the loans granted pursuant to the Transaction Documents and the obligations of the borrower in respect of interest rate swap agreements that are entered into not only with the lenders, but also with affiliates of the lenders. Typically, in these syndicated loan transactions, the security interest is granted to an administrative or collateral agent "for the benefit of the Secured

Parties.” If the definition of “Secured Parties” in the security agreement only includes the lenders and does not expressly include the applicable affiliates of the lenders, then there is a disconnect in that the security interest is being granted to secure obligations owing to affiliates of the lenders, but the security interest grant is not being given to or for the benefit of such affiliates. Furthermore, in such transactions, even if the definition of “Secured Parties” expressly includes affiliates of the lenders and thus the symmetry of the security interest grant is facially preserved, some Opining Counsel will nevertheless include an exception to the “obligations secured” aspect of the opinion in order to address the possibility that the lender affiliates may not have actually appointed the administrative or collateral agent to act on their behalf and thus the necessary agency relationship may not have been created.

5. Commercial Tort Claims. A commercial tort claim is defined in Section 679.1021(m) of the Florida UCC as a tort claim: (i) with respect to which the claimant is an organization, or (ii) if the claimant is an individual, the claim arises in the course of claimant’s business and does not include damages for personal injury or death of an individual. Former Article 9 excluded all tort claims from its coverage, except to the extent they constituted “proceeds” of other collateral. Article 9 as revised specifically permits commercial tort claims as original collateral. However, unlike security interests in other property rights, such as general intangibles, Article 9 does not permit the grant of a security interest in after-acquired commercial tort claims. The claim must exist at the time the security interest is granted. In addition, it must be described in the security agreement with greater specificity than by type. Description by type (e.g., “all existing and future commercial tort claims”) or super-generic description (e.g., “all assets of the debtor”) will not suffice. (Section 679.1081(5)(a) of the Florida UCC). Because some commercial loan security agreements include a category of commercial tort claims among the boilerplate collateral description, Opining Counsel should be careful to exclude all such claims from its attachment and perfection opinions, except to the extent existing claims are included in the collateral description with the specificity required by Article 9.

E. Perfection Opinions

1. Perfection of a Security Interest In Personal Property under Article 9 of the Florida UCC. A security interest in personal property may be perfected under Article 9 of the Florida UCC by the filing of a financing statement, by possession or delivery of the collateral, by control or in some cases upon the attachment of the security interest. The opinion letter should be understood to express opinions as to perfection of security interests only to the extent expressly provided therein. For example, if the perfection is to be rendered only with respect to property of a type in which a security interest is perfected by filing, but the description in the security agreement and in the financing statement covers other property as well, it is not necessary to specifically identify those types of items or property for which the financing statement may be ineffective to perfect the security interest.
2. Law Governing Perfection of Security Interest. In order to determine the law governing the perfection of a security interest, Opining Counsel must first determine which law governs the security agreement or make assumptions regarding those issues. This is because the state’s laws that govern the security agreement (i.e., the contractual choice of law) will be the laws that determine which state’s Article 9 mandatory choice of law provisions will be consulted to determine the law governing the perfection (as well as the effect of perfection, non-perfection and priority) of the security interest. In many cases, Opining Counsel will assume that this is the law generally covered by the opinion letter, particularly if Opining Counsel is not otherwise opining as to the enforceability of any choice of law provision contained in the security agreement. In rendering a perfection opinion, Opining Counsel does not implicitly render an opinion as to the proper choice of law provision applicable to perfection of the security interest. Similarly, an opinion on the enforceability of the contractual choice of law provision of a security agreement is not an implicit opinion on the law applicable to perfection.

Often, in transactions in which perfection opinions of Florida counsel are requested, a Florida lawyer issuing a perfection opinion should apply Florida’s mandatory choice of law provisions as set forth in

Sections 679.3011 through 679.3061 of the Florida UCC to determine the law applicable to the perfection of the security interest because that is the law covered by the opinion letter.

Once it is determined or assumed, as the case may be, which state's law governs the security agreement, that state's law will determine which state's law determines perfection, the effect of perfection or non-perfection, and the priority of the Article 9 security interest. The analysis begins with Section 9-301 of the applicable version of the UCC (Section 679.3011 of the Florida UCC). For most types of Article 9 filing collateral, Section 9-301(1) of the UCC (Section 679.3011(1) of the Florida UCC) provides that where a debtor is "located" in a jurisdiction, the local law of that jurisdiction governs perfection, the effect of perfection or non-perfection, and the priority of the Article 9 security interest. See "Location of Debtor" below.

3. *Perfection by Filing.* The recommended form of opinion for the perfection of a security interest by the filing of a financing statement is as follows:

The financing statement in the form attached hereto (the "Financing Statement") is in acceptable form for filing with the Florida Secured Transaction Registry [specify any other applicable filing office] (the "Filing Office"). Upon the proper filing of the Financing Statement with and acceptance by the Filing Office, the [Secured Party] will have a perfected security interest in such portion of the [Article 9 Collateral] in which, and only to the extent that, a security interest therein may be perfected by filing a financing statement under Article 9 of the Florida UCC [or the UCC of any other jurisdiction to which the opinion relates].

This opinion language has important limiting factors. It applies only to security interests created under Article 9 of the Florida UCC (and, if so indicated, the UCC as in effect in the other state or states listed) by virtue of the creation and attachment opinion that are the building block opinions to the perfection opinion. In addition, it relates only to collateral in which a security interest may be perfected by the filing of a financing statement in the Filing Office, even if the type or types of collateral or the identity of the debtor requires the application of one or more laws other than the Florida UCC (or, if applicable, the UCC as in effect in the state or states listed) to determine perfection of the security interest. The creation of a security interest is a building block for, and is implicit in, this opinion language. If Opining Counsel is rendering an opinion as to perfection of the security interest but not opining as to the creation and attachment of the security interest (for example, where another state's law may be the law governing the security agreement), the perfection opinion should contain an express assumption that the security interest has been created and has attached to the collateral.

Opining Counsel should review the financing statement as part of its diligence with respect to this opinion to make sure that it complies as to form with the requirements of Section 9-502 of the UCC (Section 679.5021 of the Florida UCC). However, the financing statement should not be listed as a Transaction Document, because it is not, in and of itself, a legally binding agreement. It is the notice required to be filed to perfect a security interest under Article 9 of the UCC, but does not create the security interest in the collateral.

Florida attorneys should also consider issues with respect to perfection of security interests in "fixtures" under the Florida UCC and particularly whether personal property that is equipment (where perfection of the security interest is effected by the filing of the financing statement in the Florida Secured Transaction Registry) will become a "fixture" under Florida law once the equipment is installed. Perfection of an Opinion Recipient's security interest in "fixtures" by a fixture filing requires the filing of the financing statement in the real estate property records office where the real estate is situated. A security interest in fixtures located in Florida may also be perfected by a central filing at the location of the debtor (e.g., the Florida Secured Transaction Registry for a Florida registered organization). For a more comprehensive discussion of these issues (particularly as it relates to Florida's non-uniform fixture priority rules), see "Opinions Particular to Real Estate Transactions – Creation of a Mortgage Lien."

4. After-Acquired Property. If a security agreement grants a security interest in after-acquired property which is of a type in which an Article 9 security interest may be perfected by filing and the after-acquired property is described in the collateral section of the applicable financing statement, a perfection by filing opinion implicitly includes an opinion that upon the attachment of the secured party's Article 9 security interest in the after-acquired property, such Article 9 security interest will be perfected, subject, of course, to the limitations, assumptions and qualifications otherwise set forth in the opinion or inherently or implicitly applicable thereto.

Note, however, that a different rule applies to commercial tort claims, as described above under "Creation and Attachment Opinions – Commercial Tort Claims."

5. Subsequent Changes in Facts Relating to Perfection. Opining Counsel has no obligation to expressly qualify its opinions to exclude the possible effect of subsequent changes in facts, including lapse of time and any failure to file proper continuation statements, any additional filings or other actions that may be necessary in order to perfect or continue perfection of the secured party's security interest in proceeds of collateral, the change of the debtor's name, or jurisdiction of organization, a merger of the debtor with another entity, the conversion of the debtor into another type of entity, or the transfer of property constituting collateral to a person located in another jurisdiction. An opinion speaks as of the date that it is given. Although some Opining Counsel include these qualifications expressly in their opinion letters, all of these qualifications are implicitly assumed in a security interest opinion under Florida customary practice whether or not such qualifications are expressly set forth in the opinion letter.
6. Effective Period of Financing Statement. Financing statements are generally effective for five years, with certain exceptions, and must be renewed within a six month window prior to their lapse in order to prevent a lapse. Particular indications on certain financing statements are necessary to cause the effective period of the financing statement to be longer than the five-year period generally applicable. For example, in the case of a manufactured-home transaction, if the financing statement explicitly states that it is being filed in connection with a manufactured-home transaction, it will have an effective period of 30, rather than five, years. Although opinions as to the nature of the transaction or the type of debtor as they relate to longer periods of effectiveness for financing statements may be given along with the perfection opinion, those opinions are beyond the scope of the perfection opinion and are not deemed to be implicit. Accordingly, an opinion letter does not need to make a specific exception for the period of effectiveness of the financing statement, although some Opining Counsel include this qualification in their opinion letters.
7. Location of Debtor. An opinion on perfection by filing of a security interest is not deemed to include an opinion that the state in which the financing statement is filed is the proper state in which to file, unless specifically stated in the opinion letter, and an express assumption or exception to that effect is not necessary. Opining Counsel is understood to be merely giving an opinion that, to the extent that the state where the filing is being made is the correct state, the security interest is perfected. However, it is appropriate for an Opinion Recipient to request, and for an Opining Counsel to give, an opinion as to the debtor's location under Florida law (even if Florida law interpreting the debtor's location points to the laws of another state) for matters of perfection, the effect of perfection or non-perfection, and priority of a security interest in collateral. If such an opinion is given, in most circumstances (other than those in which the applicable UCC provides that perfection issues are determined by law other than that of the state of the debtor's location), Opining Counsel must determine, or make an express assumption as to, the state of the debtor's location. The rules for determining the location of a debtor are set forth in Section 9-307 of the UCC (Section 679.3071 of the Florida UCC).

Section 9-307(e) of the UCC (Section 679.3071(5) of the Florida UCC) provides that a registered organization is located in the state under whose law it is organized. Section 9-102(a)(71) of the UCC (Section 679.1021(1)(qqq) of the Florida UCC) defines a "registered organization" as "an organization organized solely under the law of a single state or the United States and as to which the state or the

United States must maintain a public record showing the organization to have been organized.” Section 9-307(e) of the UCC (Section 679.3071(5) of the Florida UCC) and this definition will result in or lead to the conclusion that the debtor corporation, limited partnership or limited liability company is located in the state under whose laws it was organized. In order to reach such a conclusion, Opining Counsel must ascertain that the debtor has, in fact, been organized under the laws of its state of organization. Unless otherwise stated in the opinion letter or in certificates or other documents listed as having been reviewed by Opining Counsel, it is assumed, whether or not such an assumption is explicitly stated in the opinion letter, that the debtor is not incorporated or formed, as the case may be, in more than one state. Where Opining Counsel is not rendering an opinion as to the debtor’s incorporation or formation, as the case may be, the state of the debtor’s incorporation or formation should be stated in the opinion as a specific assumption.

Section 9-307(b) of the UCC (Section 679.3071(2) of the Florida UCC) provides that an individual is located at the individual’s principal residence; an organization that is not a registered organization (such as a general partnership) and that has only one place of business is located at that place of business; and an organization, other than a registered organization, with more than one place of business is located at its chief executive office. An opinion as to perfection of a security interest in the property of any of such types of debtor should not be deemed to implicitly include an opinion as to the location of such debtor; rather, it is an implicit assumption that the debtor is located in the applicable state. Nevertheless, because the location of the debtor is necessary information for the conclusion that a security interest is perfected by filing, Opining Counsel should state this assumption or its factual components explicitly. It is not unreasonable for an Opinion Recipient to ask that the perfection opinion not assume the conclusion of the debtor’s location. However, under customary practice in Florida, if such an opinion is requested for a debtor other than a registered organization, the Opinion Recipient should be willing to accept the opinion based solely on Opining Counsel’s reliance upon a certificate from the debtor as to the debtor’s principal residence, sole place of business or chief executive office, as the case may be.

8. *Qualifications Relating to Effectiveness of Financing Statements.* Often, Florida counsel include qualifications in their opinion letter advising the Opinion Recipient regarding limitations on the continued effectiveness of a financing statement. The forms of security interest perfection opinions accompanying this Report contain such qualifications. The recommended qualification language is as follows:

We call your attention to the following: (a) the continued effectiveness of certain financing statements filed under the Florida UCC are dependent on the filing of a properly completed continuation statement within six (6) months prior to the fifth anniversary of the date of filing of the financing statement and thereafter within six (6) months prior to each additional fifth anniversary of the filing of the financing statement; (b) the continued effectiveness of each of the financing statements in the event of a change of location of the debtor (as defined in the Florida UCC), may be dependent on perfecting the security interest in accordance with the laws of such other jurisdiction and the perfection or non-perfection of the security interest therein may be governed by the law of another jurisdiction; (c) the continued effectiveness of the financing statement as against collateral transferred to a new owner will be dependent upon the nature of the collateral and whether the secured party authorized the disposition of the collateral and further dependent upon perfecting the security interest in accordance with the laws of the jurisdiction (if not Florida) in which the new owner is located (as defined in the Florida UCC); (d) the continued effectiveness of the financing statements to perfect a security interest in collateral acquired by the debtor more than four months after a change of the debtor's name, as provided in the Florida UCC, is dependent on the filing of an appropriate amendment to the financing statement prior to the expiration of such four-month period; and (e) the failure of a secured party to respond within two weeks after receipt of a transaction party's request for approval or correction of the transaction party's statement of the aggregate amount of unpaid obligations or the transaction party's list of collateral may result in a loss of that secured party's security interest in collateral as against persons misled by that secured party's failure to respond, and may also result in liability of that secured party for any loss caused to the transaction party thereby.

9. *Law Applicable to Perfection Opinion.* If Section 679.3011(1) of the Florida UCC is applicable and no specific opinion on the location of the debtor or the choice of law provision in the security agreement is provided, the opinion on the issue of perfection by the filing of a financing statement is limited to an opinion under the laws of the state in which the financing statement is or is to be filed. It may be appropriate, however, for an Opinion Recipient to request, and for an Opining Counsel to render, an opinion as to the law applicable to perfection based on a determination or assumption, as the case may be, of the state of the debtor's location. However, Florida counsel may elect not to give opinions on this issue as it may constitute an opinion on the laws of another jurisdiction. See "Common Elements of Opinions – Opinions Under Florida and Federal Law; Opinions Under the Laws of Another Jurisdiction." Alternatively, Florida counsel may give an opinion on this issue under Florida law. In any event, an opinion that the filing of a financing statement perfects a security interest in collateral is not an implicit opinion that the law of the state in which the financing statement is or is to be filed governs perfection; rather, no opinion on choice of law issues is deemed given unless specifically stated.

Once it is determined or assumed which state's laws govern perfection, Opining Counsel should determine whether the financing statement and the filing thereof meet the requirements of those laws in order to perfect a security interest in the items or types of collateral described in the financing statement, to the extent such collateral is of a type that may be perfected by the filing of a financing statement. If a perfection by filing opinion is to be rendered before the financing statements have been filed and is not stated to be conditioned upon filing, the opinion should be based on an assumption that the financing statements will be duly filed.

10. *Perfection by Possession or Delivery.* Section 679.3131 of the Florida UCC permits perfection of a security interest in negotiable documents, goods, instruments, money or tangible chattel paper by taking possession of the collateral and also provides that a security interest in certificated securities may be perfected by taking delivery under Section 678.3011 of the Florida UCC. See “Article 8 Opinions” below for a discussion concerning perfection of a security interest in collateral which is subject to Article 8. A security interest in money can only be perfected by possession. Security interests in negotiable documents, goods, instruments, certificated securities, or tangible chattel paper may be perfected by filing, possession or delivery (as applicable).

The recommended form of opinion for the perfection of a security interest by taking possession of the collateral is as follows:

The security interest in the [describe the specific type of collateral] described in the [Security Agreement] will be perfected upon the [Secured Party’s] taking and retaining possession or obtaining delivery of the [collateral].

11. *Law Governing Perfection by Possession or Delivery.* When a security interest is to be perfected by possession or delivery, the law of the jurisdiction where the collateral is located governs such perfection. If an opinion is given regarding perfection of a security interest by means of the secured party’s possession of the collateral, the opinion should include a specific assumption to the effect that the collateral as to which the perfection by possession opinion applies is located, within the meaning of Sections 679.3011 and 679.3051(1)(a) of the Florida UCC, in the State of Florida.
12. *Conditions Precedent to Perfection by Possession.* When perfection is achieved by possession, Opining Counsel should satisfy itself (and preferably expressly assume) that: (i) the relevant collateral is the type of collateral in which a security interest may be perfected by possession under Article 9 of the Florida UCC; (ii) the collateral is located in Florida; (iii) each item of collateral constituting an “instrument” is represented by only one original document; and (iv) the secured party (directly or through a third party (subject to limitations described in the next sentence)) has taken and maintains exclusive “possession” of the collateral in a manner that satisfies the requirements of the Florida UCC. When a security interest is perfected by possession through a third party (e.g., a bailee) that is not an agent of the secured party, the secured party does not have possession unless the third party acknowledges in an authenticated record that it holds the collateral for the secured party’s benefit; however, the third party is not required to do so under Section 679.3131(6) of the Florida UCC. Perfection is achieved, however, when the bailee has issued a negotiable document covering goods, and the secured party has a perfected security interest in the document itself (e.g., by possession of the document). Note also that possession of the collateral by a third party that is controlled by the debtor or closely connected with the debtor may not be effective, as the debtor may be deemed to still have possession. Unless such an assumption is unreasonable under the circumstances or known to be incorrect or unreliable by Opining Counsel, the opinion is assumed to be subject to an inherent or implicit assumption that the third party is not closely connected with or controlled by the debtor. In addition, Opining Counsel should expressly assume in the opinion that the acknowledgment has been properly authorized and authenticated by the bailee/third party and that the bailee/third party, in fact, has possession of the collateral and will retain possession of the collateral in the future.

13. *Perfection by Control, other than by Possession or Delivery.* Section 679.3141 of the Florida UCC permits a security interest in certain types of collateral, such as investment property, deposit accounts, letter-of-credit rights and electronic chattel paper, to be perfected by control of the collateral. If control of collateral is established by means of an agreement (such as an authenticated record described in Section 679.1041(1)(b) of the Florida UCC regarding a deposit account, an agreement described in Section 679.1061(2)(b) of the Florida UCC regarding a commodity contract, or an agreement described in Sections 678.1061(3)(b) and 679.1061(4)(b) of the Florida UCC regarding an uncertificated security or a securities entitlement, respectively), the opinion may be stated as follows:

The security interest in the [describe the specific type of collateral] described in the [Security Agreement] will be perfected upon the execution and delivery of the [Control Agreement] by the [Debtor], the [Secured Party] and the [Depository Bank/Commodities Intermediary/Securities Intermediary].

In circumstances where control depends on the status of the secured party (for example, where the secured party is: (i) the bank with which a deposit account is maintained or the bank's customer with respect to the deposit account, (ii) a securities intermediary with respect to a securities entitlement, or (iii) the commodities intermediary with respect to a commodities account), Florida counsel may give opinions as to the perfection of a security interest by means of such control, but they should base any such opinion on an assumption that the status giving rise to control has been established and that such control will continue in the future.

14. *Law Governing Perfection by Control.* For most security interests perfected by control, such as security interests in deposit accounts, letter-of-credit rights, and certain forms of investment property, perfection is generally governed by the local law of the jurisdiction of a third party because it is the third party that is the conduit through which the secured party exercises control. The definition of "jurisdiction" should be checked carefully, however (e.g., in the case of deposit accounts, "jurisdiction" does not mean jurisdiction in the entity organization sense). Exceptions to this general rule include perfection of a security interest in electronic chattel paper by control, which is governed by the law of the location of the debtor, and perfection of a security interest in a certificated security by control, which is governed by the local law of the jurisdiction in which the certificated security is located.
15. *Types of Security Interests Required to be Perfected by Control.* Security interests in certain types of collateral, such as deposit accounts and letter-of-credit rights, can only be perfected by "control." Other means of perfection are not available.
16. *Requirements for Perfection by Control.* Opining Counsel must make a determination as to whether the method of control satisfies the requirements of the Florida UCC for the type of collateral that is the subject of the opinion. Certain methods of perfection by control require agreements with a third party, such as the holder or issuer of the collateral. The control agreement must meet the requirements of the applicable statute. For example, in a deposit account control agreement the depository bank agrees to comply with the instructions originated by the secured party directing disposition of the funds in the deposit account without further consent of the debtor. A control agreement is not necessary to perfect a security interest in a deposit account if the secured party is the bank with which the deposit account is maintained or if the secured party becomes the depository bank's customer with respect to the deposit account (See Section 679.1041 of the Florida UCC; Official Comment 3 of the UCC). A control agreement is not always necessary to perfect a security interest by control, particularly with respect to three kinds of investment property: (a) an uncertificated security where the "delivery" of the uncertificated security occurs when the secured party becomes the registered owner of the security; (b) a "security entitlement" (defined in Section 678.1021(1)(q) of the Florida UCC) where the secured party becomes the entitlement holder; and (c) a commodity contract where the secured party is the commodities intermediary with which the commodity contract is carried.

17. Assumptions for Perfection by Control Opinions. If an opinion is given regarding perfection of a security interest by means of the secured party's control of the collateral, the opinion should include the following assumptions, as applicable, depending on the type of collateral:

- (a) Depository Institution. [Name of Depository Institution] (the “Depository Institution”) is a “bank”, within the meaning of Section 679.1021(1)(h), Florida Statutes, with which the deposit accounts described in [such paragraph] are maintained;
- (b) Deposit Accounts. The account described in the [Control Agreement [and Security Agreement]] has been established with the Depository Institution, continues to exist and is properly described in the [Control Agreement [and Security Agreement]]. Such account is a “deposit account” within the meaning of Section 679.1021(1)(cc), Florida Statutes;
- (c) Securities Intermediary. [Name of Securities Intermediary] (the “Securities Intermediary”) is a “securities intermediary” as defined in Section 678.1021(1)(n), Florida Statutes;
- (d) Investment Accounts. The [Investment Account] (as defined in the [Security Agreement]) is a “securities account” as defined in Section 678.5011, Florida Statutes, has been established with the Securities Intermediary, continues to exist, and is properly described in the [Control Agreement [and Security Agreement]], and all property from time to time credited to the [Investment Account] are “financial assets” as defined in 678.1021(1)(i), Florida Statutes; and/or
- (e) [Deposit Account:] The “jurisdiction” (as defined in Section 679.3041, Florida Statutes) of the Depository Institution is the State of Florida. [Certificated Security:] The [Security Certificate] is and will remain located in the State of Florida. [Uncertificated Security:] The “issuer’s jurisdiction” (as defined in Section 678.1101(4), Florida Statutes) of the [Issuer] is the State of Florida. [Investment Property:] [Investment Account held at a Securities Intermediary:] The securities intermediary’s jurisdiction (as defined in Section 678.1101(5), Florida Statutes) of the [Securities Intermediary] as defined in the [Control Agreement] is the State of Florida. [Letter-of-Credit Rights:] The “issuer’s jurisdiction” [or a “nominated person’s” jurisdiction] (as defined in Section 679.3061, Florida Statutes) of the [Issuer/Nominated Person] is the State of Florida.

F. Opinions Regarding Priority

1. Priority of Liens. Article 9 ranks the rights of a secured party in collateral as against third parties. Opinions regarding that ranking, known as “priority opinions,” have long been the subject of intense debate. Those opposed to giving priority opinions argue that they provide nothing beyond what the Opinion Recipient learns from its review of the UCC Search Report (with respect to security interests perfected by the filing of a financing statement with the appropriate filing office). Proponents contend that priority opinions provide the Opinion Recipient with information necessary for a genuine understanding of its position as against other claimants to the collateral.

It is relatively rare for a Florida attorney to render a priority opinion, and those attorneys who give priority opinions typically do so only after including numerous qualifications and assumptions, which by their nature greatly reduce the value of the opinion and greatly increase the time and cost associated with rendering the opinion. As a result, an Opinion Recipient should generally not request, and an

Opining Counsel should not be required to render, an opinion as to the priority of a security interest under Article 9.

Nevertheless, priority opinions are sometimes required by rating agencies and other governmental organizations. In all other circumstances they should be resisted.

If a priority opinion is given, it should be limited to the extent that the Opining Counsel can determine that the secured party's security interest is perfected by analysis of the underlying collateral and priority can be established by further factual analysis as discussed below. An opinion request that Opining Counsel list all potentially applicable exceptions to priority is inappropriate. This sort of "all laws priority opinion" or "UCC priority opinion" is extraordinarily difficult to give, even after extensive due diligence, and necessarily results in a lengthy opinion replete with many potential exceptions that are not relevant to the transaction. Rather, this Report recommends that Opining Counsel limit the scope of any priority opinion rendered to a "**Limited Filing Priority Opinion.**"

- (a) *Limitations Inherent to Limited Filing Priority Opinion.* A Limited Filing Priority Opinion related to a security interest that is perfected by the filing of a financing statement should be limited to a review of the public records, usually based on a report by a third party (a "**UCC Search Report**"), and to opinions that the UCC Search Report names the proper filing office and correct name of the debtor and lists financing statements covering the same collateral. Except for the need to identify previously filed financing statements indicating interests in the same collateral, no priority qualifications to the Limited Filing Priority Opinion are required because the opinion, by its terms, does not cover the priority of other competing interests. A Limited Filing Priority Opinion does not speak to the effect of security interests that may be or must be perfected by possession or by control, or by any other methods under Article 9 or other applicable law controlling priority, and a specific disclaimer as to such matters is not necessary.

A legal opinion is not intended to be, nor should it ever be construed as, an indemnity contract. As such, if an Opinion Recipient requires coverage beyond that afforded by the Limited Filing Priority Opinion recommended below, then the Opinion Recipient should look to UCC insurance policies or some other similar form of protection for such additional coverage.

If given, the recommended form of a Limited Filing Priority Opinion is as follows:

For purposes of this opinion, we have reviewed the UCC Search Report dated _____, 20__, based on a search conducted by _____ (the "UCC Search Report"), of UCC financing statements filed in the [Filing Office] naming as debtor the Debtor identified in the UCC Search Report and on file in the Filing Office through _____, 20__, at _____ [a.]/[p.]/m. (the "Effective Date"). A copy of the UCC Search Report is attached.

The UCC Search Report sets forth the proper filing office and the proper name of the Debtor necessary to identify those [secured parties] who under the Florida UCC have, as of the Effective Date, financing statements on file with the [Filing Office] against the Debtor indicating any of the Article 9 Filing Collateral. [Except for _____,][T]/[t]he Search Report identifies no still-effective financing statement naming the Debtor as debtor and indicating any of the Article 9 Filing Collateral filed in the [Filing Office], prior to the [Effective Date].

This opinion covers only the Article 9 Filing Collateral and does not address the priority of any: (i) security interest in other [collateral] or property referenced in any financing statement listed in the UCC Search Report; (ii) security interest in fixtures, or (iii) security interest that may be perfected by filing a financing statement in any filing office other than the [Filing Office].

Although the recommended form of Limited Filing Priority Opinion set forth above excludes all collateral other than Article 9 Filing Collateral, Opining Counsel should be mindful that there are numerous types of liens that may take priority over liens properly perfected by the filing of a financing statement under Article 9 of the UCC, including, without limitation: (i) liens for the payment of federal, state or local taxes or charges which are given priority by operation of law, including, without limitation, under Section 6321 and Section 6323(c)(2) and (d) of the Internal Revenue Code; (ii) claims of the United States of America under the federal priority statutes (31 U.S.C. Section 3713 et seq.); (iii) liens in favor of the United States of America, any state or local governmental authority or any agency or instrumentality thereof, including, without limitation, liens arising under Title IV of ERISA; (iv) the rights of a “lien creditor” as defined in Section 679.1021(zz), Florida Statutes, which is entitled to priority under Section 679.323(2), Florida Statutes; (v) any other liens, claims or other interests that arise by operation of law and do not require any filing or possession in order to take priority over security interests perfected through the filing of a financing statement; (vi) a security interest which was perfected automatically upon attachment pursuant to Section 679.3091, Florida Statutes; (vii) a security interest temporarily perfected without filing or possession under Section 679.3121(5), (6) or (7), Florida Statutes; (viii) a security interest perfected by taking possession or the taking of delivery under Section 679.3131, Florida Statutes; or (ix) a security interest in deposit accounts, electronic chattel paper, investment property or letter of credit rights which is perfected by control under Section 679.3141, Florida Statutes.

- (b) *Scope of the Limited Filing Priority Opinion.* No actual priority opinion is being given by the Limited Filing Priority Opinion recommended above. The Limited Filing Priority Opinion is suitable only if perfection is obtained by filing. The Limited Filing Priority Opinion relates back to the UCC Search Report effective date. Since Florida counsel are not insurers, it is inappropriate to request that Florida counsel provide coverage for the gap period between the effective date of the UCC Search Report and the date of the opinion letter (or the filing date of the financing statement with respect to such Transaction). Although not required, it is considered best practice to attach to the opinion or to carefully identify the UCC Search Report, so that the Opinion Recipient is advised as to the details of the UCC Search Report. See “Accuracy of UCC Search Report” below for a further discussion regarding the UCC Search Report.
- (c) *Accuracy of UCC Search Report.* An opinion based on a UCC Search Report is only as good as the accuracy and completeness of the UCC Search Report. It is important to note that the search logic for each state’s UCC filing database may differ. Opining Counsel should take care to describe the UCC Search Report in detail, including the name(s) of the debtor(s) searched, the records searched, the date of the UCC Search Report, the effective date of the UCC Search Report, and the name of the UCC service (reporting) company conducting the search (particularly if the UCC Search Report is not attached to the opinion letter). It is advisable that Opining Counsel order the UCC Search Report from a UCC service (reporting) company that routinely performs searches of this type and is familiar with the search logic in the state database being searched. Under customary practice in Florida, Opining Counsel is not responsible for inaccuracies in a UCC Search Report prepared by a UCC service (reporting) company that routinely performs searches of this type, unless Opining Counsel has knowledge that the UCC Search Report is incorrect or unreliable.

In Florida, an Opining Counsel has the ability to perform his, her or its own search of the UCC records through the filing office’s online portal and thus effectively create one’s own UCC Search Report. However, although Florida practitioners often conduct preliminary diligence through this online portal, the Committees urge Florida Opining Counsel not to render a Limited Filing Priority Opinion based on an on-line UCC search. Notwithstanding such view, in the unusual situation where an Opining Counsel agrees to render such an opinion based on his, her or its own search of the UCC records in the filing office, the opinion letter should clearly set forth how the search was conducted in the description of the search report. Moreover, such Opining Counsel should be

aware that, under these circumstances and in contrast to the situation where the search is obtained from a UCC service (reporting) company, Opining Counsel is likely taking on a heightened risk and responsibility for any inaccuracies in the results of the search.

When a Limited Filing Priority Opinion is rendered, Opining Counsel is confirming to the Opinion Recipient that:

- (i) The UCC Search Report identifying the correct, current name of the debtor was obtained from the appropriate filing office. The opinion only covers the current name of the debtor, and Opining Counsel is not required to search prior names of the debtor unless expressly requested to do so by the Opinion Recipient. A security interest perfected by the filing of a financing statement filed against the current debtor under a former name of the debtor or filed against prior owners of the collateral could have priority over the filing that is the subject of the opinion, but would not be identified in the UCC Search Report and is not covered by the opinion (See Sections 679.325(1) and 679.5071 of the Florida UCC). If the debtor has changed the jurisdiction of its location within the four months preceding the effective date of the UCC Search Report, a possibility exists that another secured party would have a perfected security interest, with priority based on a filing in the debtor's former jurisdiction (See Section 679.3161 of the Florida UCC). The opinion should not be understood to cover the possible existence of these other filings. Opining Counsel is advised to make appropriate disclosures if there is a concern that a search under only the debtor's current name would mislead the Opinion Recipient.
- (ii) The UCC Search Report states that it shows financing statements on file in the filing office searched as of the effective date. The Opinion Recipient should then be in a position to determine whether the UCC Search Report has an acceptable date. As previously noted, the Limited Filing Priority Opinion does not cover the period between the effective date of the UCC Search Report and the date of the opinion letter (or the date of the filing of the financing statement with respect to such Transaction).
- (iii) Based solely on its review of the UCC Search Report, the Opining Counsel has determined that no other still-effective financing statement naming the debtor under its current name and covering the collateral remains on file in the Filing Office. Because the Filing Office must retain all financing statements and amendments (which includes termination statements and a release of collateral (see Section 679.512 of the Florida UCC) for at least one year following the date the financing statement would have lapsed in the absence of termination (see Sections 679.519(7) and 679.522(1) of the Florida UCC), the UCC Search Report will show financing statements and related releases, terminations statements and other amendments for at least six years after the original filing of the financing statement. Unless Opining Counsel has knowledge to the contrary, Opining Counsel may assume, without so stating in the opinion letter, that the releases, termination statements, and other amendments contained in the UCC Search Report were authorized and therefore were validly filed.
- (d) *UCC Priority Opinion based on Possession or Control.* Priority opinions with respect to instruments, chattel paper or certificated securities, in which a security interest is perfected by possession, delivery or control, are also of limited value, except in addressing the priority of a security interest perfected by possession, delivery or control over a security interest perfected solely by another method. Nevertheless, this Report recognizes that a priority opinion in this situation may sometimes be useful to an Opinion Recipient with respect to certain types of non-filing collateral that is central to the particular transaction that is the subject of the Transaction Documents. Under the UCC, a secured party that takes possession of an instrument and satisfies certain other requirements has priority over a secured party that has perfected its security interest solely by a method other than possession (See Section 679.330(4) of the Florida UCC). To obtain priority, the secured party with possession must give value and take possession

of the instrument in good faith without the knowledge that the grant of the security interest violates the rights of a prior secured party. Similar requirements may apply to other types of collateral. Opining Counsel should include an express qualification in the opinion regarding the absence of the required knowledge on the part of the Opinion Recipient in giving this opinion. See item (j) of the examples of limitations set forth below. An assumption regarding the Opinion Recipient's good faith is implicit in all opinions. See "Introductory Matters—The Golden Rule."

- (e) *Limitations/Qualifications.* As described above, the UCC Opinion Scope Limitation limits the filing-priority opinion's scope to the filings under the UCC and does not address the priority of the particular security interest other than against those security interests perfected by filing under the UCC. Even with this limitation, a UCC Limited Filing Priority Opinion sometimes notes the priority exceptions that might apply under the UCC, which requires Opining Counsel to recite a litany of exceptions that generally are understood only by persons practicing in the area. In the limited cases where a rating agency or other governmental agency requires Opining Counsel to render a UCC Limited Filing Priority Opinion, Opining Counsel should take great care to include in the opinion all of the exceptions related to priority applicable to the subject transaction. The following is a limited example of the types of exceptions that may be appropriate to include in the opinion letter:

We call to your attention the following:

- (a) security interests in chattel paper, instruments, documents, securities, financial assets, and security entitlements are subject to the rights and claims of holders, purchasers and other parties as provided in Sections 679.322, 679.330, and 679.331, Florida Statutes;
- (b) rights to money or funds credited to a deposit account are subject to the rights of the depository bank under Section 679.340, Florida Statutes, and to the rights of transferees under Section 679.327, Florida Statutes;
- (c) competing security interests in investment property are subject to the provisions of Section 679.328, Florida Statutes, and competing interests in letters-of-credit are subject to the provisions of Section 679.329, Florida Statutes;
- (d) security interests in goods that are fixtures and crops are subject to the provisions of Section 679.334, Florida Statutes;
- (e) security interests in goods are subject to rights of holders of possessory liens under Section 679.333, Florida Statutes;
- (f) competing security interests in goods covered by a certificate of title may be subject to the provisions of Section 679.337, Florida Statutes;
- (g) security interests in collateral consisting of proceeds will be limited as provided in Section 679.322(3), Florida Statutes;
- (h) security interests in goods that are installed in, attached or affixed to, any other goods may be subject to the provisions of Section 679.335, Florida Statutes, and may be subject to the provisions of Section 679.336, Florida Statutes, to the extent that such goods form part of a larger product or mass;
- (i) security interests in property transferred to the debtor that is subject to a security interest created by another person or entity is subject to the provisions of Section 679.325, Florida Statutes; and
- (j) we express no opinion as to the Secured Party's rights in the [collateral] to the extent that the Secured Party has knowledge that its security interest in the [collateral] violates the rights of another secured party.

The limited benefit of an opinion on the issues in these types of exceptions, most of which will usually be inapplicable, typically does not justify the time, effort, and expense incurred in giving such opinion. Nevertheless, Opinion Recipient reasonably could ask the Opining Counsel to address a specific priority issue that is of particular concern, whether or not the potentially competing claim arises under the UCC, provided the parties agree regarding who will bear the cost of the diligence required to render such opinion.

G. Article 8 Opinions

1. *Perfection of Security Interests In Certificated Securities.* This section addresses a relatively straightforward pledge of a certificated security. Under Article 9 of the Florida UCC, a security interest in a certificated security may be perfected by filing, taking delivery of the certificated security or obtaining control of the certificated security. Perfection by filing is discussed above. “Delivery” occurs when a secured party acquires possession of the security certificate. A secured party has “control” of a certificated security if it is delivered to the secured party: (i) in bearer form or (ii) in registered form, registered in the secured party’s name or endorsed to the secured party or in blank by an effective endorsement (which includes a stock power endorsed in blank). A secured party who obtains control of a certificated security has priority over another secured party who has perfected only by filing or taking delivery. This section addresses only perfection of a security interest in a certificated security by obtaining control, and does not address uncertificated securities in any respect or perfection of interests in a certificated security by other methods.

The following recommended opinion language may be used with respect to perfection of a certificated security by obtaining control:

The delivery to the [Secured Party] of the certificate(s) representing the [shares of stock] [membership interests, assuming an opt-in to Article 8 of the Florida UCC as discussed below] [other certificated securities] identified on Schedule A to the Pledge Agreement (the “Pledged Securities”) [in bearer form or registered or endorsed in the name of the [Secured Party] or in blank by an effective endorsement], together with the provisions of the Pledge Agreement, create in favor of the [Secured Party] a perfected security interest in the Pledged Securities under the Florida UCC.

2. *Law Governing Perfection for Certificated Securities.* Under the Florida UCC, the perfection of a party’s security interest in certificated securities will be governed by the local law of the jurisdiction in which the certificates representing the securities are located (other than perfection by filing, which is governed by the local law of the jurisdiction in which the applicable pledgor is located). The Florida UCC will only apply while the certificates are located in Florida, and the law governing issues of perfection and priority will change if the certificates are moved from one jurisdiction to another. Because of the difficulties of giving a forward-looking opinion based on possession, the recommended form of opinion set forth above speaks only as of the date of the opinion letter. Accordingly, Opining Counsel need not disclaim any implied forward-looking opinions regarding perfection or specifically assume that the secured party will maintain continuous possession of the Pledged Securities in the same location.
3. *What Constitutes a Security.* Opining Counsel should confirm that the Pledged Securities constitute “securities” under Article 8 of the Florida UCC. If the issuer is a corporation and the Pledged Securities are equity securities, this confirmation is straightforward. Under Florida UCC Section 678.1031(1), shares or similar equity interests issued by a corporation constitute “securities.” However, the proper classification of certificated limited liability company membership interests or partnership interests frequently raises opinion issues. Section 678.1031(3) of the Florida UCC provides that an interest in a limited liability company or partnership is not a “security” unless: (i) such interest is dealt in or traded on securities exchanges or in securities markets, (ii) such interest is an investment company security, or (iii) the issuer of such interest has “opted” (in its Organizational Documents) to have such interests treated as “securities” governed by Article 8 of the Florida UCC. If none of the foregoing exceptions

applies, then the interest in a limited liability company or partnership is a “general intangible” pursuant to Section 679.1021(1)(pp) of the Florida UCC and a security interest in such general intangible can only be perfected by filing. In that regard, the opinion letter need not expressly assume that a limited liability company or partnership that has not certificated its securities will not later “opt-in” under Article 8 to have the pledged interests treated as “securities”.

4. *Control.* If the opinion omits the bracketed language above regarding the form of the Pledged Securities and accompanying endorsements, Opining Counsel should also confirm that the secured party has obtained “control” of the Pledged Securities by taking possession of them and any endorsements (including a stock power endorsed in blank) in the manner described in the bracketed language. Opining Counsel may confirm “delivery” by observation or obtaining a certificate from a third party.
5. *Delivery and Location of Securities.* If the opinion letter is limited to Florida law, Opining Counsel should confirm that the Pledged Securities are delivered to the secured party in the State of Florida and can assume, without stating so in the opinion, that the Pledged Securities will continue to be held in the State of Florida. As noted above, the Florida UCC governs perfection by possession only while the Pledged Securities are located in the State of Florida.
6. *Article 8 Protected Purchaser Opinion.* Article 8 of the Florida UCC provides that the special status of “protected purchaser” is available not only to owners of certificated securities, but also to a person who obtains a security interest in certificated securities. (See the definitions of “purchase” and “purchaser” in subsections 671.201(32) and (33) of the Florida UCC, respectively, which include a secured party holding a security interest.) The secured party who qualifies as a “protected purchaser” is not subject to the usual Article 9 rules with respect to the relative priority of security interests. Pursuant to Section 678.3021 of the Florida UCC, a protected purchaser of a security has priority over any “adverse claim” with respect to the security, including claims that the grant of the security interest was wrongful or that another person is the owner or has a security or other interest in the security. The following recommended opinion language may be used with respect to a security interest in favor of a “protected purchaser” under Article 8 of the Florida UCC:

<p>Assuming the [Secured Party] has taken (or will take) possession of the Pledged Securities without notice (as defined in Article 8 of the Florida UCC), at or prior to the time of delivery of such Pledged Securities, of any adverse claims [and that each Pledged Security is either in bearer form or registered or endorsed in the name of the [Secured Party] or in blank by an effective endorsement], the [Secured Party] [acquired] [will acquire] its [security] interest in the Pledged Securities free of any adverse claim within the meaning of Florida UCC Section 678.1021(1)(a).</p>

To qualify as a “protected purchaser,” the secured party must: (i) obtain control of a certificated security by taking possession of the certificated security either in bearer form or registered or endorsed to it or in blank by an effective endorsement (which includes a stock power endorsed in blank); (ii) acquire its interest for value; and (iii) be without notice of any adverse claim at the time of purchase. The first element simply involves confirming the fact of possession of the Pledged Securities, together with necessary endorsements (which includes a stock power endorsed in blank), by observation or certificate from a third party. The value required by the second element is equivalent to the value required by the Article 9 opinion regarding the creation of a security interest. See “Creation and Attachment Opinions” above. Absent an adverse claim revealed by an inspection of the certificate, Opining Counsel typically cannot verify notice (or the absence thereof) of adverse claims, and therefore should be permitted to make assumptions regarding these matters that are not contrary to Opining Counsel’s knowledge.

An opinion that the secured party takes “free of any adverse claim” analyzes the secured party’s rights at a particular point in time, *i.e.*, the moment of transfer, and does not address claims that might arise in the future. Opining Counsel need not specifically state this in the opinion, and no opinion should be implied with respect to proceeds of, or distributions on, securities, or that the secured party will maintain continuous possession of the certificates in the same manner and in the same location. Any opinion regarding proceeds or distributions would need to be explicitly given, and should only be given subject to appropriate qualifications.

OPINIONS PARTICULAR TO REAL ESTATE TRANSACTIONS

This section of the Report discusses opinions that are often requested and given in connection with real estate transactions. A real estate transaction is a transaction that involves real property and any related personal property, including a transaction which involves the securing of an obligation by real property and any related personal property. Real property is property or rights and interests in property treated under Florida law as real property, including fixtures.

A. Requirements for Recording Instruments Affecting Real Estate

1. General.

In a real estate transaction, an opinion is often requested that the Transaction Documents relating to the real property are in a form suitable for recordation or filing, since recordation or filing of a deed or a mortgage are necessary to transfer title to real property or create an encumbrance on real property as security for a loan, respectively.

The following is the recommended opinion language:

The Transaction Documents to be recorded or filed are in a form suitable for recordation or filing.

The recommended opinion contains language to the effect that the Transaction Documents to be recorded or filed as part of the Transaction are in a form suitable for recordation or filing, which addresses the special requirements under Florida law applicable to transferring real estate or creating a mortgage on Florida real estate.

This opinion is often combined with the opinion regarding execution and delivery of the Transaction Documents. See “Execution and Delivery” for a discussion regarding the diligence required to determine whether the Transaction Documents have been executed and delivered.

2. Recording Format.

To determine whether a document is in a form sufficient for recording, Opining Counsel should examine the document to ensure, at a minimum, that such document is in compliance with the applicable legal requirements. Section 695.26, Florida Statutes, mandates compliance with the following requirements as a condition precedent to the recordation of a document:

- (a) The name of each person who executed the document must be legibly printed, typewritten or stamped on the document immediately beneath the signature of such person, and the post office address of each such person must be legibly printed, typewritten or stamped upon the document;
- (b) The name and post office address of the natural person who prepared the document, or under whose supervision it was prepared, must be legibly printed, typewritten or stamped upon the document;
- (c) The name of each witness to the document must be legibly printed, typewritten or stamped upon the document immediately beneath the signature of such witness;
- (d) The name of the notary public or other officer taking the acknowledgment or proof must be legibly printed, typewritten or stamped upon the document immediately beneath the signature of such notary public or other officer;
- (e) A three-inch square at the top right-hand corner of the first page and a one-inch by three-inch space at the top right-hand corner of each subsequent page of the document must be reserved for the exclusive use of the clerk of the court; and
- (f) The name and post office address of each grantee (if the document purports to transfer an interest in real property) must be legibly printed, typewritten or stamped upon the document.

It should be noted that Section 695.26, Florida Statutes, does not apply to: (i) a document executed before July 1, 1991, (ii) a decree, order, judgment or writ of any court, (iii) a document executed, acknowledged or proved outside of Florida, (iv) a will, (v) a plat, or (vi) a document prepared or executed by any public officer other than a notary public. It is also important to note that if a document that does not fully comply with the statute is accepted for recording and is recorded, the document will not be invalidated.

3. **Acknowledgments and Proof.** Section 695.03, Florida Statutes, requires the execution of any document concerning real property to be acknowledged by the party executing it or proved by a subscribing witness to it as a condition precedent to recording. However, that section is not applicable to financing statements to be filed with the Florida Secured Transaction Registry under Article 9 of the UCC. See “Opinions with Respect to Collateral Under the Uniform Commercial Code.” Section 695.03(1), Florida Statutes, sets forth the requirements for acknowledgments or proofs made within the State of Florida, Section 695.03(2), Florida Statutes, sets forth the requirements for acknowledgments or proofs made within the United States, but outside of the State of Florida, and Section 695.03(3), Florida Statutes, sets forth the requirements for acknowledgments or proofs made in a foreign country. In addition, Section 695.031, Florida Statutes, sets forth alternative methods for acknowledgments by members of the Armed Forces of the United States and their spouses. Finally, Section 695.25, Florida Statutes, sets forth acceptable statutory short forms of acknowledgments.
4. **Witnesses.** Section 689.01, Florida Statutes, requires that a document purporting to transfer a freehold interest in land or a term of years of more than one year be written and signed in the presence of two subscribing witnesses by the grantor or his lawfully authorized agent in order to be valid. Because a mortgage or lien is not considered an interest in real property, but merely an encumbrance, mortgages and liens do not require subscribing witnesses to be valid.
5. **Deed Form.** Section 689.02, Florida Statutes, sets forth an acceptable form of warranty deed and requires that such deed include a blank space for the property appraiser’s parcel identification number and the social security number(s) of the grantee(s). However, the statute further provides that the failure of a deed to comply with the foregoing requirements will not affect the validity of the conveyance or the recordability of the deed.
6. **Change of Control or Change of Ownership.** Historically, Section 201.22, Florida Statutes, required the grantor, the grantee or an agent for the grantee to file with the clerk of the court a return stating the actual consideration paid for the transfer as a condition precedent to the recordation of a deed transferring an interest in real property. This was generally accomplished through the filing of a DR-219 Recording Form with the deed. However, the obligation to file a DR-219 form was repealed by the Florida legislature in 2008.

In 2008, the Florida legislature enacted a new requirement that is contained in Section 193.1556, Florida Statutes. This new requirement requires notification to the property appraiser when real property is transferred or when there is a change in control of, or majority ownership of, an entity that owns real property. This change of ownership or control might not involve the recording of a deed and this provision was enacted so that property appraisers would be in a position to consider assessments on real property transferred through a change of ownership or control (where no deed was filed). The Florida Department of Revenue (“DOR”) has recently promulgated Form DR-430 to report such changes of ownership or control where a deed is not filed. The Form DR-430 must be filed with the property appraiser in the county where the real property is located. The failure of the grantee or the grantee’s agent to comply with the new requirement will not impair the validity of a recorded deed. However, parties that violate the statute will be subject to payment of an amount equal to the taxes avoided as a result of such failure, plus 15% interest, plus a penalty of 50% of the taxes avoided.

7. **Balloon Mortgages.** Section 697.05, Florida Statutes, requires the inclusion of a legend on certain balloon mortgages, as more particularly described in the statute. The failure of a mortgagee to comply with the statute automatically extends the maturity date of the mortgage, as provided in the statute.
8. **Conveyances by Corporations.** Section 689.01, Florida Statutes, provides that a corporation may convey real property in the same manner as other persons or entities (that is, signed in the presence of two subscribing witnesses). In connection with conveyances of real property by a corporation, a title company may require the recordation of a corporate resolution in the public records evidencing the corporation's authority to convey the real property. Alternatively, a corporation may convey real property in accordance with Section 692.01, Florida Statutes, which permits a corporation to execute documents conveying, mortgaging or affecting interests in real property by documents sealed with the corporate seal and signed in the name of the corporation by its president, chief executive officer or any vice president. In such case, the documents do not need to be witnessed and, in the absence of fraud by the grantee, the documents will be deemed to be valid whether or not the officer was authorized to execute the document. Under the statute, it is not necessary for title purposes to record the corporate resolution if the requirements of Section 692.01, Florida Statutes, are followed.

Notwithstanding the foregoing, compliance with Section 692.01, Florida Statutes, is an estoppel device which can be relied upon by third parties with no knowledge to the contrary. However, this statute should not be relied upon by Opining Counsel in rendering an opinion that a transaction has been authorized by all necessary corporate action. To give an opinion regarding authorization of a transaction, Opining Counsel needs to review, among other matters, the corporate resolutions. See "Authorization of the Transaction by a Florida Entity." Opining Counsel should also confirm (preferably by receipt of a certificate from the corporate secretary or other authorized officer of the corporation) that the person executing the document is, in fact, the president, the chief executive officer or a vice president of the corporation, and that the person executing the document has been properly authorized to execute and deliver the document on behalf of the corporation. See "Execution and Delivery."

The foregoing list of issues with respect to requirements for recording instruments affecting real estate is not all-inclusive. Further guidance may be obtained by reference to the FUND TITLE NOTES issued by Attorney's Title Insurance Fund, Inc., as periodically updated, and the UNIFORM TITLE STANDARDS issued by the RPPTL Section, as periodically updated.

B. Title and Priority

In most real estate transactions, the Opinion Recipient relies on a title insurance commitment to determine the status of title to the real property and the priority of any lien encumbering the real property. With respect to personal property, no evidence of title is obtained, although UCC search reports may be obtained by the Opinion Recipient in an effort to determine the existence and priority of certain other security interests encumbering the debtor's personal property. Therefore, unless Opining Counsel has made an independent investigation and evaluation of title by reviewing an abstract of title to the real property, Opining Counsel should not render or be required to render any opinion as to title or lien priority.

The recommended form of the language to add to the opinion letter to make this clear is as follows:

No opinion is expressed with respect to the status of title to the [Real Property,] or with respect to the relative priority of any liens or security interests created by the [Transaction Documents]. We have assumed as to matters of title and priority that the Client has good title to the [Real Property] and that with respect to the [Real Property] the Opinion Recipient is relying upon a commitment for title insurance issued by [_____ title insurer].

However, on the rare occasions where an Opinion Recipient insists on such an opinion or such an opinion is required to satisfy a governmental agency requirement (for example, an opinion required for platting), the opinion should be carefully crafted to avoid unexpected liability. In this regard, Opining Counsel should expressly limit due diligence to a review of the abstract of title or title commitment. Opining Counsel also should specifically assume the accuracy of the title information relied upon in rendering the opinion. In such situations, the following opinion language is recommended:

Based solely upon our examination of [the abstract of title] [commitment for title insurance], dated _____ and prepared by _____ (“Title Report”), and assuming the accuracy of the information contained therein, it is our opinion that: (i) as of the date of the title report, fee simple title to the [Real Property] was vested in _____, subject to the following comments, exceptions and encumbrances: [list exceptions from title report]; and (if required), (ii) _____ should sign the plat as the owner of the [Real Property], and _____, as the holder of a [mortgage, easement, etc.] affecting the [Real Property], should join in the execution of the plat.

C. Creation of a Mortgage Lien

Florida counsel are often asked to render opinions that a mortgage creates a valid lien against the subject real property, and that once the mortgage is recorded, constructive notice will be provided. They may also be asked for similar opinions as to mortgages securing interests in a leasehold. Because the Florida Statutes do not expressly recognize the concept of “perfection” in connection with liens on real property (including liens on leasehold interests in real property), but instead speak in terms of “constructive notice,” it is the better practice to use the term “constructive notice” in Florida real estate opinions. However, under Florida customary practice an opinion that the filing of a mortgage will “perfect” a lien on Florida real property or on a Florida leasehold interest in real property, has the same meaning as an opinion that the filing of the mortgage will provide constructive notice of the lien against the real property or the leasehold interest in the real property.

The recommended opinion language is as follows:

The [Mortgage] is effective to create a valid lien in favor of the [Lender] in the [Real Property]. Upon the proper recording of the [Mortgage] in the Public Records of _____ County, Florida, the Mortgage will provide constructive notice of the lien against the [Real Property].

In rendering an opinion regarding the creation of a mortgage lien, Opining Counsel should, at a minimum, review the mortgage and confirm that: (a) the mortgage: (i) contains appropriate granting language to create a lien against the real property (including “fixtures”) or against the leasehold interest in the real property, (ii) properly describes the obligations secured by the mortgage, and (iii) properly describes the collateral securing the loan; and (b) value or consideration has been given to the Client in exchange for the granting of the lien. Regarding the issue of value or consideration and whether or not expressly set forth in the opinion letter, a mortgage creation opinion implicitly includes an assumption that value (whether in the form of receipt of funds or otherwise) has been given, and the illustrative form of opinion letter in a loan transaction secured by real estate that accompanies this Report expressly includes this assumption.

Opining Counsel should be aware that, for the purposes of this opinion, the term “real property” is defined to include “fixtures.” In addition to perfecting a mortgage lien against “fixtures” under applicable real property law, a recorded mortgage may also operate as a financing statement filed as a “fixture filing” under the UCC if it meets the requirements set forth in Section 9-502(3) of the UCC (Section 679.5021(3) of the Florida UCC). Additionally, Opining Counsel should be aware that a security interest in “fixtures” may also be perfected by the filing of a financing statement filed as a “fixture filing” in the local real property records or filed as a “fixture

filing” in the UCC state filing office in the state where the debtor is organized, although under a non-uniform provision of the Florida UCC, a centrally filed security interest in fixtures will be junior to a filing recorded in the local real property records. See Sections 679.3171(6) and 679.334(4) of the Florida UCC. If the Opinion Recipient requests an opinion regarding perfection of a security interest in “fixtures” under the UCC (in contrast or in addition to the opinion regarding the mortgage lien), Opining Counsel should consider the matters discussed in “Opinions with Respect to Collateral under the Uniform Commercial Code,” which deals with opinions under the Florida UCC. Florida counsel may wish to file the financing statement with respect to “fixtures” in both the local filing office and the Florida Secured Transaction Registry to avoid any question regarding the perfection of the security interest with respect to “fixtures.”

Further, with respect to “fixtures,” Opining Counsel should be aware that, under a non-uniform provision of the Florida UCC (Section 679.334(3) of the Florida UCC), a security interest in goods which are or become fixtures is invalid against any person with an interest in the real property at the time the security interest in the goods is perfected or at the time the goods are affixed to the real property, whichever occurs later, unless such person has consented to the security interest or disclaimed an interest in the goods as fixtures. In circumstances where such consent is not obtained, Opining Counsel should consider adding an exception to the opinion that refers the Opinion Recipient to Section 679.334(3) of the Florida UCC.

In addition, Opining Counsel should decline to give an opinion that any particular property constitutes a “fixture,” since, under Florida law, the classification of any particular property as a “fixture” depends primarily on the intention of the parties.

An opinion that recordation of a mortgage will provide constructive notice as to the lien against the real property is not an opinion regarding the priority of that lien. See “Title and Priority” above.

D. Florida Taxes

1. **Documentary Stamp Taxes and Intangible Taxes – Loan Transactions.** The Opinion Recipient will sometimes request an opinion that the correct amount of documentary stamp tax under Chapter 201 of the Florida Statutes and intangible personal property tax under Chapter 199 of the Florida Statutes have been paid.

Determination of the amount of documentary stamp and intangible taxes due in connection with a loan transaction generally does not involve a legal interpretation of state tax laws; instead, determination of those taxes normally is made on the basis of a relatively simple calculation. However, failure to pay the proper amount of documentary stamp taxes and intangible taxes that are due would impact the ability of Opining Counsel to render opinions concerning enforceability of the Transaction Documents, no violation of laws and no required governmental consents or approvals. For these reasons, the assumptions that are implicitly included in all opinions of Florida counsel include an assumption that all documentary stamp taxes, intangible taxes and other taxes and fees imposed upon the execution, filing or recording of the Transaction Documents have been paid. See “Common Elements of Opinions – Assumptions.” However, in cases where the Opinion Recipient is not familiar with these Florida taxes, the Opinion Recipient might request an opinion regarding the correct amount of taxes required to be paid.

2. **Documentary Stamp Taxes and Intangible Taxes on Mortgages.** In the case of a new mortgage that only involves Florida real estate, the calculation of documentary stamp taxes and intangible taxes is quite simple and the lawyer in a Florida real estate transaction generally makes these calculations. Although this opinion is rarely requested where both lawyers involved in the Transaction are licensed in Florida, this opinion is sometimes requested by out-of-state counsel.

In many cases where such an opinion is requested, Opining Counsel will be willing to opine regarding the amount of documentary stamp and intangible taxes due because the tax is a straight-forward application of the tax rate to the loan amount. The documentary stamp tax is imposed at a rate of a certain dollar amount per \$100 (or fraction thereof) of the tax base applicable for documentary stamp tax purposes (currently a rate of \$0.35/\$100.00 or fraction thereof) and the nonrecurring intangible tax

is imposed at the rate of a certain dollar amount per \$100 of the tax base applicable for nonrecurring intangible tax purposes (currently a rate of \$0.20/\$100.00). In the case of a new mortgage that only involves Florida real estate, the applicable tax base, which is the same for both taxes in such cases, is equal to the loan amount.

In this limited factual context, the following recommended language can be used:

Based on the \$ _____ principal amount of the [loan], the correct amount of Florida documentary stamp tax payable upon recordation of the Mortgage is \$ _____ and the correct amount of Florida intangible personal property tax payable upon recordation of the Mortgage is \$ _____.

Sometimes, however, in real estate loan transactions, the documentary stamp and intangible taxes due will not be based solely on the particular loan amount. For example, in some cases the intangible tax may be apportioned based upon the value of Florida real property in relation to the value of all collateral, or both taxes might be apportioned to account for real property or other collateral located in other states. In other cases, there may be a limitation of recovery under the mortgage which could limit the applicability of taxes. In addition, the documentary stamp tax might or might not be payable in a real estate loan transaction involving a renewal, extension or modification of an existing loan.

In cases where there is a limitation on recovery in a mortgage that is set at an amount less than the loan amount, the applicable tax base for both documentary stamp and intangible taxes is the limitation amount (with such amount rounded up to the nearest \$100 for purposes of computing the documentary stamp tax) or, in the case of a mortgage that secures a promissory note executed in Florida, the greater of the limitation amount or the amount of the note (not to exceed \$700,000).

In cases where apportionment is permitted, the computations are fairly complex and often utilize different methodologies for documentary stamp taxes versus nonrecurring intangible taxes. Issues such as the extent of real property security in the State of Florida, the extent of personal property security in the State of Florida, the extent of real and personal property collateral located outside the State of Florida and the relative values of these different categories of collateral come into play in calculating the proper tax amounts. The rules that are germane to calculating the applicable apportioned taxes are set forth in rules and regulations of the DOR, and are often interpreted through formal and informal interpretive written guidance from the DOR. Application of the specific rules and the methodologies are beyond the scope of this Report and, because of the complexities involved, opinions on Florida documentary stamp taxes and intangible taxes should only be given by lawyers who reasonably believe themselves competent to render such opinions.

In these more complex cases where the taxes are not based solely on the particular real estate loan amount, it is customary (and indeed it is required by regulation for multi-state apportionment transactions) to set forth the tax calculation in the recorded mortgage, usually in a notice to the county recorder on the first page of the mortgage. For those lawyers who believe themselves competent to render the tax opinions in these complex cases, the recommended opinion language set forth below can be used in connection with such transactions. This opinion language presumes that Opining Counsel has reviewed (or in many cases, created) the notice clause and that the notice clause recites any facts necessary for the calculation of the taxes, such as the values of collateral, any relevant previous tax payments, and whether any relevant previously taxed documents were made by the same obligors.

With respect to Florida documentary stamp taxes and Florida intangible personal property taxes (“Mortgage Taxes”), it is our opinion that the “Notice to Recorder” clause on the first page of the Mortgage sets forth the correct amount of Mortgage Taxes (if any) due and payable with respect to the execution, delivery and recordation of the Mortgage, assuming that the clause correctly sets forth the respective collateral values, loan amounts and prior Mortgage Tax payments.

This language assumes that the items necessary to compute the correct amount of Florida documentary stamp taxes and intangible taxes are set forth in the “Notice to Recorder” clause in the mortgage and are correct. Whenever, in an effort to reduce taxes, there is any kind of multistate apportionment or recovery limitation or any assignment of an existing mortgage (rather than the making of a new loan), the Opinion Recipient will often ask for an opinion that the taxes have been correctly computed. Some Opining Counsel actually provide the computation details of the tax paid in their opinion letters. Others, because the collateral values and loan amounts attributable to Florida property may change during the discussions leading up to the opinion letter, address the computation opinion by reflecting in the opinion letter that the correct calculations are in the “Notice to Recorder” clause on the first page of the mortgage.

Sometimes, an Opinion Recipient will also request advice as to the consequences of nonpayment or underpayment of Florida documentary stamp taxes and intangible taxes. In such cases, the following language is often included in the opinion letter:

We note for your information that failure to pay any applicable Florida documentary stamp tax or any applicable intangible tax with respect to any document upon which such tax is required will render the document unenforceable until such time as the proper amount of tax (and any relevant interest, late fees and penalties) is paid, but will not affect the validity of the lien of the Mortgage or the constructive notice given by the recording of the Mortgage.

In order to give any of the opinions above, Opining Counsel should: (i) review the appropriate statutes, (ii) review all applicable rules promulgated by the DOR, and (iii) review applicable case law construing the statutes and rules.

In transactions where the calculation of taxes is not clear-cut, Opining Counsel may wish to seek written advice from the DOR as an additional basis for the opinion. Written advice in the form of a “Letter of Technical Advice” does not require disclosure of the taxpayer’s identity to the DOR, but it is not binding on the DOR; in contrast, a “Technical Assistance Advisement” is binding on the DOR with respect to the particular taxpayer to whom it is issued, but requires disclosure of the taxpayer’s identity and takes longer for the DOR to issue.

When such written advice from the DOR is obtained, the opinion regarding mortgage taxes should be qualified by adding the following language:

Our opinion regarding Mortgage Taxes is based upon a [non-binding letter of technical advice/binding technical assistance advisement] issued by the Florida Department of Revenue, dated _____, a copy of which is attached hereto.

If the position of the DOR differs from the applicable statutes and rules, the distinction should be pointed out to the Opinion Recipient, with Opining Counsel giving no opinion as to which position might prevail.

- 3. Documentary Stamp Taxes on Deeds and Similar Writings; Conduit Entities.** Florida documentary stamp tax is also applicable to deeds or other instruments conveying real property located in Florida. The tax is imposed at a rate of a certain dollar amount per \$100 of the consideration for the deed (currently a rate of \$0.70/\$100.00 in most counties). Determination of the amount of consideration for the deed may not be straightforward and can be affected by matters such as the amount of any mortgage and the consideration payable in other than money. In addition, the relationship between the transferor and the transferee can affect whether or not the tax is payable.

Effective on July 1, 2009, Section 201.02, Florida Statutes, was modified to provide that, in the event that owners of real property transfer the property for less than full consideration to an entity that they also own, the grantee will be treated as a “conduit entity” (as that term is defined in the statute) for a period of three years following such transfer and the sale of any interest in the “conduit entity” during

such three-year period will be subject to tax based on the consideration paid for such interest. The documentary stamp tax statute was also modified to address the conversion or merger of a trust into an entity in circumstances where real estate had previously been placed into the trust. Under the statutory modification, the conversion or merger is treated as a conveyance of real estate for documentary stamp tax purposes. These changes effectively limit the Florida Supreme Court's decision in Crescent Miami Center, LLC vs. Florida Department of Revenue, 903 So.2d 913 (Fla. 2005), to the facts of that case (no documentary stamp taxes will be due on a transfer of unencumbered real estate to an entity owned by the same owners as the real estate for no consideration), and make clear that it is the intent of the Florida legislature to impose documentary stamp taxes on virtually all transfers occurring in the future that are in the nature of "two-step" transfers.

4. **Other Taxes.** Under typical circumstances, Opining Counsel is not in a position to know all of the Opinion Recipient's activities in Florida or the extent to which certain activities of the Opinion Recipient might expose the Opinion Recipient to state income taxes or other taxes. Accordingly, Opining Counsel should not be asked to opine as to whether the Opinion Recipient will, as a result of a real estate transaction, or otherwise, be exposed to any state tax based upon or related to the Opinion Recipient's income. It is customary practice in Florida to exclude from the scope of all opinions matters related to taxation, unless such matters are expressly included in the opinion letter. See "Common Elements of Opinions – Limitations of Laws of Specific Jurisdictions or to Substantive Areas of Law; Excluded Areas of Law." However, although not required, where an opinion involving documentary stamp tax and/or intangible tax is being given, Opining Counsel often also express this exclusion regarding their opinion on documentary stamp tax and intangible tax using the following recommended language:

[Except for our opinion on Mortgage Taxes], we exclude from this opinion letter any opinion as to the applicability or effect of any federal and state taxes, including income taxes, sales taxes and franchise fees.

E. Tax Parcels

Because title insurance endorsements concerning tax lots are not available in Florida, an Opinion Recipient may request the Opining Counsel to opine that the tax parcel number or folio number assigned to the mortgaged property: (i) includes all of the intended parcels, and (ii) excludes any other parcels.

Because certain estates in real property are not separately assessed for ad valorem taxes in Florida (e.g., easements, leaseholds, etc.), the sample opinion language set forth below pertains only to fee simple interests in order to avoid inadvertently opining with respect to other real estate interests that might be part of the mortgaged property but that would be included in the tax parcel numbers of their respective servient estates. In addition, the sample opinion language should not be used in a real estate secured transaction that involves a so-called "split" or "cut-out" parcel, and the Opinion Recipient should be advised that a separate tax folio number or parcel number can be obtained for the mortgaged property by application to the county property appraiser.

The recommended form of opinion is as follows:

The real estate tax parcel number(s) or folio number(s) set forth in [the Mortgage, or other Transaction Document that specifies the number(s)] for the [Real Property] include(s) all of the Client's fee simple interest in the [Real Property] and do(es) not include any fee simple interests other than the [Real Property].

The due diligence necessary for a tax parcel opinion is straightforward. The Opining Counsel should first obtain a copy of the legal description assigned by the county property appraiser to the particular tax parcel or folio number, and then compare it to the legal description being used in the real estate secured transaction. If the legal description is simple enough (e.g., whole lots in a subdivision plat, or a government survey description),

then the comparison may be within the competence of the Opining Counsel and may not require the assistance of a professional land surveyor. On the other hand, if the legal descriptions from the various sources differ and Opining Counsel is unable to reconcile the differences, Opining Counsel should ask a professional land surveyor to compare the county property appraiser's description against the mortgage description and to certify that the two descriptions are the same real property.

The legal description appearing on the Client's ad valorem tax bill is usually abbreviated, may be incomplete, and should not be relied on for purposes of a tax parcel opinion. In many Florida counties, the county property appraiser maintains an on-line service from which the appraiser's full legal description can be obtained, along with the recording information for the vesting instrument used by the appraiser to derive the legal description. However, the on-line services maintained by some county appraisers specifically disclaim the reliability of the information obtained from that source. As a result, if there is any discrepancy between the legal descriptions obtained from the service, the title company, the vesting instrument or the mortgage documents, Opining Counsel should obtain a hard copy of the legal description from the county appraiser to determine the reason for the discrepancy. For example, if a portion of the property has recently been taken for a public right-of-way, or if portions of a parent tract have recently been cut out and sold to others, then the vesting instrument and/or the county appraiser's description might still reflect a larger tract than that being mortgaged in the real estate secured transaction.

F. Zoning and Land Use

It is not uncommon for an Opinion Recipient to request an opinion from Opining Counsel as to the zoning and land use classifications of the real property and the status of any required land use or development certificates or permits (such as certificates of occupancy or subdivision plat approvals or requirements). As a general matter, this opinion should be limited to the existing zoning and land use classifications and should be based upon a letter or certificate issued by the appropriate local government official. The letter or certificate will either be binding on the governmental body issuing the letter or certificate or will be non-binding. Usually however, such letters or certificates are non-binding, and the opinion should specifically indicate whether the letter or certificate is binding or non-binding.

The recommended opinion language is as follows:

The land use classification of the [Real Property] as presently set forth in the comprehensive plan of _____ is _____. The present zoning classification of the [Real Property] is _____ under the applicable zoning ordinances of _____. The uses presently allowed under such classifications include [insert present or proposed use of the Real Property]. In rendering these opinions, we have relied solely upon our review of a [non-binding/binding] [letter/certificate] issued by _____, dated _____, a copy of which is attached hereto.

Opinions respecting land use, zoning and permitting are based upon complex code, regulation and ordinance requirements and their interpretation. Such opinions do not lend themselves to statements of factual and legal components. Therefore, Opining Counsel, when asked for such an opinion, should create specific questions to be directed to the governmental official that respond to the request of the Opinion Recipient. It is recommended that Opining Counsel's letter to the governmental official include (at a minimum) the following: (i) the legal description of the real property, (ii) the name and address of the current owner, (iii) a request for the current land use and zoning designation of the real property, (iv) a request for a copy of the land use and zoning ordinances affecting the real property, (v) a statement, with particularity, of the current and continuing use or the intended use of the real property, (vi) whether the land use designation and zoning classification currently on the real property are compatible under the existing ordinances, (vii) whether the current and continuing use or the

intended use of the real property is compatible with the current land use and zoning codes, (viii) whether there is any special exception or variance attached to the real property, (ix) whether there exist any code violations attached to the real property, and (x) whether there are any pending changes to the land use and zoning code which would affect the current use and continuing use or the intended use of the real property. This list is not exhaustive and should be tailored to the exact criteria required under the circumstances of the opinion.

Where an opinion is requested with respect to the required permits associated with the use of the real property, obtaining a certificate of an engineer or other professional to support the opinion will generally be appropriate.

G. Environmental Opinions

Modern lending practice and regulation and the practice in the representation of a purchaser of real estate require that the Opinion Recipient obtain confirmation that the real property is not contaminated with environmentally hazardous substances and that otherwise the real property is in compliance with applicable environmental laws. The Opinion Recipient should obtain and rely upon the report of a Phase I and/or Phase II environmental audit or investigation of the real property prepared by an environmental consultant or engineer. Typically, it is beyond the scope of expertise of Opining Counsel to comment in an opinion letter on the findings and conclusions of an environmental professional. Therefore, the Committees believe that it is inappropriate for an Opinion Recipient to request an opinion from a Florida Opining Counsel regarding environmental matters.

The Opinion Recipient might also require evidence that all necessary permits and approvals from environmental regulatory agencies (for example, the Environmental Protection Agency and Florida Department of Environmental Protection) have been or will be issued. The Opinion Recipient should rely solely upon a certificate from the consultant or engineer that obtained or will obtain the permits, which certificate should include a list of all required permits and the status of each permit.

Florida is a state where an “environmental endorsement” (ALTA 8.1) is available for both residential and commercial property for mortgagee policies. The endorsement insures the insured against loss or damage sustained by reason of the lack of priority of the lien of the insured mortgage over:

- (i) any environmental protection lien which, at date of the policy, is recorded in those records established under state statutes at the date of the policy for the purpose of imparting constructive notice of matters relating to real property to purchasers for value and without knowledge, or filed in the records of the clerk of the United States District Court for the District in which the real property is located, except as set forth, if at all, in Schedule B (the schedule of exceptions) of the policy; or
- (ii) any environmental protection lien provided for by any state statute in effect at the date of the policy, except environmental protection liens provided for by the following state statute(s): (excluded statutes are inserted here)

Unless expressly set forth in the opinion letter that the opinion covers such laws, rules and regulations, under Florida customary practice federal and state environmental laws, rules and regulations are implicitly excluded from the scope of an opinion letter of Florida counsel. See “Common Elements of Opinions – Limitations to Laws of Specific Jurisdictions or to Substantive Areas of Law; Excluded Areas of Law.”

FLORIDA USURY LAW

A. Overview of Florida Usury Law

In general, “usury” is the charging or collecting of interest by a lender at a rate exceeding that allowed by applicable law. Section 687.02, Florida Statutes, provides that all contracts for the payment of interest upon any loan in excess of 18% per annum, simple interest, are usurious; however, if the loan exceeds \$500,000, then the maximum lawful rate is 25% per annum, simple interest, as described in Section 687.071, Florida Statutes. Section 687.03, Florida Statutes, states that the reserving, charging, or taking of interest above these applicable rates by a lender constitutes usury and is unlawful. The penalty for willful violation of Section 687.03, Florida Statutes, as stated in Section 687.04, Florida Statutes, is forfeiture of the entire interest payable under the loan, and if interest has actually been taken, reserved, or paid, the lender must forfeit to the party from whom the interest has been taken, reserved, or paid, double such amount of interest, unless: (1) the taker of such interest is a bona fide endorsee or transferee of negotiable paper on which the usurious nature of the interest is not apparent on its face; or (2) prior to the institution of an action for usury by a borrower, the lender notifies the borrower of the usurious nature of the loan and refunds the full amount of any overcharge taken, plus interest on such overcharge at the maximum allowable rate. In addition, a loan providing for an interest rate of greater than 25% per annum, simple interest, unless such interest is otherwise allowable by law, is deemed to be criminally usurious under Section 687.071, Florida Statutes, and the penalties for willfully and knowingly committing criminal usury include prescribed criminal penalties and the forfeiture of both the entire principal and accrued interest of the loan. Unlike the laws in certain other states (such as New York), the Florida usury statutes do not contain exemptions for corporate borrowers or commercial transactions.

Florida courts have established four elements that are necessary to substantiate a claim of usury in a transaction. The party seeking to establish usury must prove: (1) a loan, either express or implied; (2) an understanding between the lender and the borrower that the money must be repaid; (3) a greater rate of interest than is allowed by law; and (4) corrupt intent on the part of the lender to take more than the legal rate of interest for the use of the money loaned. See Dixon v. Sharp, 276 So.2d 817, 819 (Fla. 1973).

A transaction subject to usury need not always be structured in the form of a loan. It can take other forms as well. The Florida usury statutes specifically cover loans, advances of money, lines of credit, forbearances to enforce the collection of debt, and other obligations to pay interest. In determining whether a transaction involves an obligation to pay interest within the purview of the usury statutes, courts will look to the substance of a transaction, including the intent and understanding of the parties, rather than its form. See Oregrund Ltd. Partnership v. Sheive, 873 So.2d 451 (Fla. 5th DCA 2004). In Oregrund, the court found that a transaction structured as a sale of real property coupled with an option to repurchase in the future at a greatly inflated price was usurious. Other types of transactions that might, depending on their terms, be subject to the usury statutes include purchases of chattel paper, leases of real or personal property, time-price sales, and equity investments or joint ventures.

With regard to the “corrupt intent” requirement of usury, the Florida Supreme Court stated in the Dixon case that to work a forfeiture under the statute, the lender must knowingly and willfully charge more than the amount of interest allowed. Dixon, 276 So.2d at 819. “[U]sury is largely a matter of intent, and is not fully determined by the fact that the lender actually receives more than the law permits, but is determined by existence of a corrupt purpose in the lender’s mind to get more than legal interest for the money lent.” Id. Moreover, “the question of intent is to be gathered from the circumstances surrounding the entire transaction.” Id. The Court added, “If a mere mathematical computation is determinative of intent then the words “intent” and “willfully and knowingly” have no force or effect and might just as well be deleted from the statute.”

The usurious nature of a contract is determined at the date of its inception. See Coral Gables First National Bank vs. Constructors of Florida, Inc., 119 So.2d 741 (Fla. 3rd DCA 1960). The court stated that “[T]he general rule followed in this state is that the usurious character of a contract must be determined as of the date of

its inception, and if usurious at that time, no subsequent transactions will purge it.” Id at 746. The court went on to state that “When such contracts are renewed by a new or substituted contract, usury follows and becomes part of the later contract, making it vulnerable in like manner to the original contract.” However, the court stated that, if a usurious contract is abandoned and a new one is entered into “free from the vice of the old,” the usurious character of the original contract will not follow into the new contract.

Traditional usury computations consist of first determining what constitutes “interest” in the transaction, then comparing the interest taken or charged to the “principal” in the transaction, and finally “annualizing” the calculation to derive the stated and effective rates of interest, which are then compared to the requirements of the usury statutes. Under Section 687.03(3), Florida Statutes, calculations of usury should be determined upon the assumption that the debts will be paid according to their agreed-upon terms, whether or not the loans are prepaid or collected by court action prior to maturity.

“Interest” is the compensation paid by the borrower to or for the benefit of the lender for the use of money lent by the lender, and may include either money or other tangible or intangible property. However, compensation for the use of money lent need not necessarily be labeled “interest” under the loan documents for it to be relevant for usury analysis. Loan fees, commissions, discounts or other fees that are actually concealed compensation to the lender for the use of the funds, rather than payment for legitimate services rendered or actual expenses incurred, may constitute interest for usury calculation purposes. See, e.g., Barnett Bank of West Orlando v. Abramowitz, 419 So.2d 627 (Fla. 1982) and North American Mortgage Investors v. Cape San Blas Joint Venture, 378 So.2d 287 (Fla. 1979).

In addition, items such as stock options or warrants, additional real or personal property, partnership interests, equity interests in projects, and the like taken by a lender in connection with a loan, absent statutory exemption, could be deemed to be additional interest. See, for example, Jersey Palm-Gross v. Paper, 658 So.2d 531 (Fla. 1995), where the lender required a 15% equity interest in the borrower’s investment partnership as additional compensation for a loan in the amount of \$200,000. However, for loans that exceed \$500,000, the usury statutes at Section 687.03(4), Florida Statutes, specifically exempt from interest the value of property charged, reserved or taken as an advance or forbearance, the value of which “substantially depends on the success of the venture in which are used the proceeds of that loan” (for example, an equity participation or “kicker” in a commercial mortgage loan). An example of the application of this exemption can be found in Bailey v. Harrington, 462 So.2d 861 (Fla. 3rd DCA 1985), which involved a profit participation provision that entitled the lender to share in 43% of the profits from the construction project that the loan financed, but which would provide no return at all to the lender if the project realized no profits. In that case the profit participation was found to be subject to the statutory exemption and not deemed to be interest. The statutory exemption did not protect the transaction in the Jersey Palm-Gross case from a usury finding because in that case the Court found that the value of the partnership interest was quantifiable at closing, and was not merely a speculative hope for profit.

Certain legitimate expenses incurred by a lender in processing a loan may be charged to a borrower and reimbursed to the lender without being deemed to be interest for the purpose of making the usury computation. Under applicable case law, the amounts to cover expenses such as attorneys’ fees, title insurance premiums, taxes, appraisal fees, and other costs of the transaction are not deemed to be interest for purposes of the usury calculation. See, e.g., Mindlin v. Davis, 74 So.2d 789 (Fla. 1954). Similarly, if a “loan commitment fee” represents consideration for the right to secure a loan by the prospective borrower rather than additional compensation for use of the funds (albeit sometimes a fine distinction), it will not be deemed to be interest for purposes of the usury analysis. See St. Petersburg Bank and Trust Co. v. Hamm, 414 So.2d 1071 (Fla. 1982).

“Principal” for purposes of the usury computations can mean either of two things: (i) under Section 687.03(1), Florida Statutes, the amount to use in the computations is “the actual principal sum received;” and (ii) under Section 687.03(3), Florida Statutes, applicable if interest has been taken in advance (which interest is deemed to be “spread” over the stated term of the loan), the amount of principal to use in the computations is the “stated amount of the loan.” Under a Section 687.03(1) analysis, the actual principal sum received could be the amount of money a lender actually delivers to a borrower at the time of a loan closing, Wilson v. Connor, 142 So. 606 (Fla. 1932), but it should also take into account amounts paid by the lender for the direct or indirect

benefit of the borrower. Rebman v. Flagship First National Bank of Highlands County, 472 So.2d 1360 (Fla. 2nd DCA 1985). Elements of interest taken in advance, such as commitment fees, were held in earlier cases to reduce principal for purposes of the usury calculations because they effectively reduced the amount of the loan available to the borrower, but do not now reduce principal because of the applicability of Section 687.03(3), Florida Statutes. Nevertheless, the concept of “actual principal sum received” may remain viable in circumstances where interest is not required to be spread. If, for example, a compensating balance or interest reserve were required by a lender in connection with a loan rather than being permitted at the option of the borrower, that balance or reserve could reduce principal for usury calculations. See discussion in Rebman, supra. In circumstances governed by Section 687.03(3), Florida Statutes, however, where interest is “spread,” the statute requires the amount of principal used in the calculations to be the “stated amount of the loan,” contrary to prior case law. The Court in St. Petersburg Bank and Trust Co. v. Hamm, supra, held that the language of Section 687.03(3), Florida Statutes, was not ambiguous, its plain meaning was clear, and that the “stated amount of the loan” should not be interpreted to mean the “actual principal sum received.” The Court held that an initial loan charge paid at the outset of the loan did not reduce principal for the purposes of the usury calculations.

It is generally recognized that the “spreading” calculation methods of Section 687.03(3), Florida Statutes, apply when a loan involves interest taken in advance or as a forbearance. It is not clear from the statutory language whether such calculation methods apply as well to interest taken at other times, and not just at the initiation of the loan or forbearance period. The language is somewhat ambiguous, and reads “any payment or property charged, reserved, or taken as an advance or forbearance, which is in the nature of, and taken into account in the calculation of, interest” must be spread over the term of the loan. It is not clear whether the terms “charged” or “reserved” are linked to the phrase, “as an advance or forbearance,” or whether only the term “taken” is supposed to be linked to the phrase “as an advance or forbearance.” Because the subsequent language in the subsection regarding calculation methods consistently refers to “advances” and “forbearances” only, many believe that all the terms should be considered linked to the phrase “as an advance or forbearance.” Support for this interpretation can be found in the discussion in Sailboat Apartment Corp. v. Chase Manhattan Mortgage and Realty Trust, 363 So.2d 564 (Fla. 3rd DCA 1978), which appears to conclude that only advances and forbearances are meant to be covered by the statute.

Under Section 687.03(3), Florida Statutes, all sums of interest that are required to be spread are to be valued as of the date received and then spread over the stated term of the loan for the purpose of determining the effective rate of interest. The spreading should be calculated by first computing the advance or forbearance as a percentage of the total stated amount of the loan and then dividing such amount by the number of years, or fractions thereof, of the loan according to its stated maturity date, without regard to early maturity in the event of default. The resulting annual percentage rate is then to be added to the stated annual percentage rate of interest on the loan to produce the effective rate of interest for the usury calculations.

An interesting usury analysis can be found in the recent case of Velletri v. Dixon, 44 So.3d 187 (Fla. 2nd DCA 2010). Although the Committees have serious reservations with respect to the correctness of the Velletri court’s determination as to what amounts constitute “interest” for purposes of the usury analysis under the particular facts and circumstances, the case may be instructive because it contains a detailed analysis (including the detailed mathematical calculations) as to why, under the facts presented in that case, the interest rate charged was determined by the court to be criminally usurious.

Although it is common for a so-called “usury savings clause” to be included in most promissory notes and other commercial loan documents, the Florida Supreme Court has held that such clauses are not a sure cure for usury in a transaction. Because usury is largely a matter of intent, determined by the existence of a corrupt purpose in the lender’s mind to get more than legal interest for the money loaned, a savings clause is merely one factor to be considered in the overall determination of whether the lender intended to charge a usurious interest rate. See Jersey Palm-Gross, supra. Thus, if there is a finding of intent to take usurious interest based on the facts of a given case, the savings clause cannot be counted upon as a panacea that will purge usury from a transaction and protect the lender from forfeiture of interest or other penalties.

Exemptions from the usury limitations exist under the Florida usury statutes themselves, as well as under other Florida and federal statutes. As noted above, Section 687.03(3), Florida Statutes, contains an exemption for equity

kickers for loans in excess of \$500,000. Further, the “parity statute,” Section 687.12, Florida Statutes, permits certain types of lenders that are otherwise authorized to make particular kinds of loans to charge interest at rates permitted to these types of lenders on such loans. Additionally, Section 655.56(1), Florida Statutes, exempts from the Florida usury laws any interest, premiums or fines paid to a financial institution on a loan that is secured by a first lien on real property or on savings accounts (to the extent of the withdrawal value thereof). Also, Section 658.491, Florida Statutes, permits banks making collateralized commercial loans secured by accounts, contract rights, or other receivables to charge and collect audit charges that are not subject to the Florida usury statutes. Finally, Section 658.49, Florida Statutes, authorizes banks to make certain additional charges not subject to the Florida usury laws for loans not exceeding \$50,000 and Sections 665.074 and 667.011, Florida Statutes, exempt from the Florida usury laws all reasonable expenses incurred by Florida savings associations and Florida savings banks in connection with the making of real estate loans, and authorizes the savings associations and banks to charge lump sum “reasonable charges,” part or all of which can be retained by the associations and banks.

Alternate interest rate structures are also provided for lenders licensed under the Florida Consumer Finance Act (at Section 516.001, F.S. et seq.), the Motor Vehicle Sales Finance Act (at Section 520.01, F.S. et seq.), the Retail Installment Sales Act (at Section 520.30 F.S. et seq.), the Home Improvement Sales and Finance Act (at Section 520.60 F.S. et seq.), and the Florida Pawnbroking Act at Section 539.001, F.S. et seq.). Additionally, certain federal laws dealing with interest rates preempt Florida usury laws in some circumstances, including, for example, the National Bank Act (12 U.S.C. §85) and the Depository Institutions Deregulation and Monetary Control Act of 1980 (Pub. L. No. 96-221, 94 Stat. 132).

B. Opinions of Florida Counsel Relating To Usury

In a transaction involving the contracting of a loan between a borrower and a lender, an opinion of Florida Opining Counsel that the Transaction Documents creating the loan are enforceable obligations of the borrower under Florida law includes, by implication, an opinion that the loan is not usurious under Florida law, unless usury law is expressly excluded from the scope of such opinion in the opinion letter. Similarly, if a Florida Opining Counsel renders a “no violation of Florida laws” opinion on a loan transaction, such opinion implicitly includes an opinion that the loan is not usurious under Florida law, unless usury law is expressly excluded from the scope of such opinion in the opinion letter.

If Opining Counsel intends to cover usury law within the scope of the remedies opinion or the “no violation of Florida laws” opinion, and the opinion letter does not expressly include the form of usury opinion recommended in the box below (in which case usury law will be covered only to the extent of the specific opinion regarding usury) or an express exclusion of usury law from the scope of the opinion letter (in which case the remedies opinion and the “no violation of Florida laws” opinion will be deemed not to cover usury law), Opining Counsel should make the complete analysis of the Transaction and the Transaction Documents, including the computation of the interest, principal, and components of the annual interest rate with respect to the Transaction that are required in order to determine whether the particular loan transaction is usurious under Florida law (in the manner described below). However, if Opining Counsel does not intend to cover usury law within the scope of the remedies opinion or the “no violation of Florida laws” opinion, Opining Counsel should include an express statement excluding usury law from the scope of the opinions in the opinion letter.

In addition, it is not unusual for an Opinion Recipient to request a specific opinion from a Florida Opining Counsel that a loan transaction is not usurious under Florida law, especially if the Opinion Recipient is located outside of Florida, because the determination of whether usury exists in a transaction can be complex and because the Opinion Recipient may face severe penalties, civil and criminal, if the Transaction Documents violate Florida usury laws. If such an opinion is requested, the following standard formulation of the usury opinion, which is much more limited, is most common and is thus recommended:

The [Transaction Documents] do not and will not violate applicable Florida usury laws provided that the [Opinion Recipient] has not and does not reserve, charge, take, or receive, directly or indirectly, at any time, interest or other sums deemed to be in the nature of interest (however labeled) in an amount exceeding the equivalent of the rate of [eighteen/twenty-five percent (18/25%)] per annum, simple interest, calculated on the basis of a year of 365 days (or 366 days, as applicable) and the actual number of days elapsed.

This recommended opinion language provides guidance to the Opinion Recipient as to the maximum amount of annual interest that can be paid on a loan transaction under Florida usury law. However, the recommended opinion effectively places the burden on the Opinion Recipient to assess whether the particular loan transaction is or is not usurious. Often, an Opinion Recipient will be comfortable accepting this form of usury opinion because the Opinion Recipient's counsel is already advising the Opinion Recipient regarding this issue.

Notwithstanding the foregoing, in the view of the Committees, Florida Opining Counsel falls outside Florida customary practice if such Opining Counsel renders the recommended form of opinion in circumstances where the Transaction Documents on their face evidence a usury law violation under Florida law.

If Opining Counsel renders the recommended form of usury opinion, then under Florida customary practice such Opining Counsel's remedies opinion and "no violation of Florida laws" opinion are deemed implicitly not to cover Florida usury law, and the usury law opinion is considered given only to the extent covered in the separately presented usury opinion language. Although some Opining Counsel expressly include this qualification and limitation in the opinion letter, such express qualification and limitation is not necessary under the circumstances.

However, in some cases an Opinion Recipient may request that Florida Opining Counsel provide an opinion that under the particular facts and circumstances of a loan transaction, the loan is not usurious under Florida law. Although such opinion requests are discouraged, and an affirmative opinion that the particular facts and circumstances of a loan transaction are not usurious is rendered far less often by Florida counsel in today's modern opinions world than it was in the past, when Florida Opining Counsel agrees to render an opinion that the particular facts and circumstance of a loan transaction are not usurious, the following opinion language is recommended:

The interest rate applicable to the obligations of the Borrower under the Transaction Documents does not violate the usury laws of the State of Florida. This opinion assumes that the Opinion Recipient has not and will not charge or receive, directly or indirectly, any fees, charges, benefits, or other compensation in connection with such obligations, except as expressly set forth in the Transaction Documents.

In a case where an affirmative opinion is to be rendered that the particular facts and circumstances of a loan transaction are not usurious, Opining Counsel should conduct a careful and thorough review and analysis of the Transaction, the Transaction Documents, the nature of the Opinion Recipient, and applicable Florida usury laws (as discussed above). This includes making a calculation of the applicable annual interest rate under Florida law (which is required to determine whether or not such rate is usurious). Although lawyers are generally not required to make mathematical computations in rendering third-party legal opinions, in the context of delivering such a usury opinion such computations are necessary.

Under Florida customary practice, an affirmative usury opinion with respect to the particular facts and circumstances of a loan transaction addresses only the compensation expressly described in the Transaction Documents and not other amounts that might be deemed to be interest in connection with the Transaction. In that regard and as a matter of Florida customary practice, Opining Counsel may assume, without explicitly stating, that the Opinion Recipient will not receive, directly or indirectly, any fees, charges, benefits or other compensation except as set forth in the Transaction Documents. However, Opining Counsel who render such usury opinions often make this assumption explicit in their opinion letters, and the recommended form of opinion language set forth above expressly includes this assumption.

Further, in rendering an affirmative opinion that the particular facts and circumstances of a loan transaction are not usurious, Opining Counsel should be mindful of the components that need to be considered in determining the annual interest rate. For example, the Transaction Documents may require payment of certain amounts (including prepayment penalties, late fees, default interest and LIBOR breakage). Arguably, these amounts are excluded from the computation of interest rate because at the time the loan is made, such amounts are not expected to be triggered and become payable. However, that may not always be the case under the particular facts and circumstances of the Transaction. In such cases, Opining Counsel may need to take into account the potential that these amounts will become payable in determining whether to render an affirmative usury opinion with respect to the particular facts and circumstances of the Transaction.

Opining Counsel should also carefully consider the impact on this expanded form of usury opinion in situations where assumptions as to valuation with respect to non-monetary compensation in the nature of interest would be necessary in order to assess whether a particular loan transaction is usurious (such as where a lender receives an equity interest in the borrower). Further, to the extent that the Transaction Documents require payment of monetary compensation that is not expressly deemed interest, but may otherwise be deemed in the nature of interest, it may be appropriate in giving this expanded form of usury opinion to expressly include in the opinion letter the factual assumptions that have been relied upon by Opining Counsel in connection with reaching a legal conclusion on this issue.

Although rendering an opinion that the particular facts and circumstances of a loan transaction are not usurious under Florida law is discouraged by this Report, rendering such an opinion does not, in and of itself, violate Florida customary practice. Further, although the Committees recommend that Opining Counsel consider expressly including in the opinion letter the assumptions made by Opining Counsel to reach Opining Counsel's conclusions on this legal issue (such as the assumed value of certain non-monetary compensation for purposes of making the calculation of the annual interest rate being charged on the loan), it does not, in and of itself, violate Florida customary practice for an Opining Counsel to elect not to include such assumptions in Opining Counsel's opinion letter.

CHOICE OF LAW

A. Overview

In complex commercial transactions, particularly those involving parties from multiple states, the Transaction Documents sometimes expressly select the law of a jurisdiction other than Florida (a “**Selected Jurisdiction**”) as the governing law with respect to the interpretation of such documents. In such transactions, an Opinion Recipient will sometimes request an opinion that the choice of law provision contained in the Transaction Documents will be given effect under Florida law and that a Florida court will apply the law of the Selected Jurisdiction in connection with the interpretation of the Transaction Documents.

Various sources provide guidance relative to whether the choice of law provision in an agreement will be given effect. As a general matter in the United States, the Restatement (Second) of Conflict of Laws (1971) is often looked to as important guidance on this issue. Indeed, consistent with the Restatement, courts around the country generally try to follow the parties’ intent with respect to the selection of the governing law of an agreement. Although Florida courts have not expressly adopted the Restatement, many Florida court decisions on this issue include language that parallels, at least in part, the Restatement’s position on when the choice of law provision in an agreement will be given effect.

Section 187 of the Restatement (Second) of Conflict of Laws (1971) provides that a choice of law provision in an agreement will be upheld unless either: (a) there is no “substantial relationship” between the parties or the transaction and the chosen state and there is no other “reasonable basis” for the choice of the laws of a particular state, or (b) application of the law of the chosen state would be “contrary to a fundamental policy of a state: (i) which has a materially greater interest than the chosen state in the determination of the particular issue” and (ii) which, under the rule of Section 188 of the Restatement (Second) of Conflict of Laws (1971), would be the state of the applicable law in the absence of an effective choice of law by the parties.”

Similarly, the UCC, in Section 1-105 (Section 671.105 of the Florida UCC), expressly addresses the effectiveness of choice of law provisions in transactions covered by the UCC. Section 1-105 of the UCC provides that the parties may choose the law of a state that “bears a reasonable relation” to the transaction, unless otherwise required by specified provisions of the UCC (such as the provisions of Article 9 that specify choice of law for purposes of perfection, the effect of perfection or nonperfection, and priority of security interests and agricultural liens).

As more fully described below, prior to 2000 Florida courts generally followed an analysis similar to that described in the Restatement when dealing with the choice of law issue, and required a showing of a normal relation and/or a reasonable relation between the parties and/or the transaction, on the one hand, and the state whose law has been selected to govern the agreement, on the other hand, in order to uphold the parties’ selection of a governing law for the transaction documents. See Continental Mortgage Investors v. Sailboat Key, Inc., 395 So.2d 507 (Fla. 1981) and Morgan Walton Properties, Inc. v. International City Bank and Trust Company, 404 So.2d 1059 (Fla 1981).

However, in 2000, the Florida Supreme Court revisited the choice of law issue in Mazzoni Farms v. E.I. DuPont De Nemours and Company, 761 So.2d 306 (Florida 2000). In Mazzoni, the Florida Supreme Court ruled that Florida courts will enforce a choice of law provision in an agreement unless the chosen forum contravenes strong public policy. However, although in the Mazzoni case substantial contacts clearly existed between the parties and/or the transaction, on the one hand, and the jurisdiction whose law was selected to govern the transaction documents, on the other hand, unlike previous Florida Supreme Court cases on this issue the court did not discuss in its opinion the question of whether or not contacts between the parties and/or the transaction, on the one hand, and the state whose law was selected to govern the transaction documents, on the other hand, are still required in order to uphold the governing law selected by the parties. Later state and federal court cases interpreting Florida law on this issue have further created confusion regarding whether any such contacts are still required before courts (applying Florida law) will uphold the parties’ selection of a governing law in an agreement.

As a result, the extent to which such contacts must exist in order for Florida courts to enforce the parties selection of the governing law set forth in particular transaction documents has become uncertain.

Nevertheless, even after the Mazzoni decision, it remains clear that the parties' choice of a governing law for an agreement will be ineffective and unenforceable in Florida to the extent that applying such chosen law will violate an overriding public policy of the State of Florida. See Lloyd v. Cooper Corp., 134 So. 562 (Fla. 1931); Harris v. Gonzalez, 789 So.2d 405 (Fla. 4th DCA 2001). The "public policy doctrine" is subject to some limitations. It applies only when contract rights contravene a strong Florida public policy, which must be more than a mere difference between the law of the Selected Jurisdiction and the law of the State of Florida. Further, the public policy must be sufficiently important to outweigh the policy protecting freedom of contract.

One example of a strong public policy in Florida, the violation of which will cause a choice of law provision to be unenforceable, is the policy against enforcement of gambling debts. Even if the gambling obligation would be valid and enforceable in the state where it was created, and even if, based on agreement of the parties or the relationship of the underlying transaction to the gambling state, Florida conflict of law rules would result in application of the law of the gambling state, the gambling obligations will not be enforceable in Florida because it would be against the established public policy of Florida. See In re Hionas, 361 B.R. 269 (Bankr. S.D. Fla. 2006); In re Titan Cruise Lines, 353 B.R. 919 (Bankr. M.D. Fla. 2006). It should be noted that the Hionas case is contrary to the Restatement (Second) of Conflict of Laws (1971), in that the Hionas court ruled that the public policy exception should apply even though Florida would not be the state of applicable law in the absence of a choice of law provision.

Although somewhat surprising in its holding, another example where a court determined that a sufficiently strong public policy existed to ignore the choice of law provision contained in an agreement is Feeney v. Dell, Inc., 908 N.E.2d 753 (Mass. 2009). In Feeney, the Massachusetts Supreme Court held unenforceable a choice of law provision in a contract that selected Texas as the governing law of the contract and included an arbitration clause that prohibited class actions. In making its decision, the court held that the interests of Texas (minimizing legal expenses of its companies) were outweighed by the materially greater interest of Massachusetts (affording its consumers a judicial remedy through class actions and deterring wrongdoing). The court therefore determined that the overriding public policy of Massachusetts required the application of Massachusetts law to the interpretation of the contract. While not a Florida case, the Feeney decision illustrates how far a court might go in finding there to be a strong public policy that overrides the parties' selection of a governing law for an agreement even though lawyers evaluating the issue prior to the Feeney decision might not have considered such issue to present a sufficiently strong public policy to override the parties' choice of law selection in their agreement.

However, usury, a topic which some states view as an issue of strong public interest, has been held by Florida's Supreme Court not to be an issue as to which Florida's public policy is so strong that it would outweigh the parties' choice of the law of a Selected Jurisdiction. In Continental Mortgage Investors v. Sailboat Key, Inc., 395 So.2d 507 (Fla. 1981), a case that involved a choice of law provision in the context of a usury dispute, the Florida Supreme Court held that a choice of law regarding usury made by the parties will be honored where the state whose law is chosen has a "normal relation" to the transaction. The court followed the "rule of validation," which provides that, if a contract is made and to be performed in different states and the contract is usurious under the law of one state but not the other, the court will assume that the parties intended that the contract be valid and the law of the place which makes the contract valid will govern. The court also cited to Section 203 (Comment b) of the Restatement (Second) of Conflict of Laws (1971) to support the rule of validation in a usury setting. Comment b provides that "the courts deem it more important to sustain the validity of a contract, and thus to protect the expectations of the parties, than to apply the usury law of any particular state," but the state still must have a normal relationship to the transaction.

The Florida Supreme Court followed its holding in the Sailboat Key case in Morgan Walton Properties, Inc. v. International City Bank & Trust Company, 404 So.2d 1059 (Fla. 1981), holding that Florida courts will honor the express or constructive intention of the parties with respect to choice of law where the transaction has a

“normal and reasonable relation” to the state whose usury laws are selected. However, what constitutes a “normal and reasonable relation” in a particular transaction must be determined based upon the facts present in that transaction.

Almost 20 years later in 2000, the Florida Supreme Court decided the Mazzoni case. In its decision, the court stated that: “[G]enerally, Florida enforces choice-of-law provisions unless the chosen forum contravenes strong public policy.” In that case, the court upheld the choice of law contained in a settlement agreement that included extensive release language. In doing so, the court determined that the release language in that case was not void as against public policy (the plaintiffs claimed that the releases had been fraudulently induced and were therefore void, and that to enforce the choice of law provision would enable the defendant to contract against liability for fraud). The court stated that to find a fundamental policy sufficient to overturn the parties’ choice of law selection, such public policy has to be sufficiently important to outweigh the policy of protecting the freedom to contract.

Although there appeared to be a “normal relation” between the settlement transaction and the law selected to govern in the settlement agreement at issue in the Mazzoni case, and, as support for its position on this issue, the Mazzoni court cites Section 671.105 of the Florida UCC, which requires that the law of the state “bear a reasonable relation” to the transaction, the failure of the court in Mazzoni to present any analysis of the existence of the “normal relation” and/or “reasonable relation” coupled with the court’s express statement as to Florida law might well be read as setting a very low hurdle to cross in determining whether the choice of law provision in a particular agreement will be upheld by Florida courts (or federal courts applying Florida law). In fact, one Florida appellate court recently cited Mazzoni as standing for the proposition that contractual choice of law provisions are “presumptively” valid in Florida. Default Proof Credit Card Systems, Inc. v. Friedland, 992 So.2d 442 (Fla. 3rd DCA 2008). On the other hand, there continue to be cases decided after Mazzoni where courts, interpreting Florida law regarding this issue, have expressly analyzed whether a “normal relationship” was present in reaching a determination as to whether to uphold the parties selection of the governing law of a particular agreement. See, for example, In re Vision Development Group of Broward County, LLC v. TMG Sunrise LLC, 411 B.R. 768 (Bankr. S.D. Fla. 2009) and L’Arbalette, Inc. v. Zaczac, 474 F.Supp.2d 1314 (S.D.Fla. 2007).

It should also be noted, in addition to the specific choice of law section applicable under the Florida UCC (see Section 671.105 of the Florida UCC), that the Florida Statutes expressly address, in a broadly applicable way, choice of law provisions where the Selected Jurisdiction is Florida as opposed to another state. Section 685.101, Florida Statutes. If the transaction involves at least \$250,000, the parties may select Florida as the law to be applied, whether or not the contract bears any relation to Florida, unless the transaction both: (i) bears no substantial or reasonable relation to Florida, *and* (ii) no party is a resident of Florida or is incorporated in Florida or maintains a place of business in Florida. This choice of law statute is not applicable, however, to certain contracts and undertakings enumerated in Section 685.101(2)(b)-(e), Florida Statutes (which includes a cross reference to the specified provisions excluded from the choice of law provisions contained in Section 671.105 of the Florida UCC discussed above).

Another type of contract excluded from Section 685.101, Florida Statutes, by subsection (2)(e) of the statute, is a contract covered or affected by Section 655.55, Florida Statutes. Section 655.55(2), Florida Statutes, validates the parties’ express choice of Florida law to govern any contract relating to an extension of credit made by a Florida branch or office of a “deposit or lending institution” as defined in Section 655.55(3), Florida Statutes, regardless of whether the contract bears any other relationship to the State of Florida and regardless of the citizenship, residence, location or domicile of any other party to the contract. Unlike Section 685.101, Florida Statutes, Section 655.55(2), Florida Statutes, prescribes no minimum transaction amount.

If a choice of law provision in a contract is ineffective due to the lack of a substantial relationship or reasonable basis for the law selected or for public policy reasons, or if the contract lacks a choice of law provision, the court will look to either local conflict of law rules or the provisions of Section 188 of the Restatement (Second) of Conflict of Laws (1971). Section 188 provides a list of factors to apply to determine the

applicable law, including place of contracting, place of negotiation, place of performance, and location of subject matter of the contract. Florida courts typically begin their analysis with the traditional rule of *lex loci contractus* (i.e., the law of the place where the contract is made), generally holding that the nature, validity and interpretation of contracts are governed by the law of the state or country where the contracts are made or are to be performed. Matters connected with the performance of a contract are regulated by the law of the place where the contract is to be performed. Matters of procedure and remedy in the enforcement of contracts, on the other hand, depend on the forum or the place where the suit is brought. Agreements governing the descent, alienation, transfer or conveyance of real property located in Florida, including the construction, validity and effect of such conveyances, are governed by Florida law (the principle of *lex rei sitae*, or law of the place where the property is located). See Denison v. Denison, 658 So. 2d 581 (Fla. 4th DCA 1995); Kyle v. Kyle, 128 So. 2d 427 (Fla. 2d DCA 1961).

It should go without saying that, in rendering any legal opinion, Opining Counsel must carefully consider the legal issues with respect to the particular opinion to be rendered under the law as it exists as of the date of the opinion letter. See “Common Elements of Opinions-Date.” It further should go without saying that, as the law on the substantive issues discussed in this Report changes, the legal analysis that Opining Counsel must undertake may change. This is particularly so in the context of opining on the enforceability of choice of law provisions, where the applicable law continues to evolve.

B. Opinions of Florida Counsel as to Choice of Law

As noted above, when the governing law selected in Transaction Documents is other than Florida law, an Opinion Recipient may sometimes request an opinion from Florida Opining Counsel as to whether the choice of law selected in the Transaction Documents will be given effect by a Florida court (or by a federal court applying Florida choice of law rules). The law governing a contract includes both the Selected Jurisdiction’s statutory law, as well as the Selected Jurisdiction’s common law.

In light of the fact that Florida law relative to the enforceability of a choice of law provision in an agreement continues to evolve, the Committees recommend that Opining Counsel in Florida take a more conservative approach in giving a choice of law opinion. As a result, the Committees recommend that a choice of law opinion only be given in those situations where: (i) sufficient contacts with the law of the Selected Jurisdiction exist so as to create a normal relation and/or a reasonable relation between the parties or the Transaction, on the one hand, and the Selected Jurisdiction, on the other hand, and (ii) a public policy of the State of Florida would not require that Florida law be controlling as to a particular substantive point. Thus, the Committees recommend that, in giving a choice of law opinion, Opining Counsel should make the necessary investigations in order to determine whether these two requirements are satisfied (or qualify the opinion with respect to these matters).

In determining whether there is a normal relation and/or a reasonable relation between the Transaction and the law of the Selected Jurisdiction, Opining Counsel should consider the nature and amount of contacts between the parties and the Transaction. For example, in connection with a loan to a Florida borrower where the law chosen in the Transaction Documents is the law where the lender’s principal place of business is located, counsel might consider as relevant to this analysis that: (i) the Selected Jurisdiction is the place where the Transaction Documents were negotiated, executed and delivered, (ii) the Selected Jurisdiction is where the proceeds of the loan were disbursed, (iii) the Selected Jurisdiction is where the promissory note and other Transaction Documents will be held following the closing of the Transaction, and (iv) the Selected Jurisdiction is where payments due under the Transaction Documents are to be made. Further, in a merger transaction, the governing law selected might be the law of the state where one of the parties to the merger agreement has its principal place of business or the law of the jurisdiction in which both of the entities that are parties to the Transaction are organized.

In the view of the Committees, an opinion regarding choice of law, if rendered, should always be a reasoned opinion, and this opinion is an exception to the general rule against rendering reasoned opinions. See “Introductory Matters—Reasonableness; Inappropriate Subjects for Opinions.” Some Opining Counsel render

this opinion by stating that it is “more likely than not” that the selection of the law of the Selected Jurisdiction will be given effect. Others opine that the selection of the choice of law set forth in the Transaction Documents “should” be upheld. In either case, the Committees recommend that the opinion provide that it is not free from doubt (or words to similar effect). However, whether a choice of law opinion uses the words “more likely than not” or “should,” the Committees believe that the opinion has the same meaning.

Some Opining Counsel list in the opinion letter the factual assumptions that they rely upon in rendering the choice of law opinion. Others do not. The Committees recommend that the assumptions be expressly stated in the opinion letter, and the recommended form of choice of law opinion includes the assumptions underlying the choice of law opinion.

In that regard, the Committees believe that Opining Counsel should be more cautious if a number of factors are not present. Although, as described above, there is no bright line test, and some Florida lawyers believe that courts will apply the law of the Selected Jurisdiction even in situations where there are very limited contacts (if any) with the Selected Jurisdiction, there is no clear guidance as to how many contacts are required. Opining Counsel should consider whether sufficient contacts exist under the particular facts and circumstances of the Transaction to uphold the selection in the agreement of the law of the Selected Jurisdiction. Consideration should be given to both qualitative and quantitative factors.

Notwithstanding the foregoing, in the view of the Committees a choice of law opinion by a Florida lawyer that is not a reasoned opinion or does not expressly consider the contacts between the parties or the transaction, or the one hand, and the state whose law has been selected to govern the agreement, on the other hand, as described above does not, in and of itself, violate Florida customary practice. Further, in the view of the Committees, the failure of a Florida lawyer to include the assumptions supporting such counsel’s choice of law opinion in the opinion letter does not, in and of itself, violate Florida customary practice.

The recommended form of the choice of law opinion is as follows:

You have requested our opinion as to the effectiveness under Florida law of the choice of law provision contained in the Transaction Documents. The Transaction Documents provide that they shall be governed by the law of the State of _____ (the “Selected Jurisdiction”). In applying Florida conflict of law principles to this issue, Florida courts often look at whether the Transaction has a normal relation and/or a reasonable relation to the jurisdiction whose law has been selected to govern the Transaction Documents. Our opinion is based on the following relationships between the parties and/or the Transaction and the Selected Jurisdiction:

Insert applicable facts that support a normal relation and/or a reasonable relation. Examples of such facts include the following:

- (a) the [Opinion Recipient] has its principal place of business in the Selected Jurisdiction;**
- (b) the terms of the Transaction Documents were negotiated on behalf of the [Opinion Recipient] through meetings in the Selected Jurisdiction and/or through telephone calls by the representatives of the [Opinion Recipient] who were located in the Selected Jurisdiction;**
- (c) the Transaction Documents were delivered at the offices of the [Opinion Recipient] pursuant to the requirements of the Transaction Documents and the closing of the Transaction occurred or was deemed to occur at the offices of the [Opinion Recipient] in the Selected Jurisdiction;**
- (d) the parties freely chose the law of the Selected Jurisdiction as the law governing the Transaction Documents and the parties did not make the selection of the law of the Selected Jurisdiction in order to avoid public policy requirements or to engage in fraud or misleading activities;**

(e) the Transaction Documents were negotiated at arms' length between or among parties represented by counsel;

(f) *[if the Transaction is a loan transaction,]* the proceeds of the loan were deemed by the Transaction Documents to be disbursed to the Client from the Selected Jurisdiction and the payments due under the Transaction Documents are required to be made at the offices of the Opinion Recipient; and

(g) *other facts determined to be relevant to this analysis by Opining Counsel.*

Based on the foregoing assumptions and facts, and although the issue is not free from doubt, it is our opinion that if the matter were presented to a court in Florida having jurisdiction, and assuming the interpretation of the relevant law on a basis consistent with existing authority, it is more likely than not that a Florida court (or a Federal court applying Florida choice of law rules) would conclude as binding the designation of the law of the Selected Jurisdiction as the governing law of the Transaction Documents.

Notwithstanding the foregoing, the court may apply the law of Florida to the Transaction Documents if and to the extent that: (i) the issue involves interest rate limitations or usury, (ii) the court deems the application of the law of the Selected Jurisdiction to be against the public policy of Florida, (iii) the issue involves the creation of a lien against real property located in Florida and remedies in connection therewith, (iv) the issue involves the perfection of security interests in personal property located in Florida, or (v) a provision in the Transaction Documents is deemed to be procedural rather than substantive.

If the Opinion Recipient requests an opinion as to whether the selection of the law of the Selected Jurisdiction will be given effect with respect to the law of the Selected Jurisdiction governing usury, Florida counsel may elect to remove qualification (i) above from the choice of law opinion. If Opining Counsel agrees to remove qualification (i) regarding usury, the Committees recommend that Opining Counsel add the following language to the opinion letter:

With respect to the issue of usury, the dispositive case on this point in the State of Florida is Continental Mortgage Investors v. Sailboat Key, Inc., 395 So. 2d 507 (Fla. 1981). In that case, a Massachusetts business trust entered into a Florida real estate transaction with a Florida corporate borrower. The loan agreement provided that the usury laws of Massachusetts would govern the loan transaction. The lender was situated in Massachusetts, the loan was closed in Massachusetts and the negotiations and place of performance (loan advances and repayments) were in Massachusetts. In a foreclosure situation, the Florida borrower argued that the loan was usurious under Florida law and the choice of law provision designating Massachusetts law in the loan agreement was invalid as against the public policy of the State of Florida. The Supreme Court of Florida held that it was unable to glean any overriding public policy in the State of Florida against usury qua usury in a choice of law situation. The court upheld the choice of law provisions in the loan agreement based on the facts that the foreign jurisdiction had a normal relation with the transaction and that the law of the Commonwealth of Massachusetts would uphold the agreement. It further held that the good faith of the parties is not relevant to a choice of law question in the usury area unless no substantial or normal relation exists between the foreign jurisdiction and the transaction.

Some Opinion Recipients request that qualification (ii), relating to public policy, be excluded from the choice of law opinion. The Committees strongly recommend that Florida counsel not remove the public policy exception from such counsel's choice of law opinion, since the determination as to what is an overriding public policy of Florida is a difficult one that is often not clear to lawyers prior to a court decision on such issue. See, for example, the discussion above regarding the arbitration provisions prohibiting a class action in the Feeney case cited above.

If Opining Counsel agrees to remove the public policy exception from Opining Counsel's choice of law opinion, Opining Counsel has the burden of identifying any issues relating to the Client, the Transaction or the Transaction Documents that raise a sufficiently strong public policy issue that a Florida court might determine that public policy requires the application of Florida law to the Transaction rather than the law of the Selected Jurisdiction.

If Opining Counsel is delivering an "as if" remedies opinion that particular Transaction Documents would be enforceable if such documents were governed by Florida law (notwithstanding the express selection of the law of the Selected Jurisdiction in the Transaction Documents), the Committees recommend that Opining Counsel expressly exclude the choice of law provision contained in the Transaction Documents from the scope of such opinion. Notwithstanding the foregoing, under Florida customary practice such exclusion is implicit whether or not such exclusion is expressly stated in the opinion letter. See "Common Elements of Opinions—Limitations to Laws of Specific Jurisdictions or to Substantive Areas of Law; Excluded Areas of Law."

Under Florida customary practice, the choice of law provision contained in the Transaction Documents relating to the Transaction is considered to be covered by the scope of a remedies opinion with respect to such Transaction Documents, unless choice of law is expressly excluded from the scope of the opinion by express reference in the opinion letter. See "The Remedies Opinion-Analysis of the Foundational Building Block: The Meaning of the Basic Remedies Opinion." However, if a separate opinion regarding choice of law is included in the opinion letter, the scope of the choice of law opinion with respect to such Transaction will be limited to what is set forth in the express choice of law opinion contained in the opinion letter.

SPECIAL ISSUES TO CONSIDER WHEN ACTING AS LOCAL COUNSEL

A. Overview

Florida counsel are often involved in multi-state transactions. In some of these matters, Florida counsel is the primary counsel with respect to the Transaction. In other cases, Florida counsel is acting as “local counsel” regarding the Florida law issues with respect to the Transaction.

This section focuses on certain issues faced by Florida counsel when serving as local counsel in a multi-state Transaction. As local counsel with respect to a Transaction, Florida counsel will generally assist the “primary Transaction counsel” (“PTC”) in dealing with Florida law issues. Generally, a lawyer is requested to provide a local counsel opinion letter on issues relating to the Transaction under the laws of a jurisdiction (in this case, Florida) in which the PTC is not admitted to practice.

Florida local counsel may be hired by either party to a Transaction. In a loan transaction where Florida counsel has been hired to act as local counsel for a borrower, Florida Opining Counsel may be asked to render opinions to the Opinion Recipient lender regarding Florida law issues. Similarly, Florida Opining Counsel hired as local counsel by a lender in connection with a loan transaction may also be asked to provide opinions to the lender on various Florida law issues. In other types of transactions, Florida lawyers acting as local counsel on either side of a Transaction may be asked to render an opinion as to Florida law issues (such as in a merger or in connection with a sale of securities) to the other party to the Transaction.

One of the issues that must be considered by Florida counsel when acting as local counsel is to whom Opining Counsel’s opinion is to be addressed. In some cases, a local counsel opinion will be addressed directly to the Opinion Recipient. In other cases, a local counsel’s opinion will be addressed to the PTC, who will rely upon that opinion in connection with delivering its own opinion to the Opinion Recipient (which covers the same issues as the opinion of Florida local counsel). Although either method is acceptable, the latter practice is discouraged. See “Common Elements of Opinions-Opinions of Local or Specialist Counsel.”

Some local counsel address the opinion letter to both the Opinion Recipient and the PTC. Others address the opinion letter to either the Opinion Recipient or the PTC, but not to both. The Committees believe that the PTC should not request that local counsel’s opinion letter be addressed to the PTC unless the PTC is relying on local counsel’s opinion letter in delivering its own opinion letter to the Opinion Recipient.

In many cases, local counsel is asked to render an opinion letter on short notice and with only limited knowledge about the Client or the Transaction. As a result, special rules apply to local counsel opinions:

- Local counsel are generally entitled to limit the documents reviewed and the scope of the diligence performed to a defined and limited set of documents and procedures;
- Local counsel are generally entitled to assume the substance of all of the predicate opinions that are necessary to provide the “Florida specific” opinions (for example, local counsel might assume all of the entity-related “building block” opinions with respect to an out-of-state entity that are predicate opinions to a remedies opinion being rendered by Opining Counsel with respect to Transaction Documents that are governed by Florida law);
- Local counsel opinions generally expressly limit the law covered to only Florida laws, rules and regulations (and do not cover Federal law); and
- Local counsel, who often have little or no contact with the Client, are generally not asked to provide opinions on matters that might otherwise be requested of them if they were acting as the PTC (such as a “no breach of or default under agreements” opinion, a “no violation of judgments, decrees or orders” opinion and a “no litigation” confirmation).

The process of determining which opinions are to be rendered by local counsel and which opinions are to be provided by the PTC is generally left to discussion between the PTC and the local counsel, although in many cases local counsel will also discuss the scope of the local counsel opinion requests directly with counsel for the Opinion Recipient. Requests for local counsel opinions should, to the extent possible, be tailored and limited to Florida law issues that are reasonably related to the Transaction, the Transaction Documents and the Client. The earlier in the Transaction process that local counsel is engaged to assist in the Transaction, the more likely that the process will go smoothly.

Florida counsel who act as local counsel may wish to use such counsel's own form of opinion letter (such as, in the case of a loan transaction, the illustrative form of local counsel opinion letter that accompanies this Report) rather than the form of opinion letter provided by the Opinion Recipient's counsel, particularly when the opinion letter is requested at the last moment. By using such counsel's own form of opinion letter, Florida Opining Counsel can work with a form that already includes all of the assumptions, qualifications and limitations that need to be included in the opinion letter instead of having to add the necessary provisions to the form of opinion letter that has been provided to such counsel by the Opinion Recipient's counsel or by the PTC.

Under the RPC, Florida counsel must obtain Client consent to render an opinion letter. See "Introductory Matters – Ethical and Professional Issues-Client Consent" for further discussion regarding this issue. When issuing a local counsel opinion, Florida local counsel generally interface with the PTC and not the Client. As a result, the Committees believe that, under Florida customary practice, Florida counsel who act as local counsel can assume that the Client has consented to the delivery of the opinion letter from the request of the PTC that counsel deliver the opinion on behalf of the Client (whether or not such consent is expressly obtained in writing).

The Committees believe that opinion letters of Florida counsel who render local counsel opinions regarding matters of Florida law in a multi-state transaction should be interpreted under Florida customary practice. In that regard, Florida Opining Counsel should consider delivering a copy of this Report to an out-of-state Opinion Recipient to make the Opinion Recipient aware of Florida customary practice. See "Common Elements of Opinions-Opinions of Florida Counsel Are To Be Interpreted Under Florida Customary Practice."

Many of the opinions provided by local counsel in Florida are the same opinions that Florida Opining Counsel would provide if it were acting as the PTC. The illustrative form of local counsel opinion letter that accompanies this Report includes many of the opinions that are often requested of Florida counsel who are acting as local counsel in a loan transaction.

What follows is commentary that briefly summarizes the legal opinions that are often sought from Florida local counsel, with a cross reference to the applicable sections of this Report where information about those particular opinions is located.

B. Opinions Regarding Entity Status, Entity Power, Authorization of the Transaction and the Transaction Documents and Execution and Delivery

1. Entities Organized in a Jurisdiction Other than Florida. The Committees recommend that when the entities involved in the Transaction are organized in a jurisdiction other than Florida, an opinion letter of Florida counsel acting as local counsel should expressly assume entity status and organization and entity power of, and authorization of the Transaction and the Transaction Documents and execution and delivery of the Transaction Documents by, all parties to the Transaction, including the Client.

Under these circumstances, the following assumptions should be modified from their usual form to read as follows:

- i. *The legal existence of each party to the Transaction ~~other than the Client~~;*
- ii. *The power of each party to the Transaction, ~~other than the Client~~, to execute, deliver and perform all Transaction Documents executed and delivered and to do each other act done or to be done by such party;*

- iii. *The authorization, execution and delivery by each party, ~~other than the Client,~~ of each Transaction Document executed and delivered or to be executed and delivered by such party;*
- iv. *The validity, binding effect and enforceability as to each party, [other than the Client (**and with respect to the Client only to the extent expressly provided in this opinion letter**)], of each Transaction Document executed and delivered by such party or to be executed and delivered and of each other act to be done by such party; [bracketed language should only be included if a remedies opinion is being rendered];*

See “Common Elements of Opinions—Assumptions.” The illustrative form of local counsel opinion letter that accompanies this Report includes these modifications.

When the Client entities are organized in a state other than Florida, the Opinion Recipient may properly request an opinion from Florida counsel as to whether the Client entity that is organized out-of-state is required to be (or is) authorized to transact business in Florida. See “Authority to Transact Business in Florida—Qualification of a Foreign Entity to Transact Business in Florida.”

2. Florida Entities. Where the entities involved in the Transaction are Florida entities (which may, for example, occur in a multi-state transaction where the Client or one or more subsidiaries or affiliates of the Client are organized under Florida law), Florida local counsel may be asked to render “building block” opinions with respect to such entities. “Building block” opinions rendered by Florida local counsel as to Florida entities should be in the same form as the opinions generally given by Florida Opining Counsel when they act as the PTC for the Client. See “Entity Status and Organization of a Florida Entity,” “Entity Power of a Florida Entity” and “Authorization of the Transaction by a Florida Entity.”

C. Opinions regarding Local Registration or Qualification Requirements of Lenders

Florida local counsel are sometimes asked for an opinion that a foreign lender is not required to qualify to transact business in the State of Florida in order to make a loan secured by property located in Florida. This opinion is discussed in “Authorization to Transact Business in Florida – Lender Not Required to Register As a Foreign Corporation in Florida to Make a Loan,” and an example of this opinion is included in the illustrative form of local counsel opinion letter that accompanies this Report.

D. Opinions Regarding Enforceability of the Transaction Documents

Florida local counsel are sometimes asked to render opinions on the enforceability of one or more of the Transaction Documents under certain circumstances:

1. Transaction Documents Governed by Florida Law. Where the Transaction Documents are governed by Florida law, an opinion regarding the enforceability of the Transaction Documents will sometimes be requested. For example, in many multi-state loan transactions secured by Florida real estate, the mortgage will expressly be governed by Florida law (even though the law chosen to govern other Transaction Documents is of a state other than Florida) and an opinion will often be requested as to the enforceability of that mortgage under Florida law. The form of this opinion and the diligence required to support this opinion is the same whether Florida counsel is acting as local counsel or as the PTC. See “The Remedies Opinion.”
2. Transaction Documents Governed by the Laws of Another Jurisdiction. Generally, Florida counsel should not render an opinion on the enforceability of Transaction Documents that are governed by the law of a jurisdiction other than Florida. See “Common Elements of Opinions—Opinions under Florida and Federal Law; Opinions under the Laws of Another Jurisdiction.”

However, Florida local counsel may be asked for an opinion that the Transaction Documents would be enforceable under Florida law if Florida law were the law governing such documents. See “Common Elements of Opinions—Limitations to Laws of Specific Jurisdictions or to Substantive Areas of Law;

Excluded Areas of Law” and “The Remedies Opinion-Analysis of the Foundational Building Block: The Meaning of the Basic Remedies Opinion.” This opinion is often referred to as an “as if” opinion. The recommended language for the “as if” opinion is described in “Common Elements of Opinions—Limitations to Laws of Specific Jurisdictions or to Substantive Areas of Law; Excluded Areas of Law.”

As set forth above, several “building block” opinions predicated on contract law principles are required to support a remedies opinion, including an “as if” remedies opinion. In giving a remedies opinion when acting as local counsel, Opining Counsel will often need to assume these “building block” opinions. See “Opinions Regarding Entity Status, Entity Power, Authorization of the Transaction and the Transaction Documents and Execution and Delivery” above and “The Remedies Opinion-Overview of the Remedies Opinion-Related Opinions that are Building Blocks For or Necessary to Render the Remedies Opinion.”

These predicate opinions can be dealt with either by relying on the opinions of non-Florida counsel with respect to such matters or by broadening the assumptions in Opining Counsel’s opinion. As a practical matter, the Committees believe that the assumption technique is preferable, because it frees Opining Counsel from having to coordinate the Florida opinion letter with the non-Florida counsel opinion letter, which often only gets made available to local counsel just before the closing.

3. Illustrative form of local counsel opinion letter. The illustrative form of local counsel opinion letter that accompanies this Report includes examples of both forms of remedies opinion referred to above.

E. Choice of Law Opinions

In many multi-state Transactions, the law governing the interpretation of the Transaction Documents is the law of a state other than Florida. In such situations, Florida Opining Counsel are sometimes asked for an opinion as to whether a Florida court (or a Federal court applying Florida choice of law rules) would give effect to the “choice of law” provision contained in one or more of the Transaction Documents. See “Choice of Law.” The form of illustrative local counsel opinion letter that accompanies this Report includes an illustrative form of the recommended “choice of law” opinion.

Often, because Opining Counsel has little or no contact with the Client or involvement in the Transaction (other than rendering the opinion letter), Opining Counsel will assume in its opinion letter, with the express consent of the Opinion Recipient (by express reference to such consent in the opinion letter), the facts that support its opinion regarding choice of law.

F. Mortgage and Security Interest Opinions

Florida local counsel will often be asked to render opinions regarding the Security Documents and the liens created thereby. These opinions include: (i) with respect to real estate transactions, opinions regarding the proper form of the mortgage and financing statement(s) and opinions with respect to the liens created by the mortgage; and (ii) with respect to personal property collateral located in Florida, whether the security interests created are perfected under Florida law and whether the form of financing statement is in proper form for filing with the Florida Secured Transaction Registry or a local filing office. The forms of opinion that are rendered regarding these issues when Florida counsel is acting as local counsel are generally the same forms of opinion as are given when Florida Opining Counsel is the PTC. See “Opinions With Respect to Collateral Under the Uniform Commercial Code” and “Opinions Particular to Real Estate Transactions.”

One of the key issues for Florida counsel to consider when acting as local counsel is what law governs the creation, attachment and perfection of the security interests granted by the Transaction Documents. Under Article 9 of the Florida UCC, creation and attachment opinions may be governed by laws of a state other than Florida, while issues of perfection may be governed by Florida law (for example, where the choice of law selected for the Security Documents is other than Florida law, but the entity making the pledge of assets is organized under the laws of Florida or the “fixtures” being pledged are located in Florida). In such event, appropriate assumptions

should be included in the opinion letter to cover those issues that are not governed by Florida law and that are predicates to the requested opinion. See “Opinions With Respect to Collateral Under the Uniform Commercial Code-Perfection Opinions-Law Applicable to Perfection Opinions.”

G. Usury

Florida local counsel are sometimes asked to render an opinion as to whether the loans that are the subject of the Transaction are usurious. The form of the recommended opinion on usury is contained in “Florida Usury Law – Opinions of Florida Counsel Relating to Usury.” In rendering this opinion, Florida local counsel should be mindful that, if the law selected in the Transaction Documents is the law of a state other than Florida, then any such opinion will need to be rendered “as if” Florida law applies. See “Common Elements of Opinions-Limitations to Laws of Specific Jurisdictions or to Substantive Areas of the Law; Excluded Areas of Law.”

Further, Florida counsel should remember that, if such counsel renders a “remedies opinion” or a “no violation of laws” opinion under Florida law with respect to a Transaction and Transaction Documents, these opinions include an opinion regarding compliance with Florida usury law. However, if an express opinion regarding usury is included in the opinion letter, then the remedies opinion and “no violation of laws” opinions contained in the opinion letter will be limited to the scope of the express usury opinion included in the opinion letter. See “The Remedies Opinion-Analysis of the Foundational Building Block: The Meaning of the Basic Remedies Opinion-Legal Issues Covered by the Remedies Opinion.”

H. Florida Taxes

1. Real Estate Transactions. Florida local counsel will sometimes be asked for an opinion regarding the documentary stamp taxes and intangible personal property taxes due with respect to a particular real estate loan transaction. The form of such opinion is discussed in “Opinions Particular to Real Estate Transactions-Florida Taxes,” and the illustrative form of local counsel opinion letter that accompanies this Report includes an illustrative form of this opinion.
2. Documentary Stamp Taxes and Intangible Taxes on Instruments Not Secured by a Mortgage. Florida documentary stamp taxes are also due on promissory notes and other written obligations to pay money (including loan agreements that incorporate a promissory note or are incorporated by reference into a promissory note) executed and delivered in Florida. When there is both a promissory note and a mortgage, the tax is paid on the mortgage and a notation must be made on the promissory note that the applicable tax has been paid on the mortgage.

The tax is based on a rate per \$100 or fraction thereof of the face value of the instrument (currently \$0.35/\$100.00). When there is no mortgage, this tax is calculated at the same rate per \$100, but is capped at \$2,450 per instrument. As a result, in Florida transactions involving one or more instruments which are not secured by a mortgage, the promissory notes and any other loan documents that contain a “written obligation to pay money” are often executed and delivered outside of the State of Florida with the party executing such instruments also executing a “tax affidavit” evidencing out-of-state execution and delivery of the instruments. This “tax affidavit” is used to prove to DOR that the instruments were executed and delivered outside Florida.

In such cases, Florida counsel may be asked to opine that no documentary stamp taxes are due on the out-of-state execution and delivery of the promissory note and other loan documents that contains a “written obligation to pay money.” The recommended form of such language is as follows:

The [instruments] are exempt from Florida documentary stamp taxes assuming that: (i) the [instruments] were made, executed and delivered outside of the State of Florida, and (ii) no mortgage, trust deed, security agreement or other evidence of indebtedness (except for the Financing Statements) has been or will be filed or recorded in Florida. Pursuant to Rule 12B-4.053(35) of the Florida Administrative Code, this exemption is based on the [Opinion Recipient’s] ability to provide the “tax affidavit” or other evidence satisfactory to the Florida Department of Revenue to establish that the [instruments] were made, executed and delivered to the [Opinion Recipient] outside of the State of Florida. We caution you that any subsequent renewal of the [instruments] may be subject to the Florida documentary stamp tax unless the renewal [instruments] are also executed and delivered outside of the State of Florida.

The recommended language includes precautionary language at the end to make clear that renewal instruments may be subject to documentary stamp taxes unless also executed and delivered outside Florida.

Further, if this opinion is rendered, many Florida counsel add an express exclusion to the opinion letter with respect to coverage regarding the application of other taxes (such as income taxes, sales taxes and franchise fees). For a discussion on this exclusion and for recommended qualification language, see “Opinions Particular to Real Estate Transactions—Florida Taxes—Other Taxes.”

Florida intangible taxes are due only on promissory notes or other obligations for the payment of money secured by a mortgage, deed of trust or other lien on real property situated in the State of Florida. As a result, opinions regarding intangible personal property taxes in non-real estate secured loan transactions are rarely requested.

Because of the complexities involved, opinions regarding Florida taxes should only be given by lawyers who reasonably believe themselves competent to render such opinions.

I. Other Opinions that are Sometimes Requested of Florida Local Counsel in Real Estate Transactions

There are a number of opinions that are sometimes requested in multi-state Transactions involving Florida real property where the other parties to the Transaction (and their counsel) are not located in Florida. Although these opinions were sometimes rendered in the past, the Committees believe that these opinions are no longer generally provided in opinions of Florida counsel and should not be requested or rendered. Further, Opining Counsel should consider the following issues before agreeing to render any of these opinions. Notwithstanding the foregoing, rendering any of these opinions does not, in and of itself, violate Florida customary practice.

1. Opinions Regarding Customary Provisions in Loan Documents and/or a Mortgage. Counsel for out-of-state Opinion Recipients in loan transactions may request an opinion that the loan documents or the mortgage contain all of the provisions that are customarily contained in Florida loan documents or Florida mortgages.

An example of this opinion is as follows:

The Mortgage contains substantially all of the remedial, waiver and other provisions normally contained in mortgages and security agreements used in Florida in connection with transactions of the type and value described in the Loan Documents.

The key problem with this opinion request is that it requires Florida Opining Counsel to determine (subjectively) which provisions in loan documents and mortgages are “customary.” Further, there is a risk in this analysis that Opining Counsel and the Opinion Recipient (or its counsel) may have a different viewpoint as to what provisions in loan documents and mortgages are or should be “customary.” Finally, this “opinion” is actually a factual confirmation, since it involves an assessment of which provisions in Florida documents are the “customary” provisions. As a result of these factors, the Committees believe that this is an inappropriate opinion request.

Notwithstanding the foregoing, the Committees believe that some Florida Opining Counsel continue to render this opinion based on their belief that the following provisions are the “customary” provisions that are required in loan documents and mortgages in Florida: (i) an acceleration after default provision, (ii) a provision allowing for a remedy upon foreclosure, (iii) a provision allowing for the appointment of a receiver upon the occurrence of a material default, (iv) an assignment of rents provision (either in the mortgage or in a separate assignment agreement), and (v) a future advance provision. The Committees do not endorse the delivery of this opinion, but believe that the list of provisions described above are those generally found in the vast majority of loan agreements and mortgages in Florida.

2. Opinions Regarding Whether Florida Remedies Law Contains Certain Restrictions. Certain states, including California, contain certain restrictions with respect to the right of a lender to enforce remedies against a borrower. The following opinion language seeks to confirm that Florida law does not: (i) deprive the lender of its right to seek a deficiency judgment or limit the lender’s right to foreclose on other collateral securing the loan, until the loan is paid in full; (ii) require a lender to make an election of remedies; and (iii) have a “one action rule” with respect to the enforcement of loan documents or the collection of a loan.

Enforcement of the remedies provided in the Mortgage with respect to the Client or its property will not, except as expressly limited by the terms of the Mortgage and assuming that the exercise of the remedies is conducted according to statutory requirements, as interpreted by relevant case law, in a commercially reasonable manner and in good faith and with fair dealing, deprive the Lender of its right to seek a deficiency judgment, or limit the Lender’s right to foreclose on other collateral securing the Loan, until the secured obligations have been fully paid and performed, except: (i) that a “strict foreclosure” under Section 679.620, Florida Statutes, may eliminate any right to seek a deficiency judgment, and (ii) as noted in the following paragraph.

Florida law does not require a lienholder to make an election of remedies where such lienholder holds security interests and liens on both the real and the personal property of a debtor or to take recourse first or solely against or otherwise exhaust its remedies against its collateral before otherwise proceeding to enforce against such debtor the obligations of such debtor. However, under certain circumstances, if a lienholder has chosen a remedy, the lienholder may be required to pursue such remedy to fruition before attempting to exercise other remedies.

It should be noted that the reference in the opinion language contained above to Section 679.620, Florida Statutes, is to the foreclosure provisions of the Florida UCC, which do not apply to foreclosures of mortgages against Florida real property.

3. Opinions Regarding Environmental Liens Under Local Law. In some cases, Florida local counsel may be asked whether Florida has a law that allows for liens to attach to property due to environmental issues. If requested, the recommended form of such opinion is as follows:

The State of Florida currently has no state “superlien” law pursuant to which a lien against the Mortgaged Property could arise after the recordation of the Mortgage as a result of a violation of the environmental laws or regulations of the State of Florida and be superior to the lien created by the Mortgage. No environmental law or regulation of the State of Florida would require any remedial or removal action or certification of non-applicability as a condition to the granting of the Mortgage, the foreclosure or other enforcement of the Mortgage, or the sale of any of the property encumbered by the Mortgage and foreclosed upon by the Lender.

This opinion clarifies that the Florida legislature has not adopted environmental lien laws similar to those adopted in other states (such as the State of New Jersey). The Committees note that, although this opinion discusses “state” superlien laws, this opinion does not address local environmental ordinances (such as the local ordinance that has been enacted in Miami-Dade County), since local laws, administrative decisions, ordinances, rules or regulations are implicitly excluded from an opinion of Florida counsel under Florida customary practice. See “Common Elements of Opinions—Limitations to Laws of Specific Jurisdictions or to Substantive Areas of Law; Excluded Areas of Law.”

The Committees note that title insurance companies in Florida offer an endorsement for certain environmental lien matters which an Opinion Recipient should consider as a potential economical alternative to requesting this opinion.

4. Opinions regarding Future Advances Under Mortgages. Florida Opining Counsel are sometimes asked to render an opinion as to whether under Florida law the provisions of a mortgage are adequate to cover future advances. If such opinion is rendered, the recommended form of the opinion is as follows:

The provisions of the [Mortgage] are adequate under the provisions of the Florida mortgage future advance statute, Section 697.04(1), Florida Statutes, to secure any future advances made by the Lender to the Client under the [Transaction Documents] to the same extent as if each such future advance was made on the date of execution of the Mortgage; provided that: (a) [the notes or instruments evidencing the future advances should indicate an intention to be secured by the Mortgage]; (b) all such future advances must be made within twenty (20) years after the original date of the [Mortgage] and otherwise comply with the requirements of the future advance provision contained in the [Mortgage]; and (c) the total unpaid balance that may be secured by the [Mortgage] at any one time is limited to the maximum principal amount specified in the [Mortgage].

We advise you that the Florida future advance statute grants the mortgagor the right to record a notice limiting the maximum principal amount that may be so secured to an amount not less than the amount actually advanced at the time of recording, provided that a copy of the notice is sent to the mortgagee by certified mail and the mortgagor surrenders all credit cards, checks or other devices used to obtain further advances.

Notwithstanding the foregoing, we advise you that the statute provides that a mortgage will secure any increase in the principal balance as a result of negative amortization or deferred interest and will secure any disbursements made for the payment of taxes, levies or insurance on the mortgaged property, with interest on those disbursements, even if: (i) the mortgage does not provide for future advances; (ii) those disbursements cause the total indebtedness to exceed the maximum amount stated in the mortgage; or (iii) the mortgagor records a notice limiting the maximum principal amount of the mortgage.

The foregoing future advance opinion is a combination of Section 697.04(1), Florida Statutes, and protective provisions contained in the standard Florida form of revolving credit endorsement for a loan policy of title insurance. If Opining Counsel renders this opinion, such counsel should review the mortgage to confirm that the mortgage contains a “future advance” provision which conforms to the requirements of the statute.

In the case of a revolving loan, Opining Counsel should recommend a revolving credit endorsement from the title insurer as a substitute for this opinion.

Florida counsel are sometimes requested to provide a Florida local counsel opinion in connection with a future advance under an existing mortgage loan in which Opining Counsel was not involved in the original loan documentation and closing. In providing this opinion, Florida counsel should be careful to make sure that the opinion rendered does not inadvertently opine that the original loan documents are also covered by the requested opinion.

Some Opinion Recipients may request an opinion regarding the lien priority of a future advance. For the same reason that this is an inappropriate opinion request with respect to the lien priority of a mortgage encumbering real estate, this is an inappropriate request with respect to the lien priority of a future advance. See “Opinions Particular to Real Estate Transactions-Title and Priority.”

OPINIONS OUTSIDE THE SCOPE OF THIS REPORT

A. Federal Securities Law Opinions

In Transactions to which the federal securities laws apply, a third-party legal opinion may be required at the closing. The circumstances under which opinions on securities law issues may be requested include the following:

- public offerings of debt and equity securities that are registered with the SEC under the Securities Act of 1933, as amended (the “**Securities Act**”), including initial public offerings, secondary offerings by issuers whose securities are already registered under the Securities Exchange Act of 1934, as amended, whether in a shelf registration or otherwise, and secondary offerings in the public market by selling shareholders;
- private offerings of debt and equity securities, including private placements that are exempt from registration pursuant to Regulation D under the Securities Act, Section 3(a)(9) under the Securities Act, or otherwise, and transfers of securities under Rule 144 under the Securities Act; and
- opinions as to whether a particular investment being sold is a “security” under the Securities Act.

Securities law opinions may be rendered to, among others, underwriters, placement agents, purchasers, transfer agents, securities exchanges and rating agencies.

Opinions on securities law matters are generally rendered only as to federal law, although there may be state “blue sky” issues that impact the particular transaction at issue. Opinions on securities law issues should only be rendered by counsel who reasonably believe themselves competent to render such opinions. Further, the Committees believe that federal securities law opinions are primarily an issue of national practice and that, although a few state bar association reports have previously commented on federal securities law opinions in their reports, customary practice with respect to securities law opinions has primarily been addressed by the Securities Law Opinions Subcommittee of the ABA Business Law Section Federal Regulation of Securities Law Committee (the “**ABA Securities Law Opinions Committee**”).

Florida lawyers who give legal opinions on federal securities laws are encouraged to review the reports promulgated by the ABA Securities Law Opinions Committee and the ABA Business Law Section in order to determine customary practice with respect to such opinions. The most recent reports that reflect customary practice with respect to these securities law matters are as follows:

1. “Negative Assurance in Securities Offerings (2008 Revision),” which was issued by the ABA Securities Law Opinions Committee in 2008;
2. “No Registration Opinions,” which was issued by the ABA Securities Law Opinions Committee in 2007; and
3. “Legal Opinions in SEC Filings,” which was issued by the Task Force on Securities Law Opinions of the ABA Business Law Section in 2004.

Florida lawyers who are “appearing and practicing” before the SEC also have additional obligations under the SEC’s standards of professional conduct and under the Sarbanes-Oxley Act of 2002. See “Introductory Matters – Ethical and Professional Issues – Securities and Exchange Commission and Sarbanes-Oxley Act of 2002.” Further, Florida counsel who render opinions that are filed with the SEC in connection with registered securities offerings should consider the guidance provided by the SEC Division of Corporation Finance in Staff Legal Bulletin 19 (October 14, 2011), which sets forth the views of the Division of Corporation Finance regarding “Legality and Tax Opinions.”

B. Cross-Border Opinions

Delivery of third-party closing opinions is becoming increasingly more typical in cross-border transactions (transactions between parties in the United States and parties outside the United States). From the standpoint of U.S. counsel (including Florida counsel), a cross-border transaction might involve the issuance of a closing

opinion letter to a foreign Opinion Recipient. The customary practice of this Report applies to all opinions issued by Florida Opining Counsel, wherever the Opinion Recipient is located. However, opinions to foreign Opinion Recipients raise issues that are more complex because of, among other reasons, differences in legal principles in various foreign jurisdictions, differences in education and practice, language barriers (even when documents are in English or are translated to English) and the absence in many foreign jurisdictions of written guidance and experience in the giving and receiving of third-party closing opinions. This can lead to misunderstandings as to what an opinion means and as to how the opinion should be interpreted.

Opinions issued in a cross-border transaction are beyond the scope of this Report. The Committees are aware that the ABA Committee is currently working on a report focusing on closing opinions by U.S. counsel to non-U.S. Opinion Recipients. The ABA Committee's report, when issued, is expected to clarify how U.S. customary practice applies in the context of outbound opinions, to provide guidance on opinions that are frequently requested in cross-border practice and to explain why some opinion requests by non-U.S. Opinion Recipients are inappropriate.

C. Specialized Opinions in Loan Transactions (Margin Regulations and Investment Company Act)

In some loan transactions, Opining Counsel may be asked to opine on two specialized areas of federal law: (i) compliance with margin regulations (Regulation T, U or X of the Board of Governors of the Federal Reserve System); and (ii) whether, after receipt of the loan proceeds, the borrower Client is, or will be, an "investment company" under the Investment Company Act of 1940. Both of these opinions are implicitly excluded from the scope of opinions of Florida counsel based on the exclusions of securities laws, rules and regulations and Federal Reserve Board margin regulations from the opinions of Florida counsel under Florida customary practice. See "Common Elements of Opinions – Limitations to Laws of Specific Jurisdictions or to Substantive Areas of Law; Excluded Areas of Law."

The Committees believe that these opinions are only appropriate and should only be requested when the Transaction presents issues either under the Investment Company Act of 1940 or Federal Reserve Board margin regulations. Further, these opinions involve issues that are complex, and opinions regarding these issues should only be rendered by Opining Counsel that has sufficient familiarity with these laws, rules and regulations.

D. Intellectual Property Opinions

Intellectual property lawyers often render legal opinions regarding intellectual property issues. Sometimes these opinions provide comfort to a third-party opinion recipient (for example, an opinion given on an intellectual property issue in the context of a merger). Further, intellectual property lawyers often render legal opinions to their Clients as to matters such as: (i) whether something is patentable; (ii) whether a patent infringes another patent; and (iii) on freedom to operate. In such cases, the opinions are typically reasoned opinions reflecting a careful analysis of the facts and law under the circumstances.

The Committees have determined not to include in this Report a discussion of issues relating to intellectual property opinions. The Committees believe that intellectual property opinions are specialized and should only be rendered by lawyers who reasonably believe themselves to be competent to render such opinions.

E. Tax Opinions

Tax opinions are often given to third parties in connection with commercial transactions. These opinions often relate to how a particular entity will be taxed (for example, as a pass-through entity) and whether income earned by the entity will be characterized as income subject to capital gains rates compared to ordinary income rates. Tax opinions may also relate to whether the particular Transaction that is the subject of the opinion will be a taxable or a tax-free transaction.

Like opinions on Federal securities laws, opinions on tax matters are outside the scope of this Report. Guidance on tax opinions has been issued by the Tax Section of the American Bar Association. The Internal Revenue Service has also issued guidance and restrictions under Circular 230 with respect to opinions regarding the taxability of certain transactions the principal purpose of which is the avoidance or evasion of any tax imposed by the Internal Revenue Code.

The Committees believe that tax opinions are specialized and should only be rendered by lawyers who reasonably believe themselves competent to render such opinions.

F. True Sale, Substantive Consolidation and Other Insolvency Related Opinions

In the context of structured finance transactions, opinions are sometimes requested as to whether the Transaction is a true sale under federal bankruptcy law and as to whether special purpose entities established to participate in the Transaction will be substantively consolidated with an operating entity that is participating in the Transaction under federal bankruptcy laws.

The Committees have determined that opinions in this specialized area of practice are beyond the scope of this Report and should only be rendered by lawyers who reasonably believe themselves competent to render such opinions. Florida lawyers who determine that they are competent to render these types of opinions are encouraged to carefully review the guidance that has been published regarding these types of opinions, including: (i) the “Special Report by the Tribar Opinion Committee: Opinions in the Bankruptcy Context: Rating Agency, Structured Financing and Chapter 11 Transactions,” that was published in 1991; and (ii) the “Special Report on the Preparation of Substantive Consolidation Opinions” that was published in February 2009 by the Committee on Structured Finance and the Committee on Bankruptcy and Corporation Reorganization of The Association of the Bar of the City of New York.

G. Municipal Bond Opinions

The Committees believe that municipal bond opinions are a specialized area of practice and outside the scope of this Report. Florida counsel that render opinions on municipal bond issues are encouraged to refer to the publications of the National Association of Bond Lawyers for guidance regarding the customary practice with respect to opinions on municipal bond issues.

The Committees believe that municipal bond opinions are specialized and should only be rendered by lawyers who reasonably believe themselves competent to render such opinions.

DEFINITIONS

The following terms are defined in the Report. Reference is made to the page in the Report where such term is defined so that the context of the term can be considered.

	<u>Page</u>
“ 1991 Report ” means the “Report on Standards for Opinions of Florida Counsel” of the Business Law Section Committee promulgated in 1991.	1
“ 1998 Secured Transactions Report ” means the report entitled: “Opinions on Secured Transactions under the Uniform Commercial Code” promulgated by the Business Law Section Committee in 1998.	2
“ ABA Business Law Section ” means the Section of Business Law of the American Bar Association.	1
“ ABA Committee ” means the ABA Business Law Section Committee on Legal Opinions.	2
“ ABA Securities Law Opinions Committee ” means the Securities Law Opinions Subcommittee of the ABA Business Law Section’s Federal Regulation of Securities Law Committee.	185
“ ABA Guidelines ” means the Guidelines for the Preparation of Closing Opinions issued in 2002 by the ABA Committee.	4
“ Accord ” means the “Third Party Legal Opinions Report, Including Legal Opinion Accord” issued in 1991 by the ABA Business Law Section.	1
“ ACREL ” means the American College of Real Estate Lawyers.	3
“ Applicable Laws ” means the federal or Florida laws, rules and regulations that a Florida lawyer exercising customary professional diligence would reasonably be expected to recognize as being applicable to the Client, the Transaction Documents or the Transaction to which the opinion relates, but excluding the Excluded Laws.	30, 113
“ Article 9 ” means Chapter 679 of the Florida Statutes.	132
“ Business Law Section ” means the Business Law Section of The Florida Bar.	1
“ Business Law Section Committee ” means the Legal Opinion Standards Committee of the Business Law Section.	1
“ California Business Law Section ” means the Business Law Section of the State Bar of California. . .	4
“ California Remedies Report ” means the “Report on Third-Party Remedies Opinion” that was issued in 2004 and updated in 2007 by the California Business Law Section.	4
“ Chapter ” means a particular chapter of the Florida Statutes.	
“ Client ” is the person or entity being represented by the Opining Counsel and on whose behalf a third-party legal opinion is being rendered.	8
“ collateral ” means the identified assets that are the subject of the grant of a security interest.	133
“ Committees ” collectively means the Business Law Section Committee and the RPPTL Section Committee.	1
“ Customary Practice Statement ” means the “Statement on the Role of Customary Practice in the Preparation and Understanding of Third-Party Legal Opinions” issued in 2008, a copy of which is Appendix “C” to the Report.	3

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“ Department ” means the Florida Department of State	38
“ DOR ” means the Florida Department of Revenue.	154
“ Excluded Laws ” means the Florida and federal laws, rules and regulations enumerated in “Common Elements of Opinions – Limitations to Laws of Specific Jurisdictions or to Substantive Areas of Law; Excluded Areas of Law” that are implicitly excluded from the scope of opinions of Florida counsel unless the opinion letter expressly includes one or more of such laws, rules or regulations within the scope of the opinion.	30
“ FBCA ” means the Florida Business Corporation Act (Chapter 607, Florida Statutes).	39
“ Florida Land Trust ” means a land trust that arises strictly under Section 689.071, Florida Statutes.	52
“ FLLCA ” means the Florida Limited Liability Company Act (Chapter 608, Florida Statutes).	50
“ FRULPA ” means the Florida Revised Uniform Limited Partnership Act of 2005 (Chapter 620.1101 et. seq.).	42
“ FRUPA ” means the Florida Revised Uniform Partnership Act of 1995 (Chapter 620.8101 et seq.).	46
“ Florida Statutes ” refers to the statutory law of the State of Florida.	
“ Fictitious Name Act ” means Florida’s Fictitious Name Act that is contained in Section 865.09, Florida Statutes.	47
“ Florida UCC ” means the Florida Uniform Commercial Code, that is Chapters 670 through 680 of the Florida Statutes.	132
“ known ” or “ knowledge ” means the conscious awareness of the lawyers in the “primary lawyer group” of factual matters that such lawyers recognize as being relevant to the opinion or confirmation so qualified.	34
“ LLC ” means a limited liability company.	50
“ LLLP ” means a limited liability limited partnership.	44
“ LLP ” means a limited liability partnership.	47
“ LSC ” means local or specialist counsel.	25
“ Opining Counsel ” means the lawyer rendering the opinion letter on behalf of the Client.	8
“ Opinion Recipient ” is the third party to whom a third-party legal opinion letter is delivered. It is generally the other party to a Transaction between the Opinion Recipient and the Client, although it may be another third party involved in the Transaction (such as a rating agency or a transfer agent).	8
“ Organizational Documents ” means the organizational documents of Florida entities that are set forth in “Entity Status and Organization of a Florida Entity-Organizational Documents.”	38
“ primary lawyer group ” means: (1) the lawyer who signs his or her name or the name of the firm to the opinion letter, (ii) the lawyers currently in the firm who are actively involved in preparing or negotiating the opinion letter, and (iii) the lawyers currently in the firm who are actively involved in negotiating or documenting the Transaction or the Transaction Documents.	33
“ Prior Florida Reports ” means collectively the 1991 Report, RPPTL Report No. 1, the 1998 Secured Transactions Report and RPPTL Report No. 2.	2
“ POC ” means the primary Opining Counsel with respect to the Transaction.	25
“ Qualifications ” means the qualifications to the remedies opinion.	97

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“ Real Estate Report ” means the “Inclusive Real Estate Secured Transactions Report” that was issued in 1999 by ACREL and the RPTE.	3
“ Recipient’s Counsel ” means the lawyer representing the Opinion Recipient in the Transaction.	8
“ Report ” means the “Report on Third-Party Legal Opinion Customary Practice in Florida, dated December 3, 2011.”	1
“ Restatement ” means the Restatement of the Law (Third) of the Law Governing Lawyers.	8
“ RPC ” means the Rules of Professional Conduct of The Florida Bar.	15
“ RPPTL Report No. 1 ” means the report entitled; “Opinions in Real Estate Transactions, including Loan Transactions” that was promulgated in 1996 by the RPPTL Section Committee.	1
“ RPPTL Report No. 2 ” means the report entitled; “Opinions in Real Estate Transactions, including Loan Transactions” that was promulgated in 2004 by the RPPTL Section Committee.	2
“ RPPTL Section ” means the Real Property, Probate and Trust Law Section of The Florida Bar.	1
“ RPPTL Section Committee ” means the Legal Opinions Committee of the RPPTL Section.	1
“ RPTE ” means the ABA Real Property, Trust and Estate Law Section.	3
“ SEC ” means the U.S. Securities and Exchange Commission.	17
“ Securities Act ” means the Securities Act of 1933, as amended.	185
“ SPE ” means a special purpose entity	68
“ Security Documents ” means the Transaction Documents under which a security interest is granted in the collateral.	103
“ Steering Committee ” means the steering/drafting committee consisting of members of the Business Law Section Committee and the RPPTL Committee that oversaw the drafting of this Report.	5
“ Transaction ” is the commercial transaction to which an opinion relates. It may be a debt or equity financing, a real estate purchase, an acquisition of stock or assets or any other type of commercial transaction.	8
“ Transaction Documents ” means those agreements between or among the parties as to which the opinions are being given.	8
“ TriBar LLC Membership Interest Report ” means the “Supplemental TriBar LLC Opinion Report: Opinions on LLC Membership Interests” issued by the TriBar Opinion Committee in 2011	4
“ TriBar Preferred Stock Report ” means the “Special Report of the TriBar Opinion Committee: Duly Authorized Opinions in Preferred Stock” issued by the TriBar Opinion Committee in 2008	4
“ TriBar Report ” means the “Third-Party Closing Opinion” report that was issued in 1998 by the TriBar Opinion Committee.	3
“ UCC ” means the Uniform Commercial Code.	7
“ UCC Opinion Scope Limitation ” means limitations on the scope of security interest opinions under the UCC.	133
“ UCC Search Report ” means the report of UCC financing statements filed in the specified filing office naming the Client as debtor. In Florida, the filing office is the Florida Secured Transaction Registry. . . .	146
“ WGLO ” means the Working Group on Legal Opinions.	2

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Statement on the Role of Customary Practice in the Preparation and Understanding of Third-Party Legal Opinions*

At the closing of many business transactions, the lawyers for one party deliver to the other party a legal opinion letter covering matters the recipient has asked those lawyers to address. These opinion letters, also commonly known as closing or third-party legal opinions, are prepared and understood in accordance with the customary practice of lawyers who regularly give them and review them for clients.

Customary practice permits an opinion giver and an opinion recipient (directly or through its counsel) to have common understandings about an opinion without spelling them out. The use of customary practice does this in two principal ways:

1. It identifies the work (factual and legal) opinion givers are expected to perform to give opinions. Customary practice reflects a realistic assessment of the nature and scope of the opinions being given and the difficulty and extent of the work required to support them.
2. It provides guidance on how certain words and phrases commonly used in opinions should be understood. Customary practice may expand or limit the plain meaning of those words and phrases.

By providing content to abbreviated opinion language, customary practice permits the omission from an opinion letter of descriptions of the procedures that the opinion giver has performed and of many definitions, assumptions, limitations, and exceptions. Thus, it reduces the number of words needed to communicate complex thoughts. As a matter of customary practice, the explicit inclusion in an opinion letter of some but not all of these matters does not exclude others customarily understood to apply. A departure from customary practice is not implied and should not be inferred unless the departure is clear in the opinion letter.

The role of customary practice in third-party legal opinion practice is well established. The American Law Institute’s Restatement (*Third*) of the Law Governing Lawyers** states:

In giving “closing” opinions, lawyers typically use custom and practice to provide abbreviated opinions that facilitate the closing. Such opinions may not recite certain assumptions, limitations, and standards of diligence because they are understood between counsel.

The *Restatement* also refers to customary practice as an element in determining the “meaning of the opinion letter.”

* The “Statement on the Role of Customary Practice in the Preparation and Understanding of Third-Party Legal Opinions,” was published by the American Bar Association Section of Business Law in *The Business Lawyer* 63:4, pp. 1277-1279. It is reprinted with the permission of the American Bar Association. As of October 6, 2011, the Customary Practice Statement had been adopted by 33 bar associations or sections of bar associations, including the Business Law Section and the RPPTL Section.

** The references to the *Restatement* in this statement are to Sections 51, 52, and 95 of the *Restatement*. The references also include the following Comments, Illustrations, and Notes to those sections: Section 51, Comment e; Section 52, Comment b, Comment e, Illustration 2; and Section 95, Reporter’s Note to Comment b, Reporter’s Note to Comment c. The *Restatement* sometimes refers to “custom and practice.” The *Restatement* uses the phrases “custom and practice” and “customary practice” to mean the same thing.

The *Restatement* identifies customary practice as a source of the criteria for determining whether the opinion giver has satisfied its obligations of competence and diligence. Under the *Restatement* the “professional community whose practices and standards are relevant” in making that determination is that of “lawyers undertaking similar matters.” That professional community may vary based on, among other things, the subject of the opinion and the relevant jurisdiction.

The *Restatement* treats bar association reports on opinion practice as valuable sources of guidance on customary practice. Customary practice evolves to reflect changes in law and practice.

Some closing opinions refer to the application of customary practice. Others do not. Either way, customary practice applies.

ILLUSTRATIVE FORMS

HOW TO USE THE ILLUSTRATIVE FORMS

A. Overview

Four illustrative opinion letter forms accompany the Report. They are: (i) a form of opinion letter to be used in a commercial loan transaction; (ii) a form of opinion letter to be used in a loan transaction secured by real estate; (iii) a form of opinion letter to be used in connection with a share issuance by a Florida corporation; and (iv) a form of opinion letter to be used when acting as local Florida counsel in a loan transaction. The Report also includes a form of illustrative certificate to counsel. Although any number of illustrative transaction models could have been used, the Committees settled on these particular illustrative transaction models because, in the view of the Committees, these four illustrative forms of opinion letters should provide guidance to Florida lawyers as to many of the third-party legal opinions that they render.

The illustrative forms that accompany the Report have been developed to provide Florida practitioners with opinion forms that can be used in their day-to-day opinion-giving practices. The illustrative forms key off of the various sections of the Report, which provide guidance as to the meaning of the words in the particular opinions and as to the diligence that is recommended to be completed to render the particular opinions. In that regard, the illustrative forms are annotated with both commentary and references to sections of the Report where further information about the Florida third-party legal opinion customary practice regarding such opinions is described.

The illustrative forms of opinion letters cover issues discussed in the Report with respect to the particularities of the transactions that are described in each of the illustrative forms of opinion letters. The illustrative forms of opinion letters also provide suggestions as to different ways in which Opining Counsel might approach certain opinion issues. However, Florida attorneys who use the illustrative forms should, in all cases, tailor the form used to the particularities of the Client that they are representing in the Transaction and to the particularities of the Transaction Documents. Further, in all cases, Opining Counsel must reach a professional judgment concerning the particular legal opinions being rendered in Opining Counsel's opinion letter.

The illustrative forms are samples only. They are not intended to be prescriptive models, nor are they intended to be exemplars to which all opinion letters are to be compared. It is not required or mandated that a Florida lawyer use the illustrative opinion letter forms or the illustrative certificate to counsel.

To facilitate the use of the illustrative forms, editable versions in MS Word of each of the forms have been made available on the websites of the Business Law Section and the RPPTL Section. However, the editable MS Word versions of the illustrative forms do not contain any of the annotations or commentary contained in the annotated forms that accompany the Report. As a result, the Committees recommend that the editable MS Word versions of the illustrative forms should be used in conjunction with the annotated versions of the illustrative forms that accompany the Report and the Report itself.

B. Structure of the Illustrative Forms of Opinion Letters

All of the illustrative forms of opinion letters that accompany the Report are structured in a similar manner, as follows:

1. Introductory Matters;
2. Incorporation by Reference;
3. Documents Reviewed (Transaction Documents, Other Reviewed Documents and Authority Documents);
4. Opinion Limitations and Assumptions;
5. Definition of "knowledge;"

6. Opinions;
7. Definitions of “Applicable Laws” and “Excluded Laws;”
8. Qualifications to various opinions contained in the opinion letter; and
9. Other matters (such as laws covered by the opinion letter, who can rely on the opinion, and confirmation that the opinion letter speaks as of its date).

The structure of the illustrative forms is one that the Committees believe is easy to follow and consistent with the opinion giving practices of many firms in Florida. However, the Committees note that there is no one right way to structure an opinion letter.

C. Structure of the Illustrative Form of Certificate to Counsel

The illustrative form of certificate to counsel that accompanies the Report is intended to provide Opining Counsel with: (i) factual information that supports Opining Counsel’s opinion letter (such as authority information, including Organizational Documents, resolutions, information about execution and delivery by the Client and the like); (ii) factual information that Opining Counsel will need to consider and evaluate in providing particular opinions contained in the opinion letter (such as lists of other agreements to be reviewed in rendering the “no breach of or default under agreements” opinion); (iii) confirmation that the Client does not have any knowledge of any matters covered by the opinion letter being incorrect (such as confirmation of “no required governmental consents or approvals” or “no litigation”); and (iv) confirmation as to the Client’s consent to the issuance of the opinion letter.

The certificate to counsel should be executed by an officer of the Client, if the Client is a corporation, by a general partner, if the Client is a limited partnership or a general partnership, by a member, manager, or officer, as applicable, if the Client is a limited liability company, or by a trustee, if the Client is a trust.

The illustrative form of certificate to counsel is not intended to be a prescriptive model. In the view of the Committees, a Florida lawyer’s failure to use the illustrative form of certificate to counsel or to obtain a certificate to counsel in connection with rendering an opinion letter (in whatever form) does not, in and of itself, violate Florida customary practice.

FORM "A"

Illustrative Form of Opinion Letter in a Commercial Loan Transaction

This illustrative form of opinion letter is for a commercial loan transaction. It assumes that: (i) the Transaction Documents expressly provide that they are governed by Florida law, (ii) all Client entities are Florida entities, and (iii) all collateral (consisting of personal property and certificated securities) pledged pursuant to the Transaction Documents is located in Florida. It also assumes that there is an entity borrower, an individual guarantor and an entity guarantor. Finally, this illustrative form of opinion letter assumes that a Florida law firm (rather than an individual lawyer) is rendering the opinion.¹

[Date of Opinion]²

[Name of Opinion Recipient]³
[Address of Opinion Recipient]

Re: [Description of Transaction]

Ladies and Gentlemen:

We have acted as counsel to _____ [Name of Borrower], [a Florida corporation/partnership/limited liability company/as trustee of _____, a Florida trust] (the "Borrower"), in connection with a [term/revolving] loan (the "Transaction") in the original principal amount of \$_____ (the "Loan Amount") made by [Name of Lender] (the "Lender") in favor of the Borrower pursuant to that certain [Loan Agreement/Credit Agreement, dated _____] (the "Loan Agreement"). We have also acted as counsel to _____ (the "Individual Guarantor") and _____, [a Florida corporation/partnership/limited liability company/as trustee of _____, a Florida trust] (the "Entity Guarantor," and collectively with the Individual Guarantor, the "Guarantors") in connection with the Transaction.

This opinion letter⁴ is furnished to you pursuant to Section __ of the Loan Agreement at the request and with the consent of the Borrower and the Guarantors.⁵ Capitalized terms used but not otherwise defined herein shall have the definitions set forth in the Loan Agreement.⁶

This opinion letter is limited to the matters expressly stated herein. No opinions are to be inferred or implied beyond the opinions expressly so stated.⁷

¹ All references in the footnotes to this illustrative form of opinion letter are to sections of the "Report on Third-Party Legal Opinion Customary Practice in Florida, dated December 3, 2011" (the "Report"). Unless otherwise defined in this illustrative form of opinion letter, terms defined in the Report have the same meanings herein. The Report supersedes the Prior Florida Reports.

² See "Common Elements of Opinions-Date."

³ See "Common Elements of Opinions-Addressee(s) and Reliance."

⁴ This illustrative form of opinion letter is couched as an opinion letter even though it also includes a no litigation factual confirmation.

⁵ See "Common Elements of Opinions-Brief Description of Transaction and Request for Opinion Letter" and "Introductory Matters-Ethical and Professional Issues-Client Consent."

⁶ See "Common Elements of Opinions-Definitions." In using this illustrative form of opinion letter, care should be taken to make certain that defined terms used in the opinion letter are consistent with the particularities of the Transaction, the Transaction Documents and/or the identity of the parties to the Transaction and the Transaction Documents.

⁷ See "Introductory Matters-No Implied Opinions."

Interpretation of Opinion Letters Under Florida Customary Practice; Incorporation by Reference⁸

The Committees believe that all opinion letters of Florida counsel with respect to matters of Florida law should be interpreted under Florida customary practice (as articulated by the Report), regardless of whether or not the Report is expressly incorporated by reference into the opinion letter itself and regardless of where the Opinion Recipient is located.

Notwithstanding the foregoing, the Committees recommend that Florida counsel consider the express incorporation by reference of the Report into an opinion letter. Such express incorporation has three key benefits: (i) it allows Opining Counsel to expressly incorporate lists of assumptions, limitations, qualifications and exceptions by explicit reference, thus shortening the opinion letter, (ii) it greatly reduces confusion and/or later disagreements by both Opining Counsel and the Opinion Recipient as to the application and effect of Florida customary practice (as articulated in the Report) with respect to the opinion letter, and (iii) it should lessen the concern that a court interpreting the opinion letter may incorrectly determine, despite the view of the Committees regarding this issue, not to follow Florida customary practice (as articulated in the Report), particularly where the court is located outside of Florida.

If the Report is expressly incorporated by reference into the opinion letter, the following language is recommended:

This opinion letter has been prepared and is to be construed in accordance with the “Report on Third-Party Legal Opinion Customary Practice in Florida, dated December 3, 2011” (the “Report”). The Report is incorporated by reference into this opinion letter.

This illustrative form of opinion letter can be used whether or not the Report is expressly incorporated by reference into the opinion letter.

Documents Reviewed⁹

In connection with rendering an opinion, Opining Counsel must review various documents with respect to the Transaction. Generally, these documents will fall into three categories: (i) the Transaction Documents, (ii) other documents that may be required to be reviewed to render one or more of the opinions in the opinion letter, and (iii) documents that relate to the Client’s entity status and organization, entity power and authorization of the Transaction and the Transaction Documents (which are sometimes called “authority documents”).

In many cases, all of the reviewed documents are listed in a single list, with definitions provided for certain categories of documents (i.e., the “Transaction Documents,” the “Other Reviewed Documents” and the “Authority Documents”). In other cases, the “Authority Documents” are not separately defined, but rather are included with the list of “Other Reviewed Documents.”

This illustrative form of opinion letter breaks up the documents reviewed into the referenced three separate categories.

Transaction Documents¹⁰

An opinion letter should include a specific list of the Transaction Documents relating to the Transaction (which are the agreements between or among the parties as to which the opinions are being rendered). The list of Transaction Documents set forth below is an illustrative list of the documents for a commercial loan transaction. Sometimes one or more of these illustrative Transaction Documents will have a different name than the name described below and sometimes one or more of these illustrative Transaction Documents will be combined into a single document. In some cases, not all of these illustrative Transaction Documents will be required because of the particular facts and circumstances of the Transaction. In all cases, the list of Transaction Documents set forth in the opinion letter should be tailored to the specifics of the Transaction to which the particular opinion letter relates.

⁸ See “Common Elements of Opinions-Opinions of Florida Counsel Are To Be Interpreted Under Florida Customary Practice” and “Common Elements of Opinions-Express Incorporation of the Report into Opinion Letters.”

⁹ See “Common Elements of Opinions-Opinion.”

¹⁰ See “Common Elements of Opinions-Transaction Documents.”

In connection with rendering the opinions set forth in this opinion letter, we have reviewed originals or copies of the following documents:

- (i) The Loan Agreement;
- (ii) The Promissory Note, dated _____, 20__, in the Loan Amount executed by the Borrower in favor of the Lender (the “Note”);
- (iii) The Guaranty Agreement, dated _____, 20__, executed by the Individual Guarantor in favor of the Lender (the “Individual Guaranty”);
- (iv) The Guaranty Agreement, dated _____, 20__, executed by the Entity Guarantor in favor of the Lender (the “Entity Guaranty” and together with the Individual Guaranty, the “Guarantees”);
- (v) The Security Agreement, dated _____, 20__ (the “Security Agreement”), made by the Borrower in favor of the Lender with respect to the grant of a security interest in the personal property collateral described in the Security Agreement (the “Personal Property Collateral”); and
- (vi) The Pledge Agreement, dated _____, 20__ (the “Pledge Agreement”), made by the Borrower in favor of the Lender with respect to the pledge of the certificated [shares of stock/partnership interests/membership interests] identified on Schedule __ to the Pledge Agreement (the “Pledged Securities Collateral”).

The Loan Agreement, the Note, the Guarantees, the Security Agreement, and the Pledge Agreement are hereinafter collectively referred to as the “Transaction Documents,” the Security Agreement and the Pledge Agreement are hereinafter collectively referred to as the “Security Documents,” and the Personal Property Collateral and the Pledged Securities Collateral are hereinafter collectively referred to as the “Collateral.”

Other Reviewed Documents¹¹

Opining Counsel should consider listing other documents reviewed in connection with rendering the opinions set forth in the opinion letter. The list of other documents reviewed will necessarily be Transaction-specific. Some of the “Other Reviewed Documents” may be contracts that are not Transaction Documents and others may be documents that are not contractual in nature at all. Examples of the types of documents that might be listed here are included below.

In addition, in connection with rendering the opinions set forth in this opinion letter, we have reviewed originals or copies of the following other documents:

- (i) the financing statement to be filed in the Florida Secured Transaction Registry (the “State Filing Office”) naming the Borrower as debtor and the Lender as secured party and describing the Personal Property Collateral, [*the form of which is attached to this opinion letter*] (the “Financing Statement”);
- (ii) *if applicable, the documents from a prior related loan transaction;*
- (iii) *if applicable, a list of “other agreements” of the Borrower or the Guarantors or a list of judgments, decrees and orders applicable to the Borrower or the Guarantors reviewed in rendering the “no violation and no breach or default” opinion; and*
- (iv) *if applicable, other transaction documents as to which Opining Counsel is not rendering any opinions or closing documents with respect to the Transaction, such as closing statements, certificates delivered to the Lender by the Client at the closing and contracts as to which no opinions are being rendered in the opinion letter.*

Authority Documents

Opining Counsel should consider including a list of the Authority Documents, which are the documents that relate to entity status and organization, entity power, and authorization of the Transaction and the Transaction Documents. This illustrative form includes the certificates to counsel among the Authority Documents, because,

¹¹ See “Common Elements of Opinions-Transaction Documents.”

in many cases, the certificates to counsel are the documents pursuant to which the Client delivers to Opining Counsel copies of the various entity organizational and authorization documents. Further, with respect to the certificates to counsel, some Opining Counsel deliver copies of the certificates to counsel to the Opinion Recipient (either separately or by attaching the certificates of counsel to the opinion letter), while others do not.

Further, in connection with rendering the opinions set forth in this opinion letter, we have reviewed originals or copies of the following authorization documents:

- (i) *the Borrower's Organizational Documents (describe with specificity);*¹²
- (ii) *the Entity Guarantor's Organizational Documents (describe with specificity);*¹²
- (iii) *the Borrower's authorizing documents with respect to the Transaction (describe with specificity the minutes and/or written consent actions that authorize the Transaction);*¹³
- (iv) *the Entity Guarantor's authorizing documents with respect to the Transaction (describe with specificity the minutes and/or written consent actions that authorize the Transaction);*¹³
- (v) Certificates of Status of the Borrower and the Entity Guarantor, dated _____, 20__, issued by the Florida Department of State;
- (vi) *other certificates of public officials, if any (describe with specificity);*
- (vii) a certificate to counsel from the Borrower, dated _____, 20__, [a copy of which is attached hereto as _____] (the "Borrower Certificate to Counsel");¹⁴
- (viii) a certificate to counsel from the Individual Guarantor, dated _____, 20__, [a copy of which is attached hereto as _____] (the "Individual Guarantor Certificate to Counsel");¹⁴ and
- (ix) a certificate to counsel from the Entity Guarantor, dated _____, 20__, [a copy of which is attached hereto as _____] (the "Entity Guarantor Certificate to Counsel" and, together with the Borrower Certificate to Counsel and the Individual Guarantor Certificate to Counsel, the "Certificates to Counsel").¹⁴

Catch-all Language or Limiting Language

Some Opining Counsel include catch-all language in the opinion letter to the effect that they have reviewed such other documents as they have deemed necessary and relevant to form the basis for the opinions. Others do not include such language. In other opinion letters, Opining Counsel limit the documents reviewed to those expressly listed, affirmatively stating that Opining Counsel has reviewed no other documents.

In preparing and delivering an opinion letter, Opining Counsel should, in accordance with Florida customary practice, review the documents and make the inquiries relevant to the particular legal opinions being rendered. Whether catch-all language or limiting language is or is not included, Opining Counsel should, under Florida customary practice, perform the diligence required to render each opinion being rendered, and a limitation in the list of documents reviewed that reflects a failure of Opining Counsel to review the documents that are expected to be reviewed to render the particular opinion under Florida customary practice is not likely to constitute a limitation on the scope of the opinion unless the exception from customary practice is expressly noted in the opinion letter. On the other hand, inclusion of the catch-all language is not intended to expand the scope of the documents required to be reviewed beyond that required under Florida customary practice to render the opinions being issued with respect to the Transaction and the Transaction Documents as set forth in the opinion letter.

¹² See "Entity Status and Organization of a Florida Entity-Organizational Documents."

¹³ See "Authorization of the Transaction by a Florida Entity."

¹⁴ For a discussion regarding the content of certificates to counsel, see "Common Elements of Opinions-Reliance on Factual Certificates and Representations and Warranties; Assumptions of Fact; Scope of Reliance." An illustrative form of certificate to counsel accompanies the Report as Form "E."

Recommended catch-all language is as follows:

We have also reviewed such other documents, instruments and certificates as we have deemed relevant or necessary to form the basis for the opinions set forth in this opinion letter.

Recommended limiting language is as follows:

For purposes of rendering the opinions contained in this opinion letter, we have not reviewed any documents other than the documents listed above. We have also not reviewed any documents that may be referred to in or incorporated by reference into any of the documents listed above.

Opinion Limitations and Assumptions

Opining Counsel generally describe in the opinion letter limitations to the scope of the opinion letter and assumptions upon which the opinions set forth in the opinion letter are based. These include limitations of general applicability, assumptions that Opining Counsel is making and definitions of key concepts (such as the definition of Opining Counsel's "knowledge") that are often expressly set forth in the opinion letter to highlight to the Opinion Recipient these limitations on the scope of the opinion letter.

Under Florida customary practice, certain limitations and assumptions are implicitly incorporated into opinion letters delivered by Florida counsel as to matters of Florida law whether or not such limitations and assumptions are expressly set forth in the opinion letter. However, the Committees believe that express inclusion of such limitations and assumptions in the opinion letter (whether through express incorporation of such limitations and assumptions by reference to the Report or by including a listing of such limitations and assumptions in the opinion letter) is the preferred approach to avoid confusion regarding the applicable limitations and assumptions.

General Limitations

With your consent, we have relied upon, and assumed the accuracy of, the representations and warranties contained in the Transaction Documents [and in the Certificates to Counsel] supplied to us by the Borrower and the Guarantors with respect to the factual matters set forth therein. However, no opinion is rendered hereunder as to the accuracy of the representations and warranties contained in the Transaction Documents [or in the Certificates to Counsel]. *[Further, the factual matters set forth in the Certificates to Counsel have been provided to us solely for our benefit in issuing this opinion, and no party, other than this firm, is entitled to rely upon them.]*¹⁵

We have, with your consent, assumed that certificates of public officials dated earlier than the date of this opinion letter remain accurate from such earlier dates through and including the date of this opinion letter.¹⁶

Assumptions¹⁷

A list of assumptions should be inserted here. Under Florida customary practice, some assumptions are implicitly incorporated into opinion letters delivered by Florida counsel as to matters of Florida law whether or not they are expressly set forth in the opinion letter. Other assumptions are only included in the opinion letter if they are expressly set forth in the opinion letter.

The following list of assumptions includes all of the assumptions that are implicitly incorporated into opinion letters delivered by Florida counsel as to matters of Florida law under Florida customary practice. The Committees believe that express inclusion in the opinion letter of these implicitly included assumptions is the preferred approach, in order to avoid confusion regarding whether or not these assumptions apply to the opinion letter. This list also contemplates that Opining Counsel may elect to add additional assumptions to the opinion letter based on the particular facts and circumstances of the Transaction, the Transaction Documents, the Clients and/or the scope of the opinions being rendered.

¹⁵ See "Common Elements of Opinions-Reliance on Factual Certificates and Representations and Warranties; Assumptions of Facts; Scope of Reliance."

¹⁶ See "Common Elements of Opinions-Reliance on Certificates of Public Officials."

¹⁷ See "Common Elements of Opinions-Assumptions."

If Opining Counsel only includes some, but not all, of the implicitly included assumptions in the opinion letter, the Committees believe that all of the remaining assumptions that are implicitly included in all opinion letters of Florida counsel under Florida customary practice will nevertheless be implied into the opinion letter. Notwithstanding the foregoing, the Committees urge Florida counsel to include the entire list of implied assumptions in their opinion letters out of a concern that a court interpreting an opinion letter rendered by Florida counsel may determine incorrectly not to follow Florida customary practice (as articulated by the Report) and may instead decide that only those assumptions that are expressly set forth in the opinion letter constitute a part of the opinion letter.

Opining Counsel should further recognize that problems can arise if, in the course of negotiating the final form of opinion letter to be delivered at the closing of the Transaction, Opining Counsel delivers a draft form of opinion letter to the Opinion Recipient that expressly includes the assumptions implicitly included in all opinions of Florida counsel under Florida customary practice, and, thereafter, Opining Counsel agrees to remove one or more of the stated assumptions from the opinion letter. Under such circumstances, Opining Counsel may no longer have the benefit of the implicit incorporation into the opinion letter of such removed assumptions.

If the Report has been expressly incorporated by reference into the opinion letter, Opining Counsel may wish to use the following:

In rendering the opinions set forth herein, we have relied, without investigation, on each of the assumptions implicitly included in all opinions of Florida counsel that are set forth in the Report in “Common Elements of Opinions – Assumptions” [and the following additional assumptions: _____ (other assumptions that are based on the particularities of the Transaction, the Transaction Documents, the Clients and/or the scope of the opinions being rendered)].

If the Report has not been expressly incorporated by reference into the opinion letter, Opining Counsel may wish to include a list of assumptions in the opinion letter.

In rendering the opinions set forth herein, we have relied, without investigation, on each of the following assumptions:

Assumptions deemed to be implicitly included in all opinion letters of Florida counsel under Florida customary practice

- (a) the legal capacity of each natural person to take all actions required of each such person in connection with the Transaction;
- (b) the legal existence of each party to the Transaction other than the Borrower and the Entity Guarantor;
- (c) the power of each party to the Transaction, other than the Borrower and the Guarantors, to execute, deliver and perform all Transaction Documents executed and delivered by such party and to do each other act done or to be done by such party;
- (d) the authorization, execution and delivery by each party, other than the Borrower and the Guarantors, of each Transaction Document executed and delivered or to be executed and delivered by such party;
- (e) the validity, binding effect and enforceability as to each party, other than the Borrower and the Guarantors, of each Transaction Document executed and delivered by such party or to be executed and delivered and of each other act done or to be done by such party;
- (f) there have been no undisclosed modifications of any provision of any document reviewed by us in connection with the rendering of this opinion letter and no undisclosed prior waiver of any right or remedy contained in any of the Transaction Documents;
- (g) the genuineness of each signature, the completeness of each document submitted to us, the authenticity of each document reviewed by us as an original, the conformity to the original of each document reviewed by us as a copy and the authenticity of the original of each document received by us as a copy;

(h) the truthfulness of each statement as to all factual matters otherwise not known to us to be untruthful or unreliable contained in any document encompassed within the diligence review undertaken by us;

(i) each certificate or other document issued by a public authority is accurate, complete and authentic as of the date of the opinion letter, and all official public records (including their proper indexing and filing) are accurate and complete;

(j) each recipient of the opinion letter has acted in good faith, without notice of any defense against enforcement of rights created by, or adverse claim to any property or security interest transferred or created as part of, the Transaction, and has complied with all laws applicable to it that affect the Transaction;

(k) the Transaction and the conduct of the parties to the Transaction comply with any requirement of good faith, fair dealing and conscionability;

(l) routine procedural matters such as service of process or qualification to do business in the relevant jurisdiction(s) will be satisfied by the parties seeking to enforce the Transaction Documents;

(m) agreements (other than the Transaction Documents as to which opinions are being given) and judgments, decrees and orders reviewed in connection with rendering the opinions will be enforced as written;

(n) no discretionary action (including a decision not to act) that is permitted in the Transaction Documents will be taken by or on behalf of the Borrower or the Guarantors that might result in a violation of law or constitute a breach of or default under any of the Borrower's or the Guarantors' other agreements or under any applicable court order;

(o) there are no agreements or understandings among the parties, written or oral, and there is no usage of trade or course of prior dealing among the parties that would, in either case, define, supplement, modify or qualify the terms of the Transaction Documents or the rights of the parties thereunder;

(p) the payment of all required documentary stamp taxes, intangible taxes and other taxes and fees imposed upon the execution, filing or recording of documents;

(q) with respect to the Transaction and the Transaction Documents, including the inducement of the parties to enter into and perform their respective obligations thereunder, there has been no mutual mistake of fact or undue influence and there exists no fraud or duress; [and]

Additional assumptions expressly included in the opinion letter

(r) _____ (other assumptions that are based on the particularities of the Transaction, the Transaction Documents, the Clients and/or the scope of the opinions being rendered).

Knowledge¹⁸

When used in this opinion letter, the phrases "to our knowledge," "known to us" or the like means the conscious awareness of the lawyers in the "primary lawyer group" of factual matters such lawyers recognize as being relevant to the opinion or confirmation so qualified. Such phrases do not imply that we have undertaken any independent investigation within our firm, with the Borrower and/or the Guarantors or with any third party to determine the existence or absence of any facts or circumstances, and no inference should be drawn merely from our past or current representation of the Borrower and/or the Guarantors. Where any opinion or confirmation is qualified by the phrase "to our knowledge," "known to us" or the like, it means that the lawyers in the "primary lawyer group" are without any actual knowledge or conscious awareness that the opinion or confirmation is untrue in any respect material to the opinion or confirmation. For purposes of this opinion letter, "primary lawyer group" means: (i) the lawyer who signs his or her name or the name of the firm to this opinion letter, (ii) the lawyers currently in the firm who are actively involved in preparing or negotiating this opinion letter, and (iii) the lawyers currently in the firm who are actively involved in negotiating or documenting the Transaction or the Transaction Documents.

¹⁸ See "Common Elements of Opinions-Knowledge."

The Opinions¹⁹

The specific opinions being rendered by Opining Counsel should be inserted following introductory language. The recommended “lead-in” language is as follows:

Based upon and subject to the foregoing, and subject to the assumptions, limitations and qualifications contained herein, we are of the opinion that:

“Building Block” Opinions

1. The Borrower is a [corporation/partnership/limited liability company/trustee of a Florida trust] organized under Florida law, and its [corporate/partnership/limited liability company] status is active.²⁰

2. The Entity Guarantor is a [corporation/partnership/limited liability company/trustee of a Florida trust] organized under Florida law, and its [corporate/partnership/limited liability company] status is active.²⁰

3. Based solely on the good standing certificates from the Secretary of State of _____ and _____, the Borrower and the Entity Guarantor are each qualified to transact business as a foreign [corporation/partnership/limited liability company] in the States of _____ and _____.²¹

4. The Borrower has the [corporate/partnership/limited liability company/trust] power to execute and deliver the Transaction Documents to which it is a party and to perform its respective obligations thereunder.²²

5. The Entity Guarantor has the [corporate/partnership/limited liability company/trust] power to execute and deliver the Transaction Documents to which it is a party and to perform its respective obligations thereunder.²²

6. The Borrower has authorized the execution, delivery and performance of the Transaction Documents to which it is a party by all necessary [corporate/partnership/limited liability company/trust] action.²³

7. The Entity Guarantor has authorized the execution, delivery and performance of the Transaction Documents to which it is a party by all necessary [corporate/partnership/limited liability company/trust] action.²³

8. Each of the Transaction Documents to which the Borrower is a party has been executed and delivered by the Borrower.²⁴

9. Each of the Transaction Documents to which either of the Guarantors is a party has been executed and delivered by the respective Guarantor.²⁴

The Remedies Opinion

10. Each of the Transaction Documents to which the Borrower is a party is a valid and binding obligation of the Borrower, enforceable against the Borrower in accordance with its respective terms.²⁵

11. Each of the Transaction Documents to which either of the Guarantors is a party is a valid and binding obligation of each such Guarantor, enforceable against each such Guarantor in accordance with its respective terms.²⁵

¹⁹ See “Common Elements of Opinions-Opinion.”

²⁰ See “Entity Status and Organization of a Florida Entity.”

²¹ See “Authority to Transact Business in Florida-Opinions regarding Qualification of a Florida Entity under the Laws of another Jurisdiction.”

²² See “Entity Power of a Florida Entity.”

²³ See “Authorization of the Transaction by a Florida Entity.”

²⁴ See “Execution and Delivery.”

²⁵ See “The Remedies Opinion-Overview of the Remedies Opinion” and “The Remedies Opinion-Analysis of the Foundational Building Block: The Meaning of the Basic Remedies Opinion.”

No Violation and No Breach or Default Opinion

12. The execution and delivery by the Borrower and the Guarantors of the Transaction Documents and the performance by the Borrower and the Guarantors of their respective obligations under the Transaction Documents to which each is a party do not:²⁶

(a) violate the Borrower's or the Entity Guarantor's Organizational Documents;²⁷

(b) constitute a breach of or a default under, or result in the creation of a security interest or a lien on the assets of the Borrower or either of the Guarantors under, any of the Borrower's or either of the Guarantors' [agreements identified in _____ (*reference to a schedule in one of the Transaction Documents, to a public securities filing, to a list of other agreements set forth in the opinion letter, or to a certificate to counsel*) / "material agreements" that are known to us];²⁸

(c) violate any judgment, decree or order of any court or administrative tribunal applicable to the Borrower or either of the Guarantors that is [listed in _____ (*reference to a schedule in one of the Transaction Documents, to a list of judgments, decrees and orders set forth in the opinion letter, or to a certificate to counsel*) / known to us];²⁹ or

(d) violate any of the Applicable Laws [*or, if no definition of Applicable Laws is included in the opinion letter, "violate any federal or Florida laws, rules or regulations that a Florida counsel exercising customary professional diligence would reasonably be expected to recognize as being applicable to the Borrower, the Guarantors, the Transaction Documents or the Transaction, but excluding the laws, rules and regulations enumerated below.*]³⁰

No Required Governmental Consents or Approvals Opinion³¹

13. No consent, approval, authorization or other action by, or filing or registration with, any governmental authority of the United States or the State of Florida is required by or on behalf of the Borrower or either of the Guarantors to execute and deliver the Transaction Documents and to close the Transaction contemplated by the Transaction Documents other than [_____]³² / those consents, approvals, authorizations, actions, filings and registrations as to which the requisite consents, approvals or authorizations have been obtained, the requisite actions have been taken and the requisite filings and registrations have been accomplished].

²⁶ See "No Violation and No Breach or Default."

²⁷ See "No Violation and No Breach or Default-No Violation of Organizational Documents."

²⁸ See "No Violation and No Breach or Default-No Breach of or Default under Agreements." The first formulation referencing specified reviewed agreements is the recommended formulation.

²⁹ See "No Violation and No Breach or Default-No Violation of Judgments, Decrees or Orders." The first formulation referencing specified judgments, decrees or orders applicable to the Client is the recommended formulation.

³⁰ See "No Violation and No Breach or Default-No Violation of Laws."

³¹ See "No Required Governmental Consents or Approvals."

³² Opining Counsel sometimes list here the specific consents received or the filings required with respect to the particular Transaction, including consents relating to security interests or lien creation or as to the perfection of such security interests or liens that are required. However, under Florida customary practice, no opinion is rendered with respect to any such security interest unless the opinion letter contains an express opinion with respect to such security interest.

Usury Opinion

14. The Transaction Documents do not and will not violate applicable Florida usury laws provided that the Lender has not and does not reserve, charge, take or receive, directly or indirectly, at any time, interest or other sums deemed to be in the nature of interest (however labeled) in an amount exceeding the equivalent of the rate of [18%/25%] per annum, simple interest, calculated on the basis of a year of 365 days (or 366 days as applicable) and the actual number of days elapsed.³³

Security Agreement Opinions-Personal Property

*If the loan transaction is secured by personal property, the following opinion may be appropriate regarding the creation and attachment of the security interests in the personal property:*³⁴

15. The Security Agreement is effective to create in favor of the Lender³⁵ a security interest in such portion of the Personal Property Collateral (the “Article 9 Collateral”) in which a security interest may be created under Article 9 of the Uniform Commercial Code in effect in the State of Florida as of the date of this opinion letter (the “Florida UCC”).

If the security interest being granted in any of the Personal Property Collateral is perfected by filing, and Florida is the proper jurisdiction in which to file a financing statement in order to perfect the security interest in the Personal Property Collateral, the following opinion may be given:

16. The Financing Statement is in acceptable form for filing with the State Filing Office. Upon the proper filing of the Financing Statement with and acceptance by the State Filing Office, the Lender will have a perfected security interest in such portion of the Article 9 Collateral in which, and only to the extent that, a security interest therein may be perfected by filing a financing statement under Article 9 of the Florida UCC.³⁶

If the security interest being granted in the Personal Property Collateral includes personal property as to which perfection is accomplished in a manner other than by the filing, additional opinions regarding the perfection of security interests in this other Personal Property Collateral may be requested by the Opinion Recipient. For information regarding the forms of opinions to be rendered under such circumstances, see the following sections under the heading “Opinions with Respect to Collateral under the Uniform Commercial Code-Perfection Opinions:” (i) if the security interest in the collateral is perfected by possession, see “Perfection by Possession or Delivery;” or (ii) if the collateral is deposit accounts or investment accounts, see “Perfection by Control, other than by Possession or Delivery.”

³³ See “Florida Usury Law-Opinions of Florida Counsel Relating to Usury.” Florida counsel should be aware that, unless Florida usury law is excluded from the scope of an opinion letter that includes a “remedies opinion” and/or a “no violation of laws” opinion, then such opinions will be deemed (under Florida customary practice) to include an opinion that the Transaction Documents do not violate Florida usury law. However, if the opinion letter includes an express opinion regarding usury, then the scope of the usury opinion being given under the “remedies opinion” and under the “no violation of laws” opinion will be limited to the scope of the express usury opinion that is contained in the opinion letter. See “The Remedies Opinion-Analysis of the Foundational Building Block: The Meaning of the Basic Remedies Opinion-Legal Issues Covered by the Remedies Opinion.”

³⁴ See “Opinions With Respect to Collateral Under the Uniform Commercial Code-Creation and Attachment Opinions.”

³⁵ Some counsel add the words: “, as security for the [O]bligations.” If such words are added, Opining Counsel should make sure that the “obligations” that are referenced in the Security Documents are, in fact, the “obligations” that are secured by the lien granted in the Collateral under the Security Documents. See “Opinions with Respect to Collateral Under the Uniform Commercial Code-Creation and Attachment Opinions – Identification of Secured Obligations.”

³⁶ See “Opinions With Respect to Collateral Under the Uniform Commercial Code-Perfection Opinions-Perfection by Filing.”

This illustrative form of opinion letter does not include any opinions regarding the priority of any security interest granted as against third parties. As a result, none of the qualifications and limitations that are required with respect to a priority opinion are included in this illustrative form of opinion letter. The Committees believe that it is relatively rare in Florida for an Opining Counsel to render an opinion regarding the priority of a security interest. However, if a priority opinion is rendered, the Committees recommend that it should only be a limited filing priority opinion and thus should be rendered subject to appropriate qualifications and limitations. The recommended form of such limited filing priority opinion, and the recommended qualifications and limitations with respect to such limited filing priority opinion, are discussed in “Opinions With Respect to Collateral Under the Uniform Commercial Code-Opinions Regarding Priority.”

Pledge Agreement Opinions-Certificated Securities³⁷

If the loan transaction is secured by a pledge of certificated securities,³⁸ the following opinion may be appropriate regarding the creation and attachment of the security interest in the certificated securities:

17. The Pledge Agreement is effective to create in favor of the Lender³⁵ a security interest in such portion of the Pledged Securities Collateral described in the Pledge Agreement in which a security interest may be created under Article 9 of the Florida UCC.

If the security interest being granted is in certificated securities and the security interest in such securities will be perfected by taking possession of the Pledged Securities Collateral, the following opinion may be given:

18. Assuming that the certificate(s) representing the Pledged Securities Collateral, [in bearer form or registered or indorsed in the name of the Lender or in blank by an effective indorsement], is delivered to the Lender in the State of Florida and that the Lender takes and retains possession thereof in the State of Florida, the Lender will have a perfected security interest in the Pledged Securities Collateral under the Florida UCC.³⁹

This illustrative form of opinion letter does not include any opinions regarding the priority of any security interest granted in certificated securities as against third parties. The Committees believe that it is relatively rare in Florida for an Opining Counsel to render an opinion regarding the priority of a security interest in certificated securities. However, if such an opinion is rendered, it should be limited to a “protected purchaser opinion” under Article 8 of the Florida UCC. For information regarding the “protected purchaser opinion,” see “Opinions With Respect to Collateral Under the Uniform Commercial Code-Article 8 Opinions-Article 8 Protected Purchaser Opinion.”

In Transactions involving out-of-state lenders, Opining Counsel may be asked to render an opinion that no Florida documentary stamp taxes or intangible taxes are due in connection with the Transaction (other than typical recording fees and the like). If Opining Counsel agrees to render this opinion, then Opining Counsel

³⁷ If the collateral is uncertificated securities, then unless such collateral meets the technical requirements of Article 8, it will be treated as a “general intangible,” and perfection of the security interest in such collateral will be governed by Article 9 of the Florida UCC. See “Opinions with Respect to Collateral Under the Uniform Commercial Code-Article 8 Opinions.”

³⁸ In a Florida LLC or a Florida partnership, both certificated and uncertificated securities (within the definition of “securities” under Article 8 of the Florida UCC) can only exist if the respective Organizational Documents expressly provide that: (i) the interests in such entity should be treated as securities under Article 8 of the Florida UCC; and (ii) such securities are certificated or uncertificated, as the case may be. Otherwise, interests in a Florida LLC or a Florida partnership (other than those held in securities accounts) are treated, for perfection purposes, as “general intangibles” under the Florida UCC (even if represented by certificates). See “Opinions with Respect to Collateral Under the Uniform Commercial Code-Article 8 Opinions-What Constitutes a Security.”

³⁹ See “Opinions With Respect to Collateral Under the Uniform Commercial Code-Article 8 Opinions.” Particularly in the case of interests in limited liability companies, some Florida attorneys also file a precautionary financing statement with the State Filing Office relating to the Pledged Securities Collateral in case the Pledged Securities Collateral is deemed to be a “general intangible” (in which case, the security interest in the Pledged Securities Collateral will be perfected by the filing of the financing statement).

should review the recommended opinion language and the diligence required to render such opinion that is discussed in “Special Issues to Consider When Acting as Local Counsel-Florida Taxes-Documentary Stamp Taxes and Intangible Taxes on Instruments Not Secured by a Mortgage.”

The No Litigation Confirmation

To our knowledge, there is no action, suit or proceeding, at law or in equity, or by or before any governmental agency, now pending or overtly threatened in writing against the Borrower or either of the Guarantors that challenges the validity or enforceability of, seeks to enjoin the performance of, or seeks damages with respect to, the Transaction Documents or the Transaction [, except: _____]. For avoidance of doubt, please be advised that in rendering this confirmation we have made no independent investigation, including, without limitation, any search of court records, the files of our firm or the files of the Borrower or either of the Guarantors.⁴⁰

Applicable Laws and Excluded Laws⁴¹

“Applicable Laws” is defined under Florida customary practice and is set forth in the Report. Opining Counsel often expressly define in the opinion letter the Applicable Laws that are covered by the scope of the opinion letter. Whether or not such definition is expressly included in the opinion letter, a Florida Opining Counsel would be obligated to consider all Applicable Laws, as so defined, in rendering the opinion letter.

The recommended form of the definition of Applicable Laws is as follows:

When used in this opinion letter, the term “Applicable Laws” means the federal and Florida laws, rules and regulations that a Florida counsel exercising customary professional diligence would reasonably be expected to recognize as being applicable to the Borrower, the Guarantors, the Transaction Documents or the Transaction, but excluding the laws, rules and regulations set forth below.

Whether or not a definition of Applicable Laws is expressly included in the opinion letter, Opining Counsel generally include in the opinion letter a list of laws that are excluded from coverage in the opinion letter. As set forth in the Report, some laws are implicitly excluded from opinion letters of Florida counsel under Florida customary practice, whether or not these laws are expressly excluded from the scope of the opinion letter by express reference in the opinion letter. Opining Counsel may also wish to expressly exclude other laws from the scope of the opinion letter by expressly referencing in such opinion letter the exclusion of such laws from the scope of the opinion letter.

The Committees believe that the express inclusion in the opinion letter of a list of excluded laws is the preferred approach, whether through an express incorporation of the list of implicitly excluded laws contained in the Report or by actually setting forth such list of excluded laws in the opinion letter. However, the Committees recognize that some Florida counsel may choose to include a list of some, but not all, of the implicitly excluded laws in their opinion letters. The Committees believe that, in such situation, all of the remaining excluded laws that implicitly limit the scope of opinion letters of Florida counsel under Florida customary practice will nevertheless be implied into the opinion letter. Notwithstanding the foregoing, the Committees urge Florida counsel to include the entire list of implicitly excluded laws in their opinion letters out of a concern that a court interpreting an

⁴⁰ See “No Litigation-The “No Litigation” Confirmation.” As described in the Report, common practice in Florida with respect to the no litigation factual confirmation has changed over the last few years. This illustrative form of opinion letter includes a version of the no litigation confirmation that the Committees believe currently represents the no litigation confirmation generally given by Florida counsel.

⁴¹ See “Common Elements of Opinions-Limitations to Laws of Specific Jurisdictions or to Substantive Areas of Law; Excluded Areas of Law.”

opinion letter of Florida counsel may incorrectly determine not to follow Florida customary practice (as articulated in the Report) and may instead decide that only those excluded laws that are expressly set forth in the opinion letter limit the scope of the opinion letter.

Opining Counsel should also recognize that problems can arise if, in the course of negotiating the final form of opinion letter to be delivered at the closing of the Transaction, Opining Counsel delivers a draft of the opinion letter to the Opinion Recipient that expressly includes the entire list of excluded laws and, thereafter, Opining Counsel agrees to remove one or more of those stated excluded laws from the list contained in the opinion letter. Under such circumstances, Opining Counsel may no longer have the benefit of implicit incorporation into the opinion letter of such removed excluded laws.

If the Report has been expressly incorporated by reference into the opinion letter, Opining Counsel may wish to use the following:

The following federal and Florida laws, rules and regulations are expressly excluded from the scope of this opinion letter: (a) laws, rules and regulations that are defined as the Excluded Laws in the “Common Elements of Opinions-Limitations to Laws of Specific Jurisdictions or to Substantive Areas of Law; Excluded Areas of Law” section of the Report, and (b) the following laws, rules and regulations: _____ (*other laws, rules and regulations that are to be expressly excluded from the scope of the opinion letter under the particular circumstances in which the opinion letter is being rendered*).

If the Report is not expressly incorporated by reference into the opinion letter, Opining Counsel may wish to include a list of excluded laws in the opinion letter.

The following federal and Florida laws, rules and regulations are expressly excluded from the scope of this opinion letter:

Laws, rules and regulations deemed to be implicitly excluded from the scope of all opinion letters of Florida counsel under Florida customary practice

- (a) securities laws, rules and regulations;
- (b) Federal Reserve Board margin regulations;
- (c) laws, rules and regulations regulating banks and other financial institutions, insurance companies and investment companies;
- (d) pension and employee benefit laws, rules and regulations, such as the Employee Retirement Income Security Act (ERISA);
- (e) labor laws, rules and regulations, including laws on occupational safety and health (OSHA);
- (f) antitrust and unfair competition laws, rules and regulations;
- (g) laws, rules and regulations concerning compliance with fiduciary requirements;
- (h) laws, rules and regulations concerning the creation, attachment, perfection or priority of any lien or security interest, except to the extent expressly set forth in this opinion letter;⁴²
- (i) laws, rules and regulations relating to taxation;

⁴² Some counsel exclude this item from the list of excluded laws in situations where they are giving opinions on security interest issues. However, this exclusion from laws covered by the opinion letter is one of the excluded laws that is implicitly excluded from the scope of all opinions of Florida counsel under Florida customary practice. It is included in this illustrative form of opinion letter in order to make clear that security interest issues are not implicitly covered by other opinions that are being rendered (such as a “remedies” opinion or a “no required governmental consents or approvals” opinion on or with respect to a security agreement). Under Florida customary practice, security interest opinions are only rendered if and to the extent they are expressly included in an opinion letter.

- (j) bankruptcy, fraudulent conveyance, fraudulent transfer and other insolvency laws;
- (k) environmental laws, rules and regulations;
- (l) laws, rules and regulations relating to patents, copyrights, trademarks, trade secrets and other intellectual property;
- (m) local laws, administrative decisions, ordinances, rules or regulations, including any zoning, planning, building, occupancy or other similar approval or permit or any other ordinance or regulation of any county, municipality, township or other political subdivision of the State of Florida;
- (n) criminal and state forfeiture laws and any racketeering laws, rules and regulations;
- (o) other statutes of general application to the extent that they provide for criminal prosecution;
- (p) laws relating to terrorism or money laundering;
- (q) laws, regulations and policies concerning national and local emergency and possible judicial deference to acts of sovereign states;

Laws, rules and regulations expressly excluded from the scope of the opinion letter by Opining Counsel

- (r) _____ (other laws, rules and regulations that are to be expressly excluded from the scope of the opinion letter under the particular circumstances in which the opinion letter is being rendered);

Exclusions applicable to all laws, rules and regulations excluded from the scope of the opinion letter

- (s) filing or consent requirements under any of the foregoing excluded laws; [and]
- (t) judicial and administrative decisions to the extent they deal with any of the foregoing excluded laws.

Qualifications

Qualifications to the scope of the opinions set forth in an opinion letter are generally included in the opinion letter. This illustrative opinion letter includes qualifications to the opinions described above. If one or more of the opinions to which these qualifications relate are not being rendered in the opinion letter, the applicable qualifications need not be included in the opinion letter.

The foregoing opinions are subject to the following exceptions, qualifications and limitations:

Execution and Delivery Qualification

We did not physically witness the execution and delivery of the Transaction Documents, and our opinions herein regarding the execution and delivery of the Transaction Documents by the Borrower and the Guarantors are based, in part, on [our review of the Certificates to Counsel in which the Borrower and the Guarantors confirmed certain facts to us with respect to the execution and delivery of the Transaction Documents / our review of copies of executed signature pages for such Transaction Documents provided to us (electronically or otherwise)].⁴³

No Violation and No Breach or Default Qualifications

We express no opinion in paragraph [12(b)] regarding liens arising by operation of law or as to compliance or non-compliance with provisions in other agreements that require financial calculations or determinations to ascertain compliance⁴⁴ or relating to any other aspect of the financial condition or results of operations of the Borrower or either of the Guarantors.

⁴³ See "Execution and Delivery."

⁴⁴ See "No Violation and No Breach or Default-No Breach of or Default under Agreements."

No Required Governmental Consents or Approvals Qualification

We express no opinion as to any consent, approval, authorization or other action or filing necessary for the ongoing operation of the Borrower's or either of the Guarantors' respective businesses.⁴⁵

Remedies Opinion Qualifications⁴⁶

The opinions regarding enforceability of the Transaction Documents that are contained in paragraphs [10 and 11] above are limited by:

1. bankruptcy, insolvency, reorganization, moratorium, fraudulent conveyance and transfer, and similar law affecting the rights and remedies of creditors generally (the "Bankruptcy Exception");⁴⁷ and
2. general principles of equity, regardless of whether such enforceability is considered in a proceeding at law or in equity (the "Equitable Principles Limitation").⁴⁸

The Committees recommend that a "generic" qualification⁴⁹ should be included in all opinion letters of Florida counsel that include a remedies opinion. There are two forms of the "generic" qualification: (i) the "material breach" qualification, which specifies which provisions of the Transaction Documents should be enforceable, and (ii) the "practical realization" qualification, which provides that the Opinion Recipient should receive the principal benefit of its bargain. In the context of a commercial loan transaction secured by personal property and certificated securities, including the transaction upon which this illustrative form of opinion letter is based, the "material breach" qualification is the recommended form of "generic" qualification.⁵⁰

The following is the recommended form of the "material breach" qualification:

In addition, certain remedies, waivers and other provisions of the Transaction Documents might not be enforceable; nevertheless, subject to the Bankruptcy Exception and the Equitable Principles Limitation, such unenforceability will not render the Transaction Documents invalid as a whole or preclude: (i) the judicial enforcement of the obligation of the Borrower to repay the principal, together with the interest thereon (to the extent not deemed a penalty), as provided in the Note, (ii) the acceleration of the obligation of the Borrower to repay such principal, together with such interest, upon a material default by the Borrower of the payment of such principal or interest or upon a material default by the Borrower in any other material provisions of the Transaction Documents, or (iii) the foreclosure in accordance with Applicable Laws of the lien on and security interest in the Personal Property Collateral and the Pledged Securities Collateral created by the Security Documents upon maturity or upon acceleration pursuant to (ii) above.⁵¹

As noted, the inclusion of a "generic" qualification in the opinion letter does not limit the impact on the scope of the remedies opinion of the Bankruptcy Exception and the Equitable Principles Limitation. See "The Remedies Opinion-The "Generic" Qualification."

If either form of the "generic" qualification is included in the opinion letter, it may be unnecessary to also include an extensive list of specific qualifications to the remedies opinion in the opinion letter (although Opining Counsel may elect to expressly include in the opinion letter one or more specific qualifications limiting the scope of the remedies opinion to bring those qualifications to the attention of the Opinion Recipient).

⁴⁵ See "No Required Governmental Consents or Approvals-Exceptions."

⁴⁶ See generally: "The Remedies Opinion-Qualifications for Narrowing the Scope of the Remedies Opinion."

⁴⁷ See "The Remedies Opinion-The Bankruptcy Exception and the Equitable Principles Limitation-The Bankruptcy Exception."

⁴⁸ See "The Remedies Opinion-The Bankruptcy Exception and the Equitable Principles Limitation-The Equitable Principles Limitation."

⁴⁹ See "The Remedies Opinion-The "Generic" Qualification."

⁵⁰ If a "material breach" qualification is not included in the opinion letter, Opining Counsel should include a "practical realization" qualification. The form of such qualification is set forth in "The Remedies Opinion-The "Generic" Qualification-The "Practical Realization" Qualification."

⁵¹ See "The Remedies Opinion-The "Generic" Qualification-The "Material Breach" Qualification."

However, if neither form of “generic” qualification is included in the opinion letter, the Committees believe that Opining Counsel would be wise to include a list of specific exceptions to the scope of the remedies opinion that excludes from the scope of the opinion those rights and remedies contained in the Transaction Documents that may not be enforceable. To determine which specific qualifications to the remedies opinion to include in the opinion letter, Opining Counsel may wish to review the Transaction Documents and consider which of the rights and remedies contained in the Transaction Documents might not be enforceable.

When one of the Transaction Documents is a loan guaranty, some Florida Opining Counsel, in an abundance of caution, add a qualification to the effect that subsequent changes in the underlying loan documents could make the guaranty unenforceable under certain circumstances. Those Florida Opining Counsel that add this qualification do so because there are some Florida courts that have ruled that a guarantor may be released from a guaranty if there is a “material alteration” of the guarantor’s obligation to the detriment of the guarantor, unless the change is contemplated by the guaranty or the guarantor consents (or a valid waiver in the guaranty waives the necessity of such consent). Under relevant case law, whether a particular change in loan documents will be considered a material alteration or detrimental to the guarantor, or whether a particular change in loan documents is contemplated by a guaranty agreement, is based on the particular facts and circumstances and the express language in the guaranty agreement, respectively.

The recommended qualification relating to a loan guaranty is as follows:

We note also that, in the absence of an enforceable waiver or consent, a guarantor may be discharged if: (i) action by the lender impairs the value of collateral securing guaranteed debt to the detriment of the guarantor, (ii) the lender elects remedies for default that impair the subrogation rights of the guarantor against the borrower, (iii) the guaranteed debt is materially modified, or (iv) the lender otherwise takes action under loan documents that materially prejudices the guarantor.

Notwithstanding the foregoing, in the view of the Committees, not including this qualification in an opinion letter that includes a remedies opinion regarding the enforceability of a guaranty agreement does not, in and of itself, violate Florida customary practice.

The following is a representative list of specific exclusions to the scope of the remedies opinion that might be appropriate under the circumstances. This list is not exclusive, and Opining Counsel may wish to add to the opinion letter other qualifications to the scope of the remedies opinion.

No opinion is expressed herein with respect to any provision of the Transaction Documents that:⁵²

- (a) purports to excuse a party from liability for the party’s own acts;
- (b) purports to make void any act done in contravention thereof;
- (c) purports to authorize a party to act in the party’s sole discretion or purports to provide that determination by a party is conclusive;
- (d) requires waivers or amendments to be made only in writing;
- (e) purports to effect waivers of: (i) constitutional, statutory or equitable rights, (ii) the effect of applicable laws, (iii) any statute of limitations, (iv) broadly or vaguely stated rights, (v) unknown future defenses, or (vi) rights to damages;
- (f) imposes or permits: (i) liquidated damages, (ii) the appointment of a receiver, (iii) penalties, (iv) indemnification for gross negligence, willful misconduct or other wrongdoing, (v) confessions of judgment, or (vi) rights of self-help or forfeiture;
- (g) purports to limit or alter laws requiring mitigation of damages;
- (h) concerns choice of forum, consent or submission to the personal or subject matter jurisdiction of courts, venue of actions, means of service of process, waivers of rights to jury trials, and agreements regarding arbitration;

⁵² See “The Remedies Opinion-Examples of Specific Limitations to the Remedies Opinion (Additional Qualifications)-Other Common Qualifications.”

- (i) purports to reconstitute the terms thereof as necessary to avoid a claim or defense of usury;
- (j) purports to require a party thereto to pay or reimburse attorneys' fees incurred by another party, or to indemnify another party therefor, which provisions may be limited by applicable statutes and decisions relating to the collection and award of attorneys' fees;
- (k) relates to the evidentiary standards or other standards by which the Transaction Documents are to be construed, including, but not limited to, provisions that attempt to change or waive rules of evidence or fix the method or quantum of proof to be applied in litigation or similar proceedings;
- (l) prohibits or unreasonably restricts: (i) competition, (ii) the solicitation or acceptance of customers, business relationships or employees, (iii) the use or disclosure of information, or (iv) activities in restraint of trade;
- (m) enumerates that remedies are not exclusive or that a party has the right to pursue multiple remedies without regard to other remedies elected or that all remedies are cumulative;
- (n) constitutes severability provisions;
- (o) permits the exercise, under certain circumstances, of rights without notice or without providing opportunity to cure failures to perform;
- (p) purports to create rights to setoff otherwise than in accordance with applicable law;
- (q) contains a blanket prohibition on assignments or a specific prohibition on assignment of payments due or to come due; or
- (r) purports to entitle any party to specific performance of any provision thereof.

Counsel for the Opinion Recipient should consider whether to request coverage in the opinion letter as to the enforceability of specific provisions in the Transaction Documents. This may be particularly appropriate where counsel for the Opinion Recipient is located in a state other than Florida.

Security Document Qualifications

1. Our opinions regarding the Security Documents that are set forth in paragraphs [15-18] above are limited to Article 9, and in addition, with respect to the Pledged Securities Collateral, to Article 8, of the Florida UCC. We express no opinion with respect to: (a) the right, title or interest of the Borrower in or to any of the Collateral or any other property; (b) except as expressly set forth in paragraphs [15-18] above, the creation, attachment or perfection of any security interest or lien;⁵³ (c) the priority of any security interest or lien;⁵³ (d) under Article 9 of the Florida UCC, what other Florida law or law of another state governs the perfection or effect of perfection or non-perfection of the security interest of the Lender in any particular item or items of the Article 9 Collateral; and (e) any collateral not subject to Article 9 or Article 8 of the Florida UCC.⁵⁴

⁵³ Paragraph (h) of the list of excluded laws excludes from the scope of opinion letters of Florida counsel laws, rules and regulations concerning the creation, attachment, perfection or priority of any lien or security interest, other than any opinions on such matters as are expressly included in the opinion letter. This qualification might be viewed as overlapping with the list of excluded laws, and therefore arguably unnecessary. However, many Opining Counsel leave this qualification in their opinion letters despite the duplication to remind the Opinion Recipient as to the scope of the opinion that is being rendered with respect to security interests.

⁵⁴ See "Opinions With Respect to Collateral Under the Uniform Commercial Code-Scope of UCC Opinions; Limitations."

2. For purposes of this opinion letter, we assume that: (i) “value” has been given to the Borrower in connection with the Transaction, and (ii) the Borrower has rights in the Personal Property Collateral⁵⁵ and the Pledged Securities Collateral.⁵⁶

3. For purposes of this opinion letter, we assume that the respective descriptions of the Personal Property Collateral contained in the Security Agreement [and in the Financing Statement] sufficiently identify the Personal Property Collateral intended to be covered thereby [and that the information regarding the debtor and the secured party contained in the Financing Statement is correct and complete.]⁵⁷

4. For purposes of this opinion letter, we assume that the description of the Pledged Collateral contained in the Pledge Agreement sufficiently identifies the Pledged Collateral intended to be covered thereby.

5. The scope of our opinions regarding the security interests created by the Security Documents is further limited by the Bankruptcy Exception and the Equitable Principles Limitation.⁵⁸

If the security interest has been granted in deposit accounts or investment accounts where perfection of the security interest will be perfected by means of a control agreement, qualifications with respect to such opinion should be included in the opinion letter. The recommended form of such additional qualifications is discussed in “Opinions with Respect to Collateral under the Uniform Commercial Code-Perfection Opinions-Perfection by Control, other than by Possession or Delivery” and “—Assumptions for Perfection by Control Opinions.”

Many Florida counsel also add language to the opinion letter to advise the Lender that the creation, attachment and/or perfection of certain security interests may be subject to special rules. Although not required, the recommended language is as follows:

Our opinions concerning creation, attachment and/or perfection of security interests and liens are further subject to the following:

- We call to your attention the fact that the attachment and perfection of a security interest in “proceeds” (as defined in the Florida UCC) of collateral is governed and restricted by Section 679.3151 of the Florida UCC;
- Section 552 of the Federal Bankruptcy Code limits the extent to which property acquired by a debtor after the commencement of a case under the Federal Bankruptcy Code may be subject to a security interest arising from a security agreement entered into by the debtor before the commencement of such case;
- We express no opinion with respect to any goods which are accessions to, or commingled or processed with, other goods to the extent that the security interest is limited by Sections 679.335 or 679.336 of the Florida UCC;
- The security interest in certain kinds of collateral, such as rights under contracts and agreements, may be subject to and limited by the terms of any agreements under which the collateral exists and by the terms of the agreements and contracts themselves (except as expressly provided by Sections 679.4061, 679.4071, 679.4081, and 679.409 of the Florida UCC); and

⁵⁵ See “Opinions With Respect to Collateral Under the Uniform Commercial Code-Creation and Attachment Opinions-Enforceability of Security Interests.”

⁵⁶ See “Opinions With Respect to Collateral Under the Uniform Commercial Code-Article 8 Opinions-Perfection of Security Interests in Certificated Securities.”

⁵⁷ If Opining Counsel agrees to remove the bracketed language, then Opining Counsel is responsible for confirming the factual information contained in the financing statement. See “Opinions With Respect to Collateral Under the Uniform Commercial Code-Creation and Attachment Opinions-Description of Collateral.”

⁵⁸ See “Opinions with Respect to Collateral Under the Uniform Commercial Code-Scope of UCC Opinions; Limitations-Bankruptcy and Equitable Principles Not Included.”

- The filing of the Financing Statement with the State Filing Office will not or may not be effective to perfect the security interest in as-extracted oil, gas, and other minerals and related receivables generated by sale of the minerals at the wellhead or minehead, where the debtor has a real estate interest in the minerals before extraction, or in timber to be cut.

*Florida Opining Counsel often include in their opinion letters information advising the Opinion Recipient about issues that might in the future affect the continuing perfection of the security interest. Although not required, the recommended language is as follows:*⁵⁹

In addition, we call your attention to the following: (a) the continued effectiveness of certain financing statements filed under the Florida UCC is dependent on the filing of a properly completed continuation statement within six (6) months prior to the fifth anniversary of the date of filing of the financing statement and thereafter within six (6) months prior to each additional fifth anniversary of the filing of the financing statement; (b) the continued effectiveness of each of the financing statements in the event of a change of location of the debtor (as defined in the Florida UCC), or the removal from the State of Florida of any of the fixtures covered by financing statements filed in Florida, may be dependent on perfecting the security interest in accordance with the laws of such other jurisdiction and the perfection or non-perfection of the security interest therein may be governed by the law of another jurisdiction; (c) the continued effectiveness of the financing statement as against collateral transferred to a new owner will be dependent upon the nature of the collateral and whether the secured party authorized the disposition of the collateral and further dependent upon perfecting the security interest in accordance with the laws of the jurisdiction in which the new owner is located (as defined in the Florida UCC); (d) the continued effectiveness of the financing statements to perfect a security interest in collateral acquired by the debtor more than four months after a change of the debtor's name, identity or corporate or other organizational structure, as provided in the Florida UCC, is dependent on the filing of an appropriate amendment to the financing statement prior to the expiration of such four-month period; and (e) the failure of a secured party to respond within two weeks after receipt of a transaction party's request for approval or correction of the transaction party's statement of the aggregate amount of unpaid obligations or the transaction party's list of collateral may result in a loss of that secured party's security interest in collateral as against persons misled by that secured party's failure to respond, and may also result in liability of that secured party for any loss caused to the transaction party thereby.

*This illustrative form of opinion letter does not include a priority opinion. As such, none of the qualifications and limitations that are required with respect to a priority opinion are included in this form. If a priority opinion is rendered, it should be rendered subject to extensive appropriate qualifications and limitations.*⁶⁰

Other Matters

We do not express any opinion as to the laws of any jurisdiction other than the State of Florida and the United States of America.⁶¹

⁵⁹ See "Opinions With Respect to Collateral Under the Uniform Commercial Code-Perfection Opinions-Location of Debtor."

⁶⁰ See "Opinions with Respect to Collateral under the Uniform Commercial Code-Opinions Regarding Priority."

⁶¹ See "Common Elements of Opinions-Opinions under Florida or Federal Law; Opinions under the Laws of Another Jurisdiction." Under customary practice in Florida, this opinion incorporates the concept that no opinion is being rendered under the laws of any other jurisdiction, whether or not so stated.

This opinion letter is furnished to you solely for your benefit in connection with the Transaction and may not be relied upon by any other party without our prior written consent in each instance.⁶² Further, copies of this opinion letter may not be furnished to any other party, nor may any portion of this opinion letter be quoted, circulated or referred to in any other document without our prior written consent in each instance.⁶³

This opinion letter speaks only as of the date hereof. We assume no obligation to update or supplement this opinion letter if any applicable laws change after the date of this opinion letter or if we become aware after the date of this opinion letter of any facts or other developments, whether existing before or first arising after the date hereof, that might change the opinions expressed above.⁶⁴

Very truly yours,

LAW FIRM'S SIGNATURE⁶⁵

⁶² See “Common Elements of Opinions-Addressee(s) and Reliance.” If Opining Counsel agrees to allow assignees to rely on the opinion letter, the following language is recommended in place of the language set forth in the first sentence of the first paragraph set forth above:

This opinion letter is furnished to you solely for your benefit in connection with the Transaction and, except as set forth below, may not be relied upon by any other party without our prior written consent in each instance. At your request, we hereby consent to reliance hereon by any future assignee of your interest in the loans under the Transaction Documents pursuant to an assignment that is made and consented to in accordance with the express provisions of Section ___ of the Loan Agreement, on the condition and understanding that: (i) this opinion letter speaks only as of the date hereof, (ii) we have no responsibility or obligation to update or supplement this opinion letter, to consider its applicability or correctness to any person other than its addressee(s), or to take into account changes in law, facts or any other developments of which we may later become aware, and (iii) any such reliance by a future assignee must be actual and reasonable under the circumstances existing at the time of assignment, including any changes in law, facts or any other developments known to or reasonably knowable by the assignee at such time.

⁶³ See “Common Elements of Opinions-Addressee(s) and Reliance.”

⁶⁴ See “Common Elements of Opinions-Date.”

⁶⁵ See “Common Elements of Opinions-Signatures.”

FORM "B"

Illustrative Form of Opinion Letter In a Loan Transaction Secured by Real Estate

This illustrative form of opinion letter is for a loan transaction secured by real estate. It assumes that: (i) the Transaction Documents expressly provide that they are governed by Florida law, (ii) all Client entities are Florida entities, and (iii) the real estate securing the loan is located in Florida. It also assumes that there is an entity borrower, an individual guarantor and an entity guarantor. Finally, this illustrative form of opinion letter assumes that a Florida law firm (rather than an individual lawyer) is rendering the opinion.¹

[Date of Opinion]²

[Name of Opinion Recipient]³
[Address of Opinion Recipient]

Re: [Description of Transaction]

Ladies and Gentlemen:

We have acted as counsel to _____ [Name of Borrower], [a Florida corporation/partnership/limited liability company/as trustee of _____, a Florida trust] (the "Borrower"), in connection with a loan (the "Transaction") in the original principal amount of \$ _____ (the "Loan Amount") made by [Name of Lender] (the "Lender") in favor of the Borrower pursuant to that certain [Loan Agreement/Credit Agreement, dated _____] (the "Loan Agreement"). We have also acted as counsel to _____ (the "Individual Guarantor") and _____, [a Florida corporation/partnership/limited liability company/as trustee of _____, a Florida trust] (the "Entity Guarantor," and collectively with the Individual Guarantor, the "Guarantors") in connection with the Transaction.

This opinion letter⁴ is furnished to you pursuant to Section __ of the Loan Agreement at the request and with the consent of the Borrower and the Guarantors.⁵ Capitalized terms used but not otherwise defined herein shall have the definitions set forth in the Loan Agreement.⁶

This opinion letter is limited to the matters expressly stated herein. No opinions are to be inferred or implied beyond the opinions expressly so stated.⁷

¹ All references in the footnotes to this illustrative form of opinion letter are to sections of the "Report on Third-Party Legal Opinion Customary Practice in Florida, dated December 3, 2011" (the "Report"). Unless otherwise defined in this illustrative form of opinion letter, terms defined in the Report have the same meanings herein. The Report supersedes the Prior Florida Reports.

² See "Common Elements of Opinions-Date."

³ See "Common Elements of Opinions-Addressee(s) and Reliance."

⁴ This illustrative form of opinion letter is couched as an opinion letter even though it includes a no litigation factual confirmation.

⁵ See "Common Elements of Opinions-Brief Description of Transaction and Request for Opinion Letter" and "Introductory Matters-Ethical and Professional Issues-Client Consent."

⁶ See "Common Elements of Opinions-Definitions." In using this illustrative form of opinion letter, care should be taken to make certain that defined terms used in the opinion letter are consistent with the particularities of the Transaction, the Transaction Documents, and/or the identity of the parties to the Transaction and the Transaction Documents.

⁷ See "Introductory Matters-No Implied Opinions."

Interpretation of Opinion Letters Under Florida Customary Practice; Incorporation by Reference⁸

The Committees believe that all opinion letters of Florida counsel with respect to matters of Florida law should be interpreted under Florida customary practice (as articulated by the Report), regardless of whether or not the Report is expressly incorporated by reference into the opinion letter itself and regardless of where the Opinion Recipient is located.

Notwithstanding the foregoing, the Committees recommend that Florida counsel consider the express incorporation by reference of the Report into an opinion letter. Such express incorporation has three key benefits: (i) it allows Opining Counsel to expressly incorporate lists of assumptions, limitations, qualifications and exceptions into the opinion letter by explicit reference, thus shortening the opinion letter, (ii) it greatly reduces confusion and/or later disagreements by both Opining Counsel and the Opinion Recipient as to the application and effect of Florida customary practice (as articulated in the Report) with respect to the opinion letter, and (iii) it should lessen the concern that a court interpreting the opinion letter may incorrectly determine, despite the view of the Committees regarding this issue, not to follow Florida customary practice (as articulated in the Report), particularly where the court is located outside of Florida.

If the Report is expressly incorporated by reference into the opinion letter, the following language is recommended:

This opinion letter has been prepared and is to be construed in accordance with the “Report on Third-Party Legal Opinion Customary Practice in Florida, dated December 3, 2011” (the “Report”). The Report is incorporated by reference into this opinion letter.

This illustrative form of opinion letter can be used whether or not the Report is expressly incorporated by reference into the opinion letter.

Documents Reviewed⁹

In connection with rendering an opinion, Opining Counsel must review various documents with respect to the Transaction. Generally, these documents will fall into three categories: (i) the Transaction Documents, (ii) other documents that may be required to be reviewed to render one or more of the opinions in the opinion letter, and (iii) documents that relate to the Client’s entity status and organization, entity power and authorization of the Transaction and the Transaction Documents (which are sometimes called “authority documents”).

In many cases, all of the reviewed documents are listed in a single list, with definitions provided for certain categories of documents (i.e., the “Transaction Documents,” the “Other Reviewed Documents” and the “Authority Documents”). In other cases, the “Authority Documents” are not separately defined, but rather are included within the list of “Other Reviewed Documents.”

This illustrative form of opinion letter breaks up the documents reviewed into the referenced three separate categories.

Transaction Documents¹⁰

An opinion letter should include a specific list of the Transaction Documents relating to the Transaction (which are the agreements between or among the parties as to which the opinions are being rendered). The list of Transaction Documents set forth below is an illustrative list of the documents for a loan transaction secured by real estate. Sometimes one or more of these illustrative Transaction Documents will have a different name than the name described below and sometimes one or more of these illustrative Transaction Documents will be combined into a single document. In some cases, not all of these illustrative Transaction Documents will be required because of the particular facts and circumstances of the Transaction. In all cases, the list of Transaction Documents set forth in the opinion letter should be tailored to the specifics of the Transaction to which the particular opinion letter relates.

⁸ See “Common Elements of Opinions-Opinions of Florida Counsel Are To Be Interpreted Under Florida Customary Practice” and “Common Elements of Opinions-Express Incorporation of the Report into Opinion Letters.”

⁹ See “Common Elements of Opinions-Opinion.”

¹⁰ See “Common Elements of Opinions-Transaction Documents.”

In connection with rendering the opinions set forth in this opinion letter, we have reviewed originals or copies of the following documents:

- (i) The Loan Agreement;
- (ii) The Promissory Note, dated _____, 20__, in the Loan Amount executed by the Borrower in favor of the Lender (the “Note”);
- (iii) The Guaranty Agreement, dated _____, 20__, executed by the Individual Guarantor in favor of the Lender (the “Individual Guaranty”);
- (iv) The Guaranty Agreement, dated _____, 20__, executed by the Entity Guarantor in favor of the Lender (the “Entity Guaranty” and together with the Individual Guaranty, the “Guarantees”);
- (v) The Mortgage and Security Agreement, dated _____, 20__ (the “Mortgage”), made by the Borrower in favor of the Lender with respect to the real property (the “Real Property”), including fixtures (the “Fixtures”), described in the Mortgage (the Real Property and the Fixtures are sometimes collectively referred to as the “Real Property Collateral”); and
- (vi) The Assignment of Leases and Rents, dated _____, 20__ (the “Assignment of Leases and Rents”), made by the Borrower in favor of the Lender with respect to the leases and rents constituting real property to be derived from the Real Property Collateral (the “Leases and Rents Collateral”).

The Loan Agreement, the Note, the Guarantees, the Mortgage and the Assignment of Leases and Rents are hereinafter collectively referred to as the “Transaction Documents.”

Other Reviewed Documents¹¹

Opining Counsel should consider listing other documents reviewed in connection with rendering the opinions set forth in the opinion letter. The list of other documents reviewed will necessarily be Transaction-specific. Some of the “Other Reviewed Documents” may be contracts that are not Transaction Documents and others may be documents that are not contractual in nature at all. Examples of the types of documents that might be listed here are included below.

In addition, in connection with rendering the opinions set forth in this opinion letter, we have reviewed originals or copies of the following other documents:

- (i) the financing statement to be filed in the public records of _____ County, Florida (the “Local Filing Office”) naming the Borrower as debtor and the Lender as secured party and describing the Fixtures,¹² [the form of which is attached to this opinion letter] (the “Financing Statement”);
- (ii) *if applicable, the documents from a prior related loan transaction;*
- (iii) *if applicable, a list of “other agreements” of the Borrower or the Guarantor, or a list of judgments, decrees and orders applicable to the Borrower or the Guarantors reviewed in rendering the “no violation and no breach or default” opinion; and*

¹¹ See “Common Elements of Opinions–Transaction Documents.”

¹² This form assumes that the Mortgage grants a security interest in “fixtures.” Under Florida law, a security interest in fixtures is perfected by the filing of a UCC financing statement in the local filing office where the mortgage will be recorded. However, some Florida attorneys also make a precautionary filing of the financing statement with the State Filing Office with respect to the “fixtures” (so that the security interest in the “fixtures” will be perfected even if the personal property defined as “Fixtures” in the Mortgage doesn’t constitute “fixtures” under Florida law).

- (iv) *if applicable, other transaction documents as to which Opining Counsel is not rendering any opinions or closing documents with respect to the Transaction, such as closing statements, certificates delivered to the Lender by the Client at the closing and contracts as to which no opinions are being rendered in the opinion letter.*

Authority Documents

Opining Counsel should consider including a list of the Authority Documents, which are the documents that relate to entity status and organization, entity power, and authorization of the Transaction and the Transaction Documents. This illustrative form includes the certificates to counsel among the Authority Documents, because, in many cases, the certificates to counsel are the documents pursuant to which the Client delivers to Opining Counsel copies of the various entity organizational and authorization documents. Further, with respect to the certificates to counsel, some Opining Counsel deliver copies of the certificates to counsel to the Opinion Recipient (either separately or by attaching the certificates of counsel to the opinion letter), while others do not.

Further, in connection with rendering the opinions set forth in this opinion letter, we have reviewed originals or copies of the following authorization documents:

- (i) *the Borrower's Organizational Documents (describe with specificity);*¹³
- (ii) *the Entity Guarantor's Organizational Documents (describe with specificity);*¹³
- (iii) *the Borrower's authorizing documents with respect to the Transaction (describe with specificity the minutes and/or written consent actions that authorize the Transaction);*¹⁴
- (iv) *the Entity Guarantor's authorizing documents with respect to the Transaction (describe with specificity the minutes and/or written consent actions that authorize the Transaction);*¹⁴
- (v) Certificates of Status of the Borrower and the Entity Guarantor, dated _____, 20__, issued by the Florida Department of State;
- (vi) *other certificates of public officials, if any (describe with specificity);*
- (vii) a certificate to counsel from the Borrower, dated _____, 20__, [a copy of which is attached hereto as _____] (the "Borrower Certificate to Counsel");¹⁵
- (viii) a certificate to counsel from the Individual Guarantor, dated _____, 20__, [a copy of which is attached hereto as _____] (the "Individual Guarantor Certificate to Counsel");¹⁵ and
- (ix) a certificate to counsel from the Entity Guarantor, dated _____, 20__, [a copy of which is attached hereto as _____] (the "Entity Guarantor Certificate to Counsel" and, together with the Borrower Certificate to Counsel and the Individual Guarantor Certificate to Counsel, the "Certificates to Counsel");¹⁵

Catch-all Language or Limiting Language

Some Opining Counsel include catch-all language in the opinion letter to the effect that they have reviewed such other documents and have made such other inquiries as they have deemed necessary and relevant to form the basis for the opinion. Others do not include such language. In other opinion letters, Opining Counsel expressly limit the documents reviewed to those expressly listed, affirmatively stating that Opining Counsel has reviewed no other documents.

¹³ See "Entity Status and Organization of a Florida Entity-Organizational Documents."

¹⁴ See "Authorization of the Transaction by a Florida Entity."

¹⁵ For a discussion regarding the content of certificates to counsel, see "Common Elements of Opinions-Reliance on Factual Certificates and Representations and Warranties; Assumptions of Fact; Scope of Reliance." An illustrative form of certificate to counsel accompanies the Report as Form "E."

In preparing and delivering an opinion letter, Opining Counsel should, in accordance with Florida customary practice, review the documents and make the inquiries relevant to the particular legal opinions being rendered. Whether catch-all language or limiting language is or is not included, Opining Counsel should, in accordance with Florida customary practice, perform the diligence required to render each opinion being rendered, and a limitation in the list of documents reviewed that reflects a failure of Opining Counsel to review the documents that are expected to be reviewed to render the particular opinion under Florida customary practice is not likely to constitute a limitation on the scope of the opinion unless the exception from customary practice is expressly noted in the opinion letter. On the other hand, inclusion of the catch-all language is not intended to expand the scope of the documents required to be reviewed beyond that required under Florida customary practice to render the opinions being issued with respect to the Transaction and the Transaction Documents as set forth in the opinion letter.

Recommended catch-all language is as follows:

We have also reviewed such other documents, instruments and certificates as we have deemed relevant or necessary to form the basis for the opinions set forth in this opinion letter.

Recommended limiting language is as follows:

For purposes of rendering the opinions contained in this opinion letter, we have not reviewed any documents other than the documents listed above. We have also not reviewed any documents that may be referred to in or incorporated by reference into any of the documents listed above.

Opinion Limitations and Assumptions

Opining Counsel generally describe in the opinion letter limitations to the scope of the opinion letter and assumptions upon which the opinions set forth in the opinion letter are based. These include limitations of general applicability, assumptions that Opining Counsel is making and definitions of key concepts (such as the definition of Opining Counsel's "knowledge") that are often expressly set forth in the opinion letter to highlight to the Opinion Recipient these limitations on the scope of the opinion letter.

Under Florida customary practice, certain limitations and assumptions are implicitly incorporated into opinion letters delivered by Florida counsel as to matters of Florida law whether or not such limitations and assumptions are expressly set forth in the opinion letter. However, the Committees believe that express inclusion of such limitations and assumptions in the opinion letter (whether through express incorporation of such limitations and assumptions by reference to the Report or by including a listing of such limitations and assumptions in the opinion letter) is the preferred approach to avoid confusion regarding the applicable limitations and assumptions.

General Limitations

With your consent, we have relied upon, and assumed the accuracy of, the representations and warranties contained in the Transaction Documents [and in the Certificates to Counsel] supplied to us by the Borrower and the Guarantors with respect to the factual matters set forth therein. However, no opinion is rendered hereunder as to the accuracy of the representations and warranties contained in the Transaction Documents [or in the Certificates to Counsel]. *[Further, the factual matters set forth in the Certificates to Counsel have been provided to us solely for our benefit in issuing this opinion, and no party, other than this firm, is entitled to rely upon them.]*¹⁶

We have, with your consent, assumed that certificates of public officials dated earlier than the date of this opinion letter remain accurate from such earlier dates through and including the date of this opinion letter.¹⁷

¹⁶ See "Common Elements of Opinions-Reliance on Factual Certificates and Representations and Warranties; Assumptions of Facts; Scope of Reliance."

¹⁷ See "Common Elements of Opinions-Reliance on Certificates of Public Officials."

Assumptions¹⁸

A list of assumptions should be inserted here. Under Florida customary practice, some assumptions are implicitly incorporated into opinion letters delivered by Florida counsel as to matters of Florida law whether or not they are expressly set forth in the opinion letter. Other assumptions are only included in the opinion letter if they are expressly set forth in the opinion letter.

The following list of assumptions includes all of the assumptions that are implicitly incorporated into opinion letters delivered by Florida counsel as to matters of Florida law under Florida customary practice. The Committees believe that express inclusion in the opinion letter of these implicitly included assumptions is the preferred approach, in order to avoid confusion regarding whether or not these assumptions apply to the opinion letter. This list also contemplates that Opining Counsel may elect to add additional assumptions to the opinion letter based on the particular facts and circumstances of the Transaction, the Transaction Documents, the Client and/or the scope of the opinions being rendered.

If Opining Counsel only includes some, but not all, of the implicitly included assumptions in the opinion letter, the Committees believe that all of the remaining assumptions that are implicitly included in all opinion letters of Florida counsel under Florida customary practice will nevertheless be implied into the opinion letter. Notwithstanding the foregoing, the Committees urge Florida counsel to include the entire list of implied assumptions in their opinion letters out of a concern that a court interpreting an opinion letter rendered by Florida counsel may determine incorrectly not to follow Florida customary practice (as articulated by the Report) and may instead decide that only those assumptions that are expressly set forth in the opinion letter constitute a part of the opinion letter.

Opining Counsel should further recognize that problems can arise if, in the course of negotiating the final form of the opinion letter to be delivered at the closing of the Transaction, Opining Counsel delivers a draft form of the opinion letter to the Opinion Recipient that expressly includes the assumptions implicitly included in all opinions of Florida counsel under Florida customary practice, and, thereafter, Opining Counsel agrees to remove one or more of the stated assumptions from the opinion letter. Under such circumstances, Opining Counsel may no longer have the benefit of the implicit incorporation into the opinion letter of such removed assumptions.

If the Report has been expressly incorporated by reference into the opinion letter, Opining Counsel may wish to use the following:

In rendering the opinions set forth herein, we have relied, without investigation, on each of the assumptions implicitly included in all opinions of Florida counsel that are set forth in the Report in “Common Elements of Opinions – Assumptions” [and the following additional assumptions: _____ (other assumptions that are based on the particularities of the Transaction, the Transaction Documents, the Clients and/or the scope of the opinions being rendered)].

If the Report has not been expressly incorporated by reference into the opinion letter, Opining Counsel may wish to include a list of assumptions in the opinion letter.

In rendering the opinions set forth herein, we have relied, without investigation, on each of the following assumptions:

Assumptions deemed to be implicitly included in all opinion letters of Florida counsel under Florida customary practice

- (a) the legal capacity of each natural person to take all actions required of each such person in connection with the Transaction;
- (b) the legal existence of each party to the Transaction other than the Borrower and the Entity Guarantor;
- (c) the power of each party to the Transaction, other than the Borrower and the Guarantors, to execute, deliver and perform all Transaction Documents executed and delivered by such party and to do each other act done or to be done by such party;
- (d) the authorization, execution and delivery by each party, other than the Borrower and the Guarantors, of each Transaction Document executed and delivered or to be executed and delivered by such party;

¹⁸ See “Common Elements of Opinions-Assumptions.”

(e) the validity, binding effect and enforceability as to each party, other than the Borrower and the Guarantors, of each Transaction Document executed and delivered by such party or to be executed and delivered and of each other act done or to be done by such party;

(f) there have been no undisclosed modifications of any provision of any document reviewed by us in connection with the rendering of this opinion letter and no undisclosed prior waiver of any right or remedy contained in any of the Transaction Documents;

(g) the genuineness of each signature, the completeness of each document submitted to us, the authenticity of each document reviewed by us as an original, the conformity to the original of each document reviewed by us as a copy and the authenticity of the original of each document received by us as a copy;

(h) the truthfulness of each statement as to all factual matters otherwise not known to us to be untruthful or unreliable contained in any document encompassed within the diligence review undertaken by us;

(i) each certificate or other document issued by a public authority is accurate, complete and authentic as of the date of the opinion letter, and all official public records (including their proper indexing and filing) are accurate and complete;

(j) each recipient of the opinion letter has acted in good faith, without notice of any defense against enforcement of rights created by, or adverse claim to any property or security interest transferred or created as part of, the Transaction, and has complied with all laws applicable to it that affect the Transaction;

(k) the Transaction and the conduct of the parties to the Transaction comply with any requirement of good faith, fair dealing and conscionability;

(l) routine procedural matters such as service of process or qualification to do business in the relevant jurisdiction(s) will be satisfied by the parties seeking to enforce the Transaction Documents;

(m) agreements (other than the Transaction Documents as to which opinions are being given) and judgments, decrees and orders reviewed in connection with rendering the opinions will be enforced as written;

(n) no discretionary action (including a decision not to act) that is permitted in the Transaction Documents will be taken by or on behalf of the Borrower or the Guarantors in the future that might result in a violation of law or constitute a breach of or default under any of the Borrower's or the Guarantors' other agreements or under any applicable court order;

(o) there are no agreements or understandings among the parties, written or oral, and there is no usage of trade or course of prior dealing among the parties that would, in either case, define, supplement, modify or qualify the terms of the Transaction Documents or the rights of the parties thereunder;

(p) the payment of all required documentary stamp taxes, intangible taxes and other taxes and fees imposed upon the execution, filing or recording of documents;

(q) with respect to the Transaction and the Transaction Documents, including the inducement of the parties to enter into and perform their respective obligations thereunder, there has been no mutual mistake of fact or undue influence and there exists no fraud or duress; [and]

Additional assumptions expressly included in the opinion letter

(r) _____ (other assumptions that are based on the particularities of the Transaction, the Transaction Documents, the Clients and/or the scope of the opinions being rendered).

Knowledge¹⁹

When used in this opinion letter, the phrases "to our knowledge," "known to us" or the like means the conscious awareness of the lawyers in the "primary lawyer group" of factual matters such lawyers recognize as being relevant to the opinion or confirmation so qualified. Such phrases do not imply that we have undertaken any independent investigation within our firm, with the Borrower and/or the Guarantors or with any third party to determine the existence or absence of any facts or circumstances, and no inference should be drawn merely from

¹⁹ See "Common Elements of Opinions-Knowledge."

our past or current representation of the Borrower and/or the Guarantors. Where any opinion or confirmation is qualified by the phrase “to our knowledge,” “known to us” or the like, it means that the lawyers in the “primary lawyer group” are without any actual knowledge or conscious awareness that the opinion or confirmation is untrue in any respect material to the opinion or confirmation. For purposes of this opinion letter, “primary lawyer group” means: (i) the lawyer who signs his or her name or the name of the firm to this opinion letter, (ii) the lawyers currently in the firm who are actively involved in preparing or negotiating this opinion letter, and (iii) the lawyers currently in the firm who are actively involved in negotiating or documenting the Transaction or the Transaction Documents.

The Opinions²⁰

The specific opinions being rendered by Opining Counsel should be inserted following introductory language. The recommended “lead-in” language is as follows:

Based upon and subject to the foregoing, and subject to the assumptions, limitations and qualifications contained herein, we are of the opinion that:

“Building Block” Opinions

1. The Borrower is a [corporation/partnership/limited liability company/trustee of a Florida trust] organized under Florida law, and its [corporate/partnership/limited liability company] status is active.²¹

2. The Entity Guarantor is a [corporation/partnership/limited liability company/trustee of a Florida trust] organized under Florida law, and its [corporate/partnership/limited liability company] status is active.²¹

3. Based solely on the good standing certificates from the Secretary of State of _____ and _____, the Borrower and the Entity Guarantor are each qualified to transact business as a foreign [corporation/partnership/limited liability company] in the States of _____ and _____.²²

4. The Borrower has the [corporate/partnership/limited liability company/trust] power to execute and deliver the Transaction Documents to which it is a party and to perform its respective obligations thereunder.²³

5. The Entity Guarantor has the [corporate/partnership/limited liability company/trust] power to execute and deliver the Transaction Documents to which it is a party and to perform its respective obligations thereunder.²³

6. The Borrower has authorized the execution, delivery and performance of the Transaction Documents to which it is a party by all necessary [corporate/partnership/limited liability company/trust] action.²⁴

7. The Entity Guarantor has authorized the execution, delivery and performance of the Transaction Documents to which it is a party by all necessary [corporate/partnership/limited liability company/trust] action.²⁴

8. Each of the Transaction Documents to which the Borrower is a party has been executed and delivered by the Borrower.²⁵

9. Each of the Transaction Documents to which either of the Guarantors is a party has been executed and delivered by the respective Guarantors.²⁵

²⁰ See “Common Elements of Opinions-Opinion.”

²¹ See “Entity Status and Organization of a Florida Entity.”

²² See “Authority to Transact Business in Florida-Opinions regarding Qualification of a Florida Entity under the Laws of another Jurisdiction.”

²³ See “Entity Power of a Florida Entity.”

²⁴ See “Authorization of the Transaction by a Florida Entity.”

²⁵ See “Execution and Delivery.”

The Remedies Opinion

10. Each of the Transaction Documents to which the Borrower is a party is a valid and binding obligation of the Borrower, enforceable against the Borrower in accordance with its respective terms.²⁶

11. Each of the Transaction Documents to which either of the Guarantors is a party is a valid and binding obligation of each such Guarantor, enforceable against each such Guarantor in accordance with its respective terms.²⁶

No Violation and No Breach or Default Opinion

12. The execution and delivery by the Borrower and the Guarantors of the Transaction Documents and the performance by the Borrower and the Guarantors of their respective obligations under the Transaction Documents to which each is a party do not:²⁷

(a) violate the Borrower's or the Entity Guarantor's Organizational Documents;²⁸

(b) constitute a breach of or a default under, or result in the creation of a security interest or a lien on the assets of the Borrower or either of the Guarantors under, any of the Borrower's or either of the Guarantors' [agreements identified in _____ (*reference to a schedule in one of the Transaction Documents, to a public securities filing, to a list of other agreements set forth in the opinion letter, or to a certificate to counsel*) / "*material agreements*" that are known to us];²⁹

(c) violate any judgment, decree or order of any court or administrative tribunal applicable to the Borrower or either of the Guarantors that is [listed in _____ (*reference to a schedule in one of the Transaction Documents, to a list of judgments, decrees or orders set forth in the opinion letter, or to a certificate to counsel / known to us*);³⁰ or

(d) violate any of the Applicable Laws [*or, if no definition of Applicable Laws is included in the opinion letter, "violate any federal or Florida laws, rules or regulations that a Florida counsel exercising customary professional diligence would reasonably be expected to recognize as being applicable to the Borrower, the Guarantors, the Transaction Documents or the Transaction, but excluding the laws, rules and regulations enumerated below.*]³¹

No Required Governmental Consents or Approvals Opinion³²

13. No consent, approval, authorization or other action by, or filing or registration with, any governmental authority of the United States or the State of Florida is required by or on behalf of the Borrower or either of the Guarantors to execute and deliver the Transaction Documents and to close the Transaction contemplated by the Transaction Documents other than [_____]³³/ those consents, approvals,

²⁶ See "The Remedies Opinion-Overview of the Remedies Opinion" and "The Remedies Opinion-Analysis of the Foundational Building Block: The Meaning of the Basic Remedies Opinion."

²⁷ See "No Violation and No Breach or Default."

²⁸ See "No Violation and No Breach or Default-No Violation of Organizational Documents."

²⁹ See "No Violation and No Breach or Default-No Breach of or Default under Agreements." The first formulation referencing specified reviewed agreements is the recommended formulation.

³⁰ See "No Violation and No Breach or Default-No Violation of Judgments, Decrees or Orders." The first formulation referencing specified judgments, decrees or orders applicable to the Client is the recommended formulation.

³¹ See "No Violation and No Breach or Default-No Violation of Laws."

³² See "No Required Governmental Consents or Approvals."

³³ Opining Counsel sometimes list here the specific consents received or the filings required with respect to the particular Transaction, including consents relating to security interests or lien creation or as to the perfection of such security interests or liens. However, under Florida customary practice, no opinion is rendered with respect to any such security interest unless the opinion letter contains an express opinion with respect to such security interest.

authorizations, actions, filings and registrations as to which the requisite consents, approvals or authorizations have been obtained, the requisite actions have been taken and the requisite filings and registrations have been accomplished].

Usury Opinion

14. The Transaction Documents do not and will not violate applicable Florida usury laws provided that the Lender has not and does not reserve, charge, take or receive, directly or indirectly, at any time, interest or other sums deemed to be in the nature of interest (however labeled) in an amount exceeding the equivalent of the rate of [18%/25%] per annum, simple interest, calculated on the basis of a year of 365 days (or 366 days as applicable) and the actual number of days elapsed.³⁴

Real Estate Collateral Opinions

15. The Mortgage and the Assignment of Leases and Rents to be recorded or filed are in a form suitable for recordation or filing.³⁵

16. The Mortgage is effective to create a valid lien in favor of the Lender in the Real Property Collateral. Upon the proper recording of the Mortgage in the Local Filing Office, the Mortgage will provide constructive notice of the lien against the Real Property Collateral.³⁶

17. The Assignment of Leases and Rents is effective to create a valid lien in favor of the Lender in the Leases and Rents Collateral. Upon the proper recording of the Assignment of Leases and Rents in the public records of the Local Filing Office, the Assignment of Leases and Rents will provide constructive notice of the lien against the Leases and Rents Collateral.³⁶

18. The Financing Statement is in acceptable form for filing with the Local Filing Office. Upon the proper filing of the Financing Statement with and acceptance by the Local Filing Office, the Lender will have a perfected security interest in the Fixtures described therein.³⁷

Some lenders ask for an opinion regarding the zoning of the real property that is the subject of the opinion letter or regarding tax parcel status. Both of these opinions are actually factual confirmations that should always be based solely upon information obtained from the appropriate governmental official (often in the form of a letter from such official). For information about these opinions (including the recommended opinion language and the diligence required to render these opinions), see “Opinions Particular to Real Estate Transactions-Zoning and Land Use” and “—Tax Parcels.” If either of these opinions is rendered, any letter from an appropriate governmental official that is obtained as support for the opinion should be added to the list of “Other Reviewed Documents.”

³⁴ See “Florida Usury Law – Opinions of Florida Counsel Relating to Usury.” Florida counsel should be aware that, unless Florida usury law is excluded from the scope of an opinions letter that includes a “remedies opinion” and/or a “no violation of laws” opinion, then such opinions will be deemed (under Florida customary practice) to include an opinion that the Transaction Documents do not violate Florida usury law. However, if the opinion letter includes an express opinion regarding usury, then the scope of the usury opinion being given under the “remedies opinion” and under the “no violation of laws” opinion will be limited to the scope of the express usury opinion that is contained in the opinion letter. See “The Remedies Opinion-Analysis of the Foundational Building Block: The Meaning of the Basic Remedies Opinion-Legal Issues Covered by the Remedies Opinion.”

³⁵ See “Opinions Particular to Real Estate Transactions-Requirements for Recording Instruments Affecting Real Estate.”

³⁶ See “Opinions Particular to Real Estate Transactions-Creation of a Mortgage Lien.”

³⁷ See “Opinions With Respect to Collateral Under the Uniform Commercial Code-Perfection Opinions-Perfection by Filing.”

In Transactions involving out-of-state lenders and Florida mortgages, Opining Counsel may be asked to render an opinion regarding the Florida documentary stamp taxes and intangible taxes due in connection with the Transaction. If Opining Counsel agrees to render this opinion, then Opining Counsel should review the recommended opinion language, the qualifications to such opinion and the diligence required to render such opinion that is discussed in “Opinions Particular to Real Estate Transactions—Florida Taxes.” The most often rendered version of this opinion is included in paragraph 11 of Form “D,” which is the illustrative form of local counsel opinion that accompanies the Report.

The No Litigation Confirmation

To our knowledge, there is no action, suit or proceeding, at law or in equity, or by or before any governmental agency, now pending or overtly threatened in writing against the Borrower or either of the Guarantors that challenges the validity or enforceability of, seeks to enjoin the performance of, or seeks damages with respect to, the Transaction Documents or the Transaction [, except: _____]. For avoidance of doubt, please be advised that in rendering this confirmation we have made no independent investigation, including, without limitation, any search of court records, the files of our firm or the files of the Borrower or either of the Guarantors.³⁸

Applicable Laws and Excluded Laws³⁹

“Applicable Laws” is defined under Florida customary practice and is set forth in the Report. Opining Counsel often expressly define in the opinion letter the Applicable Laws that are covered by the scope of the opinion letter. Whether or not such definition is expressly included in the opinion letter, a Florida Opining Counsel would be obligated to consider all Applicable Laws, as so defined, in rendering the opinion letter.

The recommended form of the definition of Applicable Laws is as follows:

When used in this opinion letter, the term “Applicable Laws” means the federal and Florida laws, rules and regulations that a Florida counsel exercising customary professional diligence would reasonably be expected to recognize as being applicable to the Borrower, the Guarantors, the Transaction Documents or the Transaction, but excluding the laws, rules and regulations set forth below.

Whether or not a definition of Applicable Laws is expressly included in the opinion letter, Opining Counsel generally include in the opinion letter a list of laws that are excluded from coverage in the opinion letter. As set forth in the Report, some laws are implicitly excluded from opinion letters of Florida counsel under Florida customary practice, whether or not these laws are expressly excluded from the scope of the opinion letter by express reference in the opinion letter. Opining Counsel may also wish to expressly exclude other laws from the scope of the opinion letter by expressly referencing in such opinion letter the exclusion of such laws from the scope of the opinion letter.

³⁸ See “No Litigation-The “No Litigation” Confirmation.” As described in the Report, common practice in Florida with respect to the no litigation factual confirmation has changed over the last few years. This illustrative form of opinion letter includes a version of the no litigation confirmation that the Committees believe currently represents the no litigation confirmation generally given by Florida counsel.

³⁹ See “Common Elements of Opinions-Limitations to Laws of Specific Jurisdictions or to Substantive Areas of Law; Excluded Areas of Law.”

The Committees believe that the express inclusion in the opinion letter of a list of excluded laws is the preferred approach, whether through an express incorporation of the list of explicitly excluded laws contained in the Report or by actually setting forth such list of excluded laws in the opinion letter. However, the Committees recognize that some Florida counsel may choose to include a list of some, but not all, of the implicitly excluded laws in their opinion letters. The Committees believe that, in such situation, all of the remaining excluded laws that implicitly limit the scope of opinion letters of Florida counsel under Florida customary practice will nevertheless be implied into the opinion letter. Notwithstanding the foregoing, the Committees urge Florida counsel to include the entire list of implicitly excluded laws in their opinion letters out of a concern that a court interpreting an opinion letter of Florida counsel may incorrectly determine not to follow customary practice (as articulated in the Report) and may instead decide that only those excluded laws that are expressly set forth in the opinion letter limit the scope of the opinion letter.

Opining Counsel should recognize that problems can arise if, in the course of negotiating the final form of opinion letter to be delivered at the closing of the Transaction, Opining Counsel delivers a draft of the opinion letter to the Opinion Recipient that expressly includes the entire list of excluded laws, and, thereafter, Opining Counsel agrees to remove one or more of the excluded laws from the list contained in the opinion letter. Under such circumstances, Opining Counsel may no longer have the benefit of implicit incorporation into the opinion letter of such removed excluded laws.

If the Report has been expressly incorporated by reference into the opinion letter, Opining Counsel may wish to use the following:

The following federal and Florida laws, rules and regulations are expressly excluded from the scope of this opinion letter: (a) laws, rules and regulations that are defined as the Excluded Laws in the “Common Elements of Opinions-Limitations to Laws of Specific Jurisdictions or to Substantive Areas of Law; Excluded Areas of Law” section of the Report, and (b) the following laws, rules and regulations: _____ (other laws, rules and regulations that are to be expressly excluded from the scope of the opinion letter under the particular circumstances in which the opinion letter is being rendered).

If the Report is not expressly incorporated by reference into the opinion letter, Opining Counsel may wish to include a list of excluded laws in the opinion letter.

The following federal and Florida laws, rules and regulations are expressly excluded from the scope of this opinion letter:

Laws, rules and regulations deemed to be implicitly excluded from the scope of all opinion letters of Florida counsel under Florida customary practice

- (a) securities laws, rules and regulations;
- (b) Federal Reserve Board margin regulations;
- (c) laws, rules and regulations regulating banks and other financial institutions, insurance companies and investment companies;
- (d) pension and employee benefit laws, rules and regulations, such as the Employee Retirement Income Security Act (ERISA);
- (e) labor laws, rules and regulations, including laws on occupational safety and health (OSHA);
- (f) antitrust and unfair competition laws, rules and regulations;
- (g) laws, rules and regulations concerning compliance with fiduciary requirements;

- (h) laws, rules and regulations concerning the creation, attachment, perfection or priority of any lien or security interest, except to the extent expressly set forth in this opinion letter;⁴⁰
- (i) laws, rules and regulations relating to taxation;
- (j) bankruptcy, fraudulent conveyance, fraudulent transfer and other insolvency laws;
- (k) environmental laws, rules and regulations;
- (l) laws, rules and regulations relating to patents, copyrights, trademarks, trade secrets and other intellectual property;
- (m) local laws, administrative decisions, ordinances, rules or regulations, including any zoning, planning, building, occupancy or other similar approval or permit or any other ordinance or regulation of any county, municipality, township or other political subdivision of the State of Florida;
- (n) criminal and state forfeiture laws and any racketeering laws, rules and regulations;
- (o) other statutes of general application to the extent that they provide for criminal prosecution;
- (p) laws relating to terrorism or money laundering;
- (q) laws, regulations and policies concerning national and local emergency and possible judicial deference to acts of sovereign states;

Laws, rules and regulations expressly excluded from the scope of the opinion letter by Opining Counsel

- (r) _____ (other laws, rules and regulations that are to be expressly excluded from the scope of the opinion letter under the particular circumstances in which the opinion letter is being rendered);

Exclusions applicable to all laws, rules and regulations excluded from the scope of the opinion letter

- (s) filing or consent requirements under any of the foregoing excluded laws; [and]
- (t) judicial and administrative decisions to the extent they deal with any of the foregoing excluded laws.

Qualifications

Qualifications to the scope of the opinions set forth in an opinion letter are generally included in the opinion letter. This illustrative opinion letter includes qualifications to the opinions described above. If one or more of the opinions to which these qualifications relate are not being rendered in the opinion letter, the applicable qualifications need not be included in the opinion letter.

The foregoing opinions are subject to the following exceptions, qualifications and limitations:

Execution and Delivery Qualification

We did not physically witness the execution and delivery of the Transaction Documents, and our opinions herein regarding the execution and delivery of the Transaction Documents by the Borrower and the Guarantors

⁴⁰ Some Opining Counsel exclude this item from the list of excluded laws in situations where they are giving opinions on security interest issues. However, this exclusion from laws covered by the opinion letter is one of the excluded laws that is implicitly excluded from the scope of all opinions of Florida counsel under Florida customary practice. It is included in this illustrative form of opinion letter in order to make clear that security interest issues are not implicitly covered by other opinions that are being rendered (such as a “remedies” opinion or a “no required governmental consents or approvals” opinion on or with respect to a security agreement). Under Florida customary practice, security interest opinions are only rendered if and to the extent they are expressly included in an opinion letter.

are based, in part, on, [our review of the Certificates to Counsel in which the Borrower and the Guarantors confirmed certain facts to us with respect to the execution and delivery of the Transaction Documents / our review of copies of executed signature pages for such Transaction Documents provided to us (electronically or otherwise)].⁴¹

No Violation and No Breach or Default Qualifications

We express no opinion in paragraph [12(b)] regarding liens arising by operation of law or as to compliance or non-compliance with provisions in other agreements that require financial calculations or determinations to ascertain compliance⁴² or relating to any other aspect of the financial condition or results of operations of the Borrower or either of the Guarantors.

No Required Governmental Consents or Approvals Qualification

We express no opinion as to any consent, approval, authorization or other action or filing necessary for the ongoing operation of the Borrower's or either of the Guarantors' respective businesses.⁴³

Remedies Opinion Qualifications⁴⁴

The opinions regarding enforceability of the Transaction Documents that are contained in paragraphs [10 and 11] above are limited by:

1. bankruptcy, insolvency, reorganization, moratorium, fraudulent conveyance and transfer, and similar law affecting the rights and remedies of creditors generally (the "Bankruptcy Exception");⁴⁵ and
2. general principles of equity, regardless of whether such enforceability is considered in a proceeding at law or in equity (the "Equitable Principles Limitation").⁴⁶

The Committees recommend that a "generic" qualification⁴⁷ should be included in all opinion letters of Florida counsel that include a remedies opinion. There are two forms of the "generic" qualification: (i) the "material breach" qualification, which specifies which provisions of the Transaction Documents should be enforceable, and (ii) the "practical realization" qualification, which provides that the Opinion Recipient should receive the principal benefit of its bargain. In the context of a loan transaction secured by Florida real estate and fixtures, including the transaction upon which this illustrative form of opinion letter is based, the "material breach" qualification is the recommended form of "generic" qualification.⁴⁸

The following is the recommended form of the "material breach" qualification:

In addition, certain remedies, waivers and other provisions of the Transaction Documents might not be enforceable; nevertheless, subject to the Bankruptcy Exception and the Equitable Principles Limitation, such unenforceability will not render the Transaction Documents invalid as a whole or preclude: (i) the judicial enforcement of the obligation of the Borrower to repay the principal, together with the interest thereon (to the extent not deemed a penalty), as provided in the Note, (ii) the acceleration of the obligation of the Borrower to repay such principal, together with such interest, upon a material default by the Borrower of the payment of such principal or interest or

⁴¹ See "Execution and Delivery."

⁴² See "No Violation and No Breach or Default-No Breach of or Default under Agreements."

⁴³ See "No Required Governmental Consents or Approvals-Exceptions."

⁴⁴ See generally: "The Remedies Opinion-Qualifications for Narrowing the Scope of the Remedies Opinion."

⁴⁵ See "The Remedies Opinion-The Bankruptcy Exception and the Equitable Principles Limitation-The Bankruptcy Exception."

⁴⁶ See "The Remedies Opinion-The Bankruptcy Exception and the Equitable Principles Limitation-The Equitable Principles Limitation."

⁴⁷ See "The Remedies Opinion-The "Generic" Qualification."

⁴⁸ If a "material breach" qualification is not included in the opinion letter, Opining Counsel should include a "practical realization" qualification. The form of such qualification is set forth in "The Remedies Opinion-The "Generic" Qualification-The "Practical Realization" Qualification."

upon a material default by the Borrower in any other material provisions of the Transaction Documents, or (iii) the foreclosure in accordance with Applicable Laws of the lien on and security interest in the Real Property Collateral created by the Mortgage upon maturity or upon acceleration pursuant to (ii) above.⁴⁹

As noted, the inclusion of a “generic” qualification in the opinion letter does not limit the impact on the scope of the remedies opinion of the Bankruptcy Exception and the Equitable Principles Limitation. See “The Remedies Opinion-The “Generic” Qualification.”

If either form of the “generic” qualification is included in the opinion letter, it may be unnecessary to also include an extensive list of specific qualifications to the remedies opinion in the opinion letter (although Opining Counsel may elect to expressly include in the opinion letter one or more specific qualifications limiting the scope of the remedies opinion to bring those qualifications to the attention of the Opinion Recipient).

However, if neither form of “generic” qualification is included in the opinion letter, the Committees believe that Opining Counsel would be wise to include a list of specific exceptions to the scope of the remedies opinion that excludes from the scope of the opinion those rights and remedies contained in the Transaction Documents that may not be enforceable. To determine which specific qualifications to the remedies opinion to include in the opinion letter, Opining Counsel may wish to review the Transaction Documents and consider which of the rights and remedies contained in the Transaction Documents might not be enforceable.

When one of the Transaction Documents is a loan guaranty, some Florida Opining Counsel, in an abundance of caution, add a qualification to the effect that subsequent changes in the underlying loan documents could make the guaranty unenforceable under certain circumstances. Those Florida Opining Counsel that add this qualification do so because there are some Florida courts that have ruled that a guarantor may be released from a guaranty if there is a “material alteration” of the guarantor’s obligation to the detriment of the guarantor, unless the change is contemplated by the guaranty or the guarantor consents (or a valid waiver in the guaranty waives the necessity of such consent). Under relevant case law, whether a particular change in loan documents will be considered a material alteration or detrimental to the guarantor, or whether a particular change in loan documents is contemplated by a guaranty agreement, is based on the particular facts and circumstances and the express language in the guaranty agreement, respectively.

The recommended qualification relating to a loan guaranty is as follows:

We note also that, in the absence of an enforceable waiver or consent, a guarantor may be discharged if: (i) action by the lender impairs the value of collateral securing guaranteed debt to the detriment of the guarantor, (ii) the lender elects remedies for default that impair the subrogation rights of the guarantor against the borrower, (iii) the guaranteed debt is materially modified, or (iv) the lender otherwise takes action under loan documents that materially prejudices the guarantor.

Notwithstanding the foregoing, in the view of the Committees, not including this qualification in an opinion letter that includes a remedies opinion regarding the enforceability of a guaranty agreement does not, in and of itself, violate Florida customary practice.

The following is a representative list of specific exclusions to the scope of the remedies opinion that might be appropriate under the circumstances. This list is not exclusive, and Opining Counsel may wish to add to the opinion letter other qualifications to scope of the remedies opinion.

No opinion is expressed herein with respect to any provision of the Transaction Documents that:⁵⁰

- (a) purports to excuse a party from liability for the party’s own acts;
- (b) purports to make void any act done in contravention thereof;
- (c) purports to authorize a party to act in the party’s sole discretion or purports to provide that determination by a party is conclusive;

⁴⁹ See “The Remedies Opinion-The “Generic” Qualification-The “Material Breach” Qualification.”

⁵⁰ See “The Remedies Opinion-Examples of Specific Limitations to the Remedies Opinion (Additional Qualifications)-Other Common Qualifications.”

- (d) requires waivers or amendments to be made only in writing;
- (e) purports to effect waivers of: (i) constitutional, statutory or equitable rights, (ii) the effect of applicable laws, (iii) any statute of limitations, (iv) broadly or vaguely stated rights, (v) unknown future defenses, or (vi) rights to damages;
- (f) imposes or permits: (i) liquidated damages, (ii) the appointment of a receiver, (iii) penalties, (iv) indemnification for gross negligence, willful misconduct or other wrongdoing, (v) confessions of judgment, or (vi) rights of self-help or forfeiture;
- (g) purports to limit or alter laws requiring mitigation of damages;
- (h) concerns choice of forum, consent or submission to the personal or subject matter jurisdiction of courts, venue of actions, means of service of process, waivers of rights to jury trials, and agreements regarding arbitration;
- (i) purports to reconstitute the terms thereof as necessary to avoid a claim or defense of usury;
- (j) purports to require a party thereto to pay or reimburse attorneys' fees incurred by another party, or to indemnify another party therefor, which provisions may be limited by applicable statutes and decisions relating to the collection and award of attorneys' fees;
- (k) relates to the evidentiary standards or other standards by which the Transaction Documents are to be construed, including, but not limited to, provisions that attempt to change or waive rules of evidence or fix the method or quantum of proof to be applied in litigation or similar proceedings;
- (l) prohibits or unreasonably restricts: (i) competition, (ii) the solicitation or acceptance of customers, business relationships or employees, (iii) the use or disclosure of information, or (iv) activities in restraint of trade;
- (m) enumerates that remedies are not exclusive or that a party has the right to pursue multiple remedies without regard to other remedies elected or that all remedies are cumulative;
- (n) constitutes severability provisions;
- (o) permits the exercise, under certain circumstances, of rights without notice or without providing opportunity to cure failures to perform;
- (p) purports to create rights to setoff otherwise than in accordance with applicable law;
- (q) contains a blanket prohibition on assignments or a specific prohibition on assignment of payments due or to come due; or
- (r) purports to entitle any party to specific performance of any provision thereof.

Counsel for the Opinion Recipient should consider whether to request coverage in the opinion letter as to the enforceability of specific provisions in the Transaction Documents. This may be particularly appropriate where counsel for the Opinion Recipient is located in a state other than Florida.

Real Property Collateral Qualifications

No opinions are expressed with respect to the status of title to the Real Property Collateral or the Leases and Rents Collateral or with respect to the relative priority of any liens or security interests created by the Transaction Documents. We have assumed as to matters of title and priority that the Borrower has good title to the Real Property Collateral and the Leases and Rents Collateral.⁵¹

For purposes of this opinion letter, we have assumed that the respective descriptions of the Real Property Collateral and the Leases and Rents Collateral contained in the Mortgage, in the Assignment of Leases and Rents

⁵¹ See "Opinions Particular to Real Estate Transactions-Title and Priority."

[and in the Financing Statement] sufficiently identify the collateral intended to be covered thereby [and that the information regarding the debtor and the secured party contained in the Financing Statement is correct and complete].⁵²

For purposes of this opinion, we assume that the Fixtures constitute “fixtures” as defined in the Uniform Commercial Code (“UCC”) in the State of Florida as of the date of this opinion letter (the “Florida UCC”). We caution you that, to the extent that the goods described in the Financing Statement or the Mortgage are not “fixtures” under Florida law, it may be necessary to file a financing statement under the UCC against the Borrower as debtor in the appropriate jurisdiction. No opinion is rendered hereunder as to whether the Fixtures constitute “fixtures” under Florida law.

The scope of our opinions regarding the liens and security interests created by the Mortgage and the Assignment of Leases and Rents is further limited by the Bankruptcy Exception and the Equitable Principles Limitation.

We assume that “value” has been given to the Borrower in connection with the Transaction.

In addition, we call your attention to the following: (a) the continued effectiveness of certain financing statements filed under the Florida UCC is dependent on the filing of a properly completed continuation statement within six (6) months prior to the fifth anniversary of the date of filing of the financing statement and thereafter within six (6) months prior to each additional fifth anniversary of the filing of the financing statement; (b) the continued effectiveness of each of the financing statements in the event of a change of location of the debtor (as defined in the Florida UCC), or the removal from the State of Florida of any of the fixtures covered by financing statements filed in Florida, may be dependent on perfecting the security interest in accordance with the laws of such other jurisdiction and the perfection or non-perfection of the security interest therein may be governed by the law of another jurisdiction; (c) the continued effectiveness of the financing statement as against collateral transferred to a new owner will be dependent upon the nature of the collateral and whether the secured party authorized the disposition of the collateral and further dependent upon perfecting the security interest in accordance with the laws of the jurisdiction in which the new owner is located (as defined in the Florida UCC); (d) the continued effectiveness of the financing statements to perfect a security interest in collateral acquired by the debtor more than four months after a change of the debtor’s name, identity or corporate or other organizational structure, as provided in the Florida UCC, is dependent on the filing of an appropriate amendment to the financing statement prior to the expiration of such four-month period; and (e) the failure of a secured party to respond within two weeks after receipt of a transaction party’s request for approval or correction of the transaction party’s statement of the aggregate amount of unpaid obligations or the transaction party’s list of collateral may result in a loss of that secured party’s security interest in collateral as against persons misled by that secured party’s failure to respond, and may also result in liability of that secured party for any loss caused to the transaction party thereby.⁵³

⁵² See “Opinions Particular to Real Estate Transactions-Creation of a Mortgage Lien.” If Opining Counsel agrees to remove the bracketed language, then Opining Counsel is responsible for confirming the factual information contained in the financing statement. See “Opinions with Respect to Collateral Under the Uniform Commercial Code-Creation and Attachment Opinions.”

⁵³ This language is often added to the opinion letter to advise the Opinion Recipient about issues that might in the future affect the continuing perfection of their security interest under Article 9 of the Florida UCC that is perfected by filing a financing statement. This paragraph does not apply to security interests created under the Mortgage.

Other Matters

We do not express any opinion as to the laws of any jurisdiction other than the State of Florida and the United States of America.⁵⁴

This opinion letter is furnished to you solely for your benefit in connection with the Transaction and may not be relied upon by any other party without our prior written consent in each instance.⁵⁵ Further, copies of this opinion letter may not be furnished to any other party, nor may any portion of this opinion letter be quoted, circulated or referred to in any other document without our prior written consent in each instance.⁵⁶

This opinion letter speaks only as of the date hereof. We assume no obligation to update or supplement this opinion letter if any applicable laws change after the date of this opinion letter or if we become aware after the date of this opinion letter of any facts or other developments, whether existing before or first arising after the date hereof, that might change the opinions expressed above.⁵⁷

Very truly yours,

LAW FIRM'S SIGNATURE⁵⁸

⁵⁴ See "Common Elements of Opinions-Opinions under Florida or Federal Law; Opinions under the Laws of Another Jurisdiction." Under customary practice in Florida, this opinion incorporates the concept that no opinion is being rendered under the laws of any other jurisdiction, whether or not so stated.

⁵⁵ See "Common Elements of Opinions-Addressee(s) and Reliance." If Opining Counsel agrees to allow assignees to rely on the opinion letter, the following language is recommended in place of the language set forth in the first sentence of the second paragraph set forth above:

This opinion letter is furnished to you solely for your benefit in connection with the Transaction and, except as set forth below, may not be relied upon by any other party without our prior written consent in each instance. At your request, we hereby consent to reliance hereon by any future assignee of your interest in the loans under the Transaction Documents pursuant to an assignment that is made and consented to in accordance with the express provisions of Section __ of the Loan Agreement, on the condition and understanding that: (i) this opinion letter speaks only as of the date hereof, (ii) we have no responsibility or obligation to update or supplement this opinion letter, to consider its applicability or correctness to any person other than its addressee(s), or to take into account changes in law, facts or any other developments of which we may later become aware, and (iii) any such reliance by a future assignee must be actual and reasonable under the circumstances existing at the time of assignment, including any changes in law, facts or any other developments known to or reasonably knowable by the assignee at such time.

⁵⁶ See "Common Elements of Opinions-Addressee(s) and Reliable"

⁵⁷ See "Common Elements of Opinions-Date."

⁵⁸ See "Common Elements of Opinions-Signatures."

FORM "C"

Illustrative Form of Opinion Letter For a Share Issuance by a Florida Corporation

This illustrative form of opinion letter is for a transaction in which a Florida corporation is issuing shares of its authorized but unissued common stock in a stock purchase and sale transaction. It assumes that: (i) the Company currently has one shareholder (the Existing Shareholder), (ii) the Company is entering into a Registration Rights Agreement with the Purchaser, (iii) the Existing Shareholder, the Purchaser and the Company will be entering into a Shareholders' Agreement in connection with the Transaction, (iv) the Transaction Documents expressly provide that they are governed by Florida law, and (v) the Company is a Florida corporation. Finally, this illustrative form of opinion letter assumes that a Florida law firm (rather than an individual lawyer) is rendering the opinion.¹

[Date of Opinion]²

[Name of Opinion Recipient]³
[Address of Opinion Recipient]

Re: [Description of Transaction]

Ladies and Gentlemen:

We have acted as counsel to _____, a Florida corporation (the "Company"), in connection with that certain stock purchase and sale transaction of _____ shares of the Company's authorized but unissued common stock (the "Shares") contemplated by Section ___ of that certain Stock Purchase Agreement, dated _____, 20__ (the "Agreement") between the Company and _____, a _____ [corporation/partnership/limited liability company] (the "Purchaser"). We have also acted as counsel to _____, an individual (the "Existing Shareholder") in connection with the Shareholders' Agreement (as defined below)

This opinion letter is furnished to you pursuant to Section ___ of the Agreement at the request and with the consent of the Company and the Existing Shareholder.⁴ Capitalized terms used but not otherwise defined herein shall have the definitions set forth in the Agreement.⁵

This opinion letter is limited to the matters expressly stated herein. No opinions are to be inferred or implied beyond the opinions expressly so stated.⁶

¹ All references in the footnotes to this illustrative form of opinion letter are to sections of the "Report on Third-Party Legal Opinion Customary Practice in Florida, dated December 3, 2011" (the "Report"). Unless otherwise defined in this illustrative form of opinion letter, terms defined in the Report have the same meanings herein. The Report supersedes the Prior Florida Reports.

² See "Common Elements of Opinions-Date."

³ See "Common Elements of Opinions-Addressee(s) and Reliance."

⁴ See "Common Elements of Opinions-Brief Description of Transaction and Request for Opinion Letter" and "Introductory Matters-Ethical and Professional Issues-Client Consent."

⁵ See "Common Elements of Opinions-Definitions." In using this illustrative form of opinion letter, care should be taken to make certain that defined terms used in the opinion letter are consistent with the particularities of the Transaction, the Transaction Documents, and/or the identity of the parties to the Transaction and the Transaction Documents.

⁶ See "Introductory Matters-No Implied Opinions."

Interpretation of Opinion Letters under Florida Customary Practice; Incorporation by Reference⁷

The Committees believe that all opinion letters of Florida counsel with respect to matters of Florida law should be interpreted under Florida customary practice (as articulated by the Report), regardless of whether or not the Report is expressly incorporated by reference into the opinion letter itself and regardless of where the Opinion Recipient is located.

Notwithstanding the foregoing, the Committees recommend that Florida counsel consider the express incorporation by reference of the Report into an opinion letter. Such express incorporation has three key benefits: (i) it allows Opining Counsel to expressly incorporate lists of assumptions, limitations, qualifications and exceptions into the opinion letter by explicit reference, thus shortening the opinion letter, (ii) it greatly reduces confusion and/or later disagreements by both Opining Counsel and the Opinion Recipient as to the application and effect of Florida customary practice (as articulated in the Report) with respect to the opinion letter, and (iii) it should lessen the concern that a court interpreting the opinion letter may incorrectly determine, despite the view of the Committees regarding this issue, not to follow Florida customary practice (as articulated in the Report), particularly where the court is located outside of Florida.

If the Report is expressly incorporated by reference into the opinion letter, the following language is recommended:

This opinion letter has been prepared and is to be construed in accordance with the “Report on Third-Party Legal Opinion Customary Practice in Florida, dated December 3, 2011” (the “Report”). The Report is incorporated by reference into this opinion letter.

This illustrative form of opinion letter can be used whether or not the Report is expressly incorporated by reference into the opinion letter.

Documents Reviewed⁸

In connection with rendering an opinion, Opining Counsel must review various documents with respect to the Transaction. Generally, these documents will fall into three categories: (i) the Transaction Documents, (ii) other documents that may be required to be reviewed to render one or more of the opinions in the opinion letter, and (iii) documents that relate to the Client’s entity status and organization, entity power and authorization of the Transaction and the Transaction Documents (which are sometimes called “authority documents”).

In many cases, all of the reviewed documents are listed in a single list, with definitions provided for certain categories of documents (i.e., the “Transaction Documents,” the “Other Reviewed Documents” and the “Authority Documents”). In other cases, the “Authority Documents” are not separately defined, but rather are included within the list of “Other Reviewed Documents.”

This illustrative form of opinion letter breaks up the documents reviewed into the referenced three separate categories.

Transaction Documents⁹

An opinion letter should include a specific list of the Transaction Documents relating to the Transaction (which are the agreements between or among the parties as to which the opinions are being rendered). The list of Transaction Documents set forth below is an illustrative list of the documents for a stock purchase and sale transaction. Sometimes one or more of these illustrative Transaction Documents will have a different name than the name described below and sometimes one or more of these illustrative Transaction Documents will be combined into a single document. In some cases, not all of these illustrative Transaction Documents will be required because of the particular facts and circumstances of the Transaction. In all cases, the list of Transaction Documents set forth in the opinion letter should be tailored to the specifics of the Transaction to which the particular opinion letter relates.

⁷ See “Common Elements of Opinions-Opinions of Florida Counsel Are To Be Interpreted Under Florida Customary Practice” and “Common Elements of Opinions-Express Incorporation of the Report into Opinion Letters.”

⁸ See “Common Elements of Opinions-Opinion.”

⁹ See “Common Elements of Opinions-Transaction Documents.”

In connection with rendering the opinions set forth in this opinion letter, we have reviewed originals or copies of the following documents:

- i. the Agreement;
- ii. the Registration Rights Agreement, dated _____, 20__, between the Company and Purchaser (the “Registration Rights Agreement”); and
- iii. the Shareholders’ Agreement, dated _____, 20__, among the Purchaser, the Existing Shareholder and the Company (the “Shareholders’ Agreement”).

The Agreement, the Registration Rights Agreement and the Shareholders’ Agreement are hereinafter collectively referred to as the “Transaction Documents.”

Other Reviewed Documents¹⁰

Opining Counsel should consider listing other documents reviewed in connection with rendering the opinions set forth in the opinion letter. The list of other documents reviewed will necessarily be Transaction-specific. Some of the “Other Reviewed Documents” may be contracts that are not Transaction Documents and others may be documents that are not contractual in nature at all. Examples of the types of documents that might be listed here are included below.

In addition, in connection with rendering the opinions set forth in this opinion letter, we have reviewed originals or copies of the following other documents:

- (i) the stock certificate, dated _____, 20__, representing the Shares being issued to the Purchaser by the Company in the Transaction;
- (ii) *if applicable, a list of the “other agreements” of the Company or the Existing Shareholder or a list of judgments, decrees or orders applicable to the Company or the Existing Shareholder reviewed in rendering the “no violation and no breach or default opinion; and*
- (iii) *if applicable, other transaction documents as to which Opining Counsel is not rendering any opinions or closing documents with respect to the Transaction, such as closing statements, certificates of the Company and/or the Existing Shareholder delivered at the closing to the Purchaser and contracts as to which no opinion is being rendered in the opinion letter.*

Authority Documents

Opining Counsel should consider including a list of the Authority Documents, which are the documents that relate to entity status and organization, entity power, and authorization of the Transaction and the Transaction Documents. This illustrative form includes the certificates to counsel among the Authority Documents, because, in many cases, the certificates to counsel are the documents pursuant to which the Client delivers to Opining Counsel copies of the various entity organizational and authorization documents. Further, with respect to the certificates to counsel, some Opining Counsel deliver copies of the certificates to counsel to the Opinion Recipient (either separately or by attaching the certificates of counsel to the opinion letter), while others do not.

Further, in connection with rendering the opinions set forth in this opinion letter, we have reviewed originals or copies of the following authorization documents:

- (i) the Company’s Articles of Incorporation, dated _____ (the “Articles”) and By-Laws (the “Bylaws” and, together with the Articles, the “Organizational Documents”) (*describe with specificity*);¹¹

¹⁰ See “Common Elements of Opinions–Transaction Documents.”

¹¹ See “Entity Status and Organization of a Florida Entity-Organizational Documents.”

- (ii) the Company’s authorizing documents with respect to the Transaction and the Transaction Documents *(describe with specificity the minutes and/or written consent actions that authorize the Transaction)*;¹²
- (iii) Certificate of Status of the Company, dated _____, 20__, issued by the Florida Department of State;
- (iv) *other certificates of public officials, if any (describe with specificity)*;
- (v) a certificate to counsel¹³ from the Company, dated _____, 20__, [a copy of which is attached hereto as _____] (the “Company Certificate to Counsel”); and
- (vi) a certificate to counsel¹³ from the Existing Shareholder, dated _____, 20__, [a copy of which is attached hereto as _____] (the “Existing Shareholder Certificate to Counsel” and, together with the Company Certificate to Counsel, the “Certificates to Counsel”).

Catch-all Language or Limiting Language

Some Opining Counsel include catch-all language in the opinion letter to the effect that they have reviewed such other documents as they have deemed necessary and relevant to form the basis for the opinions. Others do not include such language. In other opinion letters, Opining Counsel expressly limit the documents reviewed to those expressly listed, affirmatively stating that Opining Counsel has reviewed no other documents.

In preparing and delivering an opinion letter, Opining Counsel should, in accordance with Florida customary practice, review the documents and make the inquiries relevant to the particular legal opinions being rendered. Whether catch-all language or limiting language is or is not included, Opining Counsel should, under Florida customary practice, perform the diligence required to render each opinion being rendered, and a limitation in the list of documents reviewed that reflects a failure of Opining Counsel to review the documents that are expected to be reviewed to render the particular opinion under Florida customary practice is not likely to constitute a limitation on the scope of the opinion unless the exception from customary practice is expressly noted in the opinion letter. On the other hand, inclusion of the catch-all language is not intended to expand the scope of the documents required to be reviewed beyond that required under Florida customary practice to render the opinions being issued with respect to the Transaction and the Transaction Documents as set forth in the opinion letter.

Recommended catch-all language is as follows:

We have also reviewed such other documents, instruments and certificates as we have deemed relevant or necessary to form the basis for the opinions set forth in this opinion letter.

Recommended limiting language is as follows:

For purposes of rendering the opinions contained in this opinion letter, we have not reviewed any documents other than the documents listed above. We have also not reviewed any documents that may be referred to in or incorporated by reference into any of the documents listed above.

Opinion Limitations and Assumptions

Opining Counsel generally describe in the opinion letter limitations to the scope of the opinion letter and assumptions upon which the opinions set forth in the opinion letter are based. These include limitations of general applicability, assumptions that Opining Counsel is making and definitions of key concepts (such as the definition of Opining Counsel’s “knowledge”) that are often expressly set forth in the opinion letter to highlight to the Opinion Recipient these limitations on the scope of the opinion letter.

¹² See “Authorization of the Transaction by a Florida Entity.”

¹³ For a discussion regarding the content of certificates to counsel, see “Common Elements of Opinions-Reliance on Factual Certificates and Representations and Warranties; Assumptions of Fact; Scope of Reliance.” An illustrative form of certificate to counsel accompanies the Report as Form “E.”

Under Florida customary practice, certain limitations and assumptions are implicitly incorporated into opinion letters delivered by Florida counsel as to matters of Florida law whether or not such limitations and assumptions are expressly set forth in the opinion letter. However, the Committees believe that express inclusion of such limitations and assumptions in the opinion letter (whether through express incorporation of such limitations and assumptions by reference to the Report or by including a listing of such limitations and assumptions in the opinion letter) is the preferred approach to avoid confusion regarding the applicable limitations and assumptions.

General Limitations

With your consent, we have relied upon, and assumed the accuracy of, the representations and warranties contained in the Transaction Documents [and in the Certificates to Counsel] supplied to us by the Company with respect to the factual matters set forth therein. However, no opinion is rendered hereunder as to the accuracy of the representations and warranties contained in the Transaction Documents [or in the Certificates to Counsel]. *[Further, the factual matters set forth in the Certificates to Counsel have been provided to us solely for our benefit in issuing this opinion, and no party, other than this firm, is entitled to rely upon them.]*¹⁴

We have, with your consent, assumed that certificates of public officials dated earlier than the date of this opinion letter remain accurate from such earlier dates through and including the date of this opinion letter.¹⁵

Assumptions¹⁶

A list of assumptions should be inserted here. Under Florida customary practice, some assumptions are implicitly incorporated into opinion letters delivered by Florida counsel as to matters of Florida law whether or not they are expressly set forth in the opinion letter. Other assumptions are only included in the opinion letter if they are expressly set forth in the opinion letter.

The following list of assumptions includes all of the assumptions that are implicitly incorporated into opinion letters delivered by Florida counsel as to matters of Florida law under Florida customary practice. The Committees believe that express inclusion in the opinion letter of these implicitly included assumptions is the preferred approach in order to avoid confusion regarding whether or not these assumptions apply to the opinion letter. This list also contemplates that Opining Counsel may elect to add additional assumptions to the opinion letter based on the particular facts and circumstances of the Transaction, the Transaction Documents, the Clients and/or the scope of the opinions being rendered.

If Opining Counsel only includes some, but not all, of the implicitly included assumptions in the opinion letter, the Committees believe that all of the remaining assumptions that are automatically included in all opinion letters of Florida counsel under Florida customary practice will nevertheless be implied into the opinion letter. Notwithstanding the foregoing, the Committees urge Florida counsel to include the entire list of implied assumptions in their opinion letters out of a concern that a court interpreting an opinion letter rendered by Florida counsel may determine incorrectly not to follow Florida customary practice (as articulated in the Report) and may instead decide that only those assumptions that are expressly set forth in the opinion letter constitute a part of the opinion letter.

Opining Counsel should further recognize that problems can arise if, in the course of negotiating the final form of the opinion letter to be delivered at the closing of the Transaction, Opining Counsel delivers a draft form of the opinion letter to the Opinion Recipient that expressly includes the assumptions implicitly included in all opinions of Florida counsel under Florida customary practice and, thereafter, Opining Counsel agrees to remove one or more of the stated assumptions from the opinion letter. Under such circumstances, Opining Counsel may no longer have the benefit of the implicit incorporation into the opinion letter of such removed assumptions.

¹⁴ See “Common Elements of Opinions-Reliance on Factual Certificates and Representations and Warranties; Assumptions of Facts; Scope of Reliance.”

¹⁵ See “Common Elements of Opinions-Reliance on Certificates of Public Officials.”

¹⁶ See “Common Elements of Opinions-Assumptions.”

If the Report has been expressly incorporated by reference into the opinion letter, Opining Counsel may wish to use the following:

In rendering the opinions set forth herein, we have relied, without investigation, on each of the assumptions implicitly included in all opinions of Florida counsel that are set forth in the Report in “Common Elements of Opinions – Assumptions” [and the following additional assumptions: _____ (*other assumptions that are based on the particularities of the Transaction, the Transaction Documents, the Clients and/or the scope of the opinions being rendered*)].

If the Report has not been expressly incorporated by reference into the opinion letter, Opining Counsel may wish to include a list of assumptions in the opinion letter.

In rendering the opinions set forth herein, we have relied without investigation, on each of the following assumptions:

Assumptions deemed to be implicitly included in all opinion letters of Florida counsel under Florida customary practice

(a) the legal capacity of each natural person to take all actions required of each such person in connection with the Transaction;

(b) the legal existence of each party to the Transaction other than the Company;

(c) the power of each party to the Transaction, other than the Company, to execute, deliver and perform all Transaction Documents executed and delivered by such party and to do each other act done or to be done by such party;

(d) the authorization, execution and delivery by each party, other than the Company and the Existing Shareholder, of each Transaction Document executed and delivered or to be executed and delivered by such party;

(e) the validity, binding effect and enforceability as to each party, other than the Company and the Existing Shareholder, of each Transaction Document executed and delivered by such party or to be executed and delivered and of each other act done or to be done by such party;

(f) there have been no undisclosed modifications of any provision of any document reviewed by us in connection with the rendering of this opinion letter and no undisclosed prior waiver of any right or remedy contained in any of the Transaction Documents;

(g) the genuineness of each signature, the completeness of each document submitted to us, the authenticity of each document reviewed by us as an original, the conformity to the original of each document reviewed by us as a copy and the authenticity of the original of each document received by us as a copy;

(h) the truthfulness of each statement as to all factual matters otherwise not known to us to be untruthful or unreliable contained in any document encompassed within the diligence review undertaken by us;

(i) each certificate or other document issued by a public authority is accurate, complete and authentic as of the date of the opinion letter, and all official public records (including their proper indexing and filing) are accurate and complete;

(j) each recipient of the opinion letter has acted in good faith, without notice of any defense against enforcement of rights created by, or adverse claim to any property or security interest transferred or created as part of, the Transaction, and has complied with all laws applicable to it that affect the Transaction;

(k) the Transaction and the conduct of the parties to the Transaction comply with any requirement of good faith, fair dealing and conscionability;

(l) routine procedural matters such as service of process or qualification to do business in the relevant jurisdiction(s) will be satisfied by the parties seeking to enforce the Transaction Documents;

(m) agreements (other than the Transaction Documents as to which opinions are being given) and judgments, decrees or orders reviewed in connection with rendering the opinions will be enforced as written;

(n) no discretionary action (including a decision not to act) that is permitted in the Transaction Documents will be taken by or on behalf of the Company or the Existing Shareholder that might result in a violation of law or constitute a breach of or default under any of the Company's or the Existing Shareholder's other agreements or under any applicable court order;

(o) there are no agreements or understandings among the parties, written or oral, and there is no usage of trade or course of prior dealing among the parties that would, in either case, define, supplement, modify or qualify the terms of the Transaction Documents or the rights of the parties thereunder;

(p) the payment of all required documentary stamp taxes, intangible taxes and other taxes and fees imposed upon the execution, filing or recording of documents;

(q) with respect to the Transaction and the Transaction Documents, including the inducement of the parties to enter into and perform their respective obligations thereunder, there has been no mutual mistake of fact or undue influence and there exists no fraud or duress; [and]

Additional assumptions expressly included in the opinion letter

(r) _____ (other assumptions that are based on the particularities of the Transaction, the Transaction Documents, the Clients and/or scope of the opinions being rendered).

Knowledge¹⁷

When used in this opinion letter, the phrases "to our knowledge," "known to us" or the like means the conscious awareness of the lawyers in the "primary lawyer group" of factual matters such lawyers recognize as being relevant to the opinion or confirmation so qualified. Such phrases do not imply that we have undertaken any independent investigation within our firm, with the Company and/or the Existing Shareholder or with any third party to determine the existence or absence of any facts or circumstances, and no inference should be drawn merely from our past or current representation of the Company and/or the Existing Shareholder. Where any opinion or confirmation is qualified by the phrase "to our knowledge," "known to us" or the like, it means that the lawyers in the "primary lawyer group" are without any actual knowledge or conscious awareness that the opinion or confirmation is untrue in any respect material to the opinion or confirmation. For purposes of this opinion letter, "primary lawyer group" means: (i) the lawyer who signs his or her name or the name of the firm to this opinion letter, (ii) the lawyers currently in the firm who are actively involved in preparing or negotiating this opinion letter, and (iii) the lawyers currently in the firm who are actively involved in negotiating or documenting the Transaction or the Transaction Documents.

The Opinions¹⁸

The specific opinions being rendered by Opining Counsel should be inserted following introductory language. The recommended "lead-in" language is as follows:

Based upon and subject to the foregoing, and subject to the assumptions, limitations and qualifications contained herein, we are of the opinion that:

"Building Block" Opinions

1. The Company is a corporation organized under Florida law, and its corporate status is active.¹⁹
2. The Company has the corporate power to execute and deliver the Transaction Documents to which it is a party and to perform its respective obligations thereunder.²⁰

¹⁷ See "Common Elements of Opinions-Knowledge."

¹⁸ See "Common Elements of Opinions-Opinion."

¹⁹ See "Entity Status and Organization of a Florida Entity."

²⁰ See "Entity Power of a Florida Entity."

3. The Company has authorized the execution, delivery and performance of the Transaction Documents to which it is a party by all necessary corporate action.²¹

4. Each of the Transaction Documents to which either the Company and the Existing Shareholder, respectively, are a party has been executed and delivered by the Company and the Existing Shareholder.²²

The Remedies Opinion

5. Each of the Transaction Documents to which the Company is a party is a valid and binding obligation of the Company, enforceable against the Company in accordance with its respective terms.²³

6. Each of the Transaction Documents to which the Existing Shareholder is a party is a valid and binding obligation of the Existing Shareholder, enforceable against the Existing Shareholder in accordance with its respective terms.²³

No Violation and No Breach or Default Opinion

7. The execution and delivery by the Company and the Existing Shareholder of the Transaction Documents and the performance by the Company and the Existing Shareholder of their respective obligations under the Transaction Documents to which each is a party do not:²⁴

(a) violate the Company's Organizational Documents;²⁵

(b) constitute a breach of or a default under, or result in the creation of a security interest or a lien on the assets of the Company or the Existing Shareholder under, any of the Company's or the Existing Shareholder's [agreements identified in _____ (reference to a schedule in one of the Transaction Documents, to a public securities filing, to a list of other agreements set forth in the opinion letter, or to a certificate to counsel) / "material agreements" that are known to us];²⁶

(c) violate any judgment, decree or order of any court or administrative tribunal applicable to the Company or the Existing Shareholder that is [listed in _____ (reference to a schedule in one of the Transaction Documents, to a list of judgments, decrees or orders set forth in the opinion letter, or to a certificate to counsel) / known to us];²⁷ or

(d) violate any of the Applicable Laws [or, if no definition of Applicable Laws is included in the opinion letter, "violate any federal or Florida laws, rules or regulations that a Florida counsel exercising customary professional diligence would reasonably be expected to recognize as being applicable to the Company, the Existing Shareholder, the Transaction Documents or the Transaction, but excluding the laws, rules and regulations enumerated below.];²⁸

²¹ See "Authorization of the Transaction by a Florida Entity."

²² See "Execution and Delivery."

²³ See "The Remedies Opinion-Overview of the Remedies Opinion" and "The Remedies Opinion-Analysis of the Foundational Building Block: The Meaning of the Basic Remedies Opinion."

²⁴ See "No Violation and No Breach or Default."

²⁵ See "No Violation and No Breach or Default-No Violation of Organizational Documents."

²⁶ See "No Violation and No Breach or Default-No Breach of or Default under Agreements." The first formulation referencing specified reviewed agreements is the recommended formulation. The "no breach of or default under agreements" opinion also includes (in the context of a stock issuance) an analysis of whether contractual preemptive rights apply to the issuance of the Shares based on the terms of the other agreements.

²⁷ See "No Violation and No Breach or Default-No Violation of Judgments, Decrees or Orders." The first formulation referencing specified judgments, decrees or orders applicable to the Client is the recommended formulation.

²⁸ See "No Violation and No Breach or Default-No Violation of Laws."

No Required Governmental Consents or Approvals Opinion²⁹

8. No consent, approval, authorization or other action by, or filing or registration with, any governmental authority of the United States or the State of Florida is required by or on behalf of the Company or the Existing Shareholder to execute and deliver the Transaction Documents and to close the Transaction contemplated by the Transaction Documents other than [_____] ³⁰ / those consents, approvals, authorizations, actions, filings and registrations as to which the requisite consents, approvals or authorizations have been obtained, the requisite actions have been taken and the requisite filings and registrations have been accomplished].

Opinions regarding the issuance of the Shares

9. The Company's authorized capitalization consists of _____ shares of common stock, \$ _____ par value per share.³¹

10. Based solely on a certificate of _____, ³² the Company has _____ shares of its common stock outstanding.

11. The Shares have been duly authorized by the Company and the Shares, when delivered and paid for in accordance with the terms of the Agreement, will be validly issued, fully paid and nonassessable.³³

12. The issuance of the Shares will not give rise to any preemptive rights under the Florida Business Corporation Act ("FBCA") or the Company's Articles.³⁴

13. The stock certificates(s) representing the Shares comply in all material respects with the FBCA and the Company's Articles and Bylaws.³⁵

²⁹ See "No Required Governmental Consents or Approvals."

³⁰ Opining Counsel sometimes list here the specific consents received or the filings required with respect to the particular Transaction.

³¹ See "Opinions with Respect to Securities-Corporations-Authorized Capitalization."

³² This is a factual certification. It should generally not be given, since Purchaser can rely on the representations and warranties of the Company regarding the Company's outstanding shares. In some cases, Opining Counsel will agree to render this opinion based solely on a certificate of a transfer agent or based on an agreed-upon scope of diligence procedures. In such cases, the reliance on the certificate of the transfer agent or the agreed-upon scope of diligence should be expressly set forth in the opinion letter. However, if this opinion is not so limited, it requires a review of each prior issuance of shares. As a result, in most situations the delivery of this opinion will not be cost justified. See "Opinions with Respect to Securities-Corporations-Number of Shares Outstanding."

³³ This opinion covers: (i) the authorization of the issuance of the Shares by all required corporate formality, (ii) the sufficiency of the authorized but unissued shares at the date of the opinion letter to issue the Shares, and (iii) the fact that, when the Shares are paid for in accordance with the terms of the Agreement, the Shares will be validly issued, fully paid and non-assessable. See "Opinions with Respect to Securities-Corporations-Issuances of Shares."

³⁴ See "Opinions with Respect to Securities-Corporations-No Preemptive Rights." This opinion covers statutory preemptive rights and preemptive rights arising under the Client's articles of incorporation. It does not cover preemptive rights that arise under contracts. These are more properly dealt with in an opinion regarding "no breach of or default under agreements." See "No Violation and No Breach or Default-No Breach of or Default under Agreements."

³⁵ See "Opinions with Respect to Securities-Corporations-Stock Certificates in Proper Form."

The No Litigation Confirmation

To our knowledge, there is no action, suit or proceeding, at law or in equity, or by or before any governmental agency, now pending or overtly threatened in writing against the Company or the Existing Shareholder that challenges the validity or enforceability of, seeks to enjoin the performance of, or seeks damages with respect to, the Transaction Documents or the Transaction [, except: _____]. For avoidance of doubt, please be advised that in rendering this confirmation we have made no independent investigation, including, without limitation, any search of court records, the files of our firm or the files of the Company or the Existing Shareholder.³⁶

Applicable Laws and Excluded Laws³⁷

“Applicable Laws” is defined under Florida customary practice and is set forth in the Report. Opining Counsel often expressly define in the opinion letter the Applicable Laws that are covered by the scope of the opinion letter. Whether or not such definition is expressly included in the opinion letter, a Florida Opining Counsel would be obligated to consider all Applicable Laws, as so defined, in rendering the opinion letter.

The recommended form of the definition of Applicable Laws is as follows:

When used in this opinion letter, the term “Applicable Laws” means the federal and Florida laws, rules and regulations that a Florida counsel exercising customary professional diligence would reasonably be expected to recognize as being applicable to the Company, the Existing Shareholder, the Transaction Documents or the Transaction, but excluding the laws, rules and regulations set forth below.

Whether or not a definition of Applicable Laws is expressly included in the opinion letter, Opining Counsel generally include in the opinion letter a list of laws that are excluded from coverage in the opinion letter. As set forth in the Report, some laws are implicitly excluded from opinion letters of Florida counsel under Florida customary practice, whether or not these laws are expressly excluded from the scope of the opinion letter by express reference in the opinion letter. Opining Counsel may also wish to expressly exclude other laws from the scope of the opinion letter by expressly referencing in the opinion letter the exclusion of such laws from the scope of the opinion letter.

The Committees believe that the express inclusion in the opinion letter of a list of excluded laws is the preferred approach, whether through an express incorporation of the list of implicitly excluded laws contained in the Report or by actually setting forth such list of excluded laws in the opinion letter. However, the Committees recognize that some Florida counsel may choose to include a list of some, but not all, of the implicitly excluded laws in their opinion letters. The Committees believe that, in such situation, all of the remaining excluded laws that implicitly limit the scope of opinion letters of Florida counsel under Florida customary practice will nevertheless be implied into the opinion letter. Notwithstanding the forgoing, the Committees urge Florida counsel to include the entire list of implicitly excluded laws in their opinion letters out of a concern that court interpreting an opinion letter of Florida counsel may incorrectly determine not to follow Florida customary practice (as articulated in the Report) and may instead decide that only those excluded laws that are expressly set forth in the opinion letter limit the scope of the opinion letter.

³⁶ See “No Litigation-The “No Litigation” Confirmation.” As described in the Report, common practice in Florida with respect to the no litigation factual confirmation has changed over the last few years. This illustrative form of opinion letter includes a version of the no litigation confirmation that the Committees believe currently represents the no litigation confirmation generally given by Florida counsel.

³⁷ See “Common Elements of Opinions-Limitations to Laws of Specific Jurisdictions or to Substantive Areas of Law; Excluded Areas of Law.”

Opining Counsel should recognize that problems can arise if, in the course of negotiating the final form of opinion letter to be delivered at the closing of the Transaction, Opining Counsel delivers a draft of the opinion letter to the Opinion Recipient that expressly includes the entire list of excluded laws, and, thereafter, Opining Counsel agrees to remove one or more of those stated excluded laws from the list contained in the opinion letter. Under such circumstances, Opining Counsel may no longer have the benefit of implicit incorporation into the opinion letter of such removed excluded laws.

If the Report has been expressly incorporated by reference into the opinion letter, Opining Counsel may wish to use the following:

The following federal and Florida laws, rules and regulations are expressly excluded from the scope of this opinion letter: (a) laws, rules and regulations that are defined as the Excluded Laws in the “Common Elements of Opinions-Limitations to Laws of Specific Jurisdictions or to Substantive Areas of Law; Excluded Areas of Law” section of the Report, and (b) the following laws, rules and regulations: _____
(other laws, rules and regulations that are to be expressly excluded from the scope of the opinion letter under the particular circumstances in which the opinion letter is being rendered).

If the Report is not expressly incorporated by reference into the opinion letter, Opining Counsel may wish to include a list of excluded laws in the opinion letter.

The following federal and Florida laws, rules and regulations are expressly excluded from the scope of this opinion letter:

Laws, rules and regulations deemed to be implicitly excluded from the scope of all opinion letters of Florida counsel under Florida customary practice

- (a) securities laws, rules and regulations;
- (b) Federal Reserve Board margin regulations;
- (c) laws, rules and regulations regulating banks and other financial institutions, insurance companies and investment companies;
- (d) pension and employee benefit laws, rules and regulations, such as the Employee Retirement Income Security Act (ERISA);
- (e) labor laws, rules and regulations, including laws on occupational safety and health (OSHA);
- (f) antitrust and unfair competition laws, rules and regulations;
- (g) laws, rules and regulations concerning compliance with fiduciary requirements;
- (h) laws, rules and regulations concerning the creation, attachment, perfection or priority of any lien or security interest;
- (i) laws, rules and regulations relating to taxation;
- (j) bankruptcy, fraudulent conveyance, fraudulent transfer and other insolvency laws;
- (k) environmental laws, rules and regulations;
- (l) laws, rules and regulations relating to patents, copyrights, trademarks, trade secrets and other intellectual property;
- (m) local laws, administrative decisions, ordinances, rules or regulations, including any zoning, planning, building, occupancy or other similar approval or permit or any other ordinance or regulation of any county, municipality, township or other political subdivision of the State of Florida;

- (n) criminal and state forfeiture laws and any racketeering laws, rules and regulations;
- (o) other statutes of general application to the extent that they provide for criminal prosecution;
- (p) laws relating to terrorism or money laundering;
- (q) laws, regulations and policies concerning national and local emergency and possible judicial deference to acts of sovereign states;

Laws, rules and regulations expressly excluded from the scope of the opinion letter by Opining Counsel

- (r) _____ (other laws, rules and regulations that are to be expressly excluded from the scope of the opinion letter under the particular circumstances in which the opinion letter is being rendered);

Exclusions applicable to all laws, rules and regulations excluded from the scope of the opinion letter

- (s) filing or consent requirements under any of the foregoing excluded laws; [and]
- (t) judicial and administrative decisions to the extent they deal with any of the foregoing excluded laws.

Qualifications

Qualifications to the scope of the opinions set forth in an opinion letter are generally included in the opinion letter. This illustrative opinion letter includes qualifications to the opinions described above. If one or more of the opinions to which these qualifications relate are not being rendered in the opinion letter, the applicable qualifications need not be included in the opinion letter.

The foregoing opinions are subject to the following exceptions, qualifications and limitations:

Execution and Delivery Qualification

We did not physically witness the execution and delivery of the Transaction Documents, and our opinions herein regarding the execution and delivery of the Transaction Documents by the Company and the Existing Shareholder are based, in part, on [our review of the Certificates to Counsel in which the Company and the Existing Shareholder confirmed certain facts with respect to the execution and delivery of the Transaction Documents / our review of copies of executed signature pages for such Transaction Documents provided to us (electronically or otherwise)].³⁸

No Violation and No Breach or Default Qualifications

We express no opinion in paragraph [7(b)] regarding liens arising by operation of law or as to compliance or non-compliance with provisions in other agreements that require financial calculations or determinations to ascertain compliance³⁹ or relating to any other aspect of the financial condition or results of operations of the Company or the Existing Shareholder.

No Required Governmental Consents or Approvals Qualification

We express no opinion as to any consent, approval, authorization or other action or filing necessary for the ongoing operation of the Company's or the Existing Shareholder's respective businesses.⁴⁰

³⁸ See "Execution and Delivery."

³⁹ See "No Violation and No Breach or Default-No Breach of or Default under Agreements."

⁴⁰ See "No Required Governmental Consents or Approvals-Exceptions."

Remedies Opinion Qualifications⁴¹

The opinions regarding enforceability of the Transaction Documents that are contained in paragraphs [5 and 6] above are limited by:

1. bankruptcy, insolvency, reorganization, moratorium, fraudulent conveyance and transfer, and similar law affecting the rights and remedies of creditors generally (the “Bankruptcy Exception”);⁴² and
2. general principles of equity, regardless of whether such enforceability is considered in a proceeding at law or in equity (the “Equitable Principles Limitation”).⁴³

The Committees recommend that a “generic” qualification⁴⁴ should be included in all opinion letters of Florida counsel that include a remedies opinion. There are two forms of the “generic” qualification: (i) the “material breach” qualification, which specifies which provisions of the Transaction Documents should be enforceable, and (ii) the “practical realization” qualification, which provides that the Opinion Recipient should receive the principal benefit of its bargain. In the context of a stock purchase transaction, including the transaction upon which this illustrative form of opinion letter is based, a “practical realization” qualification is the recommended form of generic qualification.

The following is the recommended form of “practical realization” qualification:

In addition, certain of the provisions of the Transaction Documents might not be enforceable; nevertheless, subject to the Bankruptcy Exception and the Equitable Principles Limitation, such unenforceability: (i) will not render the Transaction Documents invalid as a whole, or (ii) substantially interfere with the practical realization of the principal benefits purported to be provided by the Transaction Documents.⁴⁵

As noted, the inclusion of a “generic” qualification in the opinion letter does not limit the impact on the scope of the remedies opinion of the Bankruptcy Exception and the Equitable Principles Limitation. See “The Remedies Opinion-The “Generic” Qualification.”

If either form of the “generic” qualification is included in the opinion letter, it may be unnecessary to also include an extensive list of specific qualifications to the remedies opinion in the opinion letter (although Opining Counsel may elect to expressly include in the opinion letter one or more specific qualifications limiting the scope of the remedies opinion to bring those qualifications to the attention of the Opinion Recipient).

However, if neither form of “generic” qualification is included in the opinion letter, the Committees believe that Opining Counsel would be wise to include a list of specific exceptions to the scope of the remedies opinion that excludes from the scope of the opinion those rights and remedies contained in the Transaction Documents that may not be enforceable. To determine which specific qualifications to the remedies opinion to include in the opinion letter, Opining Counsel may wish to review the Transaction Documents and consider which of the rights and remedies contained in the Transaction Documents might not be enforceable.

The following is a representative list of specific exclusions to the scope of the remedies opinion that might be appropriate under the circumstances. This list is not exclusive, and Opining Counsel may wish to add to the opinion letter other qualifications to the scope of the remedies opinion.

For example, some of the issues in a typical stock purchase agreement that might require a specific qualification include the enforceability of any indemnification provisions, the enforceability of rights of first refusal and the enforceability of any non-competition arrangements that are contained in the Transaction Documents.

⁴¹ See generally: “The Remedies Opinion-Qualifications for Narrowing the Scope of the Remedies Opinion.”

⁴² See “The Remedies Opinion-The Bankruptcy Exception and the Equitable Principles Limitation-The Bankruptcy Exception.”

⁴³ See “The Remedies Opinion-The Bankruptcy Exception and the Equitable Principles Limitation-The Equitable Principles Limitation.”

⁴⁴ See “The Remedies Opinion-The “Generic” Qualification.”

⁴⁵ See “The Remedies Opinion-The “Generic” Qualification-The “Practical Realization” Qualification.”

No opinion is expressed herein with respect to any provision of the Transaction Documents that:⁴⁶

- (a) purports to excuse a party from liability for the party's own acts;
- (b) purports to make void any act done in contravention thereof;
- (c) purports to authorize a party to act in the party's sole discretion or purports to provide that determination by a party is conclusive;
- (d) requires waivers or amendments to be made only in writing;
- (e) purports to effect waivers of: (i) constitutional, statutory or equitable rights, (ii) the effect of applicable laws, (iii) any statute of limitations, (iv) broadly or vaguely stated rights, (v) unknown future defenses, or (vi) rights to damages;
- (f) imposes or permits: (i) liquidated damages, (ii) the appointment of a receiver, (iii) penalties, (iv) indemnification for gross negligence, willful misconduct or other wrongdoing, (v) confessions of judgment, or (vi) rights of self-help or forfeiture;
- (g) purports to limit or alter laws requiring mitigation of damages;
- (h) concerns choice of forum, consent or submission to the personal or subject matter jurisdiction of courts, venue of actions, means of service of process, waivers of rights to jury trials, and agreements regarding arbitration;
- (i) purports to reconstitute the terms thereof as necessary to avoid a claim or defense of usury;
- (j) purports to require a party thereto to pay or reimburse attorneys' fees incurred by another party, or to indemnify another party therefor, which provisions may be limited by applicable statutes and decisions relating to the collection and award of attorneys' fees;
- (k) relates to the evidentiary standards or other standards by which the Transaction Documents are to be construed, including, but not limited to, provisions that attempt to change or waive rules of evidence or fix the method or quantum of proof to be applied in litigation or similar proceedings;
- (l) prohibits or unreasonably restricts: (i) competition, (ii) the solicitation or acceptance of customers, business relationships or employees, (iii) the use or disclosure of information, or (iv) activities in restraint of trade;
- (m) enumerates that remedies are not exclusive or that a party has the right to pursue multiple remedies without regard to other remedies elected or that all remedies are cumulative;
- (n) constitutes severability provisions;
- (o) permits the exercise, under certain circumstances, of rights without notice or without providing opportunity to cure failures to perform;
- (p) purports to create rights to setoff otherwise than in accordance with applicable law;
- (q) contains a blanket prohibition on assignments or a specific prohibition on assignment of payments due or to come due; or
- (r) purports to entitle any party to specific performance of any provision thereof.

⁴⁶ See "The Remedies Opinion-Examples of Specific Limitations to the Remedies Opinion (Additional Qualifications)-Other Common Qualifications."

Shareholders' Agreement Qualifications

Shareholders' agreements often include voting agreements, drag-along and tag-along agreements and/or special mandatory conversion provisions which may or may not be enforceable in Florida. As a result, if such provisions are included in a shareholders' agreement, the following additional qualification may be appropriate:

This opinion is qualified by, and we give no opinion with respect to, or as to the effect of, any provisions contained in the Shareholders' Agreement imposing obligations to vote the Company's capital stock in a certain manner, to comply with any drag-along and tag-along provisions and/or to comply with certain special mandatory conversion provisions.

Counsel for the Opinion Recipient should consider whether to request coverage in the opinion letter as to the enforceability of specific provisions in the Transaction Documents. This may be particularly appropriate where counsel for the Opinion Recipient is located in a state other than Florida.

Other Matters

We do not express any opinion as to the laws of any jurisdiction other than the State of Florida and the United States of America.⁴⁷

This opinion letter is furnished to you solely for your benefit in connection with the Transaction and may not be relied upon by any other party without our prior written consent in each instance. Further, copies of this opinion letter may not be furnished to any other party, nor may any portion of this opinion letter be quoted, circulated or referred to in any other document without our prior written consent in each instance.⁴⁸

This opinion letter speaks only as of the date hereof. We assume no obligation to update or supplement this opinion letter if any applicable laws change after the date of this opinion letter or if we become aware after the date of this opinion letter of any facts or other developments, whether existing before or first arising after the date hereof, that might change the opinions expressed above.⁴⁹

Very truly yours,

LAW FIRM'S SIGNATURE⁵⁰

⁴⁷ See "Common Elements of Opinions-Opinions under Florida or Federal Law; Opinions under the Laws of Another Jurisdiction." Under customary practice in Florida, this opinion incorporates the concept that no opinion is being rendered under the laws of any other jurisdiction, whether or not so stated.

⁴⁸ See "Common Elements of Opinions-Addressee(s) and Reliance."

⁴⁹ See "Common Elements of Opinions-Date."

⁵⁰ See "Common Elements of Opinions-Signatures."

FORM "D"

Illustrative Form Of Opinion Letter When Acting As Local Counsel

This illustrative form of opinion letter is for use when Opining Counsel is acting as local counsel. It assumes that: (i) the Transaction is a multi-state loan transaction in which the Lender is located in New York, (ii) the Loan Agreement expressly provides that it is governed by the law of the State of New York, (iii) the Mortgage and the Assignment of Leases and Rents expressly provide that they are governed by Florida law, (iv) the Client entity is a Delaware entity that has operations and properties in Florida and is authorized to transact business in Florida, and (v) the collateral pledged to secure the loan pursuant to the Transaction Documents (in this case real property, fixtures and personal property) is located in Florida. Further, although the illustrative facts of this illustrative form of opinion letter include the grant of a security interest in the Client entity's personal property located in Florida to secure the loan, because the creation, attachment and perfection of such security interest will be governed by the UCC of another jurisdiction, no opinions are rendered in this illustrative form of opinion letter regarding the creation, attachment or perfection of such security interest. Finally, this illustrative form of opinion letter assumes that a Florida law firm (rather than an individual lawyer) is rendering the opinion.¹

[Date of Opinion]²

[Name of Opinion Recipient]³
[Address of Opinion Recipient]

Re: [Description of Transaction]

Ladies and Gentlemen:

We have acted as local Florida counsel to _____ [Name of Borrower], a Delaware [corporation/partnership/limited liability company] (the "Borrower"), in connection with the loan (the "Transaction") in the original principal amount of \$ _____ (the "Loan Amount") from [Name of Lender] (the "Lender"), in favor of the Borrower pursuant to that certain [Loan Agreement/Credit Agreement, dated _____] (the "Loan Agreement").

This opinion letter is furnished to you pursuant to Section ___ of the Loan Agreement at the request and with the consent of the Borrower.⁴ Capitalized terms used but not otherwise defined herein shall have the definitions set forth in the Loan Agreement.⁵

This opinion letter is limited to the matters expressly stated herein. No opinions are to be inferred or implied beyond the opinions expressly so stated.⁶

¹ All references in the footnotes to this illustrative form of opinion letter are to sections of the "Report on Third-Party Legal Opinion Customary Practice in Florida, dated December 3, 2011" (the "Report"). Unless otherwise defined in this illustrative form of opinion letter, terms defined in the Report have the same meanings herein. The Report supersedes the Prior Florida Reports.

² See "Common Elements of Opinions-Date."

³ See "Common Elements of Opinions-Addressee(s) and Reliance."

⁴ See "Common Elements of Opinions-Brief Description of Transaction and Request for Opinion Letter," "Introductory Matters-Ethical and Professional Issues-Client Consent" and "Special Issues to Consider When Acting As Local Counsel-Overview."

⁵ See "Common Elements of Opinions-Definitions." In using this illustrative form of opinion letter, care should be taken to make certain that defined terms used in the opinion letter are consistent with the particularities of the Transaction, the Transaction Documents and/or the identity of the parties to the Transaction and the Transaction Documents.

⁶ See "Introductory Matters-No Implied Opinions."

Interpretation of Opinion Letters Under Florida Customary Practice; Incorporation by Reference⁷

The Committees believe that all opinion letters of Florida counsel with respect to matters of Florida law should be interpreted under Florida customary practice (as articulated by the Report), regardless of whether or not the Report is expressly incorporated by reference into the opinion letter itself and regardless of where the Opinion Recipient is located.

Notwithstanding the foregoing, the Committees recommend that Florida counsel consider the express incorporation by reference of the Report into an opinion letter. Such express incorporation has three key benefits: (i) it allows Opining Counsel to expressly incorporate lists of assumptions, limitations, qualifications and exceptions into the opinion letter by express reference, thus shortening the opinion letter, (ii) it greatly reduces confusion and/or later disagreements by both Opining Counsel and the Opinion Recipient as to the application and effect of Florida customary practice (as articulated in the Report) with respect to the opinion letter, and (iii) it should lessen the concern that a court interpreting the opinion letter may incorrectly determine, despite the view of the Committees regarding this issue, not to follow Florida customary practice (as articulated in the Report), particularly where the court is located outside of Florida.

If the Report is expressly incorporated by reference into the opinion letter, the following language is recommended:

This opinion letter has been prepared and is to be construed in accordance with the “Report on Third-Party Legal Opinion Customary Practice in Florida, dated December 3, 2011” (the “Report”). The Report is incorporated by reference into this opinion letter.

This illustrative form of opinion letter can be used whether or not the Report is expressly incorporated by reference into the opinion letter.

Documents Reviewed⁸

In connection with rendering an opinion, Opining Counsel must review various documents with respect to the Transaction. Generally, these documents will fall into three categories: (i) the Transaction Documents, (ii) other documents that may be required to be reviewed to render one or more of the opinions in the opinion letter, and (iii) documents that relate to the Client’s entity status and organization, entity power and authorization of the Transaction and the Transaction Documents (which are sometimes called “authority documents”).

In many cases, all of the reviewed documents are listed in a single list, with definitions provided for certain categories of documents (i.e., the “Transaction Documents,” the “Other Reviewed Documents” and the “Authority Documents”). In other cases, the “Authority Documents” are not separately defined, but rather are included within the list of “Other Reviewed Documents.”

This illustrative form of opinion letter includes all three categories of documents reviewed in a single list.

Transaction Documents⁹

An opinion letter should include a specific list of the Transaction Documents relating to the Transaction (which are the agreements between or among the parties as to which the opinions are being rendered). The list of Transaction Documents set forth below is an illustrative list of the documents for a local counsel opinion in a loan transaction. Sometimes one or more of these illustrative Transaction Documents will have a different name than the name described below and sometimes one or more of these illustrative Transaction Documents will be combined into a single document. In some cases, not all of these illustrative Transaction Documents will be required because of the particular facts and circumstances of the Transaction. In all cases, the list of Transaction Documents set forth in the opinion letter should be tailored to the specifics of the Transaction to which the particular opinion letter relates.

⁷ See “Common Elements of Opinions-Opinions of Florida Counsel Are To Be Interpreted Under Florida Customary Practice” and “Common Elements of Opinions-Express Incorporation of the Report into Opinion Letters.”

⁸ See “Common Elements of Opinions-Opinion.”

⁹ See “Common Elements of Opinions-Transaction Documents.”

Other Reviewed Documents⁹

Opining Counsel should consider listing other documents reviewed in connection with rendering the opinions set forth in the opinion letter. The list of other documents reviewed will necessarily be Transaction-specific. Some of the “Other Reviewed Documents” may be contracts that are not Transaction Documents and others may be documents that are not contractual in nature at all.

Authority Documents

Opining Counsel should consider including a list of the Authority Documents, which are the documents that relate to entity status and organization, entity power, and authorization of the Transaction and the Transaction Documents. The other illustrative forms of opinion letters that accompany the Report include as an Authority Document one or more certificates to counsel, because, in many cases, the certificates to counsel are the documents pursuant to which the Client delivers to Opining Counsel copies of the various entity organizational and authorization documents. However, in some local counsel situations, certificates to counsel are not obtained and all facts pertinent to the opinions are assumed. Consistent with this approach, this illustrative form of local counsel opinion letter assumes no certificate to counsel has been obtained from the Client and that all facts pertinent to the opinions have been assumed.

List of Documents Reviewed

The following is the list of illustrative documents reviewed in connection with this illustrative form of local counsel opinion letter.

In connection with rendering the opinions set forth in this opinion letter, we have reviewed originals or copies of the following documents:

- (i) The Loan Agreement;
- (ii) The Mortgage, dated _____, 20__ (the “Mortgage”), made by the Borrower in favor of the Lender with respect to the real property collateral (the “Real Property”), including “fixtures” (the “Fixtures”) described in the Mortgage (the Real Property and the Fixtures being sometimes collectively referred to as the “Real Property Collateral”);
- (iii) The Assignment of Leases and Rents, dated _____, 20__ (the “Assignment of Leases and Rents”), made by the Borrower in favor of the Lender with respect to the leases and rents constituting real property to be derived from the Real Property Collateral (the “Leases and Rents Collateral”);
- (iv) The financing statement to be filed in the public records of _____ County, Florida (the “Local Filing Office”), naming the Borrower as debtor and the Lender as secured party and describing the collateral constituting Fixtures, [*the form of which is attached to this opinion letter*] (the “Financing Statement”); and
- (v) Certificate of Status of the Borrower, dated _____, 20__ (the “Certificate of Status”), issued by the Florida Department of State (the “Department”).

The Loan Agreement, the Mortgage and the Assignment of Leases and Rents are hereinafter collectively referred to as the “Transaction Documents.”

Limiting Language

In a local counsel opinion letter, Opining Counsel usually limits the documents reviewed to those expressly listed in the opinion letter, affirmatively stating that Opining Counsel has reviewed no other documents. Although some local counsel opinion letters include catch-all language, such language is typically not included in a local counsel opinion letter.

Recommended limiting language is as follows:

For purposes of rendering the opinions contained in this opinion letter, we have not reviewed any documents other than the documents listed above. We have also not reviewed any documents that may be referred to in or incorporated by reference into any of the documents listed above. We note that we have been retained to act solely as local Florida counsel to the Borrower in connection with the Transaction contemplated by the Transaction Documents. We are not regular counsel to the Borrower or to any other party to the Transaction Documents and are not generally informed as to their respective business affairs.

Notwithstanding the foregoing, in preparing and delivering an opinion letter Opining Counsel should, in accordance with Florida customary practice, review the documents and make the inquiries relevant to the particular legal opinions being rendered. Whether or not limiting language is or is not included in the opinion letter, Opining Counsel should, under Florida customary practice, perform the diligence required to render each opinion being rendered, and a limitation in the list of documents reviewed that reflects a failure of Opining Counsel to review the documents that are expected to be reviewed to render the particular opinion under Florida customary practice is not likely to constitute a limitation on the scope of the opinion unless the exception from customary practice is expressly noted in the opinion letter.

Opinion Limitations and Assumptions

Opining Counsel generally describe in the opinion letter limitations to the scope of the opinion letter and assumptions upon which the opinions set forth in the opinion letter are based. These include limitations of general applicability, assumptions that Opining Counsel is making and definitions of key concepts (such as the definition of Opining Counsel's "knowledge") that are often expressly set forth in the opinion letter to highlight to the Opinion Recipient these limitations on the scope of the opinion letter.

Under Florida customary practice, certain limitations and assumptions are implicitly incorporated into opinion letters delivered by Florida counsel as to matters of Florida law whether or not such limitations and assumptions are expressly set forth in the opinion letter. However, the Committees believe that express inclusion of such limitations and assumptions in the opinion letter (whether through express incorporation of such limitations and assumptions by reference to the Report or by including a listing of such limitations and assumptions in the opinion letter) is the preferred approach to avoid confusion regarding the applicable limitations and assumptions.

General Limitations

With your consent, we have relied upon, and assumed the accuracy of, the representations and warranties contained in the Transaction Documents supplied to us by the Borrower with respect to the factual matters set forth therein. However, no opinion is rendered hereunder as to the accuracy of the representations and warranties contained in the Transaction Documents.¹⁰

We have, with your consent, assumed that certificates of public officials dated earlier than the date of this opinion letter remain accurate from such earlier dates through and including the date of this opinion letter.¹¹

¹⁰ In many local counsel situations, no certificate to counsel is obtained and all facts pertinent to the opinions contained in the opinion letter are assumed. Notwithstanding the foregoing, even in such situations, Florida counsel should consider obtaining a certificate to counsel to cover matters other than the facts underlying the opinion letter (such as client consent to the issuance of the opinion letter). If a certificate to counsel is obtained, the language found in the corresponding section of Form "A" (the illustrative form of opinion letter in a commercial loan transaction) should be added. For a discussion regarding the content of certificates to counsel, see "Common Elements of Opinions-Reliance on Factual Certificates and Representations and Warranties; Assumptions of Fact; Scope of Reliance." An illustrative form of certificate to counsel accompanies the Report as Form "E."

¹¹ See "Common Elements of Opinions-Reliance on Certificates of Public Officials."

Assumptions¹²

A list of assumptions should be inserted here. Under Florida customary practice, some assumptions are implicitly incorporated into opinion letters delivered by Florida counsel as to matters of Florida law under Florida customary practice, whether or not they are expressly set forth in the opinion letter. Other assumptions are only included in the opinion letter if they are expressly set forth in the opinion letter.

The following list of assumptions includes all of the assumptions that are implicitly incorporated into opinion letters delivered by Florida counsel as to matters of Florida law under Florida customary practice. The Committees believe that express inclusion in the opinion letter of these implicitly included assumptions is the preferred approach, in order to avoid confusion regarding whether or not these assumptions apply to the opinion letter. This list also contemplates that Opining Counsel may elect to add additional assumptions to the opinion letter based on the particular facts and circumstances of the Transaction, the Transaction Documents, the Clients and/or the scope of the opinions being rendered.

If Opining Counsel only includes some, but not all, of the implicitly included assumptions in the opinion letter, the Committees believe that all of the remaining assumptions that are implicitly included in opinion letters of Florida counsel under Florida customary practice will nevertheless be implied into the opinion letter. However, the Committees urge Florida counsel to include the entire list of implied assumptions in their opinion letters out of a concern that a court interpreting an opinion letter rendered by Florida counsel may determine incorrectly not to follow Florida customary practice (as articulated in the Report) and may instead decide that only those assumptions that are expressly set forth in the opinion letter constitute a part of the opinion letter.

Opining Counsel should further recognize that problems can arise if, in the course of negotiating the final form of opinion letter to be delivered at the closing of the Transaction, Opining Counsel delivers a draft form of opinion letter to the Opinion Recipient that expressly includes the assumptions implicitly included in all opinions of Florida counsel under Florida customary practice and, thereafter, Opining Counsel agrees to remove one or more of the stated assumptions from the opinion letter. Under such circumstances, Opining Counsel may no longer have the benefit of the implicit incorporation into the opinion letter of such removed assumptions.

If the Report has been expressly incorporated by reference into the opinion letter, Opining Counsel may wish to use the following:

In rendering the opinions set forth herein, we have relied, without investigation, on each of the assumptions implicitly included in all opinions of Florida counsel that are set forth in the Report in “Common Elements of Opinions – Assumptions” [and the following additional assumptions: _____ (*other assumptions that are based on the particularities of the Transaction, the Transaction Documents, the Clients and/or the scope of the opinions being rendered*)].

If the Report has not been expressly incorporated by reference into the opinion letter, Opining Counsel may wish to include a list of assumptions in the opinion letter.

In rendering the opinions set forth herein, we have relied, without investigation, on each of the following assumptions:

Assumptions deemed to be implicitly included in all opinion letters of Florida counsel under Florida customary practice

- (a) the legal capacity of each natural person to take all actions required of each such person in connection with the Transaction;
- (b) the legal existence of each party to the Transaction;¹³
- (c) the power of each party to the Transaction to execute, deliver and perform all Transaction Documents executed and delivered by such party and to do each other act done or to be done by such party;¹³

¹² See “Common Elements of Opinions-Assumptions.”

¹³ Assumptions b, c, d and e have been modified to assume certain “building block” opinions with respect to Opining Counsel’s Client. See “Special Issues to Consider when Acting as Local Counsel-Opinions Regarding Entity Status, Entity Power, Authorization of the Transaction and the Transaction Documents and Execution and Delivery” for further information.

(d) the authorization, execution and delivery by each party of each Transaction Document executed and delivered or to be executed and delivered by such party;¹³

(e) the validity, binding effect and enforceability as to each party, other than the Borrower (and with respect to the Borrower only to the extent expressly provided in this opinion letter), of each Transaction Document executed and delivered by such party or to be executed and delivered and of each other act done or to be done by such party;¹³

(f) there have been no undisclosed modifications of any provision of any document reviewed by us in connection with the rendering of this opinion letter and no undisclosed prior waiver of any right or remedy contained in any of the Transaction Documents;

(g) the genuineness of each signature, the completeness of each document submitted to us, the authenticity of each document reviewed by us as an original, the conformity to the original of each document reviewed by us as a copy and the authenticity of the original of each document received by us as a copy;

(h) the truthfulness of each statement as to all factual matters otherwise not known to us to be untruthful or unreliable contained in any document encompassed within the diligence review undertaken by us;

(i) each certificate or other document issued by a public authority is accurate, complete and authentic as of the date of the opinion letter, and all official public records (including their proper indexing and filing) are accurate and complete;

(j) each recipient of the opinion letter has acted in good faith, without notice of any defense against enforcement of rights created by, or adverse claim to any property or security interest transferred or created as part of, the Transaction, and has complied with all laws applicable to it that affect the Transaction;

(k) the Transaction and the conduct of the parties to the Transaction comply with any requirement of good faith, fair dealing and conscionability;

(l) routine procedural matters such as service of process or qualification to do business in the relevant jurisdiction(s) will be satisfied by the parties seeking to enforce the Transaction Documents;

(m) agreements (other than the Transaction Documents as to which opinions are being rendered) and judgments, decrees and orders reviewed in connection with rendering the opinions will be enforced as written;

(n) no discretionary action (including a decision not to act) that is permitted in the Transaction Documents will be taken by or on behalf of the Borrower in the future that might result in a violation of law or constitute a breach of or default under any of the Borrower's other agreements or under any applicable court order;

(o) there are no agreements or understandings among the parties, written or oral, and there is no usage of trade or course of prior dealing among the parties that would, in either case, define, supplement, modify or qualify the terms of the Transaction Documents or the rights of the parties thereunder;

(p) the payment of all required documentary stamp taxes, intangible taxes and other taxes and fees imposed upon the execution, filing or recording of documents, except to the extent expressly set forth in this opinion letter;

(q) with respect to the Transaction and the Transaction Documents, including the inducement of the parties to enter into and perform their respective obligations thereunder, there has been no mutual mistake of fact or undue influence and there exists no fraud or duress; [and]

Additional assumptions expressly included in the opinion letter

(r) _____ (other assumptions that are based on the particularities of the Transaction, the Transaction Documents, the Clients and/or the scope of the opinions being rendered).

Knowledge¹⁴

When used in this opinion letter, the phrases “to our knowledge,” “known to us” or the like means the conscious awareness of the lawyers in the “primary lawyer group” of factual matters such lawyers recognize as being relevant to the opinion or confirmation so qualified. Such phrases do not imply that we have undertaken any independent investigation within our firm, with the Borrower or with any third party to determine the existence or absence of any facts or circumstances, and no inference should be drawn merely from our past or current representation of the Borrower. Where any opinion or confirmation is qualified by the phrase “to our knowledge,” “known to us” or the like, it means that the lawyers in the “primary lawyer group” are without any actual knowledge or conscious awareness that the opinion or confirmation is untrue in any respect material to the opinion or confirmation. For purposes of this opinion letter, “primary lawyer group” means: (i) the lawyer who signs his or her name or the name of the firm to this opinion letter, (ii) the lawyers currently in the firm who are actively involved in preparing or negotiating this opinion letter, and (iii) the lawyers currently in the firm who are actively involved in negotiating or documenting the Transaction or the Transaction Documents.

The Opinions¹⁵

The specific opinions being rendered by Opining Counsel should be inserted following introductory language. The recommended “lead-in” language is as follows:

Based upon and subject to the foregoing, and subject to the assumptions, limitations and qualifications contained herein, we are of the opinion that:

Entity Status/Foreign Qualification Opinion¹⁶

1. Based solely on the Certificate of Status issued by the Department, the Borrower is authorized to transact business as a foreign [corporation/partnership/limited liability company] in the State of Florida, and its [corporate/partnership/limited liability company] status in Florida is active.

The Remedies Opinion¹⁷ and Usury¹⁸

2. We note that Section ____ of the Loan Agreement provides that the Loan Agreement, and all issues arising thereunder, shall be governed by the law of the State of New York (the “Selected Jurisdiction”), without regard to principles of conflict of laws. Except as otherwise set forth in this opinion letter, we express no opinion as to whether the provisions of such Section ____ of the Loan Agreement are

¹⁴ See “Common Elements of Opinions-Knowledge.”

¹⁵ See “Common Elements of Opinions-Opinion.”

¹⁶ See “Authority to Transact Business in Florida-Qualification of a Foreign Entity to Transact Business in Florida.”

¹⁷ See “Common Elements of Opinions-Limitations to Laws of Specific Jurisdictions or to Substantive Areas of Law, Excluded Areas of Law” and “The Remedies Opinion.” In opinion no. 2, the remedies opinion is rendered “as if” Florida law applies to the Loan Agreement. In opinion no. 3, since the Mortgage and Assignment of Leases and Rents are governed by Florida law, the remedies opinion with respect to such agreements is rendered under Florida law.

¹⁸ See “Florida Usury Law-Opinions of Florida Counsel Relating to Usury.” Florida counsel should be aware that, unless Florida usury law is excluded from the scope of an opinion letter that includes a “remedies opinion” and/or a “no violation of laws” opinion, then such opinions will be deemed (under Florida customary practice) to include an opinion that the Transaction Documents do not violate Florida usury law. However, if the opinion letter includes an express opinion regarding usury, then the scope of the usury opinion being rendered under the “remedies opinion” and under the “no violation of laws” opinion will be limited to the scope of the express usury opinion that is contained in the opinion letter. See “The Remedies Opinion-Analysis of the Foundational Building Block: The Meaning of the Basic Remedies Opinion-Legal Issues Covered by the Remedies Opinion.”

enforceable or as to the law that is applicable to the Loan Agreement or the Transaction contemplated thereby, and we express no opinion regarding the law of the Selected Jurisdiction. Rather, with your permission, the following opinions are given based on what would be the case if a court were to refuse to apply the substantive law of the Selected Jurisdiction that is set forth in the Loan Agreement and instead were to apply the substantive law of the State of Florida to the Loan Agreement and the Transaction contemplated thereby. Based on the above:

(i) the Loan Agreement would be a valid and binding obligation of the Borrower, enforceable against the Borrower in accordance with its terms; and

(ii) the Loan Agreement would not violate applicable Florida usury laws provided that the Lender has not and does not reserve, charge, take or receive, directly or indirectly, at any time, interest or other sums deemed to be in the nature of interest (however labeled) in an amount exceeding the equivalent of the rate of [18%/25%] per annum, simple interest, calculated on the basis of a year of 365 days (or 366 days as applicable) and the actual number of days elapsed.

3. The Mortgage and the Assignment of Leases and Rents are valid and binding obligations of the Borrower, enforceable against the Borrower in accordance with their respective terms.

No Violation of Laws Opinion¹⁹

4. The execution and delivery of the Transaction Documents and the performance by the Borrower of its obligations under the Transaction Documents to which it is a party does not violate any of the Applicable Laws *[or, if no definition of Applicable Laws is included in the opinion letter, “violate any Florida laws, rules or regulations that a Florida counsel exercising customary professional diligence would reasonably be expected to recognize as being applicable to the Borrower, the Transaction Documents or the Transaction, but excluding the laws, rules and regulations set forth below.]*

No Required Governmental Consents or Approvals Opinion

5. No consent, approval, authorization or other action by, or filing or registration with, any governmental authority of the State of Florida is required by or on behalf of the Borrower to execute and deliver the Transaction Documents and to close the Transaction contemplated by the Transaction Documents other than [_____]²⁰ / those consents, approvals, authorizations, actions, filings, and registrations as to which the requisite consents, approvals or authorizations have been obtained, the requisite actions have been taken and the requisite filings and registrations have been accomplished].

Security Interest Opinions

6. The Mortgage and the Assignment of Leases and Rents to be recorded or filed are in a form suitable for recordation or filing.²¹

¹⁹ See “No Violation and No Breach or Default-No Violation of Laws.” In a local counsel situation it is generally not appropriate to require Opining Counsel to opine on issues such as “no breach of or default under agreements” or “no violation of judgments, decrees and orders” applicable to the Client.

²⁰ See “No Required Governmental Consents or Approvals.” Opining Counsel sometimes list here the specific consents received or the filings required with respect to the particular Transaction, including consents relating to security interests or lien creation or as to the perfection of such security interests or liens. However, under Florida customary practice, no opinion is rendered with respect to any such security interest unless the opinion letter contains an express opinion with respect to such security interest.

²¹ See “Opinions Particular to Real Estate Transactions-Requirements for Recording Instruments Affecting Real Estate.”

7. The Mortgage is effective to create a valid lien in favor of the Lender in the Real Property Collateral. Upon the proper recording of the Mortgage in the Local Filing Office, the Mortgage will provide constructive notice of the lien against the Real Property Collateral.²²

8. The Assignment of Leases and Rents is effective to create a valid lien in favor of the Lender in the Leases and Rents Collateral. Upon the proper recording of the Assignment of Leases and Rents in the public records of the Local Filing Office, the Assignment of Leases and Rents will provide constructive notice of the lien against the Leases and Rents Collateral.²²

9. The Financing Statement is in acceptable form for filing with the Local Filing Office.²³ Upon the proper filing of the Financing Statement with and acceptance by the Local Filing Office, the Lender will have a perfected security interest in the Fixtures described therein.²⁴

Choice of Law Opinion²⁵

10. You have requested our opinion as to the effectiveness under Florida law of the choice of law provision contained in the Loan Agreement. The Loan Agreement provides that it shall be governed by the law of the Selected Jurisdiction. In applying Florida conflict of law principles to this issue, Florida courts often look at whether the Transaction has a normal relation and/or a reasonable relation to the jurisdiction whose law has been selected to govern the Loan Agreement. For purposes of this opinion, we have assumed, with your consent, that the following facts are true and correct:²⁶

Insert applicable facts that support a normal relation and/or a reasonable relation. Examples of such facts include the following:

- (a) the Lender has its principal place of business in the Selected Jurisdiction;

²² See “Opinions Particular to Real Estate Transactions-Creation of a Mortgage Lien.”

²³ Under the facts upon which this illustrative form of opinion letter are based, because the creation, attachment and perfection of the grant of the security interest in the Borrower’s personal property is not governed by Florida law, the appropriate place of filing of the financing statement with respect to such grant of a security interest in the Borrower’s personal property collateral is not with the Florida Secured Transaction Registry. Rather, based on these facts, the financing statement with respect to the Borrower’s personal property collateral would be required to be filed with the Delaware Secretary of State. Florida counsel should note, however, that if the Borrower were a Florida entity, perfection of the security interests in such personal property collateral would have been governed by Florida law (but not creation and attachment of such security interests). For illustrative forms of security interest opinions that might be appropriately rendered if Florida law were to apply to these personal property security interests, see Form “A” (the illustrative form of opinion letter in a commercial loan transaction).

²⁴ See “Opinions With Respect to Collateral Under the Uniform Commercial Code-Perfection Opinions-Perfection by Filing.”

²⁵ See “Choice of Law.”

²⁶ In some cases, Opining Counsel will obtain a certificate to counsel to verify the facts upon which the opinion is based. However, in many cases, Opining Counsel that is acting as local counsel will not have any direct contact with the Client, but rather will deal only with the Client’s principal transaction counsel. In such case, it is generally preferable to assume the pertinent facts in the opinion letter that support the choice of law opinion. See “Special Issues to Consider When Acting As Local Counsel.”

- (b) the terms of the Transaction Documents were negotiated on behalf of the Lender through meetings in the Selected Jurisdiction and/or through telephone calls by the representatives of the Lender who were located in the Selected Jurisdiction;
- (c) the Transaction Documents were delivered at the offices of the Lender pursuant to the requirements of the Transaction Documents and the closing of the Transaction occurred or was deemed to occur at the offices of the Lender in the Selected Jurisdiction;
- (d) the parties freely chose the law of the Selected Jurisdiction as the law governing the Transaction Documents and the parties did not make the selection of the laws of the Selected Jurisdiction in order to avoid public policy requirements or to engage in fraud or misleading activities;
- (e) the Transaction Documents were negotiated at arms' length between or among parties represented by counsel; and
- (f) the proceeds of the loan that is the subject of the Transaction are deemed by the Transaction Documents to be disbursed to the Borrower from the Selected Jurisdiction and the payments due under the Transaction Documents are required to be made at the offices of the Lender in the Selected Jurisdiction.

Based on the foregoing assumed facts, and although the issue is not free from doubt, it is our opinion that, if the matter were presented today to a court in Florida having jurisdiction, and assuming the interpretation of the relevant law on a basis consistent with existing authority, it is more likely than not that a Florida court (or a Federal court applying Florida choice of law rules) would conclude as binding the designation of the law of the Selected Jurisdiction as the governing law of the Loan Agreement.

Notwithstanding the foregoing, the court may apply the law of Florida to the Loan Agreement if and to the extent that: (i) the issue involves interest rate limitations or usury,²⁷ (ii) the court deems the application of the law of the Selected Jurisdiction to be against the public policy of Florida, (iii) the issue involves the creation of a lien against real property located in Florida and remedies in connection therewith, (iv) the issue involves the perfection of security interests in personal property located in Florida, or (v) a provision in the Loan Agreement is deemed to be procedural rather than substantive.

Documentary Stamp Tax and Intangible Personal Property Tax Opinion²⁸

11. With respect to Florida documentary stamp taxes and Florida intangible personal property taxes ("Mortgage Taxes"), it is our opinion that the "Notice to Recorder" clause on the first page of the Mortgage sets forth the correct amount of Mortgage Taxes (if any) due and payable with respect to the execution, delivery and recordation of the Mortgage, assuming that the clause correctly sets forth the respective collateral values, loan amounts and prior Mortgage Tax payments. We note for Lender's information that failure to pay any applicable documentary stamp tax or any applicable intangible tax with respect to any document upon which such tax is required will render the document unenforceable until such time as the proper amount of tax (and any relevant interest, late fees and penalties) is paid, but will not affect the validity of the lien of the Mortgage or the constructive notice given by the recording of the Mortgage.

²⁷ If an opinion is rendered regarding whether the choice of law provision in the Transaction Documents will be enforced under Florida law with respect to the issue of usury, see the discussion in "Choice of Law-Opinions of Florida Counsel as to Choice of Law."

²⁸ See "Opinions Particular to Real Estate Transactions—Florida Taxes." Further, in non-real estate transactions involving out-of-state lenders, Opining Counsel may be asked to render an opinion that no Florida documentary stamp taxes and intangible taxes are due in connection with the Transaction. If Opining Counsel agrees to render such opinion, then Opining Counsel should review the recommended opinion language and the diligence required to render such opinion that is discussed in "Special Issues to Consider When Acting as Local Counsel-Florida Taxes-Documentary Stamp Taxes and Intangible Taxes on Instruments Not Secured by a Mortgage."

Foreign Lender not Required to Obtain Certificate of Authority in Florida²⁹

12. Neither the making of the loan constituting the Transaction, nor the securing of the loan with collateral, nor the ownership of the loan will, solely as the result of any such action, require the Lender to obtain a certificate of authority to transact business as a foreign [corporation/partnership/limited liability company] in the State of Florida. However, we express no opinion with respect to the effect upon the Lender of engaging in any other activities in the State of Florida (including the making of additional loans in the State of Florida) or the effect upon the Lender of having a physical presence, if any, in the State of Florida.

Applicable Laws and Excluded Laws³⁰

“Applicable Laws” is defined under Florida customary practice and is set forth in the Report. Opining Counsel often expressly define in the opinion letter the Applicable Laws that are covered by the scope of the opinion. Whether or not such definition is expressly included in the opinion letter, a Florida Opining Counsel would be obligated to consider all Applicable Laws, as so defined, in rendering the opinion letter. In the context of a local counsel opinion, the opinion letter is generally limited to Florida law.

The recommended form of the definition of Applicable Laws is as follows:

When used in this opinion letter, the term “Applicable Laws” means the Florida laws, rules and regulations that a Florida counsel exercising customary professional diligence would reasonably be expected to recognize as being applicable to the Borrower, the Transaction Documents or the Transaction, but excluding the laws, rules and regulations set forth below.

Whether or not a definition of Applicable Laws is expressly included in the opinion letter, Opining Counsel will generally include in the opinion letter a list of laws that are excluded from coverage in the opinion letter. As set forth in the Report, some laws are implicitly excluded from opinion letters of Florida counsel under Florida customary practice, whether or not these laws are expressly excluded from the scope of the opinion letter by express reference in the opinion letter. Opining Counsel may also wish to expressly exclude other laws from the scope of the opinion letter by expressly referencing in such opinion letter the exclusion of such laws from the scope of the opinion letter.

The Committees believe that the express inclusion in the opinion letter of a list of excluded laws is the preferred approach, whether through an express incorporation of the list of implicitly excluded laws contained in the Report or by actually setting forth such list of excluded laws in the opinion letter. However, the Committees recognize that some Florida counsel may choose to include a list of some, but not all, of the implicitly excluded laws in their opinion letters. The Committees believe that, in such situation, all of the remaining excluded laws that implicitly limit the scope of opinion letters of Florida counsel under Florida customary practice will nevertheless be implied into the opinion letter. Notwithstanding the foregoing, the Committees urge Florida counsel to include the entire list of implicitly excluded laws in their opinion letters out of a concern that a court interpreting an opinion letter of Florida counsel may incorrectly determine not to follow customary practice (as articulated in the Report) and may instead decide that only those excluded laws that are expressly set forth in the opinion letter limit the scope of the opinion letter.

Opining Counsel should also recognize that problems can arise if, in the course of negotiating the final form of opinion letter to be delivered at the closing of the Transaction, Opining Counsel delivers a draft of the opinion letter to the Opinion Recipient that expressly includes the entire list of excluded laws and, thereafter, Opining Counsel agrees to remove one or more of those stated excluded laws from the list contained in the opinion letter. Under such circumstances, Opining Counsel may no longer have the benefit of implicit incorporation into the opinion letter of such removed excluded laws.

²⁹ See “Authority to Transact Business in Florida-Foreign Lender Not Required to Obtain a Certificate of Authority from the Department to Make a Loan.”

³⁰ See “Common Elements of Opinions-Limitations to Laws of Specific Jurisdictions or to Substantive Areas of Law; Excluded Areas of Law.”

If the Report has been incorporated by reference into the opinion letter, Opining Counsel may wish to use the following:

All federal laws, rules and regulations and the following Florida laws, rules and regulations are expressly excluded from the scope of this opinion letter: (a) laws, rules and regulations that are defined as the Excluded Laws in the “Common Elements of Opinions-Limitations to Laws of Specific Jurisdictions or to Substantive Areas of Law; Excluded Areas of Law” section of the Report, and (b) the following laws, rules and regulations: _____
(other laws, rules and regulations that are to be expressly excluded from the scope of the opinion letter under the particular circumstances in which the opinion letter is being rendered).

If the Report is not expressly incorporated by reference into the opinion letter, Opining Counsel may wish to include a list of excluded laws in the opinion letter. Because all federal laws are excluded from the scope of this illustrative form of local counsel opinion, there are no specific references to federal laws in the list of excluded laws contained in this illustrative form of local counsel opinion (although leaving these federal law references in the opinion letter does not change the scope of the excluded laws under these circumstances).

All federal laws, rules and regulations and the following Florida laws, rules and regulations are expressly excluded from the scope of this opinion letter:

Laws, rules and regulations deemed to be implicitly excluded from the scope of all opinion letters of Florida counsel under Florida customary practice

- (a) securities laws, rules and regulations;
- (b) laws, rules and regulations regulating banks and other financial institutions, insurance companies and investment companies;
- (c) pension and employee benefit laws, rules and regulations;
- (d) labor laws, rules and regulations, including laws on occupational safety and health;
- (e) antitrust and unfair competition laws, rules and regulations;
- (f) laws, rules and regulations concerning compliance with fiduciary requirements;
- (g) laws, rules and regulations concerning the creation, attachment, perfection or priority of any lien or security interest, except to the extent expressly set forth in this opinion letter;³¹
- (h) laws, rules and regulations relating to taxation, except to the extent expressly set forth in this opinion letter;
- (i) bankruptcy, fraudulent conveyance, fraudulent transfer and other insolvency laws;
- (j) environmental laws, rules and regulations;
- (k) laws, rules and regulations relating to patents, copyrights, trademarks, trade secrets and other intellectual property;
- (l) local laws, administrative decisions, ordinances, rules or regulations, including any zoning, planning, building, occupancy or other similar approval or permit or any other ordinance or regulation of any county, municipality, township or other political subdivision of the State of Florida;
- (m) criminal and state forfeiture laws and any racketeering laws, rules and regulations;

³¹ Some Opining Counsel exclude this item from the list of excluded laws in situations where they are giving opinions on security interest issues. However, this exclusion from laws covered by the opinion letter is one of the excluded laws that is implicitly excluded from the scope of all opinions of Florida counsel under Florida customary practice. It is included in this illustrative form of opinion letter in order to make clear that security interest issues are not implicitly covered by other opinions that are being rendered (such as a “remedies” opinion or a “no required governmental consents or approvals” opinion on or with respect to a security agreement). Under Florida customary practice, security interest opinions are only rendered if and to the extent they are expressly included in the opinion letter.

- (n) other statutes of general application to the extent that they provide for criminal prosecution;
- (o) laws relating to terrorism or money laundering;
- (p) laws, regulations and policies concerning national and local emergency and possible judicial deference to acts of sovereign states;

Laws, rules and regulations, expressly excluded from the scope of the opinion letter by Opining Counsel

- (q) _____ (other laws, rules and regulations that are to be expressly excluded from the scope of the opinion letter under the particular circumstances in which the opinion letter is being rendered);

Exclusions applicable to all laws, rules and regulations, excluded from the scope of the opinion letter

- (r) filing or consent requirements under any of the foregoing excluded laws; [and]
- (s) judicial and administrative decisions to the extent they deal with any of the foregoing excluded laws.

Qualifications

Qualifications to the scope of the opinions set forth in an opinion letter are generally included in the opinion letter. This illustrative opinion letter includes qualifications to the opinions described above. If one or more of the opinions to which these qualifications relate are not being rendered in the opinion letter, the applicable qualifications need not be included in the opinion letter.

The foregoing opinions are subject to the following exceptions, qualifications and limitations:

Remedies Opinion Qualifications³²

The opinions regarding enforceability of the Transaction Documents that are contained in paragraphs [2 and 3] above are limited by:

1. bankruptcy, insolvency, reorganization, moratorium, fraudulent conveyance and transfer, and similar law affecting the rights and remedies of creditors generally (the “Bankruptcy Exception”);³³ and
2. general principles of equity, regardless of whether such enforceability is considered in a proceeding at law or in equity (the “Equitable Principles Limitation”).³⁴

The Committees recommend that a “generic” qualification³⁵ should be included in all opinion letters of Florida counsel that include a remedies opinion. There are two forms of the “generic” qualification: (i) the “material breach” qualification, which specifies which provisions of the Transaction Documents should be enforceable, and (ii) the “practical realization” qualification, which provides that the Opinion Recipient should receive the principal benefit of its bargain. In the context of a secured loan transaction, including the transaction on which this illustrative form of opinion letter is based, the “material breach” qualification is the recommended form of “generic” qualification.³⁶

³² See generally: “The Remedies Opinion-Qualifications for Narrowing the Scope of the Remedies Opinion.”

³³ See “The Remedies Opinion-The Bankruptcy Exception and the Equitable Principles Limitation-The Bankruptcy Exception.”

³⁴ See “The Remedies Opinion-The Bankruptcy Exception and the Equitable Principles Limitation-The Equitable Principles Limitation.”

³⁵ See “The Remedies Opinion-The “Generic” Qualification.”

³⁶ If a “material breach” qualification is not included in the opinion letter, Opining Counsel should include a “practical realization” qualification. The form of such qualification is set forth in “The Remedies Opinion-The “Generic” Qualification-The “Practical Realization” Qualification.”

The following is the recommended form of the “material breach” qualification:³⁷

In addition, certain remedies, waivers and other provisions of the Transaction Documents might not be enforceable; nevertheless, subject to the Bankruptcy Exception and the Equitable Principles Limitation, such unenforceability will not render the Transaction Documents invalid as a whole or preclude: (i) the judicial enforcement of the obligation of the Borrower to repay the principal, together with the interest thereon (to the extent not deemed a penalty), as provided in the Loan Agreement, (ii) the acceleration of the obligation of the Borrower to repay such principal, together with such interest, upon a material default by the Borrower of the payment of such principal or interest or upon a material default by the Borrower in any other material provisions of the Transaction Documents, or (iii) the foreclosure in accordance with Applicable Laws of the lien on and security interest in the Real Property Collateral created by the Mortgage upon maturity or upon acceleration pursuant to (ii) above.

As noted, the inclusion of a “generic” qualification in the opinion letter does not limit the impact on the scope of the remedies opinion of the Bankruptcy Exception and the Equitable Principles Limitation. See “The Remedies Opinion-The “Generic” Qualification.”

If either form of “generic” qualification is included in the opinion letter, it may be unnecessary to also include an extensive list of specific qualifications to the remedies opinion in the opinion letter (although Opining Counsel may elect to expressly include in the opinion letter one or more specific qualifications limiting the scope of the remedies opinion to bring those qualifications to the attention of the Opinion Recipient).

However, if neither form of “generic” qualification is included in the opinion letter, the Committees believe that Opining Counsel would be wise to include a list of specific exceptions to the scope of the remedies opinion that excludes from the scope of the opinion those rights and remedies contained in the Transaction Documents that may not be enforceable. To determine which specific qualifications to the remedies opinion to include in the opinion letter, Opining Counsel may wish to review the Transaction Documents and consider which of the rights and remedies contained in the Transaction Documents might not be enforceable.

The following is a representative list of specific exclusions³⁸ to the scope of the remedies opinion that might be appropriate under the circumstances. This list is not exclusive, and Opining Counsel may wish to add to the opinion letter other qualifications to the scope of the remedies opinion.

No opinion is expressed herein with respect to any provision of the Transaction Documents that:

- (a) purports to excuse a party from liability for the party’s own acts;
- (b) purports to make void any act done in contravention thereof;
- (c) purports to authorize a party to act in the party’s sole discretion or purports to provide that determination by a party is conclusive;
- (d) requires waivers or amendments to be made only in writing;
- (e) purports to effect waivers of: (i) constitutional, statutory or equitable rights, (ii) the effect of applicable laws, (iii) any statute of limitations, (iv) broadly or vaguely stated rights, (v) unknown future defenses, or (vi) rights to damages;
- (f) imposes or permits: (i) liquidated damages, (ii) the appointment of a receiver, (iii) penalties, (iv) indemnification for gross negligence, willful misconduct or other wrongdoing, (v) confessions of judgment, or (vi) rights of self-help or forfeiture;
- (g) purports to limit or alter laws requiring mitigation of damages;

³⁷ See “The Remedies Opinion-The “Generic” Qualification-The “Material Breach” Qualification.”

³⁸ See “The Remedies Opinion-Examples of Specific Limitations to the Remedies Opinion (Additional Qualifications)-Other Common Qualifications.”

- (h) concerns choice of forum, consent or submission to the personal or subject matter jurisdiction of courts, venue of actions, means of service of process, waivers of rights to jury trials, and agreements regarding arbitration;
- (i) purports to reconstitute the terms thereof as necessary to avoid a claim or defense of usury;
- (j) purports to require a party thereto to pay or reimburse attorneys' fees incurred by another party, or to indemnify another party therefor, which provisions may be limited by applicable statutes and decisions relating to the collection and award of attorneys' fees;
- (k) relates to the evidentiary standards or other standards by which the Transaction Documents are to be construed, including, but not limited to, provisions that attempt to change or waive rules of evidence or fix the method or quantum of proof to be applied in litigation or similar proceedings;
- (l) prohibits or unreasonably restricts: (i) competition, (ii) the solicitation or acceptance of customers, business relationships or employees, (iii) the use or disclosure of information, or (iv) activities in restraint of trade;
- (m) enumerates that remedies are not exclusive or that a party has the right to pursue multiple remedies without regard to other remedies elected or that all remedies are cumulative;
- (n) constitutes severability provisions;
- (o) permits the exercise, under certain circumstances, of rights without notice or without providing opportunity to cure failures to perform;
- (p) purports to create rights to setoff otherwise than in accordance with applicable law;
- (q) contains a blanket prohibition on assignments or a specific prohibition on assignment of payments due or to come due; or
- (r) purports to entitle any party to specific performance of any provision thereof.

Counsel for the Opinion Recipient should consider whether to request coverage in the opinion letter as to the enforceability of specific provisions in the Transaction Documents. This may be particularly appropriate where counsel for the Opinion Recipient is located in a state other than Florida.

Security Interest Qualifications

Our opinions regarding the Mortgage and the Assignment of Leases and Rents are subject to the following qualifications:

- (a) No opinions are expressed with respect to the status of title to the Real Property Collateral or the Leases and Rents Collateral or with respect to the relative priority of any liens or security interests created by the Transaction Documents;³⁹
- (b) We have assumed as to matters of title and priority that the Borrower has good title to the Real Property Collateral and the Leases and Rents Collateral;³⁹
- (c) We have assumed that the respective descriptions of the Real Property Collateral and the Leases and Rents Collateral contained in the Mortgage, in the Assignment of Leases and Rents [and in the Financing Statement] sufficiently identify the collateral intended to be covered thereby [and that the information regarding the debtor and the secured party contained in the Financing Statement is correct and complete];⁴⁰

³⁹ See "Opinions Particular to Real Estate Transactions-Title and Priority."

⁴⁰ See "Opinions Particular to Real Estate Transactions-Creation of a Mortgage Lien," and "Opinions With Respect to Collateral Under the Uniform Commercial Code-Creation and Attachment Opinions-Description of Collateral." In a local counsel situation, Opining Counsel should resist removal of the bracketed language in this qualification because Opining Counsel generally has little information regarding the collateral and the identity of the parties. For further discussion regarding this issue, see Footnote 52 of Form "B" (the illustrative form of opinion letter in a loan transaction secured by real estate).

- (d) We assume that the Fixtures constitute “fixtures” as defined in the Uniform Commercial Code (“UCC”) in the State of Florida as of the date of this opinion letter (the “Florida UCC”). We caution you that to the extent that the goods described in the Financing Statement or the Mortgage are not “fixtures” under Florida law, it may be necessary to file a financing statement under the UCC against the Borrower as debtor in the appropriate jurisdiction. No opinion is rendered hereunder as to whether the Fixtures constitute “fixtures” under Florida law.
- (e) Our opinions regarding the Transaction Documents are limited, with respect to the collateral constituting Fixtures, to Article 9 of the Florida UCC. We express no opinion with respect to: (a) the right, title or interest of the Borrower in any of the collateral or any other property, (b) except as expressly set forth in paragraphs [6-9] above, the creation, attachment or perfection of any security interest or liens, (c) the priority of any security interest or liens,⁴¹ (d) under Article 9 of the Florida UCC, what other Florida law or law of another state governs the perfection or effect of perfection or non-perfection of the security interest of the Lender in any particular item or items of the Article 9 Collateral, and (d) any collateral not subject to Article 9 of the Florida UCC;⁴²
- (f) We assume that “value” has been given to the Borrower in connection with the Transaction;⁴³
- (g) The scope of our opinions regarding the liens and security interests created by the Mortgage and the Assignment of Leases and Rents is further limited by the Bankruptcy Exception and the Equitable Principles Limitation;⁴⁴ and
- (h) We call your attention to the following: (a) the continued effectiveness of certain financing statements filed under the Florida UCC is dependent on the filing of a properly completed continuation statement within six (6) months prior to the fifth anniversary of the date of filing of the financing statement and thereafter within six (6) months prior to each additional fifth anniversary of the filing of the initial financing statement; (b) the continued effectiveness of each of the financing statements in the event of a change of location of the debtor (as defined in the Florida UCC), or the removal from the State of Florida of any of the fixtures covered by financing statements filed in Florida, may be dependent on perfecting the security interest in accordance with the laws of such other jurisdiction and the perfection or non-perfection of the security interest therein may be governed by the law of another jurisdiction; (c) the continued effectiveness of the financing statement as against collateral transferred to a new owner will be dependent upon the nature of the collateral and whether the secured party authorized the disposition of the collateral and further dependent upon perfecting the security interest in accordance with the laws of the jurisdiction in which the new owner is located (as defined in the Florida UCC); (d) the continued effectiveness of the financing statements to perfect a security interest in collateral acquired by the debtor more than four months after a change of the debtor’s name, identity or corporate or other organizational structure, as provided in the Florida UCC, is dependent on the filing of an appropriate amendment to the financing statement prior to the expiration of such four-month period;

⁴¹ Paragraph (g) of the list of excluded laws excludes from the scope of opinion letters of Florida counsel laws, rules and regulations concerning the creation, attachment, perfection or priority of any lien or security interest, other than any opinions on such matters as are expressly included in the opinion letter. This qualification might be viewed as overlapping with the list of excluded laws, and therefore arguably unnecessary. However, many Opining Counsel leave this qualification in their opinion letters despite the duplication to remind the Opinion Recipient as to the scope of the opinion that is being rendered with respect to security interests.

⁴² See “Opinions With Respect to Collateral Under the Uniform Commercial Code-Scope of the UCC Opinions; Limitations.” Because the UCC of another jurisdiction governs the facts of this illustrative transaction, no opinions are being rendered by Florida counsel regarding: (i) the security interests granted in the personal property collateral, or (ii) any security agreement that creates such security interests.

⁴³ See “Opinions With Respect to Collateral Under the Uniform Commercial Code-Creation and Attachment Opinions-Enforceability of Security Interests.”

⁴⁴ See “Opinions with Respect to Collateral Under the Uniform Commercial Code-Scope of UCC Opinions; Limitations-Bankruptcy and Equitable Principles Not Included.”

and (e) the failure of a secured party to respond within two weeks after receipt of a transaction party's request for approval or correction of the transaction party's statement of the aggregate amount of unpaid obligations or the transaction party's list of collateral may result in a loss of that secured party's security interest in collateral as against persons misled by that secured party's failure to respond, and may also result in liability of that secured party for any loss caused to the transaction party thereby:⁴⁵

Tax Qualifications

Except as set forth in paragraph [11] as to Florida Mortgage Taxes, we exclude from this opinion letter any opinion as to the applicability or effect of any federal and state taxes, including income taxes, sales taxes and franchise fees.

Other Matters

We do not express any opinion as to the laws of any jurisdiction other than the State of Florida.⁴⁶

This opinion letter is furnished to you solely for your benefit in connection with the Transaction and may not be relied upon by any other party without our prior written consent in each instance.⁴⁷ Further, copies of this opinion letter may not be furnished to any other party, nor may any portion of this opinion letter be quoted, circulated or referred to in any other document without our prior written consent in each instance.⁴⁸

This opinion letter speaks only as of the date hereof. We assume no obligation to update or supplement this opinion letter if any applicable laws change after the date of this opinion letter or if we become aware after the date of this opinion letter of any facts or other developments, whether existing before or first arising after the date hereof, that might change the opinions expressed above.⁴⁹

Very truly yours,

LAW FIRM'S SIGNATURE⁵⁰

⁴⁵ "Opinions With Respect to Collateral Under the Uniform Commercial Code-Perfection Opinions-Location of Debtor."

⁴⁶ See "Common Elements of Opinions-Opinions under Florida or Federal Law; Opinions under the Laws of Another Jurisdiction." Because this is a local counsel opinion letter, this opinion letter would generally be limited to Florida law. Further, under customary practice in Florida this opinion incorporates the concept that no opinion is being rendered under the laws of any other jurisdiction, whether or not so stated.

⁴⁷ See "Common Elements of Opinions-Addressee(s) and Reliance." If Opining Counsel agrees to allow assignees to rely on the opinion letter, the following language is recommended in place of the language set forth in the first sentence in the second paragraph of "Other Matters" above:

This opinion letter is furnished to you solely for your benefit in connection with the Transaction and, except as set forth below, may not be relied upon by any other party without our prior written consent in each instance. At your request, we hereby consent to reliance hereon by any future assignee of your interest in the loans under the Transaction Documents pursuant to an assignment that is made and consented to in accordance with the express provisions of Section ____ of the Loan Agreement, on the condition and understanding that: (i) this opinion letter speaks only as of the date hereof, (ii) we have no responsibility or obligation to update or supplement this opinion letter, to consider its applicability or correctness to any person other than its addressee(s), or to take into account changes in law, facts or any other developments of which we may later become aware, and (iii) any such reliance by a future assignee must be actual and reasonable under the circumstances existing at the time of assignment, including any changes in law, facts or any other developments known to or reasonably knowable by the assignee at such time.

⁴⁸ See "Common Elements of Opinions-Addressee(s) and Reliance."

⁴⁹ See "Common Elements of Opinions-Date."

⁵⁰ See "Common Elements of Opinions-Signatures."

FORM "E"
Illustrative Form of Certificate to Counsel

CERTIFICATE TO COUNSEL¹

Dated: _____ 20 _____

The undersigned, _____, in his/her capacity as _____ [officer/general partner/manager/member] of _____ (the "Client"), hereby states the following in order to induce _____ ("Opining Counsel") to provide an opinion letter, dated _____, 20__ (the "Opinion Letter"), the form of which has been provided to the Client, based, in part, on the factual matters set forth in this Certificate to Counsel (the "Certificate"). Unless otherwise defined herein, capitalized terms set forth in the Opinion Letter shall have the same meanings when used herein.

1. Knowledge. I am familiar with the [Transaction Documents] relating to the [Transaction] between the Client and _____ (the "Other Transaction Party").² I have knowledge of all of the facts contained herein or I have obtained such information from the [officers/partners/managers/members] of the Client whose duties require them to have personal knowledge thereof.
2. Representations and Warranties True and Correct. The representations and warranties of the Client as set forth in the [Transaction Documents] are true, correct, and complete as of the date of this Certificate, with the same effect as if made on the date of this Certificate. The Client hereby consents to Opining Counsel's reliance on such representations and warranties.
3. Organizational Documents.³ Exhibit "A" to this Certificate is a true, correct and complete copy of the Client's Organizational Documents, dated as of _____ (*describe with specificity*).⁴ [If the Client entity is a corporation: "There is no shareholders' agreement, voting trust agreement or agreement among shareholders" or "A copy of any shareholders' agreement, voting trust agreement or agreement among shareholders is Exhibit A-1 to this Certificate."]

¹ For a discussion regarding certificates to counsel, see "Common Elements of Opinions-Reliance on Factual Certificates and Representations and Warranties; Assumptions of Fact; Scope of Reliance." Care should be taken so that factual certificates state objective facts rather than legal conclusions. However, a factual certificate that includes one or more legal conclusions is not ineffective as to the objective facts contained therein and also acts as a factual confirmation from the Client that the Client is not aware that the particular statements in a Certificate that contain one or more legal conclusions are untrue.

² In the view of the Committees, an Opinion Recipient is not entitled to rely on the factual representations contained in the Certificate, and each of Form "A," "B" and "C" of the illustrative forms of opinion letters that accompany the Report include an express statement to this effect.

³ Sometimes Opining Counsel will obtain this information from a certificate made by the Client to the Other Transaction Party that is being delivered at the closing of the Transaction. In such circumstances, alternative language for the certificate to counsel might be as follows: "Exhibit "A" to the certificate of the [officer/partner/manager/member] includes a true, correct and complete copy of the Client's Organizational Documents."

⁴ Organizational Documents that are available from the Florida Department of State, Division of Corporations ("Department"), should be obtained from the Department. The Client's "Organizational Documents" means:

- (i) if the Client entity is a Florida corporation, the articles of incorporation that have been filed with the Department and the bylaws;
- (ii) if the Client entity is a Florida limited partnership or a Florida limited liability limited partnership, the certificate of limited partnership that has been filed with the Department and the written limited partnership agreement;
- (iii) if the Client entity is a Florida general partnership, the written partnership agreement and, if filed with the Department, the partnership registration statement;
- (iv) if the Client entity is a Florida limited liability partnership, the partnership registration statement, as filed with the Department, the statement of qualification, as filed with the Department, and the written partnership agreement;
- (v) if the Client entity is a Florida limited liability company, the articles of organization, as filed with the Department, and the written operating agreement; and
- (vi) if the Client entity is a trust, the written trust agreement.

4. Resolutions.⁵ Exhibit “B” to this Certificate is a true, correct and complete copy of all of the resolutions and/or written consent actions adopted by the Client’s _____ [directors/shareholders/partners/managers/members], dated _____ 20__, (*describe with specificity*) relating to the Transaction and the Transaction Documents (the “Resolutions”).⁶
5. Effectiveness. The Organizational Documents and the Resolutions remain in full force and effect and there have been no amendments to the Organizational Documents or the Resolutions or actions taken to amend the Organizational Documents or the Resolutions. The Resolutions have not been modified or rescinded and are the only resolutions adopted by the Client relating to the Transaction and the Transaction Documents. The Client believes that the Transaction is within the entity power of the Client as provided in its Organizational Documents.
6. Signatory; Binding Agreement. _____, the _____ of the Client, has been authorized to sign the [Transaction Documents] on behalf of the Client, and has, in fact, signed the [Transaction Documents]. The Client’s intent to enter into a binding agreement is demonstrated by such signature, and the Client has provided the executed [Transaction Documents] to the Other Transaction Party with the intent of creating a binding agreement on the part of the Client.⁷
7. No Dissolution. No action has been taken by the Client in contemplation of any liquidation or dissolution of the Client and no such actions are contemplated. To my knowledge, no action has been taken by the Department to administratively dissolve the Client and the Client has not received any notification from the Department to this effect.
8. Compliance with Other Agreements and with Judgments, Decrees and Orders.⁸ A list of the Client’s “other agreements” is set forth on Exhibit “C” to this Certificate. A list of the judgments, decrees and orders applicable to the Client is set forth on Exhibit “D” to this Certificate.
9. No Breach and No Security Interest Created. The undersigned is not aware, nor has the Client received any notices, that the execution, delivery or performance of the [Transaction Documents] (or any of them): (i) constitutes a breach of, or a default under, any agreement of the Client; (ii) results in the creation of a security interest or a lien on the assets of the Client, except pursuant to the Transaction Documents; or (iii) violates any judgment, decree or order of any court or administrative tribunal applicable to the Client.
10. No Consent. No consent, approval, authorization or order of any person or entity (including any governmental authority or of any court) is required for the Client: (a) to execute and deliver the [Transaction Documents] and (b) to perform the obligations contemplated thereby, except [_____] / those which have been previously obtained.⁹ There is no law or regulatory requirement governing the Client that affects its ability to grant security interests in its assets or otherwise engage in the Transaction.

⁵ See “Authorization of the Transaction by a Florida Entity.” Resolutions and/or written consent actions should be obtained for all entities (including the Client) that need to approve the Transaction and the Transaction Documents in order for the Client to approve the Transaction and the Transaction Documents by all necessary action.

⁶ If authorization of the Transaction by the Client requires the consent of another entity (such as an entity that is the general partner of a partnership), it may be appropriate to obtain a certificate to counsel from each such entity in order to obtain the factual information needed to support the approval of the Transaction by each such entity.

⁷ See “Execution and Delivery.”

⁸ See “No Violation and No Breach or Default.” The preferred method of rendering the “no violation and no breach or default” opinion is based on a review by Opining Counsel of specified “other agreements” of the Client and specified “judgments, decrees or orders” applicable to the Client. The purpose of including this factual statement in the Certificate is to define the universe of “other agreements” and “judgments, decrees and orders” that Opining Counsel must review in order to render the “no violation and no breach or default” opinion.

⁹ See “No Required Governmental Consents or Approvals.”

10. No Litigation.¹⁰ There is no action, suit or proceeding, at law or in equity, or by or before any governmental agency, now pending or overtly threatened in writing against Client that challenges the validity or enforceability of, or that seeks to enjoin the performance of, or seeks damages with respect to, the Transaction Documents or the Transaction, except: _____ [*insert exceptions*].
11. Bankruptcy. No proceedings have been commenced in bankruptcy for the reorganization or liquidation of the Client, nor has the Client made an assignment for the benefit of its creditors.
12. Other Factual Statements. *Other factual statements required to support the Opinion Letter should be inserted here.*
13. Accuracy of Statements. The undersigned hereby certifies that he/she is not aware of any facts that could render any of the foregoing statements to be untrue or incomplete in any respect.
14. Consent The Client has reviewed the form of the Opinion Letter and hereby consents to the issuance of the Opinion Letter. The Client also consents to the delivery of this Certificate to the Other Transaction Party.
15. Reliance This Certificate is issued solely for the benefit of Opining Counsel and may not be relied upon by any party other than Opining Counsel. This Certificate may be relied upon by Opining Counsel in connection with the issuance of the Opinion Letter.

IN WITNESS WHEREOF, the undersigned hereunto sets his/her hand as of the date first above written.

_____, as _____
[authorized officer/general partner/manager/member]

¹⁰ See “No Litigation.” As described in the Report, common practice with respect to the no litigation factual confirmation has changed over the last few years. Forms “A,” “B” and “C” of the illustrative forms of opinion letters that accompany the Report include a version of the “no litigation” confirmation that the Committees believe currently represents the “no litigation” confirmation generally given by Florida counsel, and this factual confirmation from the Client is intended to mirror that opinion (so that the Client is confirming to Opining Counsel that it is not aware of any such proceedings). The scope of this paragraph 10 of the Certificate should mirror the scope of the “no litigation” factual confirmation that is included in the Opinion Letter.