BRING TO MEETING

REAL PROPERTY, PROBATE & TRUST LAW SECTION
www.rpptl.org

Executive Council Meeting

AGENDA

Marriott Marco Island Resort & Spa
400 South Collier Boulevard
Marco Island, FL 34145
Phone: (239) 394-2511

Saturday, December 3, 2011
8:00 a.m.

BRING TO THE MEETING

Real Property, Probate and Trust Law Section
Executive Council Meeting
December 3, 2011
Marriott Marco Island – Marco Island, FL

AGENDA

I. **Presiding** — *George J. Meyer, Chair*

II. **Attendance** — *Michael J. Gelfand, Secretary*

III. **Minutes of Previous Meeting** — *Michael J. Gelfand, Secretary*
Motion to Approve the September 24, 2011 Executive Council Minutes **pp. 11**

IV. **Chair's Report** — *George J. Meyer*
2011 – 2012 RPPTL Executive Council Schedule **pp. 29**

V. **Chair-Elect's Report** — *Wm. Fletcher Belcher*
2012 – 2013 RPPTL Executive Council Schedule **pp. 30**

VI. **Liaison with Board of Governors Report** — *Clay A. Schnitker*

VII. **Treasurer's Report** — *Andrew A. O'Malley*
2011-12 Monthly (October) Report Summary **pp. 31**

VIII. **At Large Members Report** — *Debra L. Boje, Director*

IX. **Real Property Division**— *Margaret A. Rolando , Real Property Division Director*

Action Items:

1. Ad Hoc Committee on Foreclosure Reform – *Jerry Aron, Chair*

   Motion to adopt a legislative position supporting HB 213 (Passidomo), as amended, entitled the Fair Foreclosure Act to resolve various issues in the current foreclosure process, and to find that the proposal is within the purview of the Section. See attached legislative position request form, white paper and text of the bill. **pp. 33**

2. Legal Opinions Committee - *David R. Brittain, Chair*

   Motion to approve the *Report on Third-Party Legal Opinion Customary Practice in Florida*. This Report reflects customary third-party legal opinion practices of Florida counsel in a variety of commercial transactions. It is a joint effort of the Legal Opinion Standards Committee of The Florida Bar Business Law Section and the Legal Opinions Committee of RPPTL Section. The Report is intended 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 required to render such opinions. See attached Report and supporting materials. **pp. 77**

3. Mortgage and Other Encumbrances Committee – *Salome Zikakis, Chair, and James Robbins, Chair of the UCC Article 9 Subcommittee.*

   Requests support of a legislative position which recommends adopting the position of the Business Law Section to support HB 483 (Passidomo) which would amend Chapter 679, Florida Statutes, to incorporate amendment to Article 9 of the UCC drafted and adopted in 2010 by the Uniform Law Commissioners (ULC), who are members of the National Conference of Commissioners on Uniform State Laws. The RPPTL Section appointed a

UCC Article 9 Subcommittee to review HB 483. The Bankruptcy/UCC Committee of The Business Law Section established a subcommittee, the UCC Study Group, to study and review the potential for adopting the Commission's revisions to Florida's Uniform Commercial Code. The UCC Study Group recommended that the Business Law Section's Executive Council support the adoption by the State of Florida of the revisions to Article 9. The RPPTL's UCC Article 9 Subcommittee has recommended certain adjustments to and clarifications of HB 483 but supports adopting the position of the Business Law Section, which recommends supporting HB 483. See attached memorandum, staff analysis and text of the bill. **pp. 678**

Information Items

1. Mortgages and Other Encumbrances Committee – Salome Zikakis, Chair, and Real Property Litigation – Mark A. Brown, Chair

   Municipal Liens and Priority. The Section acting through the Executive Committee declined to file an amicus brief in the appeal to the Florida Supreme Court of the 5th DCA's decision in *City of Palm Bay v. Wells Fargo* regarding the priority of a first mortgage lien over two municipal liens for code enforcement violations recorded after the mortgage. The issue on appeal is summarized as: whether municipalities may enact ordinances that give their code enforcement liens priority over previously recorded liens such as purchase money mortgages—essentially making local code enforcement liens the equivalent of tax liens and special assessment liens, which are given super-priority by state statutes, not local ordinances. Code enforcement liens result from accumulating fines for code violations, such as not mowing the grass. See attached 5th DCA decision on **pp. 729**

2. Real Property Problem Study Committee – S. Katherine Frazier, Chair

   Hidden Liens. The Section previously adopted a legislative position to support legislation requiring all governmental liens to be recorded as a result of the Real Estate Problem Study Committee's report on the subject. Rep. Wood has filed the HB671, a version of the Section's initiative relating to hidden liens and providing that a conveyance, transfer, or mortgage of real property, an interest in the real property, or a lease for a term of 1 year or longer is not valid against creditors or subsequent purchasers unless such documents are recorded in the official records; providing that a lien imposed on real property by a governmental or quasi-governmental entity for certain purposes is not valid against creditors or subsequent purchasers unless the lien is recorded and contains certain information. Senator Ring has filed the companion bill, SB 670.

3. Residential Real Estate and Industry Liaison Committee – Frederick Jones, Chair

   Seller Financing Rider. The FR/BAR Contract committee has revised Rider C (the Seller Financing Rider) of the Comprehensive Riders to the contract, effective September 2011, which had previously been dropped from the Contract in that seller financing had become a thing of the past. The FR/Bar Contract Committee felt that it would be best to add the language to the Rider because the contract provision for purchase money mortgages, under the Financing clause, refers the parties to a rider or addendum. See attached Rider C. **pp. 733**

4. FR/BAR Contract - request by Tom Ball to The Florida Bar as co-owner of the copyright for the FR/Bar Contract with the Florida Realtors to make the FR/BAR Contract available to Section members on-line. See attached letter. **pp. 734**

X. Probate and Trust Law Division – *Michael A. Dribin, Probate and Trust Law Division Director*

Action Item

Guardianship and Advance Directives – *Sean W. Kelley, Chair*

Motion to adopt a legislative position supporting an amendment to F.S. §736.0813(1)(d) to provide that a trustee may provide trust accountings to qualified beneficiaries more frequently than annually and satisfy the duty to account and to clarify that the trustee does not need to provide an additional annual accounting covering a period already included a previous trust accounting, and to find that the proposal is within the purview of the Section. **pp. 743**

Information Item

1. Comments of The Real Property, Probate and Trust Law Section and of the Tax Section submitted to the Internal Revenue Service, in response to IRS Notice 2011-82, Guidance on Electing Portability of Deceased Spousal Unused Exclusion Amount. The comments were submitted at the recommendation of the Estate and Gift Tax Planning Committee, and their submission was approved by the Executive Committee. The comments of the Section are in response to a request for such comments in the IRS notice, which notice seeks to address the procedures associated with the preservation of the unused portion of the estate tax exemption available to the estate of the first spouse to die for use by the estate of the surviving spouse. **pp. 748**

2. Copy of relevant portions of SC11-192, Supreme Court of Florida, issued on November 3, 2011, "In Re: Amendments to the Florida Rules of Appellate Procedure", creating new Rule 1.970, "Appeal Proceedings in Probate and Guardianship Cases". The relevant portion of the Rule was approved by the RPPTL Section, and was written by and advocated for approval by the Probate and Trust Litigation Committee. The new Rule provides a non-exclusive list of orders in probate or guardianship proceedings which will be considered to "finally determine a right or obligation" and which will be, therefore, immediately appealable. **pp. 762**

XI. General Standing Committee Items – *Wm. Fletcher Belcher, Chair-Elect*

Action Item

Approval of 2012-2013 Budget – *Andrew A. O'Malley, Chair Budget Committee* **pp. 769**

XII. General Standing Committee Reports– *Wm. Fletcher Belcher, Director and Chair-Elect*

1. **ActionLine** – J. Richard Caskey, Chair; Scott P. Pence, Vice Chair (Real Property); Shari Ben Moussa, Vice Chair (Probate & Trust)

2. **Ad Hoc LLC Monitoring** – Lauren Y. Detzel and Ed Burt Bruton, Co-Chairs

3. **Alternative Dispute Resolution (ADR)** – Deborah BovarnickMastin and David R. Carlisle, Co-Chairs

4. **Amicus Coordination** – Robert W. Goldman, John W. Little, III, Kenneth B. Bell and Judge Gerald B. Cope, Jr., Co-Chairs

5. **Budget** – Andrew O'Malley, Chair; Pamela O. Price and Daniel L. DeCubellis, Co-Vice Chairs

6. **CLE Seminar Coordination** – Deborah P. Goodall, Chair; Sancha B. Whynot, Laura Sundberg and Sylvia B. Rojas, Co-Vice Chairs.

   CLE Schedule for 2011 - 2012 **pp. 774**

7. **Convention Coordination (2012)** – S. Katherine Frazier and Phillip A. Baumann, Co-Chairs

8. **Florida Bar Journal** – Kristen M. Lynch, Co-Chair (Probate & Trust); William P. Sklar, Co-Chair (Real Property)

9. **Florida Electronic Filing & Service** – Patricia P. Jones, Rohan Kelley and Laird A. Lile, Co-Chairs. See RPPTL mandatory e-filing Comment to Supreme Court at **pp. 775**

10. **Homestead Issues Study** – Shane Kelley, Co-Chair (Probate & Trust); Wilhelmina F. Kightlinger, Co-Chair (Real Property); Deborah Boyd, Vice Chair

11. **Legislation** – Barry F. Spivey, Chair; Robert S. Freedman, Vice Chair (Real Property); William T. Hennessey, III, Vice Chair (Probate & Trust); Susan K. Spurgeon and Michael A. Bedke, Legislative Reporters.

    A. On 9-15-11, RPPTL Executive Committee approved substitute text containing improvements and clarifications to the Uniform Principal and Income Act legislative proposal as approved by the Section at the Executive Council meeting on August 6, 2011. **pp. 780**

    B. On 10-12-11, RPPTL Executive Committee approved for filing in the Supreme Court of Florida a comment on behalf of the Section endorsing the concept of mandatory e-filing for all Florida attorneys and all Florida Courts, concluding that the schedule proposed by the FCTC for an effective date of March 1, 2013, is reasonable and should be adopted by the Supreme Court, and offering to assist the Supreme Court and The Florida Bar in implementation of such mandatory e-filing through the training and education of its members and other Florida attorneys. **pp. 843**

    C. On 10-20-11, RPPTL Executive Committee approved a Section position in favor of amending F.S. 732.102 to clarify that the recent changes in the intestate share of a surviving spouse applies only to estates of decedents dying prior to October 1, 2011, even if probate proceedings were commenced after that date. **pp. 845**

    D. On 11-5-11, RPPTL Executive Committee approved a Section submission to the United States Internal Revenue Service responding to the IRS request for comments on IRS Notice 2011-82, Guidance on Electing Portability of Deceased Spousal Unused Exclusion Amount (DSUEA). **pp. 852**

12. **Legislative Update (2011)** – Robert S. Swaine, Chair; Stuart H. Altman, Charles I. Nash, R. James Robbins, and Sharaine Sibblies, Co-Vice Chairs.

13. **Liaison with:**

    A. **American Bar Association (ABA)**– Edward F. Koren and Julius J. Zschau
    B. **Board of Legal Specialization and Education (BLSE)**– Michael C. Sasso, W. Theodore Conner, David M. Silberstein and Deborah L. Russell

C. **Clerks of Circuit Court**– Laird A. Lile
D. **FLEA / FLSSI** –David C. Brennan, John Arthur Jones and Roland Chip Waller

E. **Florida Bankers Association**– Stewart Andrew Marshall, III, and Mark T. Middlebrook
F. **Judiciary**– Judge Jack St. Arnold, Judge Melvin B. Grossman, Judge Hugh D. Hayes, Judge Claudia RickertIsom, Judge Maria M. Korvick, Judge Lauren Laughlin, Judge Celeste H. Muir, Judge Robert Pleus,Judge Lawrence Allen Schwartz, Judge Richard Suarez, Judge Morris Silberman, Judge Patricia V. Thomas and Judge Walter L. Schafer, Jr.
G. **Law Schools**– Frederick R. Dudley and Stacy O. Kalmanson
H. **Out of State Members**– Michael P. Stafford, John E. Fitzgerald, Jr., and Gerard J. Flood
I. **TFB Board of Governors**– Clay A. Schnitker
J. **TFB Business Law Section**– Marsha G. Rydberg
K. **TFB CLE Committee**– Deborah P. Goodall
L. **TFB Council of Sections**– George J. Meyer and Wm. Fletcher Belcher

14. **Long-Range Planning** – Wm. Fletcher Belcher, Chair

15. **Meetings Planning** – John B. Neukamm, Chair

16. **Member Communications and Information Technology** – Nicole C. Kibert, Chair; S. Dresden Brunner and William Parady, Co-Vice Chairs

17. **Membership and Diversity** – Michael A. Bedke andLynwood T. Arnold, Jr., Co-Chairs; Marsha G. Madorsky, Vice Chair (Fellowship); Phillip A. Baumann, Vice Chair (Member Services); Tasha K. Pepper-Dickinson, Vice Chair (Diversity); and Guy S. Emerich, Vice Chair (Mentoring)

18. **Model and Uniform Acts** – Bruce M. Stone and S. Katherine Frazier, Co-Chairs

19. **Pro Bono** – Gwynne A. Young and Adele I. Stone, Co-Chairs; Tasha K. Pepper-Dickinson, Vice Chair

20. **Professionalism and Ethics** – Lee A. Weintraub, Chair; Paul E. Roman and Lawrence J. Miller, Co-Vice Chairs

21. **Sponsor Coordination** – Kristen M. Lynch, Chair; Wilhelmina Kightlinger, Jon Scuderi, J. Michael Swaine, Adele I. Stone, Marilyn M. Polson, and W. Cary Wright, Co-Vice Chairs

22. **Strategic Planning** – Wm. Fletcher Belcher, Chair

XIII. Probate and Trust Law Division Committee Reports – *Michael A. Dribin - Director*

1. **Ad Hoc Study Committee on Creditors' Rights to Non-Exempt, Non-Probate Assets** – Angela M. Adams, Chair

2. **Ad Hoc Committee on Jurisdiction and Service of Process** – Barry F. Spivey, Chair; Sean W. Kelley, Vice Chair

3. **Ad Hoc Study Committee on Estate Planning Conflict of Interest** - William T. Hennessey III, Chair

4. **Asset Preservation** – Brian C. Sparks, Chair; Marsha G. Madorsky, Vice-Chair

5. **Attorney/Trust Officer Liaison Conference** – Robin J. King, Chair; Jack A. Falk, Jr., Vice Chair; Mary Biggs Knauer, Corporate Fiduciary Chair

5. **Estate and Trust Tax Planning** – Elaine M. Bucher, Chair; Harris L. Bonnette, Jr., and David Akins, Co-Vice Chairs

7. **Florida Electronic Court Filing** – Rohan Kelley, Chair; Laird A. Lile, Vice Chair

8. **Guardianship and Advance Directives** – Sean W. Kelley, Chair; Seth A. Marmor and Tattiana Brenes-Stahl, Co-Vice Chairs

9. **IRA, Insurance and Employee Benefits** – Linda Suzzanne Griffin and L. Howard Payne, Co-Chairs; Anne Buzby-Walt, Vice Chair

10. **Liaisons with Elder Law Section** – Charles F. Robinson and Marjorie Wolasky

11. **Liaisons with Tax Section** – Lauren Y. Detzel, William R. Lane, Jr., David Pratt, Brian C. Sparks and Donald R. Tescher

12. **Power of Attorney** – Tami F. Conetta, Chair; William R. Lane, Jr., Vice Chair

13. **Principal and Income** – Edward F. Koren, Chair

14. **Probate and Trust Litigation** – Thomas M. Karr, Chair; Jon Scuderi and J. Richard Caskey, Co-Vice Chairs

15. **Probate Law and Procedure** – Tae Kelley Bronner, Chair; S. Dresden Brunner, Jeffrey S. Goethe and John C. Moran, Co-Vice Chairs

16. **Trust Law** – Shane Kelley, Chair; Angela M. Adams, Laura P. Stephenson and Jerry B. Wells, Co-Vice Chairs

17. **Wills, Trusts and Estates Certification Review Course** – Deborah L. Russell, Chair; Richard R. Gans, Vice Chair

XIV. Real Property Division Committee Reports - *Margaret A. Rolando, Director*

1. **Condominium and Planned Development** – Steven H. Mezer, Chair; Jane Cornett and Nicole Kibert, Co-Vice-Chairs

2. **Construction Law** – Arnold D. Tritt, Chair; Hardy Roberts and Lisa Colon Heron, Co Vice-Chairs

3. **Construction Law Certification Review Course** – Kim Ashby, Chair; Bruce Alexander and Melinda Gentile, Co Vice-Chairs

4. **Construction Law Institute** – Wm. Cary Wright, Chair; Michelle Reddin and Reese Henderson, Co-Vice Chairs

5. **Governmental Regulation** –Anne Pollack, Chair; Arlene Udick and Frank L. Hearne, Co-Vice Chairs

6. **Landlord and Tenant** – Neil Shoter, Chair; Scott Frank and Lloyd Granet, Co-Vice Chairs

7. **Legal Opinions** – David R. Brittain, Chair; Roger A. Larson and Kip Thorton, Co-Vice Chairs

8. **Liaisons with FLTA** – Norwood Gay and Alan McCall, Co-Chairs; Barry Scholnik, John S. Elzeer, Joe Reinhardt, James C. Russick and Alan Fields, Co-Vice Chairs

9. **Mortgages and Other Encumbrances** – Salome Zikakis, Chair; Robert Swaine and Robert Stern, Co-Vice Chairs

10. **Property & Liability Insurance/Suretyship** – Wm. Cary Wright and Andrea Northrop, Co-Chairs

11. **Real Estate Certification Review Course** – Ted Conner, Chair; Jennifer Tobin and Raul Ballaga, Co-Vice Chairs

12. **Real Estate Entities and Land Trusts** – Wilhelmina Kightlinger, Chair; Burt Bruton and Dan DeCubellis, Co-Vice Chairs

13. **Real Property Forms** – Homer Duval, III, Chair; Jeffrey T. Sauer and Arthur J. Menor, Co-Vice Chairs

14. **Real Property Litigation** – Mark A. Brown, Chair; Susan Spurgeon and Martin Awerbach, Co-Vice Chairs

15. **Real Property Problems Study** – S. Katherine Frazier, Chair; Patricia J. Hancock and Alan Fields, Co-Vice Chairs

16. **Residential Real Estate and Industry Liaison** – Frederick Jones, Chair; William J. Haley and Denise Hutson, Co-Vice Chairs

17. **Title Insurance and Title Insurance Liaison** – Kristopher Fernandez, Chair; Homer Duvall and Raul Ballaga, Co-Vice Chairs

18. **Title Issues and Standards** – Patricia P. Jones, Chair; Robert M. Graham, Karla Gray, Jeanne Mott (also archivist) and Christopher W. Smart, Co-Vice Chairs

XV. Adjourn

The Florida Bar
Real Property, Probate & Trust Law Section

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&
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Trust Law Committee

Coral Gables Trust
Probate and Trust Litigation Committee

MINUTES
OF THE
THE FLORIDA BAR'S
REAL PROPERTY, PROBATE AND TRUST LAW SECTION

EXECUTIVE COUNCIL MEETING[1]

Saturday September 24, 2011
The Four Seasons --- Prague, Czech

DRAFT

I. Call to Order – *George J. Meyer, Chair*

Mr. Meyer called the meeting to order at 8:32 a.m., welcoming the membership.

II. Attendance – *Michael J. Gelfand, Secretary.*

Mr. Gelfand reminded members that the attendance roster was circulating to be initialed by Council members in attendance at the meeting. Initialing the roster is a member's responsibility. [*Secretary's Note*: The roster showing members in attendance is attached as **Exhibit A**.]

III. Minutes of Previous Meeting – *Michael J. Gelfand, Secretary.*

Mr. Gelfand **moved** for the approval of the Minutes of the Executive Council Legislative Update Meeting held at The Breakers Resort, Palm Beach, on August 6, 2011, correcting the spelling of the name Pettis. The Motion was approved without opposition.

IV. Chair's Report – *George J. Meyer, Chair.*

The Chair thanked the sponsors whose continuing generosity assists the Section in its endeavors, including significantly offsetting the expenses for events at this and other Section meetings. Reviewing the list of sponsors, Mr. Meyer called up on representatives present from the meeting's sponsors:

> Attorney's Title Fund Services, LLC. Mr. Tom Smith reminded members that there are two Funds. The underwriter has a net positive net worth. As there are not that many underwriting opportunities, the Fund will undertake an attorney's back office work, especially for those who do not desire to create their own back office. In addition, the Fund is now providing bonds, especially for probate matters where a number of circuits

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[1] References in these minutes to Agenda pages are to the Executive Council Meeting Agenda, dated September 9, 2011, posted at www.RPPTL.org

apparently have mandatory personal representative bonding requirements. The Joint Venture is doing well.

Florida Bar Foundation. Ms. Adele Stone thanked the Section on behalf of the Foundation. Because of low interest rates the Foundation is not doing well, not able to fund programs as in the past. For example funding for legal aid is down 60%. The Foundation needs all of your assistance.

Mr. Meyer recognized meeting sponsors who did not have representatives in attendance, or whose representatives did not desire to speak: US Trust, Harris Private Bank, Wells Fargo Private Bank, Regions Bank, Sun Trust Bank, JP Morgan, Management Planning, HFBE, Old Republic National Title Insurance, Fidelity National Title Group and First American Title Insurance Company. In addition, the new "Friends of the Section" sponsors were recognized, ReQuire Release Tracking, PEC and Business Valuation Analysts. The Carlton Fields law firm is joining the sponsors as a co-sponsor of the Saturday evening dinner.

Mr. Meyer reviewed the schedule for the remainder of the weekend. He reminded members of the remainder of the year's meetings located in the Agenda, page 104, warning that the Section's room reservation block was almost sold out for the Marco Island December meeting; thus, members should quickly make their reservations.

V. Chair-Elect's Report – *William Fletcher Belcher, Chair-Elect.*

Mr. Meyer reported for Mr. Belcher, reminding members that Executive Council meetings for the following year are listed in the Agenda, page 105.

VI. Liaison with Board of Governors Report – *Clay A. Schnitker, Bank of Governors Liaison.*

Mr. Schnitker reported that he had no report because the Board of Governors has not met since the last Executive Council meeting.

VII. Treasurer's Report – *Andrew O'Malley, Treasurer.*

Mr. Meyer reported for Mr. O'Malley that the Treasurer's report is set forth in the Agenda, pages 106 – 118.

VIII. At Large Members' Report - *Debra Boje, At Large Members' Director.*

Mr. Meyer reported for Ms. Boje that there was no At Large Members' report.

IX. Real Property Law Division – *Margaret "Peggy" Rolando, Real Property Law Division*

Ms. Rolando reported that the Real Property Law Division had no matters to report.

DRAFT

X. Probate and Trust Law Division – *Michael A. Dribin, Probate and Trust Law Division Director.*

Mr. Meyer reported for Mr. Dribin that there were no matters to report.

XI. General Standing Committee Reports – *William Fletcher Belcher, Director and Chair-Elect.*

1. **Actionline** – J. Richard Caskey, Chair; Scott P. Pence and Rose M. LaFemina, Co-Vice Chairs
2. **Alternate Dispute Resolution --** Debra Bovarnick Mastin and David R. Carlisle, Co-Chairs.
3. **Amicus Coordination** –Robert W. Goldman, John W. Little, III, Kenneth B. Bell and Judge Gerald B. Cope, Jr., Co-Chairs
4. **Budget** – Andrew O'Malley, Chair; Pamela O. Price and Daniel L. DeCubellis, Co-Vice Chairs.

Mr. Neukumm reported that a Budget Committee meeting is scheduled in the near future to address the next year's budget.

5. **CLE Seminar Coordination** – Deborah P. Goodall, Chair; Sancha B. Whynot, Laura Sundberg and Sylvia B. Rojas, Co-Vice Chairs.
6. **2011 Convention Coordinator** – S. Katherine Frazier and Phillip A. Baumann, Co Chairs.
7. **Florida Bar Journal** – Kristen M. Lynch, Chair Probate Division; William P. Sklar, Chair Real Property Division.
8. **Florida Electronic Filing & Service** – Patricia P. Jones, Rohan Kelley and Laird A. Lile, Co-Chairs.

Mr. Rohan Kelley reported that electronic filing, not just service, is here, starting in probate. There are some bumps, but it is a good start. Mr. Lile reinforced that it is here, and that the Supreme Court of Florida has requested rules mandating e-filing for which the originally deadline passed, but the deadline was extended for the Committee to respond after meetings planned for next week.

9. **Homestead Issues Study** – Shane Kelley, Co-Chair (Probate & Trust); Wilhelmina F. Kightlinger, Co-Chair (Real Property); Deborah Boyd, Vice Chair.
10. **Legislation** – Barry F. Spivey, Chair; Robert S. Freedman, Vice Chair (Real Property); William T. Hennessey, III, Vice Chair (Probate & Trust); Susan K. Spurgeon and Michael A. Bedke, Legislative Reporters.

Mr. Peter Dunbar reported for Mr. Spivey that the Legislature's committees started to meet in Tallahassee. There are nineteen Section matters of concern, including the condominium pieces which are out of bill drafting and are ready to be circulated, and other proposals which are in bill drafting. In addition, Mr. Dunbar reported the State

Governor has indicated his intent to propose a "court reform" package, including non-judicial foreclosure. Mr. Dunbar also noted mid-term election results.

11. **Legislative Update 2011** – Robert S. Swaine, Chair; Stuart H. Altman, Charles I. Nash, James Robbins, and Sharaine Sibblies, Co-Vice Chairs.

Mr. Nash reported for Mr. Swaine that all is well.

12. **Liaison with:**

A. **American Bar Association (ABA)** – Edward F. Koren and Julius J. Zschau.
B. **Board of Legal Specialization and Education (BLSE)** – Michael C. Sasso, W. Theodore Conner, David M. Silberstein and Deborah L. Russell.
C. **Clerks of Circuit Court** – Laird A. Lile.
D. **FLEA / FLSSI** – David C. Brennan, John Arthur Jones and Roland Chip Waller.
E. **Florida Bankers Association** – Stewart Andrew Marshall, III, and Mark T. Middlebrook.
F. **Judiciary** – Judge Jack St. Arnold, Judge Melvin B. Grossman, Judge Hugh D. Hayes, Judge Claudia Rickert Isom, Judge Maria M. Korvick, Judge Lauren Laughlin, Judge Celeste H. Muir, Judge Robert Pleus, Judge Lawrence Allen Schwartz, Judge Richard Suarez, Judge Morris Silberman, Judge Patricia V., Thomas and Judge Walter L. Schafer, Jr.

Mr. Meyer thanked the judiciary for their continued involvement, noting the presence of Judges Korvick, Grossman, and Muir.

G. **Law Schools -** Frederick R. Dudley and Stacy O. Kalmanson.
H. **Out of State Members** – Michael P. Stafford, John E. Fitzgerald, Jr., and Gerard J. Flood.
I. **TFB Board of Governors** – Clay A. Schnitker.
J. **TFB Business Law Section** – Marsha G. Rydberg.

Ms. Rydberg reported that the Business Law Section is drafting a receiver's handbook, addressing receivers in the corporate and the real estate arenas. The draft will be circulated as appropriate to the RPPTL Section. Mr. Meyer requested the draft be circulated to the Real Property Problem Studies Committee.

K. **TFB CLE Committee** – Deborah P. Goodall.
L. **TFB Council of Sections** – George J. Meyer and Wm. Fletcher Belcher.

13. **Long-Range Planning** – Wm. Fletcher Belcher, Chair.
14. **Meetings Planning** – John B. Neukamm, Chair.

Mr. Neukamm announced that the next committee meeting is November 3. The Committee is helpful, assisting future chairs, including standardizing contracts. Mr. Belcher is almost finished with his contracts. Ms. Rolando's contracts are underway.

DRAFT

Mr. Dribin's contract efforts are starting. A bit of a delay has been experienced with the change in Section Program Administrators.

15. **Member Communications and Information Technology** – Nicole C. Kibert, Chair; S. Dresden Brunner and William Parady, Co-Vice Chairs.
16. **Membership and Diversity** – Michael A. Bedke and Lynwood T. Arnold, Jr., Co-Chairs; Marsha G. Madorsky, Vice Chair (Fellowship); Phillip A. Baumann, Vice Chair (Member Services); Tasha K. Pepper-Dickinson, Vice Chair (Diversity); and Guy S. Emerich, Vice Chair (Mentoring).
17. **Model and Uniform Acts** – Bruce M. Stone and S. Katherine Frazier, Co-Chairs.
18. **Pro Bono** – Gwynne A. Young and Adele I. Stone, Co-Chairs; Tasha K. Pepper-Dickinson, Vice Chair.

Ms. Stone announced the introduction of a great program, "Wills on Wheels" which will be submitted for Section approval and implementation.

19. **Professionalism and Ethics** – Lee A. Weintraub, Chair; Paul E. Roman, Vice Chair and Lawrence J. Miller, Vice Chair.
20. **Sponsor Coordination** – Kristen M. Lynch, Chair; Wilhelmina Kightlinger, Jon Scuderi, J. Michael Swaine, Adele I. Stone, Marilyn M. Polson, and W. Cary Wright, Co-Vice Chairs.
21. **Strategic Planning** – Wm. Fletcher Belcher, Chair

XIII. Probate and Trust Law Division Committee Reports– *Michael A. Dribin – Director*

1. **Ad Hoc Committee on Jurisdiction and Service of Process** – Barry F. Spivey, Chair; Sean W. Kelley, Vice Chair.
2. **Ad Hoc Study Committee on Creditors' Rights to Non-Exempt, Non-Probate Assets** – Angela M. Adams, Chair.
3. **Ad Hoc Study Committee on Estate Planning Conflict of Interest** - William T. Hennessey III, Chair.
4. **Asset Preservation** – Brian C. Sparks, Chair; Marsha G. Madorsky, Vice-Chair.
5. **Attorney/Trust Officer Liaison Conference** – Robin J. King, Chair; Jack A. Falk, Jr., Vice Chair; Mary Biggs Knauer, Corporate Fiduciary Chair.
6. **Estate and Trust Tax Planning** – Elaine M. Bucher, Chair; Harris L. Bonnette, Jr., and David Akins, Co-Vice Chairs.
7. **Florida Electronic Court Filing –** Rohan Kelley, Chair; Laird A. Lile, Vice Chair.
8. **Guardianship and Advance Directives** – Sean W. Kelley, Chair; Seth A. Marmor and Tattiana Brenes-Stahl, Co-Vice Chairs.
9. **IRA, Insurance and Employee Benefits** – Linda Suzzanne Griffin and L. Howard Payne, Co-Chairs; Anne Buzby-Walt, Vice Chair.
10. **Liaisons with Elder Law Section** – Charles F. Robinson and Marjorie Wolasky.
11. **Liaisons with Tax Section** – Lauren Y. Detzel, William R. Lane, Jr., David Pratt, Brian C. Sparks and Donald R. Tescher.
12. **Power of Attorney** – Tami F. Conetta, Chair; William R. Lane, Jr., Vice Chair.
13. **Principal and Income** – Edward F. Koren, Chair.

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14. **Probate and Trust Litigation** – Thomas M. Karr, Chair; Jon Scuderi and J. Richard Caskey, Co-Vice Chairs.
15. **Probate Law and Procedure** – Tae Kelley Bronner, Chair; S. Dresden Brunner, Jeffrey S. Goethe and John C. Moran, Co-Vice Chairs.
16. **Trust Law** – Shane Kelley, Chair; Angela M. Adams, Laura P. Stephenson and Jerry B. Wells, Co-Vice Chairs.
17. **Wills, Trusts and Estates Certification Review Course** – Deborah L. Russell, Chair; Richard R. Gans, Vice Chair.

XIV. Real Property Division Committee Reports - *Margaret A. Rolando, Director*

1. **Condominium and Planned Development** – Steven H. Mezer, Chair; Jane Cornett and Nicole Kibert, Co-Vice-Chairs.
2. **Construction Law** – Arnold D. Tritt, Chair; Hardy Roberts and Lisa Colon Heron, Co-Vice-Chairs.
3. **Construction Law Certification Review Course** – Kim Ashby, Chair; Bruce Alexander and Melinda Gentile, Co Vice-Chairs.
4. **Construction Law Institute** – Wm. Cary Wright, Chair; Michelle Reddin and Reese Henderson, Co-Vice Chairs.
5. **Governmental Regulation** –Anne Pollack, Chair; Arlene Udick and Frank L. Hearne, Co-Vice Chairs.
6. **Landlord and Tenant** – Neil Shoter, Chair; Scott Frank and Lloyd Granet, Co-Vice Chairs.
7. **Legal Opinions** – David R. Brittain, Chair; Roger A. Larson and Kip Thorton, Co-Vice Chairs.
8. **Liaisons with FLTA** – Norwood Gay and Alan McCall, Co-Chairs; Barry Scholnik, John S. Elzeer, Joe Reinhardt, James C. Russick and Alan Fields, Co-Vice Chairs.
9. **Mortgages and Other Encumbrances** – Salome Zikakis, Chair; Robert Swaine and Robert Stern, Co-Vice Chairs.
10. **Property & Liability Insurance/Suretyship** – Wm. Cary Wright and Andrea Northrop, Co-Chairs.
11. **Real Estate Certification Review Course** – Ted Conner, Chair; Jennifer Tobin and Raul Ballaga, Co-Vice Chairs.
12. **Real Estate Entities and Land Trusts** – Wilhelmina Kightlinger, Chair; Burt Bruton and Dan DeCubellis, Co-Vice Chairs.
13. **Real Property Forms** – Homer Duval, III, Chair; Jeffrey T. Sauer and Arthur J. Menor, Co-Vice Chairs.
14. **Real Property Litigation** – Mark A. Brown, Chair; Susan Spurgeon and Martin Awerbach, Co-Vice Chairs.
15. **Real Property Problems Study** – S. Katherine Frazier, Chair; Patricia J. Hancock and Alan Fields, Co-Vice Chairs.
16. **Residential Real Estate and Industry Liaison** – Frederick Jones, Chair; William J. Haley and Denise Hutson, Co-Vice Chairs.
17. **Title Insurance and Title Insurance Liaison** – Kristopher Fernandez, Chair; Homer Duvall and Raul Ballaga, Co-Vice Chairs.

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XV. Czech Law.

Mr. Meyer introduced Jiri Hornik with the Prague law firm of Kocian, Solc Balastik, and thanked him and his law firm for all of the assistance and support they provided in helping to organize this Out-of-State Executive Council meeting. Mr. Meyer then introduced Ms. Sasha Stepanova with the Kocian Solc Balastik firm. She presented "Real Estate Law in the Czech Republic," summarizing current transactional requirements, including the impact of the transition from the communism to the free market. Her presentation, accompanied by slides, addressed seven fundamental issues. Her points included a three percent land purchase tax for which seller is legally responsible even if the contract provides otherwise. Mr. Hornik noted that an increasingly standard practice in larger transactions is to transfer through LLC's, to which several members noted the similarity to Florida practice. Ms. Stepanova responded to many questions addressing practical conveyancing issues on a micro and macro level.

XV. Adjournment -- There being no further business to come before the Executive Council, the meeting was adjourned at 10:00 a.m.

Respectfully submitted,

Michael J. Gelfand, Secretary

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EXHIBIT A
ATTENDANCE ROSTER
SEPTEMBER 24, 2011

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ATTENDANCE ROSTER

REAL PROPERTY PROBATE & TRUST LAW SECTION
EXECUTIVE COUNCIL MEETINGS
2011 – 2012

Executive Committee	**Aug. 6 Palm Beach**	**Sept. 24 Prague**	**Dec. 3 Marco Island**	**March 3 Ponte Vedra**	**June 2 St. Petersburg**
Meyer, George J., Chair	**X**	**X**			
Belcher, William F., Chair-Elect	**X**				
Rolando, Margaret A., Real Property Law Div. Director	**X**	**X**			
Dribin, Michael A., Probate and Trust Law Div. Director	**X**				
Gelfand, Michael J., Secretary	**X**	**X**			
O'Malley, Andrew M., Treasurer	**X**				
Spivey, Barry F., Legislation Chair	**X**				
Goodall, Deborah P., Seminar Coordinator	**X**				
Boje, Debra L., Director of At-Large Members	**X**				
Felcoski, Brian J., Immediate Past Chair	**X**				
Adams, Angela M.	**X**				
Adcock, Jr., Louie N. **Past Chair**					
Akins, David J.	**X**	**X**			
Alexander, Bruce G.					
Altman, Robert N.	**X**				
Altman, Stuart H.	**X**				
Arnold, Jr., Lynwood F.	**X**				

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Aron, Jerry E. **Past Chair**	**X**				
Ashby, Kimberly A.					
Awerbach, Martin S.	**X**				
Bald, Kimberly A.					
Ballaga, Raul P.	**X**				
Banister, John R.	**X**				
Batlle, Carlos A.	**X**				
Baumann, Phillip A.	**X**	**X**			
Beales, III, Walter R. **Past Chair**					
Bedke, Michael A.	**X**				
Bell, Honorable Kenneth B.					
Ben Moussa, Shari D.	**X**				
Bonnette, Jr., Harris L.	**X**				
Boone, Jr., Sam W.	**X**				
Boyd, Deborah	**X**				
Brenes-Stahl, Tattiana P.	**X**				
Brennan, David C. **Past Chair**	**X**				
Brittain, David R.					
Bronner, Tae K.	**X**				
Brown, Mark A.	**X**				
Brunner, S.D.	**X**				
Bruton, Jr., Ed B.					
Bucher, Elaine M.	**X**				
Butters, Sarah S.	**X**				
Buzby-Walt, Anne	**X**				
Cardillo, John T.					
Carlisle, David R.	**X**				

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Caskey, John R.	**X**				
Christiansen, Patrick T. **Past Chair**	**X**	**X**			
Cole, Stacey L.					
Colon Heron, Lisa	**X**				
Conetta, Tami F.	**X**				
Conner, William T.	**X**				
Cope, Jr., Gerald B.	**X**	**X**			
Cornett, Jane L.					
DeCubellis, Daniel L.	**X**	**X**			
Detzel, Lauren Y.	**X**	**X**			
Diamond, Sandra F. **Past Chair**	**X**	**X**			
Dollinger, Jeffrey	**X**				
Dudley, Frederick R.	**X**				
Duvall, III, Homer					
Elzeer, John S.					
Emerich, Guy S.	**X**				
Ezell, Brenda B.	**X**				
Falk, Jr., Jack A.	**X**				
Fernandez, Kristopher E.	**X**				
Fields, Alan B.	**X**				
Fitzgerald, Jr., John E.	**X**				
Fleece, III, Joseph W.	**X**	**X**			
Fleece, Jr., Joseph W. **Past Chair**					
Flood, Gerard J.	**X**				
Foreman, Michael L.	**X**				
Frazier, S. K.	**X**				
Freedman, Robert S.	**X**	**X**			

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Gans, Richard R.	**X**				
Garber, Julie A.	**X**				
Gay, III, Robert N.	**X**				
Gentile, Melinda S.					
Godelia, Vinette D.	**X**				
Goethe, Jeffrey S.	**X**				
Goldman, Robert W. **Past Chair**	**X**				
Gonzalez, Aniella	X				
Graham, Robert M.	**X**				
Granet, Lloyd	**X**				
Greer, Honorable George W.					
Griffin, Linda S.	**X**				
Grimsley, John G. **Past Chair**		**X**			
Grossman, Honorable Melvin B.		**X**			
Guttmann, III, Louis B. **Past Chair**	**X**	**X**			
Haley, William J.					
Hamrick, Alexander H.	**X**				
Hancock, Patricia J.	**X**				
Hart, W. C.					
Hayes, Honorable Hugh D.					
Hayes, Michael T.	**X**				
Hearn, Steven L. **Past Chair**	**X**	**X**			
Hearne, Frank L.	**X**				
Henderson, Jr., Reese J.					
Henderson, III, Thomas N.	**X**				
Hennessey, III, William T.	**X**				
Heuston, Stephen P.	**X**				

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Huszagh, Victor L.					
Hutson, Denise L.	**X**				
Isom, Honorable Claudia R.					
Isphording, Roger O. **Past Chair**	**X**	**X**			
Johnson, Amber Jade F.	**X**				
Jones, Frederick W.	**X**				
Jones, Jennifer W.					
Jones, John Arthur **Past Chair**					
Jones, Patricia P.H.	**X**				
Judd, Robert B.					
Kalmanson, Stacy O.	**X**				
Karr, Mary	**X**				
Karr, Thomas M.	**X**				
Kayser, Joan B. **Past Chair**					
Kelley, Rohan **Past Chair**	**X**	**X**			
Kelley, Sean W.	**X**				
Kelley, Shane	**X**				
Kendron, John J.					
Kibert, Nicole C.	**X**	**X**			
Kightlinger, Wilhelmina F.	**X**				
King, Robin J.	**X**				
Kinsolving, Ruth Barnes **Past Chair**					
Koren, Edward F. **Past Chair**	**X**				
Korvick, Honorable Maria M.	**X**	**X**			
Kotler, Alan S.	**X**				
Krier, Honorable Elizabeth V.					
Kromash, Keith S.	**X**				

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LaFemina, Rose	**X**				
Lane, Jr., William R.					
Lange, George	**X**	**X**			
Lannon, Patrick J.					
Larson, Roger A.		**X**			
Laughlin, Honorable Lauren C.					
Leebrick, Brian D.	**X**				
Lile, Laird A. **Past Chair**	**X**	**X**			
Little, III, John W.	**X**				
Lyn, Denise A. D.					
Lynch, Kristen M.	**X**				
Madorsky, Marsha G.	**X**	**X**			
Marger, Bruce **Past Chair**	**X**				

Marmor, Seth A.	**X**				
Marshall, III, Stewart A.					
Mastin, Deborah Bovarnick	**X**				
McCall, Alan K.	**X**				
McElroy, IV, Robert L.	**X**				
Mednick, Glenn M.	**X**				
Menor, Arthur J.	**X**				
Mezer, Steven H.	**X**				
Middlebrook, Mark T.	**X**				
Miller, Lawrence J.	**X**				
Moran, John C.	**X**				
Mott, Jeanne A.					
Moule, Jr., Rex E.					
Muir, Honorable Celeste H.	**X**	**X**			

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Mundy, Craig A.					
Murphy, Melissa J. **Past Chair**	X				
Mussman, Craig A.					
Nash, Charles I.	X	X			
Neukamm, John B. **Past Chair**	X	X			
Nguyen, Hung V.	X				
Norris, John E.	X				
Northrup, Andrea J.C.	X				
O'Ryan, Christian F.	X				
Parady, William A.	X	X			
Payne, L.H.	X				
Pence, Scott P.	X				
Pepper-Dickinson, Tasha K.	X				
Platt, William R.	X				
Pleus, Jr., Honorable Robert J.					
Pollack, Anne Q.					
Polson, Marilyn M.	X				
Pratt, David					
Price, Pamela O.	X				
Prince-Troutman, Stacey A.					
Pyle, Michael A.	X	X			
Raines, Alan L.					
Randolph, Jr., John W.					
Reddin, Michelle A.					
Reinhardt, III, Joe A.					
Reynolds, Stephen H.		X			
Rieman, Alexandra V.					

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Robbins, Jr., R. J.	**X**				
Roberts, III, Hardy L.	**X**	**X**			
Robinson, Charles F.	**X**				
Rojas, Silvia B.	**X**	**X**			
Roman, Paul E.	**X**	**X**			
Roscow, IV, John F.					
Russell, Deborah L.	**X**				
Russick, James C.	**X**	**X**			
Rydberg, Marsha G.	**X**	**X**			
Sachs, Colleen C.	**X**				
Sasso, Michael C.					
Sauer, Jeffrey T.	**X**				
Schafer, Jr., Honorable Walter L.					
Schnitker, Clay A.	**X**	**X**			
Schofield, Percy A.					
Scholnik, Barry A.	**X**				
Schwartz, Lawrence A.					
Schwartz, Robert M.	**X**				
Scuderi, Jon	**X**				
Sheets, Sandra G.	**X**				
Shoter, Neil B.	**X**				
Shuey, Eugene E.					
Sibblies, Sharaine A.	**X**				
Silberman, Honorable Morris					
Silberstein, David M.	**X**				
Sklar, William P.					
Smart, Christopher W.	**X**				

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Smith, G. Thomas **Past Chair**	X	X			
Smith, Wilson **Past Chair**					
Sobien, Wayne J.		X			
Sparks, Brian C.	X				
Spurgeon, Susan K.	X	X			
St. Arnold, Honorable Jack R.					
Stafford, Michael P.		X			
Staker, Karla J.	X				
Stephenson, Laura P.					
Stern, Robert G.	X				
Stone, Adele I.	X	X			
Stone, Bruce M. **Past Chair**					
Suarez, Honorable Richard J.					
Sundberg, Laura K.	X				
Swaine, Jack Michael **Past Chair**	X				
Swaine, Robert S.	X				
Taft, Eleanor, W.	X	X			
Taylor, Jr., Richard W.	X				
Tescher, Donald R.	X	X			
Thomas, Honorable Patricia V.	X				
Thornton, Kenneth E.	X				
Tobin, Jennifer S.	X				
Tritt, Jr., Arnold D.	X				
Udick, Arlene C.	X				
Umsted, Hugh C.					
Waller, Roland D. **Past Chair**	X				
Weintraub, Lee A.	X				

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Wells, Jerry B.	X				
White, Jr., Richard M.	X				
Whynot, Sancha B.	X				
Wilder, Charles D.	X	X			
Williams, Jr., Richard C.	X				
Williamson, Julie Ann S. **Past Chair**	X				
Wohlust, Gary C.	X				
Wolasky, Marjorie E.	X				
Wolf, Brian A.					
Wolf, Jerome L.	X				
Wright, William C.	X	X			
Young, Gwynne A.					
Zikakis, Salome J.	X	X			
Zschau, Julius J. **Past Chair**					

RPPTL Fellows					
Bush, Benjamin	X				
Kypreos, Theo	X				
Lucchi, Elisa F.	X				
Pasem, Narin	X				

Legislative Consultants					
Adams, Howard Eugene	X				
Aubuchon, Joshua D.	X				
Dunbar, Peter M.	X	X			
Edenfield, Martha	X	X			

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RPPTL 2011 - 2012
Executive Council Meeting Schedule
George Meyer's YEAR

Date	Location
August 4 – August 7, 2011	**Executive Council Meeting & Legislative Update** The Breakers Palm Beach, Florida Reservation Phone # 561-655-6611 www.thebreakers.com Room Rate: $190.00 Cut-off Date: July 3, 2011
September 21 – September 25, 2011	**Executive Council Meeting / Out-of-State Meeting** Four Seasons – Prague Prague, Czech Republic Reservation Phone # 420-221-427-000 http://www.fourseasons.com/prague/ Room Rate: $362.00 Cut-off Date: August 31, 2011
December 1 – December 4, 2011	**Executive Council Meeting** Marco Island Marriott Marco Island, Florida Reservation Phone #1-800-438-4373 http://www.marcoislandmarriott.com/ Room Rate: $189.00 Cut-off Date: November 9, 2011
March 1 – March 4, 2012	**Executive Council Meeting** Sawgrass Marriott Ponte Vedra Ponte Vedra, Florida Reservation Phone #1-800-457-4653 http://www.sawgrassmarriott.com/ Room Rate: $149.00 Cut-off Date: February 8, 2012
May 31 – June 3, 2012	**Executive Council Meeting / RPPTL Convention** Don CeSar Beach Resort St. Petersburg, Florida Reservation Phone # 1-800-282-1116 http://www.loewshotels.com/en/Hotels/St-Pete-Beach-Resort/Overview.aspx Room Rate $160.00 Cut-off Date: May 9, 2012

RPPTL 2012 - 2013
Executive Council Meeting Schedule
W. Fletcher Belcher's YEAR

Date	Location
July 25 – July 28, 2012	**Executive Council Meeting & Legislative Update** The Breakers Palm Beach, Florida Reservation Phone # 561-655-6611 www.thebreakers.com Room Rate: $199.00 Cut-off Date: June 25, 2012
September 13 – September 15, 2012	**Executive Council Meeting** Ritz Carlton Key Biscayne Key Biscayne, Florida Reservation Phone # 1-800-241-3333 http://www.ritzcarlton.com/keybiscayne Room Rate: $169.00 Cut-off Date: August 22, 2012
November 15 – November 18, 2012	**Executive Council Meeting/Out of State** The Inn on Biltmore Estates Ashville, North Carolina Reservation Phone #1-866-779-6277 Group Code: 1903R5 www.biltmore.com/stay/rates Room Rate: $219.00 Cut-off Date: October 15, 2012
February 7 – February 10, 2013	**Executive Council Meeting** Hotel Duval Tallahassee, Florida Reservation Phone #1-866-957-4001 - contract pending - http://www.hotelduvall.comn Room Rate: $149.00 Cut-off Date: TBA
May 23 – May 26, 2013	**Executive Council Meeting / RPPTL Convention** The Vinoy St. Petersburg, Florida http://www.marriott.com/hotels/travel/tpasr-renaissance-vinoy-resort-and-golf-club Reservation Phone # 1-888-303-4430 Room Rate $149.00 Cut-off Date: May 5, 2013

RPPTL FINANCIAL SUMMARY

2011 – 2012 (*July 1 - June 30*[1])

Revenue: **$561,899*

Expenses: *$491,806*

Net:	*$70,093*

**$ 65,888 of this figure represents revenue from sponsors and exhibitors*

Beginning Fund Balance (7-1-11)	**RPPTL CLE**
$ 1,070,640	RPPTL YTD Actual CLE Revenue **$103,774**
YTD Fund Balance (10-31-11)	RPPTL Budgeted CLE Revenue **$252,060**
$1,140,733	

[1] **This report is based on the tentative unaudited detail statement of operations dated 10/31/2011.**

RPPTL Financial Summary from Separate Budgets

2011 – 2012 [July 1 - June 30[1]]
YEAR TO DATE REPORT

General Budget

Revenue:	$ 507,182
Expenses:	$ 413,677
Net:	$ 93,505

Legislative Update

Revenue:	$ 49,012
Expenses:	$ 72,412
Net:	($23,400)

Convention

Revenue:	$ 0
Expenses:	$5
Net:	($5)

Attorney Trust Officer Conference

Revenue:	$ 5,475
Expenses:	$ 5,713
Net:	($ 238)

Miscellaneous Section Service Courses

Revenue:	$ 235
Expenses:	$ 4
Net:	$ 231

Roll-up Summary (Total)

Revenue:	$	561,899
Expenses:	$	491,806
Net Operations:	$	70,093

Reserve (Fund Balance):	$	1,070,640
GRAND TOTAL	**$**	**1,140,733**

[1] This report is based on the tentative unaudited detail statement of operations dated 10/31/2011.

LEGISLATIVE POSITION REQUEST FORM

GOVERNMENTAL AFFAIRS OFFICE

Date Form Received ____________

GENERAL INFORMATION

Submitted By __Jerry E. Aron______, Chair, _Special___ Committee of the Real Property Probate & Trust Law Section (RPPTL Approval Date____12/2_______, 2011). Special committee includes Alan Fields, Burt Bruton, Mark Brown

Address 2505 Metrocentre Boulevard, Suite 301, West Palm Beach, FL 33407
Telephone: (561) 478-0511

Position Type Special Committee, RPPTL Section, The Florida Bar
(Florida Bar, section, division, committee or both)

CONTACTS

Board & Legislation Committee Appearance

Alan Fields, Florida Land Title Association, 249 E. Virginia Street, Tallahassee, FL 32302, Telephone (727) 773-6664.
Barry F. Spivey, Spivey & Fallon, PA, 1515 Ringling Blvd., Suite 885, Sarasota, FL 34236 Telephone 941-840-1991
Peter M. Dunbar, Pennington, Moore, Wilkinson, Bell & Dunbar, P.O. Box 10095, Tallahassee, Florida 32302-2095, Telephone (850) 222-3533
Martha J. Edenfield, Pennington, Moore, Wilkinson, Bell & Dunbar, P.O. Box 10095, Tallahassee FL 32302-2095, Telephone (850) 222-3533
(List name, address and phone number)

Appearances Before Legislators SAME
(List name and phone # of those having face to face contact with Legislators)

Meetings with Legislators/staff SAME
(List name and phone # of those having face to face contact with Legislators)

PROPOSED ADVOCACY

All types of partisan advocacy or nonpartisan technical assistance should be presented to the Board of Governors via this request form. All proposed legislation that has *not* been filed as a bill or a proposed committee bill (PCB) should be attached to this request in legislative format - Standing Board Policy 9.20(c). Contact the Governmental Affairs office with questions.

If Applicable, List The Following HB 213, as amended — Representative Passidomo
(Bill or PCB #) — (Bill or PCB Sponsor)

Indicate Position Support __X___ Oppose _____ Tech Asst. ____ Other _____

Proposed Wording of Position for Official Publication:

"Support HB213 entitled the Fair Foreclosure Act to resolve various issues in the current foreclosure process."

Reasons For Proposed Advocacy:

The public interest is served by maintaining the strong tradition of judicial due process in mortgage foreclosure cases while moving mortgage foreclosure cases to final resolution expeditiously in order to get real property back into the stream of commerce, but to do so consistent with due process and fundamental fairness and without impairing the ability of the courts to manage their dockets and schedules. This act is an effort to provide additional tools to the courts to assist in achieving such a balance and to establish new and modified procedures to solve problems which have arisen in light of current foreclosure procedures.

PRIOR POSITIONS TAKEN ON THIS ISSUE

Please indicate any prior Bar or section positions on this issue to include opposing positions. Contact the Governmental Affairs office if assistance is needed in completing this portion of the request form.

Most Recent Position Public Interest Law Oppose

(Indicate Bar or Name Section) (Support or Oppose) (Date)

Others
(May attach list if more than one) None that we are aware of

(Indicate Bar or Name Section) (Support or Oppose) (Date)

REFERRALS TO OTHER SECTIONS, COMMITTEES OR LEGAL ORGANIZATIONS

The Legislation Committee and Board of Governors do not typically consider requests for action on a legislative position in the absence of responses from all potentially affected Bar groups or legal organizations - Standing Board Policy 9.50(c). Please include all responses with this request form.

Referrals

Business Law Section

(Name of Group or Organization) (Support, Oppose or No Position)

Consumer Protection Law Committee

(Name of Group or Organization) (Support, Oppose or No Position)

Trial Lawyers Section

(Name of Group or Organization) (Support, Oppose or No Position)

Please submit completed Legislative Position Request Form, along with attachments, to the Governmental Affairs Office of The Florida Bar. Upon receipt, staff will further coordinate the scheduling for final Bar action of your request which usually involves separate appearances before the Legislation Committee and the Board of Governors unless otherwise advised. For information or assistance, please telephone (904) 561-5662 or 800-342-8060, extension 5662.

WHITE PAPER

SUPPORT OF
HB 213, AS AMENDED

I. SUMMARY

The public interest is served by maintaining the strong tradition of judicial due process in mortgage foreclosure cases while moving mortgage foreclosure cases to final resolution expeditiously in order to get real property back into the stream of commerce, but to do so consistent with due process and fundamental fairness and without impairing the ability of the courts to manage their dockets and schedules. This act is an effort to provide additional tools to the courts to assist in achieving such a balance and to establish new and modified procedures to solve problems which have arisen in light of current foreclosure procedures.

II. CURRENT SITUATION

The proposed legislation attempts to resolve various issues relating to the current foreclosure process and satisfaction documentation. The bill requires verification of ownership of the note when the action is brought, defines adequate protection for lost notes in foreclosure cases, stabilizes title after a foreclosure case is finalized, lessens the time to seek a deficiency, clarifies the mechanism to expedite a foreclosure, and revises the order to show case statute.

III. SECTION-BY-SECTION ANALYSIS

A. Section 95.11 (5)(h) is created as a new litigation relating to the time to pursue deficiencies. Under current law, a deficiency decree can be pursued up to 5 years after default or notice of default on the underlying note, and well after the completion of the underlying foreclosure. §95.11 Florida Statutes. This creates the potential that the current surge of foreclosures will be followed by another surge of lawsuits seeking to establish deficiency decrees, thus prolonging the economic malaise. Proposed 95.11(5)(h) limits the time for pursuing a deficiency with respect to an owner-occupied one- to four-family dwelling to one year after the completion of foreclosure. In order to protect lenders whose foreclosures may have already been completed, the earliest limiting date is one year after the effective date or October 1, 2013.

B. Current §701.04 requires a lender to provide the mortgagor with an estoppel statement setting forth the unpaid balance of a mortgage in order to facilitate sales and refinancings. The bill modifies and updates this requirement in several key respects:

1. It expands the parties who can request the estoppel statement to include others with an interest in the property (such as the purchaser upon foreclosure of a subordinate lien). Some lenders have refused to provide this information to third parties on privacy grounds. Where a party other than the original mortgagor (or their designee) is making the request, there is no duty to provide an itemization of the unpaid loan balance. Proposed §701.04(5)

2. In order to facilitate uniformity and assure acceptability by closing agents and title insurers, proposed §701.04(1) sets forth the required content of the estoppels statement in detail to include:

(a) Unpaid amounts due as of the requested date certain
(b) At least 20 days of per diem interest after that date
(c) Certification that the party providing the estoppels is either the holder of the original promissory note or entitled to enforce the note under §673.3011, as the case may be.
(d) A commitment that upon receipt of funds, they will return a recorded mortgage satisfaction and the original promissory note marked "paid in full" or a lost note affidavit and adequate protections as required by proposed §702.11.

3. Subsection (2) provides that a lender may not charge a fee for the preparation or delivery of the first two estoppel statements in any calendar month. The lender has a separate obligation to provide certain information free of charge to the borrower (without restriction as to the number of requests) under the Real Estate Settlement Procedures Act, 12 U.S.C. §2605 and the Federal Truth in Lending Act, 15 U.S.C. §1641. However those acts do not require provision of the information to third parties (such as a title agent) set time frames for providing the information.

As the proposed Florida law was an expansion of the obligations under the Federal Act, and subject to enforcement provisions, there was some concern that parties could make an abusive number of requests, which led to the inclusion of the limitation on the number of free requests. Obviously, the Florida statute would not limit a borrower's rights to information under the Federal Acts. §701.04(2)

4. Subsection (3) reiterates the basic concept of an estoppel statement, that third parties relying on it (by purchasing or lending against the property) may rely on and enforce the estoppel statement. The borrower is not a party entitled to rely on the estoppel statement, as it was felt that the borrower should not benefit from an inadvertent error or misstatement by the lender – as there is no detrimental change in position.

5. Current §701.04 requires the holder of a mortgage to execute and record a satisfaction of mortgage. Mortgage holders do not routinely record a continuous chain of assignments in the official records. As a result a satisfaction is rarely given by the owner of record, which creates a title problem affecting the marketability of the property. Subsection (4) adds an additional requirement that if the party giving the satisfaction is not the owner of record, the satisfaction will be supplemented by a sworn certification that the person executing the satisfaction was then in physical possession of the original promissory note or was then a person entitled to enforce the note pursuant to §673.3011, as the case may be.

In drafting, we considered requiring the mortgage holder to record a continuous chain of assignments, but realized that such would be impractical, if not impossible, (absent fraudulent robo-signing) if the assignments of mortgage had not been created at the time of the original transfer. Instead, we are requiring proof of possession of the note which the mortgage follows whether or not assigned, at each stage of the process.

6. Subsection (6) requires the party receiving payment to return the original promissory note within 60 days of receipt of payment. In lieu of returning the original note, the lender can complete a lost, destroyed or stolen note affidavit and provide adequate protections in accord with current law. Subsection (6) allows the request to designate where the original note should be returned. It is anticipated that after a sale or refinancing, the paid note will be returned to the closing agent, who can then record an affidavit of return of the paid note to supplement the satisfaction from a party who is not the record assignee of the mortgage. While the bill does not <u>require</u> the filing of complete chains of mortgage assignments, such is still the preferred practice and provides the mortgage owner with important protections and the benefit of the limited liability for Condominium and HOA assessments under §718.116 and §720.3085.

7. Subsections (7) and (8) are the enforcement mechanisms for this section. If the party who receives payment does not return the note or comply with the lost note mechanism within 60 days, they are subject to a penalty of $100 per day until delivered up to a total of $5,000. A summary proceeding under §51.011 may be brought to compel compliance and the prevailing party is entitled to recovery attorneys' fees and costs.

Current §701.04 imposes duties on the holders of mortgages, other liens and judgments to satisfy them of record upon payment in full. Because the modifications of proposed §701.04 were so specific to mortgages and notes, the provisions dealing with other liens and judgments were segregated and moved to new §701.045. The new provision also added a cross reference to §55.206 which addresses the termination of liens in the judgment liens on the personal property database.

C. Proposed §702.015 is an attempt to reschedule the timing of certain aspects of the foreclosure process. The customary practice had been to plead in the alternative – both that the plaintiff was the owner and holder of the note, and that the note had been lost and seeking to re-establish the note. At some point later in the process, the plaintiff would locate and file the original note, or proceed to show its entitlement to enforce a lost note. In the meantime, the defendants were devoting resources to defending unnecessary issues and conducting discovery as to potentially irrelevant issues.

This section mandates that the foreclosing lender gather information within its control and elect remedies at the time of initially filing the foreclosure action. It also requires the foreclosing lender to allege with specificity some of the "routine" discovery requests – such as the authority by which an agent has authority to act on behalf of the note holder.

Section 702.015 also requires any complaint which does not include a lost note count to either (a) file the original note or (b) file certification that the plaintiff is in physical possession of the original promissory note, its location, the date and person who verified possession and attach copies of the note and any allonges thereto.

Any complaint which includes a count to enforce a lost, destroyed or stolen promissory note, must be accompanied by a lost note affidavit which details all assignments of the note, set forth facts showing entitlement to enforce the lost note under §673.3091, and exhibits showing entitlement to enforce.

Since §702.015 will require the earlier filing of original promissory notes, the clerk is delegated authority to return the original note where the mortgage is restructured, the case settles or is voluntarily dismissed without completion of the foreclosure.

D. Proposed §702.035 provides enhanced notice to the mortgagor and property owners, and tenants of their rights in the foreclosure process. Only one notice needs to be given to any party defendant in a single case, even if multiple mortgage holders are seeking to foreclose. A substantial amount of time and many comments were received on every aspect of the proposed notice. It is very difficult to provide meaningful and fulsome notice to the lay person. The language has been amended many times to provide the proper notice.

E. Longstanding common law grants a degree of certainty of title to a bona fide purchaser following the foreclosure sale. It is critical to Florida's real estate economy that foreclosed properties be freely marketable and its title insurable after a foreclosure. Yet the nature of certain allegations made regarding "robo-signing," fabrication of assignments of notes and mortgages, and photo-shopped "original" notes create a significant risk that foreclosures tainted by such alleged practices might be set aside even after the property has been conveyed to an arms' length purchaser. The mere prospect of this has created some hesitation to insure properties coming out of a foreclosure. A case or two expressly reaching the conclusion that a sale could be set aside would freeze up the market in previously foreclosed properties because of the unknowability of which properties might have been tainted by bad practices.

Proposed Section 702.036 recognizes that the real estate economy does require some finality in the foreclosure process. It thus backstops the common law with an express statutory limited scope marketable record title act, which legislatively converts any attempt to "unwind" a completed foreclosure (other than based on the failure of service – as such would be a constitutional defect) into a claim for money damages, and prohibits granting relief which adversely impacts the ownership or title to the property.

In the interest of fairness, this protection of the title only becomes effective after:

1. A final judgment of foreclosure has been entered,
2. Any appeals periods have run without an appeal, or the appeal has been finally resolved;
3. There was no lis pendens providing notice of the subsequent challenge and the property was acquired, for value, by a person not affiliated with the foreclosing lender; and
4. The party seeking relief from the judgment was properly served.

Proposed §702.036(3) attempts to provide similar finality where the foreclosure was based on a lost, destroyed or stolen note in those rare circumstances in which the "real" note holder attempts to enforce the note. Under that fact pattern, the "real" note holder must pursue the adequate protections given under §673.3091 (which requires the court to provide adequate protection), new Section 702.11, or the party who wrongly claimed to be the owner of the note, rather than the property in the hands of the unaffiliated bona fide purchaser for value.

F. The changes to §702.04 are technical in nature to eliminate an obsolete reference to the no longer required "decree of confirmation of sale" and the no longer used "foreign judgment book."

G. Current §702.06 included language which could only be understood by looking back to technical distinctions before Florida consolidated legal and equitable jurisdiction. Proposed §702.06(1) is intended to have the same meaning as existing §702.06.

Under current law, a deficiency decree can be pursued up to 5 years after default or notice of default on the underlying note, and well after the completion of the underlying foreclosure. §95.11 Florida Statutes. This creates the potential that the current surge of foreclosures will be followed by another surge of lawsuits seeking to establish deficiency decrees, thus prolonging the economic malaise. Proposed subsections (2) and (3) of §702.06 limit the time for pursuing a deficiency with respect to an owner-occupied one- to four-family dwelling to one year after the completion of foreclosure. In order to protect lender's whose foreclosures may have already been completed, the earliest limiting date is one year after the effective date or October 1, 2013.

H. Proposed Section 702.062 gives the court more tools to keep the foreclosure process moving forward, notwithstanding the cross-incentives of both the homeowner and the lender to move more slowly. Subsection (1) requires any party giving an extension of the time to file a response to a complaint to provide the clerk with notice (usually by a copy of the extension letter). In that manner, the court and other parties are aware of the applicable default deadlines.

Subsections (2) and (3) allows any party to notify the court when defaults are appropriate and to move for entry of defaults. Subsection (3) allows the court to specifically direct the plaintiff to file all affidavits, certifications and proofs necessary for the entry of summary judgment or to show cause why such a filing should not be made, and provides that the filing of these materials shall be construed as a motion for summary judgment. The court may then enter final summary judgment or set the case for trial in accord with its sound judicial discretion. The bill drafters felt that the court had the inherent authority to take these steps, but were advised that certain courts would take comfort in an express statutory provision.

If all parties have been served, forty-eight days after filing, any party may request a case management conference at which the court will set definite timetables for moving the case forward. The bill expressly recognizes that the court may grant extensions and stays when the parties are engaged in good faith negotiations or otherwise as justice may require, but does provide express authority for the court to condition an extension on the borrower or the lender if it so chooses paying condo & HOA assessments going forward.

I. Current §702.065 is amended to lower the amount of permissible attorneys fees before an evidentiary hearing as to reasonableness is required to the greater of 1.5% or $1500, from the current 3% (without limit).

J. Section 702.10 of the current statutes is the "order to show case" procedure. Practioners have complained that the statutory procedure does not achieve its goal of expediting

foreclosure actions in foreclosures under certain circumstances. In 2010 the Section appointed a special committee chaired by Peggy Rolando and comprised of Dan DeCubellis, Jeff Sauer, Willie Kightlinger, Kris Fernandez, Michael Gelfand, George Meyer, Mark Brown, Burt Bruton and Jerry Aron. That committee spent a few months analyzing the order to show case statute and drafted a proposed amendment. That work product was the basis of the language in HB213. Only minor changes have been made to the special committees proposal.

The revised procedure calls for a verified complaint, provides for a specific timetable for a hearing, clarifies various terminology, revises the attorneys fees provision, expands the parties to be served to any defendant, not just the mortgage; and allows for the entry of a final judgment if various events occur the only substantive change to the prior committee's proposal is that the current statute applies to nonresidential real estate. The prior committee did not propose to change the scope of the statute. HB 213 expands the scope of that portion of the bill requiring payments during pendency of the case to residential property except homestead property. The drafters of HB 213 concluded that an overwhelming percentage of residential property that is not homestead is investment property and investment property which is residential should be subject to the expedited order to show case procedure.

K. A new section 702.11 is creating a definition as to "adequate protections" for lost notes. Although the drafters recognized that §673.3091 included a provision that the judge provide adequate protection, may judges were not providing any adequate protection. Therefore, it was thought the need for a more specific requirement should be sought for mortgage foreclosures. Although the proposed list of adequate protections can be debated….

IV. FISCAL IMPACT ON STATE AND LOCAL GOVERNMENTS

The fiscal impact on state and local governments is unknown.

V. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR

There are economic benefits to lenders, borrowers, homeowners and condominium associations in the proposed bill. Lenders have more certainty as to the foreclosure process avoiding lengthy additional litigation and providing a workable process to expedite certain foreclosures. Borrowers have the benefit of knowing the lender foreclosing is the correct party, if a note is lost adequate security, is provided, satisfactions are expedited and the time to seek a deficiency is reduced. Associations are expressly provided an opportunity to be benefitted.

VI. CONSTITUTIONAL ISSUES

There is the potential of a constitutional issue in connection with a provision in the proposal which is being further explored and will be reported on at the council meeting.

VII. OTHER INTERESTED PARTIES

On two occasions the special committee sought input from a variety of section committees and reviewed each comment and suggested appropriate revisions to Representative Passidomo. She also received comments from the Consumer Protection Law Committee of the Florida Bar and incorporated certain of their requested changes.

REDLINED TO SHOW CHANGES FROM HB 213 AS FILED

REARRANGEMENTS TO CONVERT TO A STRIKE ALL AMENDMENT ARE NOT REDLINED

Amendment No.

COMMITTEE/SUBCOMMITTEE ACTION

ADOPTED (Y/N)

ADOPTED AS AMENDED (Y/N)

ADOPTED W/O OBJECTION (Y/N)

FAILED TO ADOPT (Y/N)

WITHDRAWN (Y/N)

OTHER

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1 Committee/Subcommittee Hearing bill: Representative Passidomo
2 offered the following:
3
4 **Amendment (with title amendment)**
5 Remove everything after the enacting clause and insert:
6
7 Section 1. This act may be cited as the "Florida Fair
8 Foreclosure Act."
9 Section 2. The public policy in this state is to encourage
10 borrowers and lenders to work out alternatives to mortgage
11 foreclosure before filing suit and to explore possible
12 settlements in mediation. Once suit has been filed, the public
13 interest is served by maintaining the strong tradition of
14 judicial due process in mortgage foreclosure cases while moving
15 mortgage foreclosure cases to final resolution expeditiously in

16 order to get real property back into the stream of commerce, but
17 to do so consistent with due process and fundamental fairness
18 and without impairing the ability of the courts to manage their
19 dockets and schedules. This act is an effort to provide
20 additional tools to the courts to assist in achieving such a
21 balance.
22
23 Section 2. Subsection 95.11(5)(h) is created to read:
24 95.11 Limitations other than for the recovery of real
25 property.—Actions other than for recovery of real property shall
26 be commenced as follows:
27 (5) WITHIN ONE YEAR.—
28 (h) An action to collect a deficiency following the
29 foreclosure of an owner-occupied one-family to four-family
30 dwelling unit as provided in s. 702.06.
31
32 Section 3. Section 701.04, Florida Statutes, is amended to
33 read:
34 701.04 Cancellation of mortgages.—
35 (1)(a) Within 15 ~~14~~ days after the date on which a ~~receipt~~
36 ~~of the~~ written request for an estoppel statement is received
37 from ~~of~~ a mortgagor, the holder of an interest in the property
38 encumbered by a mortgage, or the designee of either, requesting
39 a payoff amount for the mortgage as of a certain date, the
40 holder of a mortgage shall provide a written estoppel statement
41 executed by an officer or authorized agent of the holder of the
42 mortgage ~~deliver~~ to the person making the request ~~mortgagor~~ at

43 the a place, fax number, or e-mail address designated in the
44 written request. The an estoppel statement shall set letter
45 setting forth the following:
46 1. The unpaid balance of the loan secured by the mortgage,
47 including principal, all accrued interest, and any other charges
48 properly due under or secured by the mortgage as of the
49 requested date certain.
50 2. and Interest on a per-day basis for the unpaid balance
51 for a period of no less than 20 days after the date of delivery
52 of the estoppel statement.
53 3. Certification that the party providing the estoppel
54 statement is the holder of the original promissory note secured
55 thereby, or is the person or agent of the person entitled to
56 enforce the note pursuant to s. 673.3011, as the case may be.
57 4. A commitment to comply with subsection (1)(d) upon
58 timely receipt of the amounts set forth in the estoppel
59 statement.
60 (b) The mortgagee may not charge a fee for the preparation
61 or delivery of the first two estoppel statements requested for
62 any one mortgage in any calendar month. This paragraph is not
63 intended to limit requirements of federal law.
64 (c) Subsequent owners of the property encumbered by the
65 mortgage, and creditors and lienholders taking an interest in
66 the property, for a valuable consideration, and those claiming
67 by, through, and under them, may rely on the estoppel statement
68 and shall be entitled to the benefits thereof.
69 (d) Whenever the amount of money due on any mortgage or,

70 lien is~~, or judgment shall be~~ fully paid to the person or party
71 entitled to the payment thereof, or all obligations secured by
72 the mortgage or lien are otherwise satisfied, the mortgagee~~,~~
73 ~~creditor,~~ or assignee~~, or the attorney of record in the case of~~
74 ~~a judgment,~~ to whom such payment has ~~shall have~~ been made or
75 satisfaction has been given~~,~~ shall execute in writing an
76 instrument acknowledging satisfaction of the ~~said~~ mortgage~~,~~
77 ~~lien, or judgment~~ and have the same acknowledged, or proven, and
78 duly entered of record in the official records ~~book provided by~~
79 ~~law for such purposes~~ in the proper county. When the person or
80 party executing the satisfaction is not shown as the owner of
81 the mortgage in the official records, the instrument shall be
82 supplemented by an affidavit that the person executing the
83 satisfaction was then in physical possession of the original
84 promissory note secured by the mortgage or was then a person
85 entitled to enforce the note pursuant to s. 673.3011 and, if the
86 latter, shall provide the specific factual basis for such
87 authority.
88 (e) If the written request for an estoppel statement is
89 not from the mortgagor or the designee of the mortgagor, the
90 request shall include a copy of the instrument or instruments
91 showing the requestor's ownership interest in the property and
92 the unpaid balance of the loan secured by the mortgage need not
93 be itemized.
94 (2)(a) Within 60 days after ~~of~~ the date of receipt of the
95 full payment of the mortgage in accord with the estoppel
96 statement~~, lien, or judgment~~, the person required to acknowledge

97 satisfaction of the mortgage~~, lien, or judgment~~ shall send or
98 cause to be sent ~~the recorded satisfaction~~ to the maker of the
99 promissory note, or such other person as may be designated in
100 writing by the payor at or after the final payment, the recorded
101 satisfaction and, in the case of the payor of a mortgage note,
102 either:
103 1. The original promissory note, marked "paid in full"; or
104 2. A lost, destroyed, or stolen note affidavit together
105 with exhibits in compliance with s. 702.015 and evidence of
106 adequate protections as provided in s. 702.11 ~~person who has~~
107 ~~made the full payment. In the case of a civil action arising out~~
108 ~~of the provisions of this section, the prevailing party shall be~~
109 ~~entitled to attorney's fees and costs~~.
110 (b) If the documents required by this subsection have not
111 been delivered within 60 days, the party who received payment on
112 the note or mortgage shall pay to the maker of the promissory
113 note or its designee a fee in the amount of $100 per day for
114 each day beyond 60 days that the documents have not been
115 delivered. The aggregate fees under this paragraph may not
116 exceed $5,000.
117 (3) A summary procedure pursuant to s. 51.011 may be
118 brought to compel compliance with the various obligations and
119 duties of this section, and the prevailing party shall recover
120 reasonable attorney fees and costs. The court may limit recovery
121 of attorney fees and costs when an unreasonable number of
122 requests for estoppel statements has been made.
123 Section 4. Section 701.045, Florida Statutes, is created

124 to read:
125 701.045 Cancellation of liens and judgments.—
126 (1) Whenever the amount of money due on any lien, other
127 than a mortgage, or judgment is fully paid to the person or
128 party entitled to such payment, or the creditor or assignee, to
129 whom such payment has been made shall execute in writing an
130 instrument acknowledging satisfaction of the lien or judgment
131 and have it acknowledged, or proven, and duly entered of record
132 in the official records in the proper county. Within 60 days
133 after the date of receipt of the full payment of the lien or
134 judgment, the person required to acknowledge satisfaction of the
135 lien or judgment shall send or cause to be sent the recorded
136 satisfaction to the person who has made the full payment. In the
137 case of a civil action arising out of this section, the
138 prevailing party shall be entitled to attorney fees and costs.
139 (2) Whenever a writ of execution has been issued,
140 docketed, and indexed with a sheriff and the judgment upon which
141 it was issued has been fully paid, the party receiving payment
142 shall request, in writing and addressed to the sheriff, return
143 of the writ of execution as fully satisfied.
144 (3) The party receiving full payment of any judgment shall
145 also comply with s. 55.206, as appropriate.
146 Section 5. Section 702.015, Florida Statutes, is created
147 to read:
148 702.015 Elements of complaint; lost, destroyed, or stolen
149 note affidavit.—Any complaint which seeks to foreclose a
150 mortgage or other lien on residential real property, including

CODING: Words ~~stricken~~ are deletions; words underlined are additions.

151 individual units of condominiums and cooperatives, designed
152 principally for occupation by from one to four families, but not
153 including an interest in a timeshare property the foreclosure of
154 which is governed by part III of chapter 721, which secures a
155 promissory note must contain affirmative allegations expressly
156 made by the plaintiff at the time the proceeding is commenced
157 that the plaintiff is the holder of the original note secured by
158 the mortgage or allege with specificity the factual basis by
159 which the plaintiff is a person entitled to enforce the note
160 under s. 673.3011. When a party has been delegated the authority
161 to institute a mortgage foreclosure action on behalf of the
162 holder of the note, the complaint shall describe the authority
163 of the plaintiff and identify, with specificity, the document
164 that grants the plaintiff the authority to act on behalf of the
165 holder of the note. The foregoing sentence is intended to
166 require initial disclosure of status and pertinent facts and not
167 to modify existing law regarding standing or real parties in
168 interest.
169 (1) Unless the complaint includes a count to enforce a
170 lost, destroyed, or stolen instrument, the plaintiff shall cause
171 to be filed with the court, contemporaneously with and as a
172 condition precedent to the filing of the complaint for
173 foreclosure, certification, under penalty of perjury, that the
174 plaintiff is in physical possession of the original promissory
175 note. Such certification must set forth the physical location of
176 the note, the name and title of the individual giving the
177 certification, and the name of the person who personally

178 verified such physical possession and the time and date on which
179 possession was verified. Correct copies of the note and all
180 allonges thereto shall be attached to the certification. The
181 original note and all allonges thereto shall be filed with the
182 court prior to the entry of any judgment of foreclosure or
183 judgment on such note.
184 (2) When the complaint includes a count to enforce a lost,
185 destroyed, or stolen instrument, an affidavit executed under
186 penalty of perjury shall be attached to the complaint. The
187 affidavit shall:
188 (a) Detail a clear chain of all assignments for the
189 promissory note that is the subject of the action.
190 (b) Set forth facts showing that the plaintiff is entitled
191 to enforce a lost, destroyed, or stolen instrument pursuant to
192 s. 673.3091.
193 (c) Include as exhibits to the affidavit such copies of
194 the note and allonges thereto, assignments of mortgage, audit
195 reports showing physical receipt of the original note, or other
196 evidence of the acquisition, ownership, and possession of the
197 note as may be available to the plaintiff.
198
199 Section 6. Section 702.035, Florida Statutes, is amended
200 to read:
201 702.035 Legal notice concerning foreclosure proceedings.—
202 (1) The foreclosing party in a mortgage foreclosure action
203 involving occupied residential real property, designed
204 principally for occupation by from one to four families,

CODING: Words ~~stricken~~ are deletions; words underlined are additions.

V

205 including individual units of condominiums and cooperatives, but
206 not including an interest in a timeshare property the
207 foreclosure of which is governed by part III of chapter 721,
208 shall provide notice substantially in accordance with this
209 section to:
210 (a) Any mortgagor having an interest in the property and
211 the record title owners of the property; and
212 (b) All tenants of a dwelling unit in the property if the
213 foreclosing party is seeking to foreclose the interest of the
214 tenants.
215 (2) The notice required under paragraph (1)(a) shall:
216 (a) Be delivered with the summons and complaint. Such
217 notice shall be in 14-point boldfaced type and the title of the
218 notice shall be in 20-point boldfaced type. The notice shall be
219 on its own page.
220 (b) Appear as follows:
221
222 NOTICE: YOU ARE IN DANGER OF LOSING YOUR HOME
223
224 If you fail to respond to the summons and complaint in
225 this foreclosure action, you may lose your home.
226 Please read the summons and complaint carefully. You
227 should immediately contact an attorney or your local
228 legal aid office to obtain advice on how to protect
229 yourself. Sending a payment to your mortgage company
230 will not stop this foreclosure action.
231

232 YOU MUST RESPOND BY PREPARING A FORMAL WRITTEN
233 RESPONSE AND DELIVERING A COPY OF YOUR RESPONSE TO THE
234 ATTORNEY FOR THE PLAINTIFF (LENDER) AND FILING THE
235 ORIGINAL ANSWER WITH THE COURT WITHIN 20 DAYS AFTER
236 BEING SERVED. THERE IS NO CHARGE FOR FILING THE
237 WRITTEN RESPONSE. A TELEPHONE CALL OR E-MAIL TO THE
238 ATTORNEY FOR THE PLAINTIFF WILL NOT SATISFY THE
239 REQUIREMENT TO FILE A RESPONSE. THIS LAWSUIT DOES NOT
240 MEAN THAT YOU MUST IMMEDIATELY MOVE OUT OF YOUR
241 PROPERTY.
242
243 SOURCES OF INFORMATION AND ASSISTANCE:
244 The state encourages you to become informed about your
245 options in foreclosure. You should contact a licensed
246 Florida attorney to assist you. If you cannot afford
247 an attorney, your local legal aid office may be able
248 to assist you at little or no cost to you. There are
249 also government agencies and nonprofit organizations
250 that you may contact for cost-free information about
251 possible options, including trying to work with your
252 lender during this process.
253
254 FORECLOSURE RESCUE SCAMS:
255 Be careful of people who approach you with offers to
256 help you keep your home. There are individuals who
257 watch for notices of foreclosure actions in order to
258 unfairly profit from a homeowner's distress. You

259 should be extremely careful about any such promises
260 and any suggestions that you pay them a fee or deed
261 over your property. State law requires any nonattorney
262 offering such services for profit to enter into a
263 contract which fully describes the services they will
264 perform and fees they will charge, and which prohibits
265 them from taking any money from you until they have
266 completed all such promised services.
267
268 (3) The notice to any tenant required under paragraph
269 (1)(b) shall:
270 (a) Be delivered with the summons and complaint. The title
271 of the notice shall be in 14-point boldfaced type and the title
272 of the notice shall be in 20-point boldfaced type. The notice
273 shall be on its own page.
274 (b) Appear substantially as follows:
275
276 NOTICE TO TENANTS OF BUILDINGS IN FORECLOSURE
277
278 Florida law requires you be provided with this notice
279 about the foreclosure process. Please read it
280 carefully.
281
282 We, ...(name of foreclosing party)..., are the
283 foreclosing party and are located at ...(foreclosing
284 party's address).... We can be reached at
285 ...(foreclosing party's telephone number)....

286
287 The property you are renting is the subject of a
288 foreclosure proceeding. You should file a written
289 response to this summons and complaint and deliver a
290 copy of the written response to the attorney for the
291 plaintiff and file the original with the court within
292 20 days after being served. There is no charge for
293 filing the written response. A telephone call or an e-
294 mail to the attorney for the plaintiff will not
295 satisfy the requirement of filing an answer. If you
296 have a written lease and are not the owner of the
297 residence, and the lease requires payment of rent that
298 at the time it was entered into was not substantially
299 less than the fair market rent for the property, you
300 may be entitled to remain in occupancy under the
301 federal Protecting Tenants at Foreclosure Act of 2009,
302 as amended. If you do not have a written lease, under
303 the same federal law you may be entitled to remain in
304 your home until 90 days after the person or entity
305 that acquires title to the property provides you with
306 a notice. If you are a subsidized tenant under
307 federal, state, or local law or if you are a tenant
308 subject to rent control, rent stabilization, or a
309 federal statutory scheme, you may have other rights.
310 If the federal Protecting Tenants at Foreclosure Act
311 of 2009, as amended, and these other laws do not apply
312 to your situation, you may be required to vacate the

313 property upon completion of the foreclosure. The
314 filing of a foreclosure action does not automatically
315 cease your obligation to pay rent to your landlord.
316 You should contact a licensed Florida attorney to
317 understand your rights. If you cannot afford an
318 attorney, your local legal aid office may be able to
319 assist you at little or no cost to you.
320
321 (4) Only a single notice is required under this section
322 for any party defendant.
323 (5) The notice in subsections (1), (2) and (3) is
324 informational only. The failure to strictly comply with the
325 notice requirements of this section does not affect the validity
326 of any final judgment of foreclosure which may be granted, or
327 give rise to any independent cause of action or claim for
328 damages against the plaintiff or any other party.
329 (5) Whenever a legal advertisement, publication, or notice
330 relating to a foreclosure proceeding is required to be placed in
331 a newspaper, it is the responsibility of the petitioner or
332 petitioner's attorney to place such advertisement, publication,
333 or notice. For counties having ~~with~~ more than 1 million total
334 population as reflected in the 2000 Official Decennial Census of
335 the United States Census Bureau as shown on the official website
336 of the United States Census Bureau, any notice of publication
337 required by this section shall be deemed to have been published
338 in accordance with the law if the notice is published in a
339 newspaper that has been entered as a periodical matter at a post

340 office in the county in which the newspaper is published, is
341 published a minimum of 5 days a week, exclusive of legal
342 holidays, and has been in existence and published a minimum of 5
343 days a week, exclusive of legal holidays, for 1 year or is a
344 direct successor to a newspaper that has been in existence for 1
345 year that has been published a minimum of 5 days a week,
346 exclusive of legal holidays. The advertisement, publication, or
347 notice shall be placed directly by the attorney for the
348 petitioner, by the petitioner if acting pro se, or by the clerk
349 of the court. Only the actual costs charged by the newspaper for
350 the advertisement, publication, or notice may be charged as
351 costs in the action.
352 Section 7. Section 702.036, Florida Statutes, is created
353 to read:
354 702.036 Finality of mortgage foreclosure judgment.—
355 (1)(a) In any action or proceeding in which a party seeks
356 to set aside, invalidate, or challenge the validity of a final
357 judgment of foreclosure of a mortgage or to establish or
358 reestablish a lien or encumbrance on the property in abrogation
359 of the final judgment of foreclosure of a mortgage, the court
360 shall treat such request solely as a claim for monetary damages
361 and may not grant relief that adversely affects the quality or
362 character of the title to the property, if:
363 1. A final judgment of foreclosure of a mortgage was
364 entered as to a property;
365 2. All applicable appeals periods have run as to the final
366 judgment of foreclosure of a mortgage with no appeals having

367 been taken, or any appeals having been finally resolved;
368 3. The property has been acquired for value, by a person
369 not affiliated with the foreclosing lender or the foreclosed
370 owner, at a time in which no lis pendens regarding the suit to
371 set aside, invalidate, or challenge the foreclosure appears in
372 the official records of the county where the property was
373 located; and
374 4. The party seeking relief from the final judgment of
375 foreclosure of a mortgage was properly served in the foreclosure
376 lawsuit as provided in chapter 48 or chapter 49.
377 (b) This subsection does not limit the right to pursue any
378 other relief to which a person may be entitled, including, but
379 not limited to, compensatory damages, punitive damages,
380 statutory damages, consequential damages, injunctive relief, or
381 fees and costs, which does not adversely affect the ownership of
382 the title to the property as vested in the unaffiliated
383 purchaser for value.
384 (2) For purposes of this section, the following, without
385 limitation, shall be considered persons affiliated with the
386 foreclosing lender:
387 (a) The foreclosing lender or any loan servicer for the
388 loan being foreclosed;
389 (b) Any past or present owner or holder of the loan being
390 foreclosed;
391 (c) Any maintenance company, holding company, foreclosure
392 services company, or law firm under contract to any entity
393 listed in paragraph (a), paragraph (b), or this paragraph, with

394 regard to the loan being foreclosed; or
395 (d) Any parent entity, subsidiary, or other person who
396 directly, or indirectly through one or more intermediaries,
397 controls or is controlled by, or is under common control with,
398 any entity listed in paragraph (a), paragraph (b), or paragraph
399 (c).
400 (3) After foreclosure of a mortgage based upon the
401 enforcement of a lost, destroyed, or stolen note, a person who
402 is not a party to the underlying foreclosure action but who
403 claims to be the actual holder of the promissory note secured by
404 the foreclosed mortgage shall have no claim against the
405 foreclosed property after it has been conveyed for valuable
406 consideration to a person not affiliated with the foreclosing
407 lender or the foreclosed owner. This section does not preclude
408 the actual holder of the note from pursuing recovery from any
409 adequate protection given pursuant to s. 673.3091 or from the
410 party who wrongfully claimed to be the owner or holder of the
411 promissory note, the maker of the note, or any other person
412 against whom it may have a claim relating to the note.
413 Section 8. Section 702.04, Florida Statutes, is amended to
414 read:
415 702.04 ~~Mortgaged~~Foreclosing Lands in different counties.—
416 When a mortgage or other lien includes lands, railroad track,
417 right-of-way, or terminal facilities and station grounds, lying
418 in two or more counties, it may be foreclosed in any one of
419 those ~~said~~ counties, and all proceedings shall be had in that
420 county as if all the ~~mortgaged~~ land, railroad track, right-of-

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421 way, or terminal facilities and station grounds lay therein,
422 except that any notice of the sale must be published in every
423 county wherein any of the lands, railroad track, right-of-way,
424 or terminal facilities and station grounds to be sold lie. After
425 final disposition of the suit, the clerk of the circuit court
426 shall prepare and forward a certified copy of the decree of
427 foreclosure, and the certificates of title, if any, ~~and sale and~~
428 ~~of the decree of confirmation of sale~~ to the clerk of the
429 circuit court of every county wherein any of the ~~mortgaged~~
430 lands, railroad tracks, right-of-way, or terminal facilities and
431 station grounds lie, to be recorded in the official records
432 ~~foreign judgment book~~ of each such county, and the costs of such
433 copies and of the recording ~~record~~ thereof shall be taxed as
434 costs in the cause.
435 Section 9. Section 702.06, Florida Statutes, is amended to
436 read:
437 702.06 Deficiency decree; ~~common-law~~ suit to recover
438 deficiency.—
439 (1) In all suits for the foreclosure of mortgages
440 heretofore or hereafter executed, the entry of a deficiency
441 decree for any portion of a deficiency, should one exist, shall
442 be within the sound judicial discretion of the court, but the
443 complainant shall also have the right to sue ~~at common law~~ to
444 recover such deficiency, unless the court in the foreclosure
445 action has granted or denied a deficiency judgment ~~provided no~~
446 ~~suit at law to recover such deficiency shall be maintained~~
447 ~~against the original mortgagor in cases where the mortgage is~~

448 ~~for the purchase price of the property involved and where the~~
449 ~~original mortgagee becomes the purchaser thereof at foreclosure~~
450 ~~sale and also is granted a deficiency decree against the~~
451 ~~original mortgagor~~.
452 (2)(a) In respect to an owner-occupied one-family to four-
453 family dwelling unit, the party to whom a deficiency is owing
454 may move for the entry of a deficiency judgment in the
455 foreclosure action or file a separate action for collection of
456 the deficiency, no later than 1 year after the property has
457 vested in the foreclosing lender or other purchaser at the
458 foreclosure sale, or October 1, 2013, whichever is later.
459 (b) If a deficiency is not pursued within the time periods
460 specified in this section, the vesting of the property or
461 proceeds of the sale, regardless of the amount, shall be deemed
462 to be in full satisfaction of the judgment debt and a right to
463 recover any deficiency in any subsequent action or proceeding
464 shall be extinguished.
465 (c) This subsection does not restrict the authority of the
466 court to determine the entitlement to any assets held by any
467 receiver or any assignee of the rents and profits of the
468 property.
469 Section 10. Section 702.062, Florida Statutes, is created
470 to read:
471 702.062 Notice of extensions; defaults; case management
472 conference.— In any mortgage foreclosure proceeding of
473 residential real property designed principally for occupation by
474 from one to four families, including individual units of

475 condominiums and cooperatives other than a proceeding seeking
476 foreclosure of a timeshare interest under part III of chapter
477 721:
478 (1) The plaintiff's counsel shall cause to be filed with
479 the clerk of the court a notice of any extensions of time for a
480 party to respond to an initial complaint which are granted. Such
481 notice shall be filed within the later of 5 days after the
482 granting of such extension or 60 days after the effective date
483 of this act and may be made by copy of the letter confirming the
484 extension. This requirement is not intended to discourage any
485 party from requesting or granting such extensions of time.
486 (2) Any party may notify the court and all parties as to
487 any foreclosure proceeding in which the file indicates:
488 (a) All parties defendant have been served; and
489 (b) No party defendant has filed an answer or other
490 response denying, contesting, or asserting defenses to the
491 plaintiff's entitlement to the foreclosure, and the time has run
492 for the entry of defaults against all nonresponding parties
493 defendant.
494 (3) The court, on its own motion or motion of any party,
495 may enter defaults against nonresponding parties in accordance
496 with the Florida Rules of Civil Procedure and shall direct the
497 plaintiff in the foreclosure action to file all affidavits,
498 certifications, and proofs necessary or appropriate for the
499 entry of a summary judgment of foreclosure within a time certain
500 or show cause why such a filing should not be made. The filing
501 of these materials shall be construed as a motion for summary

502 judgment, and the court may upon hearing enter final summary
503 judgment or set the case for trial in accord with its sound
504 judicial discretion. This subsection does not restrict the
505 authority of the court to set aside a default or a judgment
506 granted thereon pursuant to the Florida Rules of Civil
507 Procedure.
508 (4) After all parties have been served and not earlier
509 than 48 days after the filing of the foreclosure case, any party
510 may request a case management conference at which the court
511 shall set definite timetables for moving the case forward.
512 (5) The court may grant extensions or stays in the
513 proceedings on a showing that the plaintiff and property owner
514 defendant are engaged in mediation or good faith negotiations
515 with regard to a loan modification or other settlement or
516 otherwise as justice may require. The court may condition an
517 extension or stay on the property owner or the lender, if it so
518 chooses, paying any condominium, cooperative or homeowners'
519 association assessments coming due after the date of the
520 extension or stay and keeping such assessments paid current
521 through the conclusion of the foreclosure action.
522 Section 11. Section 702.065, Florida Statutes, is amended
523 to read:
524 702.065 Final judgment in uncontested mortgage foreclosure
525 proceedings ~~where deficiency judgment waived~~; attorney
526 ~~attorney's~~ fees when default judgment entered.—
527 (1) In uncontested mortgage foreclosure proceedings in
528 which the mortgagee waives the right to recoup any deficiency

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529 judgment, the court shall enter final judgment within 90 days
530 after ~~from~~ the date of the close of pleadings. For the purposes
531 of this subsection, a mortgage foreclosure proceeding is
532 uncontested if a default has been entered against all defendants
533 or no response ~~an answer not~~ contesting the foreclosure has been
534 timely filed ~~or a default judgment has been entered by the~~
535 ~~court~~.
536 (2) In a mortgage foreclosure proceeding, when ~~a default~~
537 ~~judgment has been entered against the mortgagor and~~ the note or
538 mortgage provides for the award of reasonable attorney
539 ~~attorney's~~ fees, it is not necessary for the parties to file
540 affidavits of reasonable fees or for the court to hold a hearing
541 or adjudge the requested attorney ~~attorney's~~ fees to be
542 reasonable if the fees do not exceed the greater of 1.5 ~~3~~
543 percent of the principal amount owed at the time of filing the
544 complaint or $1,500, even if the note or mortgage does not
545 specify the percentage of the original amount that would be paid
546 ~~as liquidated damages~~. ~~Such fees constitute liquidated damages~~
547 ~~in any proceeding to enforce the note or mortgage.~~ This section
548 does not preclude a challenge, in the same action, to the
549 reasonableness of the attorney ~~attorney's~~ fees.
550 Insert text for section 14
551 Section 12. Section 702.10, Florida Statutes, is amended
552 to read:
553 702.10 ~~Order to~~ Show cause; entry of final judgment of
554 foreclosure; payment during foreclosure.—
555 (1) After a complaint in a foreclosure proceeding has been

556 filed which is verified in the form of an affidavit sufficient
557 to support a motion for summary judgment, the plaintiff
558 ~~mortgagee~~ may request a hearing to show cause ~~an order to show~~
559 ~~cause for the entry of final judgment and the court shall~~
560 ~~immediately review the complaint~~. Upon such request, the clerk
561 ~~If, upon examination of the complaint, the court finds that the~~
562 ~~complaint is verified and alleges a cause of action to foreclose~~
563 ~~on real property, the court~~ shall promptly issue a summons ~~an~~
564 ~~order~~ directed to each ~~the~~ defendant to show cause why a final
565 judgment of foreclosure should not be entered.
566 (a) The summons ~~order~~ shall:
567 1. Set the date and time for a hearing ~~on the order~~ to
568 show cause. However, the date for the hearing may not occur ~~be~~
569 ~~set~~ sooner than the later of 20 days after the service of the
570 summons or 45 days after the service of the complaint ~~order~~.
571 When service is obtained by publication, the date for the
572 hearing may not be set sooner than 55 ~~30~~ days after the first
573 publication. ~~The hearing must be held within 60 days after the~~
574 ~~date of service. Failure to hold the hearing within such time~~
575 ~~does not affect the validity of the order to show cause or the~~
576 ~~jurisdiction of the court to issue subsequent orders.~~
577 ~~2. Direct the time within which service of the order to~~
578 ~~show cause and the complaint must be made upon the defendant.~~
579 2.~~3.~~ State that the filing of defenses by a motion or by a
580 responsive pleading ~~verified or sworn answer~~ at or before the
581 hearing to show cause may constitute ~~constitutes~~ cause for the
582 court not to enter ~~the attached~~ final judgment.

583 3.~~4.~~ State that any ~~the~~ defendant has the right to file
584 affidavits or other papers at or before the time of the hearing
585 to show cause and may appear personally or by way of an attorney
586 at the hearing.
587 4.~~5.~~ State that, if any ~~the~~ defendant files defenses by a
588 motion, the hearing time may be used to hear the defendant's
589 motion.
590 5.~~6.~~ State that, if any ~~the~~ defendant fails to appear at
591 the hearing to show cause or fails to file a response ~~defenses~~
592 ~~by a motion or by a verified or sworn answer~~ or files an answer
593 not contesting the foreclosure, ~~the~~ defendant shall ~~may~~ be
594 deemed ~~considered~~ to have waived the right to a hearing and in
595 such case the court shall, unless the record shows that the
596 relief is unavailable, ~~may~~ enter a final judgment of foreclosure
597 ordering the clerk of the court to conduct a foreclosure sale.
598 6.~~7.~~ State that if the mortgage provides for reasonable
599 attorney ~~attorney's~~ fees and the requested attorney ~~attorney's~~
600 fees do not exceed the greater of 1.5 ~~3~~ percent of the principal
601 amount owed at the time of filing the complaint or $1,500, it is
602 unnecessary for the for the parties to file affidavits of
603 reasonable fees or the court to hold a hearing or adjudge the
604 requested attorney ~~attorney's~~ fees to be reasonable.
605 7.~~8.~~ Attach the proposed final judgment of foreclosure the
606 plaintiff requests the court to ~~will~~ enter~~, if the defendant~~
607 ~~waives the right to be heard~~ at the hearing on the order to show
608 cause.
609 8.~~9.~~ Require the plaintiff ~~mortgagee~~ to serve a copy of

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610 the summons ~~order~~ to show cause on each defendant ~~the mortgagor~~
611 in the following manner:
612 a. If a defendant ~~the mortgagor~~ has been served with the
613 complaint and original process, service of the summons to show
614 cause on that defendant ~~order~~ may be made in the manner provided
615 in the Florida Rules of Civil Procedure.
616 b. If a defendant ~~the mortgagor~~ has not been served with
617 the complaint and original process, the summons ~~order~~ to show
618 cause, together with ~~the summons and~~ a copy of the complaint,
619 shall be served on the defendant ~~mortgagor~~ in the same manner as
620 provided by law for original process.
621
622 Any final judgment of foreclosure entered under this subsection
623 is for in rem relief only. Nothing in this subsection shall
624 preclude the entry of a deficiency judgment where otherwise
625 allowed by law.
626 (b) The right to be heard at the hearing to show cause is
627 waived if a ~~the~~ defendant, after being served as provided by law
628 with a ~~an order to~~ show cause summons, fails to file a response
629 contesting the foreclosure ~~engages in conduct that clearly shows~~
630 ~~that the defendant has relinquished the right to be heard on~~
631 ~~that order. The defendant's failure to file defenses by a motion~~
632 ~~or by a sworn or verified answer~~ or fails to appear at the
633 hearing duly scheduled on the ~~order to~~ show cause summons
634 ~~presumptively constitutes conduct that clearly shows that the~~
635 ~~defendant has relinquished the right to be heard~~. If a defendant
636 files a response contesting the foreclosure ~~defenses by a motion~~

637 ~~or by a verified or sworn answer~~ at or before the hearing, such
638 response may constitute ~~action constitutes~~ cause upon the
639 determination of the court as set forth in paragraph (d) and may
640 preclude ~~precludes~~ the entry of a final judgment at the hearing
641 to show cause.
642 (c) In a mortgage foreclosure proceeding, when a default
643 judgment has been entered against the mortgagor and the note or
644 mortgage provides for the award of reasonable attorney
645 ~~attorney's~~ fees, it is unnecessary for the court to hold a
646 hearing or adjudge the requested attorney ~~attorney's~~ fees to be
647 reasonable if the fees do not exceed the greater of 1.5 ~~3~~
648 percent of the principal amount owed on the note or mortgage at
649 the time of filing of the complaint or $1,500, even if the note
650 or mortgage does not specify the percentage of the original
651 amount that would be paid ~~as liquidated damages~~.
652 (d) If the court finds that each ~~the~~ defendant has waived
653 the right to be heard as provided in paragraph (b), the court
654 shall promptly enter a final judgment of foreclosure without the
655 need for a further hearing upon either the filing with the court
656 of the original note, satisfaction of the conditions for
657 establishment of the lost note pursuant to law or a showing to
658 the court that the obligation to be foreclosed is not evidenced
659 by a promissory note or other negotiable instrument. If the
660 court finds that a ~~the~~ defendant has not waived the right to be
661 heard on the order to show cause, the court shall then determine
662 whether there is cause not to enter a final judgment of
663 foreclosure. If upon hearing, the court finds that no ~~the~~

664 defendant has shown cause, the court shall promptly enter a
665 judgment of foreclosure.
666 (2) In an action for <u>a mortgage</u> foreclosure, <u>on properties</u>
667 <u>other than a homestead</u> ~~other than residential real estate~~, the
668 mortgagee may request that the court enter an order directing
669 the mortgagor defendant to show cause why an order to make
670 payments during the pendency of the foreclosure proceedings or
671 an order to vacate the premises should not be entered.
672 (a) The order shall:
673 1. Set the date and time for hearing on the order to show
674 cause. However, the date for the hearing shall not be set sooner
675 than 20 days after the service of the order. Where service is
676 obtained by publication, the date for the hearing shall not be
677 set sooner than 30 days after the first publication.
678 2. Direct the time within which service of the order to
679 show cause and the complaint shall be made upon <u>each</u> ~~the~~
680 defendant.
681 3. State that <u>a</u> ~~the~~ defendant has the right to file
682 affidavits or other papers at the time of the hearing and may
683 appear personally or by way of an attorney at the hearing.
684 4. State that, if <u>a</u> ~~the~~ defendant fails to appear at the
685 hearing to show cause and fails to file defenses by a motion or
686 by a verified or sworn answer, ~~the~~ defendant may be deemed to
687 have waived the right to a hearing and in such case the court
688 may enter an order to make payment or vacate the premises.
689 5. Require the mortgagee to serve a copy of the order to
690 show cause on the mortgagor in the following manner:

691 a. If the mortgagor has been served with the complaint and
692 original process, service of the order may be made in the manner
693 provided in the Florida Rules of Civil Procedure.
694 b. If the mortgagor has not been served with the complaint
695 and original process, the order to show cause, together with the
696 summons and a copy of the complaint, shall be served on the
697 mortgagor in the same manner as provided by law for original
698 process.
699 (b) The right of a defendant to be heard at the hearing to
700 show cause is waived if the defendant, after being served as
701 provided by law with an order to show cause, engages in conduct
702 that clearly shows that the defendant has relinquished the right
703 to be heard on that order. A ~~The~~ defendant's failure to file
704 defenses by a motion or by a sworn or verified answer or to
705 appear at the hearing duly scheduled on the order to show cause
706 presumptively constitutes conduct that clearly shows that the
707 defendant has relinquished the right to be heard.
708 (c) If the court finds that a ~~the~~ defendant has waived the
709 right to be heard as provided in paragraph (b), the court may
710 promptly enter an order requiring payment in the amount provided
711 in paragraph (f) or an order to vacate.
712 (d) If the court finds that the mortgagor has not waived
713 the right to be heard on the order to show cause, the court
714 shall, at the hearing on the order to show cause, consider the
715 affidavits and other showings made by the parties appearing and
716 make a determination of the probable validity of the underlying
717 claim alleged against the mortgagor and the mortgagor's

718 defenses. If the court determines that the mortgagee is likely
719 to prevail in the foreclosure action, the court shall enter an
720 order requiring the mortgagor to make the payment described in
721 paragraph (e) to the mortgagee and provide for a remedy as
722 described in paragraph (f). However, the order shall be stayed
723 pending final adjudication of the claims of the parties if the
724 mortgagor files with the court a written undertaking executed by
725 a surety approved by the court in an amount equal to the unpaid
726 balance of the mortgage on the property, including all
727 principal, interest, unpaid taxes, and insurance premiums paid
728 by the mortgagee.
729 (e) In the event the court enters an order requiring the
730 mortgagor to make payments to the mortgagee, payments shall be
731 payable at such intervals and in such amounts provided for in
732 the mortgage instrument before acceleration or maturity. The
733 obligation to make payments pursuant to any order entered under
734 this subsection shall commence from the date of the motion filed
735 hereunder. The order shall be served upon the mortgagor no later
736 than 20 days before the date specified for the first payment.
737 The order may permit, but shall not require the mortgagee to
738 take all appropriate steps to secure the premises during the
739 pendency of the foreclosure action.
740 (f) In the event the court enters an order requiring
741 payments the order shall also provide that the mortgagee shall
742 be entitled to possession of the premises upon the failure of
743 the mortgagor to make the payment required in the order unless
744 at the hearing on the order to show cause the court finds good

745 cause to order some other method of enforcement of its order.
746 (g) All amounts paid pursuant to this section shall be
747 credited against the mortgage obligation in accordance with the
748 terms of the loan documents, provided, however, that any
749 payments made under this section shall not constitute a cure of
750 any default or a waiver or any other defense to the mortgage
751 foreclosure action.
752 (h) Upon the filing of an affidavit with the clerk that
753 the premises have not been vacated pursuant to the court order,
754 the clerk shall issue to the sheriff a writ for possession which
755 shall be governed by the provisions of s. 83.62.
756 (i) For purposes of this section, there is a rebuttable
757 presumption that a residential property for which a homestead
758 exemption for taxation was granted according to the certified
759 rolls of the latest assessment by the county property appraiser,
760 before the filing of the foreclosure action, is a homestead
761 residence.
762 (3) This section does not supersede or limit other
763 procedures adopted by the court, including, but not limited to,
764 mandatory mediation and alternative dispute resolution
765 processes.
766 Section 13. Section 702.11, Florida Statutes, is created
767 to read:
768 702.11 Adequate protections for lost, destroyed, or stolen
769 notes in mortgage foreclosure.—
770 (1) In connection with the mortgage foreclosure of a one-
771 family to four-family residential property, including an

772 individual unit in a condominium or cooperative, the following
773 constitute reasonable means of providing adequate protection
774 under s. 673.3091:
775 (a) A written indemnification agreement by a person
776 reasonably believed sufficiently solvent to honor such an
777 obligation;
778 (b) A surety bond;
779 (c) A letter of credit issued by a financial institution;
780 (d) A deposit of cash collateral with the clerk of the
781 court; or
782 (e) Such other security as the court may deem appropriate
783 under the circumstances.
784
785 Any security given shall be on terms and in amounts set by the
786 court, for a time period through the running of the statute of
787 limitations for enforcement of the underlying note, and
788 conditioned to indemnify and hold harmless the maker of the note
789 against any loss or damage, including principal, interest, and
790 attorney fees and costs, that might occur by reason of a claim
791 by another person to enforce the note.
792 (2) Any person who wrongly claimed to be the holder of or
793 pursuant to s. 673.3011 to be entitled to enforce a lost,
794 stolen, or destroyed note and caused the mortgage secured
795 thereby to be foreclosed shall be liable to the actual holder of
796 the note, without limitation to any adequate protections given,
797 for actual damages suffered together with attorney fees and
798 costs of the actual holder of the note in enforcing rights under

799 this subsection.
800 (a) The actual holder of the note is not required to
801 pursue recovery against the maker of the note or any guarantor
802 thereof as a condition precedent to pursuing remedies under this
803 section.
804 (b) This section does not limit or restrict the ability of
805 the actual holder of the note to pursue any other claims or
806 remedies it may have against the maker, the person who wrongly
807 claimed to be the holder, or any person who facilitated or
808 participated in the claim to the note or enforcement thereof.
809 Section 14. Section 702.12, Florida Statutes, is created
810 to read:
811 702.12 Applicability of s. 57.105 to foreclosures.— The
812 provisions of s. 57.105 are expressly applicable to mortgage
813 foreclosure actions.
814
815 Section 15. This act does not apply to the foreclosure of
816 liens on timeshare interests under the Timeshare Lien
817 Foreclosure Act, part III of chapter 721, Florida Statutes.
818
819 Section 16. The Division of Statutory Revision is directed
820 to replace the phrase "the effective date of this act" wherever
821 it occurs in this act with the date this act becomes a law.
822
823 Section 17. This act is intended to be remedial in nature
824 and shall apply to any action filed after the effective date of
825 this act.

826
827 Section 18. This act shall take effect upon becoming law.
828
829
830 ---
831 T I T L E A M E N D M E N T
832 Remove the entire title and insert:
833 An act relating to judicial proceedings; providing a short
834 title; specifying public policy concerning alternatives to
835 mortgage foreclosure; amending s. 95.11 F.S.; providing a cross
836 reference to s. 702.06 F.S.; amending s. 701.04, F.S.; revising
837 the time period in which an estoppel statement must be provided;
838 revising the allowable methods of delivery and contents of an
839 estoppel statement; prohibiting a fee for an estoppel statement
840 in certain circumstances; providing a fee for failure to deliver
841 certain documents within a specified period; providing a limit
842 on such fees; providing that specified persons may rely on an
843 estoppel statement; requiring a specified certification if the
844 person or party executing a satisfaction is not shown as the
845 owner of the mortgage in the official records; requiring
846 specified requests for an estoppel statement to include a copy
847 of instruments showing an ownership interest in the property;
848 revising requirements for a person required to acknowledge
849 satisfaction of the mortgage, lien, or judgment; providing for
850 actions to compel compliance; providing for attorney fees;
851 creating s. 701.045, F.S.; requiring preparation and recording
852 of an instrument acknowledging satisfaction of the lien or

853 judgment upon full payment; requiring a copy of the recorded
854 satisfaction provided to the person making the full payment
855 within a specified period; providing for civil actions for
856 compliance; providing for attorney fees; providing for
857 responsibility for return of satisfaction when an execution has
858 been issued and a judgment has subsequently been fully paid;
859 providing for compliance with specified provisions relating to
860 amendment of a judgment lien file; creating s. 702.015, F.S.;
861 providing requirements for a complaint which seeks to foreclose
862 a lien on real property; providing requirements for a complaint
863 that includes a count to enforce a lost, destroyed, or stolen
864 instrument; amending s. 702.035, F.S.; requiring the foreclosing
865 party in a mortgage foreclosure action involving specified
866 occupied dwellings to provide notice to certain persons;
867 specifying the contents of such notice; providing for notice to
868 tenants of such buildings in foreclosure; specifying the
869 contents of such notice; creating s. 702.036, F.S.; providing
870 for finality of mortgage foreclosure judgments; requiring
871 certain actions to set aside, invalidate, or challenge the
872 validity of a final judgment of foreclosure of a mortgage or to
873 establish or reestablish a lien or encumbrance on the property
874 in abrogation of the final judgment of foreclosure of a mortgage
875 to be treated as actions for monetary damages only in certain
876 circumstances; providing that certain persons be considered
877 persons affiliated with the foreclosing lender for specified
878 purposes; prohibiting claims by persons claiming to have actual
879 promissory notes following foreclosure of a mortgage based upon

880 the enforcement of a lost, destroyed, or stolen note; amending
881 s. 702.04, F.S.; revising procedural provisions for foreclosure
882 of lands in different counties; amending s. 702.06, F.S.;
883 deleting references to actions at common law for deficiencies
884 and original mortgagees; providing requirements for deficiency
885 decrees in foreclosures of certain owner-occupied dwelling
886 units; providing applicability; creating s. 702.062, F.S.;
887 providing for notice of extensions of time for a party to
888 respond to an initial complaint in certain foreclosure
889 proceedings; providing for notice when all parties have been
890 served personally and no party defendant has filed an answer or
891 other response denying, contesting, or asserting defenses to the
892 plaintiff's entitlement to the foreclosure in certain
893 circumstances; providing for entry of defaults against
894 nonresponding parties; providing for requests for case
895 management conferences; providing for extensions or stays in
896 certain circumstances; amending s. 702.065, F.S.; revising
897 requirements for considering a mortgage foreclosure proceeding
898 uncontested; providing requirements for determination of
899 reasonable attorney fees for foreclosures of certain residential
900 properties; deleting provisions relating to defaults in
901 uncontested mortgage foreclosure proceedings and liquidated
902 damages; amending s. 702.10, F.S.; revising requirements for
903 proceedings for requests for a hearing to show cause after a
904 complaint in a foreclosure proceeding has been filed which is
905 verified in the form of an affidavit sufficient to support a
906 motion for summary judgment; providing for a summons; providing

907 for waiver of the right to be heard at a hearing to show cause
908 in certain circumstances; revising terminology to allow for
909 cases in which there are multiple defendants; providing for a
910 rebuttable presumption that certain properties are homestead
911 properties; providing for applicability of other procedures;
912 creating s. 702.11, F.S.; providing requirements for reasonable
913 means of providing adequate protection under s. 673.3091, F.S.,
914 in mortgage foreclosures of certain residential properties;
915 providing for liability of persons who wrongly claim to be
916 holders of or entitled to enforce a lost, stolen, or destroyed
917 note and caused the mortgage secured thereby to be foreclosed in
918 certain circumstances; creating s. 702.12, F.S.; providing that
919 s. 57.105, F.S. applies to mortgage foreclosure proceedings;
920 specifying that the act does not apply to foreclosures of
921 timeshare interests under specified provisions; providing a
922 directive to the Division of Statutory Revision; providing
923 applicability; providing that it shall become effective upon
924 becoming law.
925
926
927

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 , 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 required 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 , 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 , 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, four reports by the TriBar Opinion Committee, two 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 , 2011) and by the Executive Council of the RPPTL Section (on December , 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 or 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 (and authority), 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 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 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 lawyers 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 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 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. 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 "concurs" 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 then 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 Applicable Law 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 laws 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 __, 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 officers 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 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. *LLLP Certificate*. A Florida limited partnership may also qualify as a limited liability limited partnership ("**LLLP**") 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 LLLP 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 LLLP 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 LLLP).

10. *General Exclusions from Opinion*. Unless otherwise expressly stated in the opinion letter, an opinion that a Florida limited partnership (or LLLP) 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 LLLP) 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 LLLP 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 revolk 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 on 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 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 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 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, and (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 (iv) 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 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) or 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) or 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

- 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 a 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 includes 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 than 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" above), 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 or Default of 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 limitedpartnership'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 do 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 genuiness 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 Opining—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 then 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, 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 forgoing, 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 recommend "generic" qualified language described below makes this clear. In the view of the Committees, it is inappropriate to request that the "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 – 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 – 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 Applicable Law. 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 a Transaction Document, 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 Law 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 laws of the other state are the same as the laws 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 contained 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, order or decree 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 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" Statement

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 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 overly 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 overly 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 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 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 senior executive officers) 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 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 pre-incorporation 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 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 on 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" an agreement and "no violation of law" 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 laws 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 laws 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 laws govern 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 day 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.

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 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; (v) 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; (vi) 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; (vii) a security interest which was perfected automatically upon attachment pursuant to Section 679.3091, Florida Statutes; (viii) a security interest temporarily perfected without filing or possession under Section 679.3121(5), (6) or (7), Florida Statutes; (ix) a security interest perfected by taking possession or the taking of delivery under Section 679.3131, Florida Statutes; (x) 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). 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.

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 as 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 the boilerplate 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:

> **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).**

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 Transactions 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 real estate loan opinion letter 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 Transactions 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 the 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 address 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'Arbalete, 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 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 laws 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 such 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, 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 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 register to do 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 the "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 are 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. As 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 law 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 stockholders;
- 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.

Appendix "A"

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.

	Page
"**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.	182
"**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, 112
"**Article 9**" means Chapter 679 of the Florida Statutes.	131
"**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.	132
"**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. 152

"**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. 131

"**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. 96

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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 __, 2011." . . . .

"**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. . . . 183

"**SPE**" means a special purpose entity 68

"**Security Documents**" means the Transaction Documents under which a security interest is granted in the collateral. . . . 102

"**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. . . . 12

"**UCC Opinion Scope Limitation**" means limitations on the scope of security interest opinions under the UCC. . . . 132

"**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. . . . 144

"**WGLO**" means the Working Group on Legal Opinions. . . . 2

Appendix "B"

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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."

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* 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 defaults 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 approval of 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 letter[4] 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]

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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 __, 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 Reference[8]

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 __, 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 Reviewed[9]

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 Documents[10]

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 of 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 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 Documents[11]

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.

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[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]

Assumptions[17]

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.

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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 opinion letters of Florida counsel

(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).*

Knowledge[18]

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 Opinions[19]

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]

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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 Florida or federal 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 Opinion[31]

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].

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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 Lender[35] 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 Securities[37]

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 Lender[35] 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

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[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 Collateral in case the Pledged Collateral is deemed to be a "general intangible" (in which case, the security interest in the Pledged 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 Laws[41]

"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 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 were 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 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 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 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 compliance[44] 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 Qualifications[46]

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" qualification[49] 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).

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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 the 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]

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[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 Collateral[55] 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 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

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[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 SIGNATURE[65]

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[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 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 letter[4] 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]

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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 ____, 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 Reference[8]

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   , 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 Reviewed[9]

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 Documents[10]

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 of 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 Documents[11]

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*

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[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 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 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.

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[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."

Assumptions[18]

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 opinion letters of Florida counsel

(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).*

Knowledge[19]

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 Opinions[20]

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 regulation 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 Opinion[32]

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,

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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 Laws[39]

"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.

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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 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 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 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

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[40] Some Opining Counsel exclude this item from the list of excluded laws in situations were 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 that they had executed and delivered 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 compliance[42] 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 Qualifications[44]

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 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" qualification[47] 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;

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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) waivers of any statute of limitations; (iv) waivers of 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 SIGNATURE[58]

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[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-Addresse(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]

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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 __, 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 Reference[7]

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 , 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 Reviewed[8]

In connection with rendering an opinion letter, 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 Documents[9]

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 of 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.

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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 Documents[10]

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 counsel[13] from the Company, dated __________, 20__, [a copy of which is attached hereto as ______] (the "Company Certificate to Counsel"); and

(vi) a certificate to counsel[13] 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]

Assumptions[16]

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.

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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 opinion letters of Florida counsel

(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).*

Knowledge[17]

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 Opinions[18]

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]

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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 Opinion[29]

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]

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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 Laws[37]

"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.

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 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 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 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 that they had executed and delivered 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 compliance[39] 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]

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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 Qualifications[41]

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 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" qualification[44] 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 on 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.

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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) waivers of any statute of limitations; (iv) waivers of 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 SIGNATURE[50]

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[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]

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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 ____, 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 Reference[7]

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 ____, 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 Reviewed[8]

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 Documents[9]

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 of 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.

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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 Documents[9]

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."

Assumptions[12]

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 Client 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 opinion letters of Florida counsel

(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]

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[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 Client, and/or the scope of the opinions being rendered).*

Knowledge[14]

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 Opinions[15]

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 Opinion[16]

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 Opinion[17] and Usury[18]

2. We note that Section ____ of the Loan Agreement provides that the Loan Agreement, and all issues arising thereunder, shall be governed by the laws 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

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[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 laws 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 Opinion[19]

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 do 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]

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[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 Opinion[25]

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 laws 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 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 interest 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 Opinion[28]

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.

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[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 Florida[29]

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 Laws[30]

"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 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, statutes, 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 were 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 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 opinions under the particular circumstances in which the opinion letter is being rendered);*

Exclusions applicable to all laws 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 Qualifications[32]

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 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" qualification[35] 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 exclusions[38] *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) waivers of any statute of limitations; (iv) waivers of 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]

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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 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;

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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 interest granted in the personal property collateral, or (ii) any security agreement that creates such security interest.

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 SIGNATURE[50]

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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 COUNSEL[1]

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 shareholder agreement, voting trust agreement or agreement among shareholders is Exhibit A-1 to this Certificate."]

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[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/partners/members/managers], 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 contempleted. 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.

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[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, customary 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.

MEMORANDUM

FROM: **Philip B. Schwartz, Reporter**
Gary Teblum, Co-Reporter

DATE: **November 15, 2011**

RE: **Modifications to the final "Report on Third-Party Legal Opinion Customary Practice in Florida" (the "Report") based on the comments received with respect to the January 21, 2010 Exposure Draft of the Report (the "Exposure Draft")**

This memorandum memorializes why 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 (collectively, the "Committees") made certain changes to the Exposure Draft in finalizing the Report. Many of the changes made to the Report were made in response to the comments received with respect to the Exposure Draft. Other changes were made based on discussions among members of the Committees regarding various sections of the Report and based on the Committees' efforts to comprehensively edit the Report.

Unless otherwise set forth in this Memorandum, terms defined in the Report that are used in this Memorandum have the same meaning herein.

1. General Comments

A. *The Committees received comments from several legal opinion commentators requesting that the Report explicitly clarify Florida's position regarding the ABA Principles and Guidelines and clarify the differences between positions taken in the Report regarding legal opinion customary practice in Florida compared to the positions taken on similar issues in other state and local bar association reports.*

The Committees believe that the Report has two primary purposes. First, the Report is intended to help Florida lawyers, and courts interpreting third-party legal opinion letters of Florida counsel with respect to matters of Florida law, to understand customary third-party legal opinion practices in Florida and to understand common practices often seen in Florida in third-party legal opinions. Second, the Report is intended to be a useful practice guide for Florida lawyers.

While the Committees understand the reasoning behind the request made by these commentators, the Committees concluded that adding the type of analysis requested by the commentators would make the Report more difficult to use and

would not provide information to users of the Report that the Committees believed would be particularly useful to such users. As a result, no changes were made to the Report in response to these particular comments.

Notwithstanding the foregoing, representatives of the Committees are actively participating in currently ongoing efforts at the national level to discuss and seek the development of national third party legal opinion customary practice, and in connection with such discussions they are sharing the views expressed in the Report regarding numerous third party legal opinion issues so that the views set forth in the Report regarding these matters can be considered along with the views of other state and local bars that have expressed their views on these issues.

B. *Several commentators, noting the position of the Committees taken in the Exposure Draft that Florida customary practice (as described in the Report) is the standard of care to which a Florida lawyer rendering a third-party legal opinion on a matter of Florida law should be held, noted their concern that the Exposure Draft did not differentiate between that which is guidance on customary practice (which the Committees believe to be the standard of care against which a Florida lawyer rendering an opinion on a matter of Florida law should be measured) and that which is a description of common third-party legal opinion practices in Florida (which guidance addresses the Committees' views on those practices). These commentators expressed the concern that trial lawyers could use the Report against a lawyer rendering a legal opinion that the Committees view as outside the common practices of Florida lawyers even where the lawyer's conduct under the circumstances did not violate the applicable standard of care in issuing the opinion letter.*

The Committees agreed with the commentators that the Report needed changes to make this distinction clearer. As a result, numerous changes were made throughout the Report to differentiate between when the Committees are discussing their views on Florida customary practice (their views as to the standard of care) and when the Committees are discussing their views as to common third-party legal opinion practices in Florida (guidance on the Committees' views on those practices). The Committees also made clear throughout the Report that an Opining Counsel who renders one or more of the opinions discouraged by the Report should not be viewed as violating the applicable standard of care solely because such Opining Counsel renders such opinions.

Notwithstanding the foregoing, the Committees believe that the term "customary practice" is often loosely used by lawyers around the country in both contexts (including in Florida), and they urge all commentators on legal opinion issues to consider this distinction when reporting on third party legal opinion issues.

C. *One commentator expressed his view that the Exposure Draft was unusually hard to read and needed a good edit.*

The Committees generally felt that the Report was well written and usable by Florida lawyers, and the use of the Exposure Draft by Florida lawyers to date supports that view. At the same time, the Committees recognized that the Exposure Draft would benefit from a comprehensive editing. As a result, as an adjunct to their review of the comments to the Exposure Draft, the Committees completed a comprehensive, cover-to-cover edit of the Report.

The Committees believe that the changes that were made as a result of this comprehensive edit of the Report have made the final Report even better and more usable.

D. *Two third-party legal opinion commentators expressed the view that the Exposure Draft went too far by using words such as "standards" that might be construed as implying that the Report sets standards that Florida lawyers are obligated to follow in their legal opinion practices.*

The Committees recognized early on in the drafting of the Report that neither the Committees, nor the RPPTL Section or the Business Law Section, are standard-setting or legislative bodies. As a result, the Committees have long believed that the role of the Committees (and the role of the RPPTL Section and the Business Law Section) is to provide guidance on what they believe to be third-party legal opinion customary practice in Florida.

The Committees believe that under the Restatement, customary third-party opinion practice in a particular jurisdiction is the standard of care to which a lawyer in that jurisdiction who is rendering a third party legal opinion will be measured. Since the Restatement and the Statement on the Role of Customary Practice make it clear that bar association reports (such as the Report) are valuable sources of guidance on customary third party legal opinion practices in a particular jurisdiction, the Committees believe that Florida customary practice (as articulated in the Report) is the standard of care against which a Florida lawyer issuing an opinion on a matter of Florida law is likely to be measured.

However, the Report, although merely providing guidance, represents guidance that the Committees hope courts will find persuasive in making a determination with respect to whether a particular Florida lawyer who has issued a particular third-party legal opinion has met the applicable standard of care.

The Committees made numerous changes throughout the Report (including a change to the title of the final Report) to help make this distinction clear.

2. <u>Background of the Report (Pages 1-7 of the final Report)</u>

A. This section was updated to describe the extensive work that was completed by the Committees following the issuance of the Exposure Draft until the approval of the final Report. It was also updated to list recent reports published by several bar associations that were reviewed by the Committees in connection with their finalization of the Report.

3. Introductory Matters (Pages 8-17 of the final Report)

A. *One commentator felt that it was inappropriate for the Committees to represent that the Report articulates the customary practices of opinion recipients (particularly non-Florida opinion recipients).*

The Committees consisted of both Opining Counsel and counsel who represent Opinion Recipients, and significant efforts were made during the Committees' deliberations to make sure that the Committees' position on issues was not overly skewed to one side or the other. The Committees believe that the Report reflects the views of what a reasonable Florida Opining Counsel ought to be willing to render in the way of opinions in connection with a transaction and what a reasonable Opinion Recipient (wherever located) receiving an opinion of Florida Opining Counsel on a matter of Florida law ought to be willing to accept.

B. The discussion on what is customary practice and why it is important has been extensively revised to reflect the changes discussed in paragraph 1(B) above. See "Introductory Matters-What is Customary Practice and Why is it Important" on page 9 of the final Report, "Common Elements of Opinions-Opinions of Florida Counsel are to be Interpreted Under Florida Customary Practice" on page 35 of the final Report and "Common Elements of Opinions-Express Incorporation of the Report into Opinion Letters" on pages 35 and 36 of the final Report.

C. *One commentator disagreed with the statement in the Report that under the presumption of continuity and regularity it is unnecessary to review the client's minute books to deliver an opinion letter.*

The discussion regarding the "Presumption of Continuity and Regularity" (which is contained on pages 11 and 12 of the final Report) has been modified to better explain how the presumption of continuity and regularity has changed over the years and how the Committees believe the presumption should be interpreted in today's modern third-party legal opinions world. The discussion has also been modified to clarify that while, generally, it is unnecessary to review the client's minute books in rendering a legal opinion, it is necessary for an Opining Counsel to review those entity records that relate to the particular legal opinions being rendered. Finally, the Report has been modified to clarify that the presumption of continuity and regularity cannot be relied upon if Opining Counsel knows the presumption to be incorrect or is aware of facts (red flags) that ought to call such presumption into question by a reasonable Opining Counsel.

D. *One commentator stated his view that the Report gives the impression that it would violate the applicable standard of care for a Florida lawyer to give a reasoned opinion.*

The Committees believe that this issue is part of the problem that arises because of the widespread use of the term "customary practice" to mean various things. As noted in paragraph 1(B) above, the final Report has been modified to make a

distinction between the Committees' views on third party legal opinion customary practice in Florida (which reflects the Committees' views on the applicable standard of care), on the one hand, and the Committees' views on common third party opinion practices followed in Florida (which addresses the Committees' views on those practices, on the other hand.

However, in light of this comment, a clarification was made on the top of page 15 of the final Report that rendering a discouraged opinion, such as a reasoned opinion, does not, in and of itself, violate Florida customary practice.

E. *One commentator expressed the view that the Exposure Draft's position on misleading opinions (which is contained in the "Introductory Matters-Ethical and Professional Issues") goes beyond the requirements of other bar reports and imposes a higher level of responsibility on Florida lawyers.*

The Committees believe that the discussion in the Report regarding misleading opinions that is contained in the "Introductory Matters – Ethical and Professional Issues" section of the Report (pages 15-17 of the final Report) reflects the appropriate level of responsibility for all lawyers, including Florida lawyers, consistent with the Rules of Professional Conduct and the Prior Florida Reports.

F. *One commentator disagreed with the statement in the Exposure Draft that, in most cases, counsel for the Opinion Recipient is in the best position to advise its client on issues of significant legal uncertainty. He stated his belief that in situations where an out-of-state attorney is representing the Opinion Recipient, the Opining Counsel may be in a much better position to advise the Opinion Recipient regarding the issue than the attorney for the Opinion Recipient.*

In the view of the Committees, issues of significant legal uncertainty are not the types of issues that are conducive to third-party legal opinions (which are typically closing opinions covering certain matters with respect to the Transaction and the Transaction Documents), but rather require counsel to consider specific facts and apply them to case law that makes a particular issue not free from doubt. When an issue is uncertain, the Committees believe that it is better left to the Opinion Recipient's counsel to advise the Opinion Recipient regarding the strengths and weaknesses of their position on the issue (and that if the Opinion Recipient is represented by non-Florida counsel in a Florida transaction, that the Opinion Recipient should retain their own Florida counsel to advise them regarding the issue). See "Issues of Significant Legal Uncertainty" on pages 14-15 of the final Report.

G. *Two of the commentators expressed concerns with the Report's discussion on the "duty of loyalty." One stated his view that the recommended discussion with the client in the ethical discussion on the "duty of loyalty" does not actually take place with clients. The second stated that he does not believe that lawyers should be obligated to (or that lawyers actually) explain to their clients the scope of the opinion letter and the consequences that may arise from its issuance.*

The Committees grappled with the tension between the wording of the ethical rules that apply to these issues and the actual practices of attorneys who render third-party legal opinion letters. The language, which largely follows the guidance in the Prior Florida Reports, was revised to highlight the issues that the Committees believe a Florida Opining Counsel should consider discussing with their clients under the Rules of Professional Conduct, rather than identifying specific conduct the Florida attorneys must follow in order to satisfy the applicable standard of care. See "Ethical and Professional Issues-Duty of Loyalty" on pages 15-16 of the final Report.

4. Common Elements of Opinions (Pages 18-37 of the final Report)

A. *One commentator disagreed with the statement in the Report that an updated opinion should always be treated as a new opinion. He stated his view that what an updated opinion letter says should determine whether it should be treated as a new opinion.*

The Committees disagreed with this comment and stated their view that an updated opinion should always be treated as a new opinion. The final Report was revised to make clear that this position is the view of the Committees. See "Date" on page 18 of the final Report.

B. Based on suggested language changes received from one of the commentators, clean-up changes were made to the opinion language in the section "Common Elements of Opinions- Addressee(s) and Reliance" (pages 18-20 of the final Report).

C. *One commentator disagreed with the statement in the Exposure Draft that lawyers should expressly state in their opinion letters that their client has consented to the issuance of the opinion letter. The commentator reflected his view that many lawyers don't state in their opinion letters that they have the consent of their client to issue the opinion letter and that such client consent may be inferred by the fact that delivery of the opinion has been made as a condition to closing.*

The final Report was revised to clarify when the Committees believe it is appropriate for a Florida Opining Counsel to include a statement in the opinion letter confirming that the opinion letter is being issued with the consent of the client and when such consent may be inferred. However, the Committees continue to believe that informed client consent to deliver an opinion letter appears to be required under the Rules of Professional Conduct and, as a result, the guidance on this issue that is contained in the Report continues to highlight this issue, in the hope that Florida lawyers will make sure they have informed client consent before they issue a third-party legal opinion. See "Brief Description of the Transaction and Request for Opinion" on page 21 of the final Report and "Client Consent" on pages 16-17 of the final Report.

D. *One of the commentators raised concerns about the recommended language in the Exposure Draft to be used to define words not defined in the opinion letter but otherwise defined in one of the transaction documents.*

The Committees believe that the recommended opinion language that was set forth in "Common Elements of Opinions – Definitions" in the Exposure Draft is often used today by many Opining Counsel. At the same time, the Committees were persuaded that achieving clarity in language suggested a better formulation of the recommended language. While the Committees believe that the old language is unlikely to be misunderstood, the Committees decided to modify the recommended language in the final Report so that it presents a clearer definition. See "Definitions" on page 22 of the final Report.

E. *One of the commentators expressed a concern with the language in the Exposure Draft about Opining Counsel's ability to rely on factual certificates and assumptions that Opining Counsel knows to be incorrect. The commentator argued that not only can a lawyer not rely on facts or assumptions that they know to be incorrect, but also that such counsel cannot rely on facts or assumptions if such counsel is aware of circumstances that make reliance unwarranted. The commentator gave examples of when, in his view, reliance on a certificate might be unwarranted (because of irregularities on the face of the certificate or because the certificate was given by someone who would not reasonably be expected to be in a position to know such information). The commentator expressed his view that this was a major flaw in the Report to the extent that a Florida Opining Counsel can rely on facts or assumptions that are unreliable (because such counsel is aware of red flags).*

The Committees believe that the language in the Exposure Draft did not either state or imply that Florida Opining Counsel can rely on facts or assumptions which they have knowledge are incorrect or as to which they are aware of facts (red flags) that ought to cause a reasonable Opining Counsel to conclude that such facts or assumptions are unreliable. However, to help avoid any misunderstanding and particularly in light of this comment, this limitation on a Florida Opining Counsel's ability to rely on facts or assumptions has been made clearer throughout the final Report. See, for example, "Reliance on Factual Certificates and Representations and Warranties; Assumption of Facts; Scope of Reliance" on pages 22-24 of the final Report.

F. *The Report, in discussing an issue regarding opinions rendered by Florida counsel under the laws of another jurisdiction with respect to Delaware limited liability companies, provides a citation to an article in the ABA Business Law Section's publication, Business Lawyer Today (on page 25 of the final Report). One of the commentators suggested that it would be more appropriate to refer readers to the report of the TriBar Opinion Committee that makes the same point.*

As stated in the Report section "Background of the Report – Materials Considered in the Preparation of this Report" (pages 3-5 of the final Report), in preparing the

Report the Committees drew heavily from the work of many fine state and local bar associations (including the TriBar Opinion Committee). However, the Committees felt that for most Florida lawyers, the article cited in the Report (which honed in on the particular issue being highlighted) was more readily available to Florida lawyers and therefore was a better source to which to refer Florida lawyers who are faced with the issue. Further, the Committees viewed their decision regarding this comment as consistent with their views regarding the primary purpose of the Report (as expressed in paragraph 1(A) above).

G. *One commentator stated his view that the opinion limitation language that is suggested on page 25 of the final Report (limiting the laws of a particular foreign jurisdiction to the statutory law in that jurisdiction, thereby excluding case law from the coverage of the particular opinion) inappropriately limits the scope of the opinion and that acceptance of such language might subject an Opinion Recipient's counsel to a claim for malpractice if the Opinion Recipient's counsel allows the client to accept such language in an opinion.*

The Committees believe that the suggested language contained on page 25 of the final Report limiting the scope of an opinion given under the laws of another jurisdiction to the statutory laws of that jurisdiction (and excluding case law from the scope of the opinion) is an example of a way in which Opining Counsel often limit their opinions under the laws of another jurisdiction in certain circumstances and is often used in today's modern legal opinion practice in situations where a cost-benefit analysis does not warrant hiring a local counsel in the foreign jurisdiction to render an opinion under the laws of that jurisdiction.

H. *One commentator suggested that the recommended opinion language contained on page 26 of the final Report excluding from the opinion matters covered by an opinion of local and specialist counsel may not be appropriate when an Opining Counsel is relying on an opinion from local counsel in rendering the Opining Counsel's opinion (such as when an Opining Counsel rendering a remedies opinion under the laws of the jurisdiction where such Opining Counsel practices is relying on an opinion of local counsel in the jurisdiction where the client entity is organized with respect to due authorization of the transaction and the transaction documents).*

A paragraph was added to the discussion on this issue (on page 26 of the final Report) with respect to predicate or "building block" opinions. However, the Committees also stated their view that, with respect to the example noted, it is better practice for Opining Counsel to assume the predicate opinions rather than relying on an opinion from local counsel with respect to such matters.

I. *One commentator stated his view that contrary to the statement in the Exposure Draft, it is not unreasonable to request a statement from the primary transaction counsel that an opinion of local/specialist counsel is satisfactory in form and scope.*

The Committees believe that in modern third-party legal opinion practice, it is no longer appropriate or necessary to request that primary transaction counsel comment in any manner about an opinion of local/specialist counsel (whether to request confirmation that such opinion is satisfactory in form and scope or satisfactory in form and substance, or that the Opinion Recipient is justified in relying on the opinion of local/specialist counsel). While such requests were common in the past, the Committees believe that they have become inappropriate over time as third-party legal opinion practice has evolved. A statement to this effect is made on page 26 of the final Report.

J. *The Committees received a question as to why the assumption on the genuineness of signatures (assumption (g) on page 28 of the final Report) no longer excepts out the Client's signature, as it did in the Prior Florida Reports.*

The Committees believe that unless Opining Counsel knows that the person purporting to sign a Transaction Document is not the person who was supposed to sign such documents (or is aware of facts (red flags) that make such assumption unreliable to a reasonable Opining Counsel), Opining Counsel can rely on the assumption regarding the genuineness of signatures with respect to its own Client's signatures. This is particularly so in situations where Opining Counsel is not in the room with the party signing the Transaction Documents when such documents are signed.

The Committees believe that Opining Counsel is not intended to be the guarantor of the signature of Opining Counsel's Client nor is Opining Counsel a handwriting expert, and that therefore Opining Counsel should not be responsible for the genuineness of Opining Counsel's Client's signature. The Committees believe that this modification to customary practice has evolved over time.

K. *One commentator expressed concern with one of the assumptions included in the assumptions that are implicitly included in the opinions of Florida counsel under Florida customary practice (assumption (n) that "no action, discretionary or otherwise, will be taken by or on behalf of the Client in the future that might result in a violation of law or otherwise constitute a breach or default under any of the Transaction Documents (or any other document related thereto) or under any applicable court order"). The commentator noted his view that the words "or otherwise" assumes away a key element of the "no breach or default" and the "no violation of laws" opinions in that Opining Counsel should not be excused from considering in rendering opinions on no violation of laws and no breach or default of court orders the effects of actions that the Client is required to take under the Transaction Documents.*

The Committees had extensive discussion about this comment, with several members of the Committees having the view that the assumption as originally drafted was correct and appropriate. However, after such discussion, the Committees decided to modify this particular assumption so that the assumption that is implicitly included in all opinions of counsel under Florida customary

practice is limited to discretionary actions taken by the Client that might result in a violation of law or might constitute a breach of or default under other agreements or under applicable court orders (rather than extending to all actions taken, discretionary or otherwise, that might constitute a breach of the Transaction Documents). See assumption (n) on page 28 of the final Report.

The Committees recognize that many Florida Opining Counsel will continue to include in their opinion letters the broader assumption that was contained in the Exposure Draft, but feel that such broader assumption should only apply to an opinion letter in which the expanded assumption is expressly included in the opinion letter).

L. *One commentator recommended that the Committees consider adding an additional implicit assumption to those already included in the Report relating to compliance with fiduciary duties in approving the Transaction and the Transaction Documents. The commentator reflected his view that this particular assumption is considered part of customary practice in other jurisdictions.*

In the Report's discussion on "Authorization of the Transaction by a Florida Entity," the Committees expressed their view that, implicitly under Florida customary practice, an Opining Counsel can assume that the directors, partners, members or managers approving the Transaction have complied with all applicable fiduciary duties in connection with such approval. However, the Committees concluded that such assumption does not need to be expressly stated in the opinion letter under Florida customary practice. As a result, the Committees did not make the change suggested by the commentator.

M. *Two commentators took issue with the discussion in the Exposure Draft regarding diligence that might be prudent under certain circumstances to determine the legal capacity of an individual.*

The discussion regarding this issue contained in the Exposure Draft resulted from a lawsuit in Florida against a lawyer who issued a legal opinion with respect to a real estate transaction in which it turned out that the lawyer's client was a minor. After the real estate downturn, the client sued to set aside the contract and was successful in getting out of his obligations to purchase certain real property. Thereafter, the lawyer was sued by the Opinion Recipient with respect to his opinion. The lawyer's opinion had the standard assumption as to the legal capacity of the individuals involved in the transaction.

The Committees believe that the discussion in the Report (at page 30 of the final Report) is an example of a real world situation where a prudent counsel might decide that it is appropriate to protect themselves with simple diligence (such as looking at the minor's drivers license), thereby avoiding a problem. Based on this analysis, the Committees left this discussion in the final Report.

N. *Two comments were received regarding the interplay between "applicable law" and "excluded laws." One commentator suggested that clarifying language should be added to the Report to make clear that applicable laws are those laws, rules and regulations that a Florida lawyer would reasonably be expected to recognize as being applicable to the Client, the Transaction or the Transaction Documents. The second commentator expressed concern about the interplay of the discussion in the Report on applicable laws and excluded laws and the discussion on the "no-breach of or default under agreements" and the "no violations of laws" opinion.*

The discussion throughout the Report with respect to the definition of "applicable laws" was modified so that this definition is consistent in all sections of the Report. See, for example, pages 30 and 112 of the final Report.

O. *One commentator requested guidance as to whether it is acceptable to render an "as if" opinion that excludes coverage of the governing law provision of the Transaction Document at issue and assumes Florida law applies to the interpretation of the Transaction Documents and to also render an opinion in the same opinion letter that the governing law provision contained in the Transaction Documents will be enforced by a Florida court.*

The Committees believe that giving both of these opinions in the same opinion letter is not inconsistent. For example, in rendering an "as if" opinion as to the enforceability of the Transaction Documents in the form recommended by the Report, Opining Counsel is not opining that the choice of law provision in the Transaction Documents is not enforceable; merely that if Florida law were the governing law of the agreement (and the governing law provision of the agreement were to be ignored), the agreement would be enforceable under Florida law. In the view of the Committees, this makes the two opinions consistent.

See page 33 of the final Report for a discussion on the Committees recommended form of the "as if" opinion and pages 170-173 for the Committees recommended form of opinion of Florida Opining Counsel that the parties selection of a governing law for the Transaction Documents will be given effect by a Florida court (or by a federal court applying Florida choice of law rules).

P. *One commentator expressed his view that where a firm is rendering a no-litigation confirmation and is also handling litigation for the client, the primary lawyer group should always include the lawyer(s) handling the litigation matter. He expressed the concern that the definition of the primary lawyer group in the Report creates a trap for the unwary Opining Counsel who relies on the definition.*

The Committees believe that the definition of the "primary lawyer group" that is recommended on page 33 of the final Report is the appropriate default rule under Florida customary practice. The definition is well known (having been part of the ABA Accord and the Prior Florida Reports). Further, guidance is provided on

page 34 of the final Report advising Opinion Recipients about this issue so that, if appropriate under the particular facts and circumstances of the Transaction, they can request expansion of the primary lawyer group to include litigators handling litigation matters for the Client.

Q. *One commentator disagreed with the statement in the Exposure Draft that an opinion letter as to a matter of Florida law should be signed by a member of The Florida Bar. The commentator expressed his concern as to whether that requirements works in the context of a multi-state firm.*

The language on this issue contained in the Exposure Draft was consistent with the Prior Florida Reports. Nevertheless, the Committees were persuaded that in a multi-state firm, it doesn't matter who signs the opinion letter so long as a Florida lawyer is responsible for the Florida aspects of the opinion letter and the firm has a way of confirming which Florida lawyer oversaw the opinion letter with respect to the Florida law issues (whether or not a Florida attorney is the attorney who signs the opinion letter). See "Signatures" on page 36 of the final Report.

5. <u>Entity Status and Organization of a Florida Entity (Pages 38-57 of the final Report)</u>

A. *One commentator disagreed with the position taken in the Report that the "organization" opinion does not require confirming that the steps required to organize the corporation were properly taken at the time that the corporation was organized. He stated his view that this position is inconsistent with customary practice around the country and that the words "valid existence as a corporation" can be used to communicate that opining counsel has not confirmed organizational steps at the time the entity was formed.*

The Committees believe that customary practice regarding the "organization" opinion has changed over time and that in today's modern third-party legal opinions world this opinion means that the corporation is "organized" at the time of the opinion letter with respect to the particular transaction as to which the opinion letter relates. Clarifying language has been added to the Report (on page 39 of the final Report) to make clear that if Opining Counsel knows (or is aware of information (red flags) that would cause a reasonable Opining Counsel to know) that the failure to have been properly organized at an earlier time is reasonably likely to cause adverse consequences to the corporation, then Opining Counsel must consider the "organization" of the corporation as of an earlier time before opining that the corporation is properly organized.

B. *One commentator noted that the there was a lack of clarity in the Report between the "organization" opinion and the "incorporated" or "existing" opinion.*

The Report has been modified to clearly differentiate between these two opinions and to make clear that an opinion that a corporation is "organized" includes an opinion that such corporation is "incorporated" and "existing," but not the reverse. See pages 39-40 of the final Report.

C. *One commentator noted that the discussion regarding "de jure" corporations applies to both the "organized" and the "incorporated/existing" opinion.*

The discussion in the Report regarding "de jure" corporations has been modified (on page 40 of the final Report) to separate this discussion from the discussion on the "incorporated" and "existing" opinion and to make clear that the discussion regarding "de jure" corporations applies to both the "organized" opinion and the "incorporated/existing" opinion.

D. *Consistent with this commentator's position regarding the "presumption of continuity and regularity (see paragraph 3(C) above), one commentator disagreed with the discussion regarding the officer's certificate to be obtained to support the "organization" opinion because it provides that Opining Counsel is not obligated to look behind the proper approval of the by-laws or the proper election or appointment of the directors and officers of the corporation in issuing the "organization" opinion.*

The Committees believe that in today's modern third-party legal opinions world, customary practice allows an Opining Counsel to limit the Opining Counsel's diligence regarding these matters to a review of the by-laws and resolutions provided by the Client with respect to the Transaction and the Transaction Documents and not to have to go behind these matters to confirm proper approval of such matters (relying on the presumption of continuity and regularity) unless Opining Counsel knows there is an issue with such information (or unless Opining Counsel is aware of information (red flags) that would cause a reasonable Opining Counsel to know that such facts are incorrect or unreliable). See the discussion in "Officer's Certificate" on page 41 of the final Report.

E. *One commentator noted that a factual certificate with respect to an LLC might be obtained from an officer rather than from a manager or member.*

The Report language in the diligence checklist on page 52 of the final Report has been modified to make clear that it is appropriate to obtain a certificate from an officer of an LLC if officers have been appointed by the managers or members of the LLC in accordance with the terms of the LLC's operating agreement.

6. <u>Authority to Transact Business in Florida (Pages 58-67 of the final Report)</u>

A. *One commentator expressed concern with the position taken in the Exposure Draft that an opinion letter as to the status of a foreign entity in Florida should include an express assumption that the entity has active status or is in good standing in its jurisdiction of organization. In the view of the commentator, this requirement creates a trap for the unwary.*

The Committees agreed with the commentator, and upon reflection, concluded that this is an assumption that is always implicitly included in an opinion of Florida counsel under these circumstances. However, the final Report (at page 58) recommends to Opining Counsel that Opining Counsel take appropriate steps in

all cases to confirm the active status of the Client foreign entity in its jurisdiction of organization because of the importance of that fact to the Transaction at issue and because of the importance of that fact to the other legal opinions generally being rendered simultaneously by Opining Counsel with respect to the Transaction and the Transaction Documents.

B. Various changes were made to this section of the Report based on comments discussed elsewhere in this Memorandum (such as adding the red flags language and cleaning up the proper use in this section of the words "customary practice"). See paragraphs 1(B) and 1(C) above.

7. Entity Power of a Florida Entity (Pages 68-75 of the final Report)

A. *One commentator, noting that many state bar reports differentiate between "consummation" of a Transaction (up to closing) and "performance" of the obligations under the Transaction Documents (acts after the closing), disagreed with the statement in the Report that the two mean the same thing for purposes of the "entity power" opinion.*

The Committees understand the technical differences between the use of the word "consummation" in the entity power opinion rather than the use of the word "performance" in such opinion. The Committees believe, however, that with respect to the entity power opinion, Opinion Recipients expect that the entity power opinion will cover both consummation of the Transaction and performance of the Client under the Transaction Documents, and that the wordsmithing of this opinion ought not affect the scope of this particular opinion as it is generally understood under customary practice (even if the Opinion Recipient is prepared to accept the opinion in that form). As a result, the Committees concluded that the use of the word "consummate" instead of "perform" in an opinion on entity power should not limit the scope of such opinion under Florida customary practice.

Clarifications have been made to the entity power section of the final Report (on page 68) to make the distinction between the two concepts ("consummation" and "performance") clear and also to make clear the Committees' views as to the meaning of the entity power opinion under Florida customary practice.

B. *One commentator raised questions about the statements in the Report regarding the meaning/propriety of giving an opinion that an entity has the power to own its properties and conduct its business.*

Modifications were made on page 69 of the final Report to make clear: (i) that in the view of the Committees, rendering or requesting this opinion is discouraged, and (ii) what this opinion means if it is rendered (and as to the recommended diligence necessary to render it).

C. Other changes:

(1) The Entity Power discussion has been reordered on pages 68 and 69 of the final Report so that it starts with a discussion regarding an opinion as to the power of an entity to enter into a Transaction and to perform its obligations under the Transaction Documents and thereafter discusses an opinion regarding the entity's power to conduct its business in the manner in which it is currently being conducted and to own its properties.

(2) The name of this Report section has been modified to remove the words "and authority", which words were determined to be unnecessary.

(3) As suggested by one of the commentators, the LLC discussion (on page 71 of the final Report) has been modified to reflect that officers appointed pursuant to the LLC's operating agreement can deliver a certificate to counsel on behalf of the LLC.

8. <u>Authorization of the Transaction by a Florida Entity (Pages 76-86 of the final Report)</u>

A. *One commentator disagreed with the position taken in the Report that in connection with issuing an authorization opinion with respect to a corporation it is necessary to review a shareholders agreement, voting trust agreement or other agreement among shareholders because it may affect the authorization of the transaction. Such commentator stated his view that review of these agreements would be applicable to a "no breach or default under agreements" opinion, but not to an "authorization" opinion.*

The Committees believe that a shareholders agreement, voting trust agreement or other agreement between or among shareholders can potentially have an impact on the authorization of a transaction by the corporation and therefore such agreements should be reviewed (if any such agreements are in place) in connection with rendering an opinion on the authorization of a Transaction by a Florida corporation. However, the language (on pages 76 and 77 of the final Report) has been clarified to make clear that this requirement only relates to shareholder agreements, voting trust agreements and other agreements between or among shareholders.

B. *One commentator disagreed with the Report's use of the "presumption of continuity and regularity" to conclude that actions were properly taken to authorize the transaction.*

The Committees have previously discussed their position on the presumption of continuity and regulatory (see paragraph 3(C) above). The use of the presumption in this context (on page 77 of the final Report) is consistent with that position.

C. *One commentator suggested that the reference to shareholders being in compliance with fiduciary duties was inappropriate.*

After discussion, the Committees agreed with the commentator and removed the reference to shareholders from the statement that the authorization opinion does not mean that directors and officers are in compliance with their respective fiduciary duties with respect to the Transaction and the Transaction Documents. See page 77 of the final Report.

D. *One commentator disagreed with the position taken in the Report that Opining Counsel should go up the chain and review the authorization of entities holding a membership or manager interest in an LLC as necessary for such Opining Counsel to be comfortable, based on the particular facts and circumstances, that approval of the transaction by the LLC Client has been obtained. The commentator noted that in its own analysis of the issue, the TriBar Opinion Committee had concluded that in many transactions this was an unrealistic expectation and had determined that when a member or manager is not a natural person, Opining Counsel can assume that such entity has approved the transaction without going behind such approval (unless such assumption is unreasonable under the circumstances). See the TriBar report on Third-Party Closing Opinions: Limited Liability Companies, fn 52 on page 689.*

The Committees considered the comment but, after extensive discussion, concluded that, in their view, under Florida customary practice Opinion Recipients expect an Opining Counsel to consider going up the chain in appropriate circumstances to be sure that appropriate authorization approvals have been obtained for a partnership, limited partnership or LLC entering into a Transaction. Language was added to the Report (on pages 79, 81 and 84 of the final Report) to highlight this responsibility of Opining Counsel and to make clear that if Opining Counsel is unable to reasonably conclude that the requisite approvals up the chain have been obtained, Opining Counsel should highlight in the opinion letter any limitations as to the scope of the opinion.

9. Execution and Delivery (Pages 87-89 of the final Report)

A. *One commentator disagreed with the position taken in the Report (on page 87 of the final Report) that the "no violation of laws" opinion is a "building block" opinion for the remedies opinion. The commentator stated his view that the fact that an agreement violates one or more laws does not necessarily make the agreement unenforceable.*

The Committees, after extensively debating the issue, concluded that they disagreed with the commentator about whether a "no violation of laws" opinion is a "building block" opinion for the remedies opinion. While recognizing that a violation of laws in an agreement does not render such agreement unenforceable in all cases, the Committees concluded that the likelihood of unenforceability in any given situation was high enough that, in their view, a "no violation of laws" opinion should be treated as a "building block" opinion for the remedies opinion in all cases. See also the more-detailed discussion regarding this issue in paragraph 10(A) below.

B. *One commentator disagreed with the statement in the Report that Opining Counsel can rely on a certificate from the Client confirming that the person who signed the agreement on the Client's behalf had the authority to do so. He noted that such statement assumes a legal conclusion that must be based on applicable law, the client's organizational documents and resolutions to the extent they specify who may sign for the client. The commentator also disagreed that this discussion relates to the presumption of continuity and regularity.*

The Committees were mindful that an opinion as to execution and delivery of Transaction Documents is a mixed question of law and fact requiring that Opining Counsel determine whether the person who is signing the Transaction Documents for the Client is the person authorized to sign such documents and that the Client has taken steps, though its authorized representative, to deliver the executed Transaction Documents with the intent of creating a legally binding agreement. At the same time, the Committees believe that lawyers should not be guarantors of their Client's signatures and that in today's modern transaction world (where formal, in-person closings are generally a thing of the past), lawyers should get the factual information needed to support the conclusion as to whether their Client has executed and delivered the Transaction Documents from their Client through a certificate to counsel.

One of the problems considered by the Committees was how to deal with the fact that certificates to counsel on the execution and delivery of Transaction Documents often state that the Client has executed and delivered the Transaction Documents rather than setting forth the underlying facts that will allow Opining Counsel to reach its legal conclusion regarding execution and delivery. To deal with that issue, the Report was modified (on pages 87 and 88 of the final Report) to be clear as to what a certificate to counsel couched in that manner means in connection with the rendering of this opinion. Further, the Committees give an example in the illustrative certificate to counsel that accompanies the Report as to an appropriate formulation of the factual certifications with respect to this issue.

Finally, the Committees believe that it is the presumption of continuity and regularity as it has developed in a modern opinions world that allows Opining Counsel not to have to look behind certain factual matters unless Opining Counsel has knowledge to the contrary or is aware of facts (red flags) that ought to cause a reasonable Opining Counsel to recognize that such facts are unreliable.

C. The boxed language on page 89 of the final Report was modified to clarify that this opinion is being rendered not based solely on the certificate to counsel, but rather based *in part* on the certificate to counsel (the certificate to counsel is being relied upon for the factual support underlying this opinion, but not for the legal analysis required to support this opinion).

10. The Remedies Opinion (Pages 90-107 of the final Report)

A. *One commentator stated his view that the scope of the "no violation of laws" opinion discussed in the Exposure Draft was too limited.*

The Committees were mindful that there is a difference between the scope of the "no violation of laws" opinion that is needed to support a remedies opinion (is the contract invalidated by law violations) and the broader general scope of the "no violation of laws opinion." However, it is only violations of laws that might invalidate the contract that apply as a predicate opinion with respect to the scope of the remedies opinion. As a result, this section (contained on pages 90 and 91 of the final Report) was not modified in the final Report.

B. *One commentator took issue with the statement in the Exposure Draft that "essential terms" is the Committee's view as to the scope of a remedies opinion under Florida customary practice. The commentator felt that this statement was inconsistent with the position also taken in this section of the Report that the default rule under Florida customary practice is that "each and every right and remedy is enforceable absent the inclusion of an extensive list of qualifications in the opinion letter that expressly limits the scope of the remedies opinion to the "essential terms" of the agreement.*

The Committees' position on the remedies opinion is one that has been crafted following extensive debate among Committee members, and seeks to bridge the fault line between the TriBar view and the California view in a manner that avoids the problems inherent in the disagreements between the two views.

As a starting point, it was the clear consensus of the Committees that in most situations, it is not the role of Opining Counsel to give comfort to an Opinion Recipient on the enforceability of "each and every" right, remedy and undertaking contained in an agreement, since, in virtually all cases where a remedies opinion is rendered, the Opinion Recipient is represented by counsel that is advising the Opinion Recipient regarding the enforceability of the provisions contained in the agreement. Further, it is often the case that the remedies provisions of agreements are not heavily negotiated (particularly in financing transactions). As such, in today's modern opinions world where there is a need for a cost-benefit analysis to support the work required to render a particular opinion, the Committees believe that the remedies opinion rendered by Opining Counsel as to enforceability of an agreement should only cover the enforceability of the "essential terms" of the agreement.

In the 1991 Report, the Committee's sought to substantively limit the scope of the remedies opinion to the "essential provisions" of the agreement. Further, in their 1996 and 2004 supplements to the 1991 Report, the RPPTL Section, following the approach taken in the ACREL All-Inclusive Opinion, stated that the qualifications to the remedies opinion needed to be included in the opinion letter to limit the scope of the remedies opinion to "essential provisions" but that what the Report

defines as a "material breach" qualification should be included in any opinion letter that contains a remedies opinion.

As the Committees debated the issues associated with the scope of the remedies opinion, there were some Committee members who wanted to follow the historic view taken in the 1991 Report (i.e., that a remedies opinion only covers the enforceability of the "essential provisions" of an agreement whether or not the remedies opinion includes express qualifications limiting the scope of the opinion in that regard), there were others who wanted to follow the TriBar approach (i.e., that an opinion that an agreement is "enforceable in accordance with its terms" ought to cover the enforceability of each and every right, remedy and undertaking in the agreement and that qualifications should only be added to the opinion letter to cover the potential unenforceability of those provisions in the agreement whose enforcement is questionable, thereby requiring Opining Counsel to review each provision in the agreement to assess which provisions might be unenforceable under the laws of and in the courts of the jurisdiction whose laws govern the agreement) and finally there were others who felt that the position taken by the real estate bar in the ACREL All-Inclusive Opinion was the right approach to follow.

After extensive debate, the consensus reached by the Committees in the Exposure Draft was that: (i) from a substantive standpoint, the right answer in today's modern opinions world is that an Opining Counsel ought to only be asked to cover in their remedies opinion the enforceability of the "essential provisions" of the agreement; and (ii) unless the qualifications required to limit the scope of the remedies opinion to "essential provisions" are expressly included in the opinion letter, the opinion letter will be deemed to cover each and every right, remedy and undertaking contained in the agreement subject to only those qualifications and limitations to the scope of the remedies opinion as are expressly included in the opinion letter.

Notwithstanding the foregoing, there remained a concern, and it is expressed in the Exposure Draft, that most Florida counsel rendering a remedies opinion think they are only covering "essential provisions" of an agreement even if they don't include a comprehensive set of qualifications in their opinion letters and that therefore the ultimate path taken by the Committees in the Exposure Draft might be creating a trap for the unwary.

In its debate on the finalization of the Report, the Committee again extensively debated this issue. The final Report expresses the Committees' conclusion that they made a mistake in the Exposure Draft and that, in the view of the Committees (expressed on page 93 of the final Report), the scope of a remedies opinion under Florida customary practice is (and has always been) implicitly limited to the enforceability of the "essential terms" of an agreement, whether or not the qualifications required to limit the scope of the opinion to the enforceability of the agreement's "essential terms" are expressly included in the opinion letter. Notwithstanding the foregoing, the final Report strongly

recommends including an extensive set of qualifications in any opinion letter containing a remedies opinion so that there are no misunderstandings regarding this issue between Opining Counsel and the Opinion Recipient.

C. *One commentator questioned the Committees' use of the word "should" in the Exposure Draft in the context of the statement "...which is understood to mean that a court ~~should~~* ***would*** *enforce the provision as written..."). The Commentator noted that under Section 3.5 of the ABA Guidelines, no distinction exists between "should" and "would."*

At the top of page 9 of the final Report, the Committees state their view as to what an opinion means, and differentiate between the use of the words "should" and "would" in this context. As a result, the Committees do not agree with the ABA guideline that states that the two words mean the same thing. The Committees also note that in other contexts bar associations have noted differences between the two words (such as in the context of tax opinions). For example, in stating that a court "should" rule in a certain manner, it means that based on current law and the particular facts, a reasonable Opining Counsel would conclude that a court should reach a particular legal conclusion under such circumstances; however, it is not a guarantee that the court "would" actually reach that conclusion. As a result, the Committees left the word "should" in this provision of the Report (on page 96 of the final Report).

D. *One commentator disagreed with the position taken in the Exposure Draft that the bankruptcy exception and the equitable principles limitation only qualify the remedies opinion (citing to the 1998 TriBar report on closing opinions, page 623, for the proposition that the bankruptcy exception excludes an entire body of law from the opinion letter). The commentator also noted his view that the language in the opinion letter should determine the applicability of the limitation and that the position taken by the Committees regarding this issue is inconsistent with a later statement in the Report that the bankruptcy exception and the equitable principles limitation also implicitly qualify opinions relating to security interests granted under the Florida UCC.*

The Committees extensively debated whether the bankruptcy exception and the equitable principles limitation ought to affect the scope of the opinions in an opinion letter beyond their impact on the scope of a remedies opinion and the scope of opinions regarding real property and personal property security interests (where clearly these two qualifications should always apply, whether or not these qualifications are explicitly set forth in the opinion letter). After discussion, the final Report was modified (on pages 97-98 of the final Report) to reflect that these qualifications implicitly cover all remedies opinions and security interest opinions, whether or not these qualifications are expressly set forth in the opinion letter, but may also qualify other opinions in the opinion letter depending on the scope of the language regarding these qualifications as set forth in the particular opinion letter. At the same time, the Committees were unable to think of

situations where these qualifications might substantively limit the scope of other opinions contained in a typical closing opinion letter.

E. *One commentator noted his concern that the language in the Exposure Draft to the effect that an opinion of Florida counsel that includes a remedies opinion should include a "generic" qualification should not be construed to cause an attorney to be determined to be negligent if they don't include a "generic" qualification in an opinion letter that contains a remedies opinion.*

As noted in paragraph 1(B) above, changes have been made throughout the Report to make clear as to when the Committees believe something is expected of an attorney in order to satisfy the standard of care under customary practice and when something is a common and acceptable opinion practice in this state. In the view of the Committees, the failure of a Florida lawyer who renders a remedies opinion to include a generic qualification in such lawyer's opinion letter does not, in and of itself, violate Florida customary practice. At the same time, Florida lawyers are cautioned in the Report as to the consequences of not including a "generic" qualification in an opinion letter that contains a remedies opinion and as to why the Committees believe that such a qualification should always be included in an opinion letter of Florida counsel containing a remedies opinion.

F. *One commentator noted his view that there is a stronger argument for not using the "practical realization" qualification (that a court will find that a contractual provision constituted a "principal benefit" to an opinion recipient when its invalidity caused the opinion recipient so much harm as to give rise to the lawsuit, no matter how insignificant the benefit of that particular contractual provision was) than the argument set forth in the Exposure Draft.*

The Committees agreed with the commentator and added language to the discussion of the "practical realization" qualification to deal with this issue (on page 101 of the final Report). The Committees also added their views responding to this argument.

G. *One commentator noted that if the Committees believe that the scope of the remedies opinion should only cover "essential terms," the Report should jettison the "generic" qualification and recommend that lawyers limit their enforceability opinions to the matters covered by (i), (ii) and (iii) of the "material breach" qualification.*

The Committees believe that although there is a certain logic to the commentator's suggestion, current third-party legal opinion practices around the country make the structure of remedies opinion qualifications in the framework recommended by the Report the appropriate course to follow under the circumstances.

H. *One commentator disagreed with the statement in the Exposure Draft regarding reliance on a certificate under certain circumstances. The commentator noted that it reflected the statements at issue as fundamentally "legal" in nature, rather than "factual" in nature.*

The Committees concluded that the commentator was correct. The final Report (in "Implicit Assumption as to Discharge or Disclosure of Fiduciary Obligations" contained on page 104 of the final Report) was modified to clean up what the Committees believe was a scriveners' error.

I. *One commentator noted that qualification (f) of the "other common qualifications" for "penalties" is tantamount to an exception for violations of public policy and is therefore inconsistent with Section 4.8 of the ABA Guidelines and eviscerates the opinion. The commentator argued that carving out violations of public policy from the legal issues covered by the remedies opinion effectively eviscerates the opinion.*

While the Committees understand the view of the commentator, the Committees continue to believe that the enforceability of penalties should not be covered within the scope of a remedies opinion under Florida customary practice. Further, this qualification is in other state and local bar reports and was in the Prior Florida Reports. As such, no change has been made to qualification (f) on page 105 of the final Report.

J. *One commentator questioned two of the common qualifications, (j) and (l). Qualification (j) covers provisions in an agreement which purport 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 of attorneys' fees. Qualification (l) covers provisions which prohibit or unreasonably restrict: (a) competition, (b) the solicitation or acceptance of customers, business relationships or employees, (c) the use or disclosure of information, (d) the ability of any person to transfer any property, or (e) activities in restraint of trade.*

One commentator suggested that this section should only include a list of qualifications as to which enforceability of such provisions might be an issue under Florida law.

Another commentator questioned why the Report suggests the inclusion in an opinion letter that contains a remedies opinion of a lengthy list of specific qualification of agreement provisions that might not be enforceable where the enforceability of certain of those provision in Florida is not at issue.

The Committees continue to believe that the common qualifications in the list contained on pages 105 and 106 of the final Report are the ones that ought generally to be excluded from coverage in a remedies opinion. Further, the Report follows the model discussed in paragraph 10(B) above that focuses on limiting the

scope of the remedies opinion to only the "essential terms" of an agreement. Additionally, the Report also states that many Opining Counsel choose to include in an opinion letter that contains a remedies opinion an extensive list of explicit qualifications in order to exclude from the scope of the remedies opinion all of the potentially problematic provisions without having to require Opining Counsel to spend any time determining whether any or all of these provisions is or is not enforceable under Florida law, and that this approach to opinion practice is quite acceptable and does not, in and of itself, violate Florida customary practice. See the discussion on pages 96 and 97 of the final Report.

The Committees also reviewed the list of common qualifications contained in the Report and concluded that such list continues to be the correct list to include in the illustrative forms of opinion letters that accompany the Report.

Several members of the Committees are currently participating in a WGLO project looking at whether common remedies opinion qualifications address provisions in agreements that are generally enforceable or unenforceable in various jurisdictions (including Florida), with a goal of creating a national reference guide on these issues. While the Committees think that this will be helpful to both Opinion Recipients and Opining Counsel, they do not believe that such an analysis changes the basic premises that are inherent in Florida customary practice as to the scope of a remedies opinion and as to the cost-benefit analysis that drives the Committee's conclusions regarding the scope of a remedies opinion and regarding the qualifications that should be included in an opinion letter that contains a remedies opinion.

K. *One commentator disagreed with the potential inclusion of a qualification regarding the potential unenforceability of a voting agreement, a drag along and tag along provision or a "pay to play" provision in the context of an opinion on the enforceability of a shareholders agreement.*

In connection with their consideration of this comment, the Committees reviewed again the California venture capital opinion report and the form of opinion letter published by the National Venture Capital Association. The Committees also conducted research on the issue.

At the present time, the Committees are not aware of any case law in Florida that supports the enforceability or unenforceability of these types of provisions. As a result, this proposed qualification was left in the Report (on page 106 of the final Report) for use in appropriate circumstances. However, the Committees added language to the final Report to highlight that Opining Counsel, in deciding whether to include these qualifications in Opining Counsel's opinion letter, may wish to consider who Opining Counsel is representing in connection with the Transaction.

11. <u>No Violation and No Breach or Default (Pages 108-113 of the final Report)</u>

A. *One commentator noted that, contrary to what was stated in the Exposure Draft, a statement that a transaction doesn't violate the Client's material agreements without a knowledge qualifier is a legal opinion and not a factual confirmation.*

After discussion, the Committees concluded that the commentator was right and changed the language in the Report (on page 110 of the final Report). The Committees also added a clarification (on page 109 of the final Report) to make clear that, in the view of the Committees, this broad opinion should never be requested or given.

B. *One commentator noted concerns with the language in the Exposure Draft in the discussion on the "no violation of agreements" opinion about Opining Counsel's knowledge of agreements based on work undertaken for the client. The commentator was concerned that the "deemed to be aware" language used in this section (on page 110 of the final Report) might require opining counsel in a large firm to know what others in the firm are doing for the client. The commentator was also concerned that it is unclear how Opining Counsel's "knowledge" would affect an Opining Counsel that is rendering the "no violation of agreements" opinion with respect to a specified list of agreements.*

Another commentator recommended that the Report be clarified to be clear that the agreements known discussion does not apply if the opinions are given with respect to listed agreements.

The Committee made two changes in response to these comments. First, language was added on page 110 of the final Report to make clear that "known" agreements are only agreements known to the members of the "primary lawyer group" (and a cross reference was added in this discussion to "Common Elements of Opinions-Knowledge"). Second, the language in this section (on page 110 of the final Report) was clarified to make clear that agreements known to Opining Counsel are not covered by a "no breach of or default under agreements" opinion to the extent that such opinion covers a list of enumerated documents (so long as such knowledge of other agreements does not cause the opinion to be misleading).

C. *One commentator disagreed with the statement in the Exposure Draft as to what is covered by applicable law in the context of a "no violation of laws" opinion.*

This language has been clarified on page 112 of the final Report to address the concern noted by the commentator.

12. <u>No Required Governmental Consents (Pages 114-116 of the final Report)</u>

A. *One commentator disagreed with the inclusion in the Exposure Draft of an exclusion with respect to consents required for ongoing operation of the Client's business or the ownership of its properties, since, in his view, consents required*

for the operation of the Client's business or the ownership of its properties are not covered by the scope of the "no required governmental consents" opinion.

The commentator correctly points out that the scope of the "no required governmental consents or approvals" opinion by the express language of the recommended form of opinion does not cover consents required for the ongoing operation of the Client's business or the ownership of its properties. However, the Committees believe that Florida lawyers are often concerned that an Opinion Recipient may misunderstand the scope of this opinion, and, as a result, the Committees believe that many Florida Opining Counsel include a qualification to this effect in their opinion letters. The recommended form of such qualification is contained on page 115 of the final Report.

B. *One commentator raised an issue with respect to the client certificate discussed in "Certificate of Client and Review of Applicable Laws" (on pages 115 and 116 of the final Report). The commentator stated his belief that the suggested certificate is infrequently obtained.*

The Committees are aware that often a certificate to this effect is not obtained because Opining Counsel has sufficient information based on what they know about the Client's activities to feel comfortable giving the "no required governmental consents or approvals" opinion. However, the Committees recommend that obtaining the certificate discussed will assist Opining Counsel in supporting the diligence that Opining Counsel undertook to render this opinion if questions arise with respect to the support for this opinion after the opinion is rendered. Modifications were made on page 116 of the final Report to make this clear.

C. *One commentator noted his view that a "no required governmental consents or approvals" opinion should include coverage of post-closing obligations, at least in the context of loan opinions.*

In the view of the Committees, this opinion does not cover post-closing obligations under Florida customary practice, and the discussion on the top of page 115 of the final Report has been expanded to make clear that Florida Opining Counsel should resist efforts of Opinion Recipients or their counsel to expand the scope of this opinion. Further, the Report cautions Opining Counsel who agree to this modification in their opinion letter to consider the diligence required to cover post-closing performance of the Client's obligations under the Transaction Documents.

The Committees considered whether Florida customary practice limits the scope of this opinion to the pre-closing obligations under the Transaction Documents even if the language in the opinion letter covers performance of post-closing obligations under the Transaction Documents. However, after much discussion, the Committees concluded that if the concept of post-closing performance is expressly covered in the opinion letter, then the scope of the opinion will be

deemed to cover post-closing obligations. The Committees added cautionary language to the final Report with respect to this issue to highlight the issue to Florida counsel**.**

D. *One commentator noted his view that the scope of the client certificate discussed on pages 115 and 116 of the final Report does not need to cover the location in which the client engages in business because the opinion only covers Florida and federal law.*

After discussion, the Committees agreed with the commentator and accordingly revised this discussion in the Report.

13. No Litigation (Pages 117-121 of the final Report)

A. *One commentator raised an issue regarding the statement in the Exposure Draft that the no litigation confirmation should never be construed as reflecting the anticipated results of litigation. He stated his view that this statement is unnecessary because the wording of the no litigation confirmation does not say anything about the anticipated results of any disclosed litigation.*

The Committees agreed with the commentator that the plain meaning of the words of the typical "no litigation" confirmation does not cover the anticipated results of the litigation. At the same time, the Committees felt that it was important to make this statement (which is contained at the end of the first paragraph on page 117 of the final Report) so that it is absolutely clear that, in the view of the Committees, a "no litigation" confirmation does not cover the anticipated results of litigation.

B. *One commentator stated his view that the discussion on ethical duties in "Selected Issues-Pending or Overtly Threatened Litigation or Governmental Proceedings" in the Exposure Draft is not raising an ethical issue, but rather a potential legal claim against the lawyer delivering the opinion letter for negligent misrepresentation.*

The Committee modified this section, which is contained on page 120 of the final Report, to discuss both the potential legal claim and the potential ethical issue that a lawyer should consider under these circumstances.

C. *In this same section discussed in (B) above, the commentator stated his view that the recommended form of the opinion limiting the confirmation to claims overtly threatened in writing is unnecessary and doesn't belong in that discussion.*

In light of this comment, the Committees revised the Report to be clear that similar issues arise as to overtly threatened claims that are not asserted in writing as arise with respect to unasserted claims.

D. *One commentator expressed the view that the discussion in "Selected Issues-Knowledge" that prudence might suggest that a firm consider seeking information from lawyers as to their knowledge of matters beyond the lawyers in the primary*

lawyer group when rendering a no litigation confirmation (notwithstanding the limitations in the opinion letter to the lawyers in the primarily lawyer group) in light of the holding in Dean Foods is incorrect and inconsistent with the TriBar position on the issue.

The Committees continue to believe that prudence suggests that a law firm might wish to consider seeking information from those who represent the Client in litigation matters even if the primary lawyer group is more limited and does not include the litigators handling any such matters. The Committees believe that in light of the holding in the Dean Foods case, a more conservative approach that is consistent with how a judge might look at the situation in hindsight makes sense under the circumstances. Revisions have been made on pages 120 and 121 of the final Report to reflect the Committees views in that regard.

E. *One commentator expressed his view that the analogy in this same section of the Exposure Draft with respect to an auditors' request for information could create unnecessary issues if opinion practices and auditor responses were mixed together in this manner in a state bar report on legal opinion practices.*

After discussion, the Committee removed the reference to auditor requests for information from this section of the final Report. The revised language is contained on page 121 of the final Report.

Notwithstanding the foregoing, the Committees recognize that, despite this intended separation, many attorneys often view the no litigation confirmation from the framework of a response to an auditor's request for information. As a result, a reference to the ABA Statement of Policy Regarding Lawyer's Responses to Auditor Requests for Information has been added in "Limitations on Evaluation of Merits" on page 121 of the final Report.

14. Opinions with Respect to Securities (Pages 122-130 of the final Report)

A. *One commentator noted that he was unsure whether the Exposure Draft was suggesting that an opinion that shares are validly issued can be based on a certificate by an officer confirming the ultimate fact that the issuance was approved (as opposed to a certificate representing that a resolution in the form attached to the certificate was adopted by the Board).*

The diligence checklist regarding this issue that is contained on page 125 of the final Report was modified to make clear that an opinion on the authorization and issuance of shares can be based on a certificate from the Client that provides the documents required by Opining Counsel to assess whether shares have been validly authorized and issued (articles, by-laws and resolutions). However, the final Report (at page 124) has also been modified to reflect that unless Opining Counsel is aware of facts to the contrary (or red flags that make such facts unreliable), Opining Counsel need not look behind such resolutions to determine whether they were properly approved.

B. *One commentator noted that in the outstanding number of shares opinion it is not an appropriate reference to suggest that Opining Counsel review the stock certificates, since the stock certificates are held by the shareholders.*

The final Report (at page 123) has been modified to reflect that Opining Counsel might review or agree to review the stock ledger and other available stock records of the corporation.

C. *One commentator stated his view that the authorized shares opinion covers the authorization and creation of the shares to be issued and not their issuance.*

The Committees agreed with the commentator and the final Report (on page 124) was revised to make this point clear.

D. *One commentator noted that the "fully paid" opinion looks to the receipt of the consideration called for by the resolution approving issuance of the shares (as well as compliance with any requirement for the receipt of consideration in the applicable corporate statute, articles or bylaws) and does not cover requirements under subscription agreements (which, in the commentator's view, are not normally reviewed by counsel in giving a "fully paid" opinion).*

The Committees modified the final Report (on pages 126 and 127) to recommend that Opining Counsel should review a Subscription Agreement to the extent that such Subscription Agreement is referred to in the resolutions authorizing the share issuance (and to the extent that it sets forth the consideration to be paid for the shares).

E. *One commentator noted that some corporations issue shares but don't issue certificates and don't comply with the uncertificated shares provisions (such as mutual funds).*

The Committees believe that the FBCA provides for the issuance of uncertificated securities and that for securities to be uncertificated under Florida law the requirements of the statute must be followed.

Notwithstanding the foregoing, the Committees recognize that many shares are held in street name through the Depository Trust Company (DTC) system. However, these shares are technically held of record by CEDE & CO. and are then beneficially held by their ultimate owners through brokerage firms that are part of the DTC system.

F. *One commentator disagreed with the statement in the Exposure Draft that Opining Counsel should resist requests for opinions regarding the authorization and valid issuance of prior securities issuances and disagreed with the statement that the Exposure Draft made as to the value of such opinion. The commentator stated that underwriters insist on receiving this opinion and that this comment in the Exposure Draft doesn't reflect reality.*

Historicity, an opinion that previously issued shares were duly authorized and validly issued was delivered in the context of an underwritten public offering, although it was generally not rendered under other circumstances. However, there was often resistance to rendering this opinion if Opining Counsel had not represented the company in these prior issuances of its shares. The Committees believe that, over time, there has been a shift in the requirement for this opinion, and that today this opinion is not always required in underwritten public offerings (unless the offering relates to a secondary offering of the particular shares being transferred). In the view of the Committees, the value of this opinion is almost always outweighed by its cost. See "Outstanding Equity Securities" on page 130 of the final Report.

G. The final Report only addresses opinions as to issuances of common stock by Florida corporations and does not address issuances of preferred stock by Florida corporations or issuances of interests in partnerships or limited liability companies by such entities. The Committees intend to address these additional topics by future supplements to the Report. However, to provide guidance to Florida attorneys regarding these matters until such supplements are issued, a reference has been added on page 122 of the final Report to two reports of the TriBar Opinion Committee that cover these topics.

15. Opinions with Respect to Collateral Under the Uniform Commercial Code (Pages 131-150 of the final Report)

A. *One commentator expressed the view that the recommended scope limitation for a UCC opinion should not include a discussion regarding the Client's right, title or interest in the collateral, since this is not a scope limitation issue.*

The Committee agreed with this comment and modified the recommended form of UCC Scope Limitation on page 132 of the final Report to remove reference to the Client's right, title and interest in the collateral. However, a qualification of the opinion disclaiming any opinion with respect to the Client's right, title or interest in the collateral continues to be included elsewhere in this section of the Report.

B. *One commentator noted that with respect to the laws governing perfection of a security interest, a court will look to the choice of law rules of the forum.*

The final Report reflects the Committees' view on the law governing perfection of a security interest. See "Law Governing Perfection of Security Interest" on pages 137 and 138 of the final Report.

C. *One commentator suggested that in the perfection by filing opinion, the proper filing of the Financing Statement with or acceptance by the Filing Office is sufficient to perfect the security interest, compared to the language in the Exposure Draft, which states that upon the filing of the financing statement with,*

and acceptance by, the filing office of, the financing statement, the security interest will be perfected.

The Committees disagreed with the commentator and did not make the commentator's suggested change to the language of the perfection by filing opinion. See page 138 of the final Report.

D. The discussion on security interests in commercial tort claims was moved to page 137 of the final Report and is now included in the section on opinions regarding the creation and attachment of a security interest.

E. *One commentator suggested revisions to the recommended qualification regarding continued effectiveness of financing statements that was contained in the Exposure Draft to remove language that is inapplicable under revised Article 9.*

The final report cleans up the language in the recommended qualification, including making the change suggested by the commentator. See page 140 of the final Report.

F. *One commentator disagreed with the discussion in the section "Accuracy of the UCC Search Report" section of the Exposure Draft with respect to the possibility that Opining Counsel might perform their own search of the UCC records in the filing office. He noted his view that this would be a really bad idea.*

While the Committees agree that such practice is highly discouraged, the Committees are aware that some Florida lawyers continue to render a limited filing perfection opinion based on their own search of the state's UCC records. The final Report (at page 146) states that if Opining Counsel agrees to render this opinion based on its own search of the UCC records, Opining Counsel is responsible for any inaccuracies in the search.

16. <u>Opinions Particular to Real Estate Transactions (Pages 151-160 of the final Report)</u>

A. No substantive changes were made to this section of the Report, although several clean-up language changes were made.

17. <u>Florida Usury Law (Pages 161-166 of the final Report)</u>

A. *One commentator recommended that the Report should make clear (with respect to a full-blown usury opinion) that counsel is not expected to do the mathematical calculations necessary to determine whether the loan is usurious.*

As a starting point, the Report recommends that Florida lawyers not provide an opinion as to whether the particular facts and circumstances of a loan transaction are not usurious under Florida law, since this opinion requires extensive analysis to be completed regarding the particularities of the Transaction and applicable Florida usury law. In the context of the cost-benefit analysis that ought to define

opinion practices, the Committees believe that the lender's counsel advising such counsel's lender client is in the best position to advise their client with respect whether the particular facts and circumstances of a loan transaction make that loan transaction usurious or not usurious under Florida law.

To exclude coverage of usury laws from an opinion letter, Florida Opining Counsel must include an express exclusion in their opinion letter. Otherwise, Florida usury law is covered by the scope of a remedies opinion and a "no violation of Florida laws" opinion of Florida Opining Counsel. Alternatively, Opining Counsel may render the recommended usury opinion form, which recites the maximum allowed interest rate under Florida law, but leaves it to the Opinion Recipient to determine whether the particular facts and circumstances of the loan at issue are usurious under the circumstances. In such circumstances, no mathematical computations are required.

Notwithstanding the foregoing, the final Report (at page 165) states that if the particular facts and circumstances of the loan transaction at issue in the opinion letter are facially usurious, Florida customary practice does not permit the use of the recommended form of usury opinion.

Moreover, it is impossible to render an express opinion that the particular facts and circumstances of a loan transaction are or are not usurious without making certain mathematical calculations (although as a general rule lawyers are not required to make mathematical calculations in rendering legal opinions, usury opinions are a limited exception to that rule under certain circumstances). To render an opinion that the particular facts and circumstances of a loan transaction are not usurious, Opining Counsel must review the Transaction Documents to assess, under the particular facts and circumstances of the loan transaction at issue: (i) what is deemed to be "interest" under Florida usury law (and how some of those charges are to be "spread" over more than one annual period), (ii) what is the principal amount of the loan, and (iii) based on those numbers, what is the actual annual rate of interest being charged on the particular loan transaction. Based on these computations, Opining Counsel can reach a conclusion as to whether or not the particular facts and circumstances of the loan are or are not usurious. See discussion on pages 165 and 166 of the final Report.

B. *One commentator recommended that the Report should expressly provide that an opining counsel does not violate customary practice if such opining counsel does not include assumptions in their opinion as to valuation.*

A statement has been added to the final Report (on page 166) that delivering a full-blown usury opinion or not expressly including in such opinion the assumptions as to valuation used to reach that conclusion does not, in and of itself, violate Florida customary practice.

18. <u>Choice of Law Opinions (Pages 167-173 of the final Report)</u>

A. *One commentator stated his view that the discussion on the choice of law opinion in the Exposure Draft was deficient in its analysis of the Restatement (Second) of Conflicts of Law.*

The Committees made clarifications to the choice of law discussion to make sure that the analysis of the Restatement contained in the final Report (on page 167) is accurate and complete. The Committees also updated the case law discussed in the final Report (on pages 167-170) to reflect current Florida court cases on the topic and to warn users of the Report that this area of the law is still evolving.

B. *One commentator noted that the opinion on choice of law is a "choice of law" opinion and not a "choice of laws" opinion, since, in his view, "law" covers both statutory law and common law and "laws" covers only statutory law.*

The Committees agreed with the commentator that this opinion is a "choice of law" opinion and covers the selection of the law of a particular jurisdiction as the governing law of a particular transaction document. While, in the view of the Committees, the words "law" and "laws" are used interchangeably by many lawyers and therefore the distinction is not as clear as suggested by the commentator, an effort was made in the final Report to use the word "law" in the discussion of the choice of law opinion and to make clear that the selection of a governing law for a transaction document includes both statutory law and common law (cases). See, for example, the first paragraph of "Opinions of Florida Counsel as to Choice of Law" on page 170 of the final Report.

C. *One commentator disagreed with the inclusion in the recommended "as if" opinion contained in the Exposure Draft that expressly excludes from the scope of such opinion the choice of law provision contained in the Transaction Documents, since, in the view of the commentator, an "as if" means by definition that the governing law clause choosing another state's law is being disregarded.*

After discussion, the Committees decided to leave the exclusion in the recommended form of "as if" opinion to make it clear that the governing law provision is expressly excluded from the scope of an "as if" opinion. See page 173 of the final Report. Nevertheless, the Committees believe that, under Florida customary practice, an "as if" opinion under Florida law implicitly excludes coverage of the governing law provision contained in the Transaction Documents even if such governing law provision is not excluded by express language.

D. *One commentator raised a question as to whether it is appropriate to give a choice of law opinion when also giving an "as if" opinion that the Transaction Documents are enforceable if Florida law applies.*

The Committees believe that it is appropriate to give both of these opinions in the same opinion letter. The first opinion, excluding from its scope the governing law provision, covers whether the Transaction Documents are enforceable if Florida

law were the governing law. The second opinion expressly addresses whether the governing law provision contained in the Transaction Documents should be upheld by a Florida court. In the view of the Committees, these opinions are not inconsistent. See paragraph 4(O) above.

19. Special Issues to Consider When Acting as Local Counsel (Pages 174-182 of the final Report)

A. No substantive changes were made to this section, although several clean-up language changes were made. Some of these language changes were made based on suggested language changes received from one or more of the commentators.

20. Opinions Excluded from the Scope of this Report (Pages 183-185 of the final Report)

A. *One commentator took issue with the statement in this section of the Report that private sales of securities to which Federal securities law apply may require delivery of a third party legal opinion.*

The Committees are aware that in many private securities offerings (particularly larger ones) where opinions were commonly rendered in the past, it is no longer common practice to require the delivery of opinions at the closing of such transactions. However, in Florida, where many transactions that take place tend to be smaller transactions, such opinions are often still requested and rendered. See page 183 of the final Report.

B. *One commentator suggested that the "Federal Securities Law Opinions" discussion refer to a 2004 report on "Legal Opinions in SEC Filings" that was promulgated by Task Force of the ABA Business Law Section Federal Regulation of Securities Law Committee.*

After reviewing the 2004 report, the Committees added a reference to such report on page 183 of the final Report.

Additionally, a reference was added in this section of the final Report to Staff Legal Bulletin 19 regarding "Legality and Tax Opinions."

C. No additional substantive changes were made to this section, although several clean-up language changes were made. Some of these language changes were made based on suggested language changes received from one or more of the commentators.

Summary of Key Substantive Changes to the
"Report on Third-Party Legal Opinion Customary Practice in Florida"[1]

Changes fall into three categories:

1. changes to address issues where the Committees determined that the exposure draft of the Report was either in error or might be read in a manner not intended by the Committees;

2. changes to make the Report clearer on numerous topics of importance; and

3. edits to fine tune the Report generally.

The following reflects a list of the key changes made to the Report that fit into the first category:

- "Customary Practice" v. Common or Typical Opinion Practice. Changes made to differentiate between when the Committees are discussing their views on Florida third-party legal opinion customary practice (i.e., the applicable standard of care) and when the Committees are describing common third-party legal opinion practices in Florida (guidance on the Committees' views regarding those practices). See, for example, page 9 of the final Report.

- Guidance v. Standards. Clarifies that since the Committees and the Bar Sections are not legislative bodies they don't have the power to legislate (i.e., to set standards). Rather, reflects that the Report provides guidance regarding the views of the Committees on third-party legal opinion customary practice in Florida. This clarification included a change in the name of the Report to remove the use of the word "standards."

- Presumption of Continuity and Regularity; No Right to Rely on Facts Known to Be Incorrect or Unreliable. Explains more clearly the views of the Committees on the presumption of continuity and regularity, which presumption allows Florida Opining Counsel to review a client's entity records that directly relate to the particular third-party legal opinions being rendered without, as a general matter, having to review all of the Client's minute books or other historical entity records in rendering a third-party legal opinion. Also makes clear, throughout the Report, that an Opining Counsel cannot rely on assumed facts or other assumptions that such counsel knows are wrong or knows are unreliable (because Opining Counsel is aware of facts (red flags) that ought to call such assumed facts or assumptions into question by a reasonable Opining Counsel). See, for example, pages 11 and 12 of the final Report.

[1] This is a list of key substantive changes to the final Report as compared to the exposure draft of the Report. Reference is made to the comprehensive marked version of the Report, current draft dated November 15, 2011. Reference is also made to the Memorandum, dated November 15, 2011, that identifies with specificity the various substantive comments received with respect to the exposure draft of the Report, how the Committees dealt with each such comment and the rationale behind each such response. Terms defined in the Report and in the Memorandum that are used in this list have the same meanings herein.

- Clarifying Consequences if Inadvisable or Inappropriate Opinions are Rendered. Expressly states that, if a Florida Opining Counsel renders third-party legal opinions that the Report deems inadvisable or third-party legal opinions that the Report states are subjects as to which a third-party legal opinion should not be requested or rendered (inappropriate opinion requests), the rendering of any such opinions does not, in and of itself, violate Florida customary practice. See, for example, page 15 of the final Report.

- Clarifying Suggested Discussions with Client Prior to Rendering a Third-Party Legal Opinion. Revises the discussion concerning the "duty of loyalty" to a lawyer's client and the obligation of Opining Counsel to explain the scope of the third-party legal opinion and its consequences to a client and makes it clear that there are issues which an Opining Counsel should consider discussing with Opining Counsel's client before a particular third-party legal opinion is rendered on the client's behalf. See pages 15-17 of the final Report.

- Treating Each Updated Third-Party Legal Opinion as a New Opinion Letter. Clarifies that, in the view of the Committees, an updated third-party legal opinion letter should always be treated as a new opinion letter. See page 18 of the final Report.

- Ability to Assume the Genuineness of Client's Signatures. Confirms that Opining Counsel can assume the genuineness of all signatures, including the signatures of the Opining Counsel's client (unless such Opining Counsel knows of facts to the contrary or is aware of facts (red flags) that make such assumption unreliable). See page 28 of the final Report.

- Ability of Out-of-State Lawyer in a Multi-State Firm to Sign a Third-Party Legal Opinion Letter. Clarifies that, in a multi-state law firm, a third-party legal opinion letter with respect to Florida law matters may be signed by a non-Florida lawyer so long as a Florida lawyer oversees the Florida aspects of the opinion letter and the firm can identify the Florida lawyer taking on that responsibility. See page 36 of the final Report.

- Explaining Meaning of Words in Entity Opinions. Clarifies the meaning of the words "organization," "incorporated" and "existing" in third-party legal opinion letters regarding Florida entities under Florida customary practice. See pages 38-40 of the final Report.

- Officers of LLCs Can Sign Certificates of Counsel. Clarifies that, if officers have been appointed under the operating agreement of a Florida LLC, such officers (rather than a member or manager) may sign certificates to counsel on behalf of the LLC. See the diligence checklist on pages 51 and 52 of the final Report.

- Authority to Transact Business Opinion; Implicit Assumption. Clarifies that, under Florida customary practice, a third-party legal opinion that an entity is authorized to

transact business in Florida includes an implicit assumption that the entity is in good standing in its jurisdiction of formation or organization; however, recommends that good practice suggests that such good standing be independently confirmed. See page 58 of the final Report.

- Scope of Entity Power Opinion. Clarifies the views of the Committees regarding the scope of the entity power opinion under Florida customary practice. Also removes the word "authority" from the title of this section. See pages 68 and 69 of the final Report.

- Authorization of Transaction Opinion; Review of Certain Agreements. Confirms the view of the Committees that Florida Opining Counsel should review any shareholders agreements, voting trust agreements or other agreements between or among shareholders in making a determination as to whether a particular transaction has been properly authorized by all necessary entity action. See pages 76 and 77 of the final Report.

- Up the Chain Review of Authorization of the Transaction. Confirms the view of the Committees as to the extent that Florida Opining Counsel must go up the chain and review the authorization of entities that are partners, members or managers of other entities. See pages 79, 81 and 84 of the final Report.

- Remedies Opinion Only Covers Enforceability of "Essential Provisions". Confirms the view of the Committees that a remedies opinion of Florida Opining Counsel on matters of Florida law only covers within its scope the enforceability of the "essential" provisions of the transaction documents, even if the qualifications and limitations needed to explicitly reduce the scope of such remedies opinion to its "essential" terms are not expressly included in the opinion letter. Also expresses the strong recommendation of the Committees that, notwithstanding the Committees' view on the scope of the remedies opinion under Florida customary practice, Florida counsel should expressly include in any third-party legal opinion letter that contains a remedies opinion the qualifications and limitations that expressly limit the scope of such remedies opinion to the "essential" provisions of the transaction documents. See page 93 of the final Report.

- Acceptable Practice to Include Complete List of Qualifications Even if Not Directly Applicable. Confirms the view of the Committees that, based on a cost-benefit analysis, common Florida opinion practice allows inclusion of an extensive list of qualifications in an opinion letter containing a remedies opinion without having to remove those qualifications that are not directly applicable to the enforceability of the provisions contained in the transaction documents on which the opinion is being rendered and without regard to which of these qualifications may not be enforceable under Florida law. See pages 96 and 97 of the final Report.

- Extent to Which Agreements are Known. Clarifies the extent to which other agreements are "known" to Opining Counsel for purposes of rendering the "no breach

of or defaults under agreements" opinion when such opinion is not limited to an enumerated list of other agreements. Also clarifies that other "known" agreements need not be reviewed when such opinion is expressly limited to an enumerated list of other agreements (unless not considering such "known" other agreements makes the opinion misleading). See pages 109-111 of the final Report.

- Consents and Approvals – Limited to Those Applicable to Closing and Pre-Closing Performance. Clarifies the view of the Committees that a "no governmental consents and approvals" opinion of Florida counsel only covers closing and pre-closing performance of the client unless the scope of such opinion is expressly expanded in the third-party legal opinion letter to include post-closing performance by the client. See pages 114-116 of the final Report.

- What Constitutes Knowledge in No Litigation Confirmation. Clarifies the view of the Committees regarding the "knowledge" of Opining Counsel in rendering a no litigation confirmation. See pages 117-121 of the final Report.

- Issuance of Common Stock Opinion – Extensive Cleanup; But Substantively Mostly The Same. Extensive cleanup of the discussion on opinions with respect to the issuance of shares of common stock by a Florida corporation (duly authorized, validly issued, fully paid and non-assessable). See pages 122-130 of the final Report.

- Not Customary to Render Opinions on Prior Securities Issuance; Cost-Benefit Analysis. States the view of the Committees that, based on a cost-benefit analysis, it is not common practice in Florida to render an opinion regarding the authorization and valid issuance of prior securities issuances. See page 130 of the final Report.

- UCC Opinions – Extensive Cleanup; But Substantively Mostly The Same. Extensive clean-up of the discussion on security interest opinions under the UCC. See pages 131-150 of the final Report.

- Clarifies Difficult Analysis That Is Required in Order to Render a Usury Opinion Based on Specific Facts and Circumstances. Modifies the Florida usury law discussion to further clarify the difficult analysis required to render an opinion that the particular facts and circumstances of a loan transaction are not usurious under Florida law. See pages 161-166 of the final Report.

- Significant Clarification of Issues Bearing on Rendering a Choice of Law Opinion. Modifies the choice of law discussion to further clarify Florida law with respect to the issues to consider when rendering an opinion that the governing law provision in an agreement will be upheld by a Florida court. See pages 167-173 of the final Report.

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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 , 2011

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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 required 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   , 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   , 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, four reports by the TriBar Opinion Committee, two 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 , 2011) and by the Executive Council of the RPPTL Section (on December , 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 or 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 (and authority), 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 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 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 lawyers 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 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 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. 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 "concurs" 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 then 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 Applicable Law 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 laws 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 __, 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 officers 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 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. *LLLP Certificate*. A Florida limited partnership may also qualify as a limited liability limited partnership ("**LLLP**") 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 LLLP 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 LLLP 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 LLLP).

10. *General Exclusions from Opinion*. Unless otherwise expressly stated in the opinion letter, an opinion that a Florida limited partnership (or LLLP) 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 LLLP) 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 LLLP 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 revolk 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 on 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 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 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 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, and (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 (iv) 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 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) or 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) or 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

- 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 a 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 includes 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 than 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" above), 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 or Default of 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 limitedpartnership'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 do 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 genuiness 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 Opining—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 then 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, 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 forgoing, 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 recommend "generic" qualified language described below makes this clear. In the view of the Committees, it is inappropriate to request that the "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 – 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 – 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 Applicable Law. 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 a Transaction Document, 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 Law 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 laws of the other state are the same as the laws 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 contained 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, order or decree 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 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" Statement

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 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 overly 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 overly 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 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 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 senior executive officers) 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 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 pre-incorporation 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 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 on 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" an agreement and "no violation of law" 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 laws 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 laws 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 laws govern 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 day 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.

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 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; (v) 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; (vi) 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; (vii) a security interest which was perfected automatically upon attachment pursuant to Section 679.3091, Florida Statutes; (viii) a security interest temporarily perfected without filing or possession under Section 679.3121(5), (6) or (7), Florida Statutes; (ix) a security interest perfected by taking possession or the taking of delivery under Section 679.3131, Florida Statutes; (x) 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). 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.

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 as 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 the boilerplate 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:

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).

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 Transactions 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 real estate loan opinion letter 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 Transactions 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 the 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 address 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'Arbalete, 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 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 laws 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 such 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, 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 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 register to do 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 the "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 are 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. As 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 law 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 stockholders;
- 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.

Appendix "A"

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.

	Page
"**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.	182
"**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, 112
"**Article 9**" means Chapter 679 of the Florida Statutes.	131
"**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.	132
"**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.	152
"**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.	131
"**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.	96

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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 __, 2011.” . . . .

“**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. 183

“**SPE**” means a special purpose entity 68

“**Security Documents**” means the Transaction Documents under which a security interest is granted in the collateral. 102

“**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. 12

“**UCC Opinion Scope Limitation**” means limitations on the scope of security interest opinions under the UCC. 132

“**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. . . . 144

“**WGLO**” means the Working Group on Legal Opinions. 2

Appendix "B"

STATUTORY CROSS REFERENCES

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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."

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* 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 defaults 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 approval of 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 letter[4] 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]

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[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 __, 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 Reference[8]

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 __, 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 Reviewed[9]

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 Documents[10]

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 of 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.

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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 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 Documents[11]

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]

Assumptions[17]

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 opinion letters of Florida counsel

(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).*

Knowledge[18]

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 Opinions[19]

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]

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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 Florida or federal 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 Opinion[31]

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 Lender[35] 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."

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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 Securities[37]

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 Lender[35] 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

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[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 Collateral in case the Pledged Collateral is deemed to be a "general intangible" (in which case, the security interest in the Pledged 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 Laws[41]

"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 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;

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[42] Some counsel exclude this item from the list of excluded laws in situations were 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 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 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 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 compliance[44] 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 Qualifications[46]

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" qualification[49] 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 the 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]

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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 Collateral[55] 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 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

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[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]

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[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 SIGNATURE[65]

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[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 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 letter[4] 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]

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[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 ____, 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 Reference[8]

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 , 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 Reviewed[9]

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 Documents[10]

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 of 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.

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[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 Documents[11]

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 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 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.

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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."

Assumptions[18]

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 opinion letters of Florida counsel

(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).*

Knowledge[19]

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 Opinions[20]

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]

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[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 regulation 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 Opinion[32]

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,

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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."

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[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 Laws[39]

"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.

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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:

<u>Laws deemed to be implicitly excluded from the scope of all opinion letters of Florida counsel under Florida customary practice</u>

(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;

<u>Laws expressly excluded from the scope of the opinion letter by Opining Counsel</u>

(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);*

<u>Exclusions applicable to all laws excluded from the scope of the opinion letter</u>

(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:

<u>Execution and Delivery Qualification</u>

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 were 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 that they had executed and delivered 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 compliance[42] 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 Qualifications[44]

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 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" qualification[47] 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;

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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) waivers of any statute of limitations; (iv) waivers of 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]

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[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 SIGNATURE[58]

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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-Addresse(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]

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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 __, 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 Reference[7]

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 , 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 Reviewed[8]

In connection with rendering an opinion letter, 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 Documents[9]

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 of 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.

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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 Documents[10]

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 counsel[13] from the Company, dated __________, 20__, [a copy of which is attached hereto as ______] (the "Company Certificate to Counsel"); and

(vi) a certificate to counsel[13] 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.

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[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]

Assumptions[16]

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.

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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 opinion letters of Florida counsel

(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).*

Knowledge[17]

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 Opinions[18]

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]*

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[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 Opinion[29]

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]

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[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 Laws[37]

"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.

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 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 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 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 that they had executed and delivered 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 compliance[39] 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 Qualifications[41]

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 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" qualification[44] 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 on 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.

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[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) waivers of any statute of limitations; (iv) waivers of 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 SIGNATURE[50]

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[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]

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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 ____, 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 Reference[7]

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 ____, 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 Reviewed[8]

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 Documents[9]

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 of 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 Documents[9]

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."

Assumptions[12]

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 Client 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 opinion letters of Florida counsel

(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]

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[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 Client, and/or the scope of the opinions being rendered).*

Knowledge[14]

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 Opinions[15]

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 Opinion[16]

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 Opinion[17] and Usury[18]

2. We note that Section ____ of the Loan Agreement provides that the Loan Agreement, and all issues arising thereunder, shall be governed by the laws 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 laws 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 Opinion[19]

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 do 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]

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[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 Opinion[25]

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 laws 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 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 interest 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 Opinion[28]

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 Florida[29]

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 Laws[30]

"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:

<u>Laws deemed to be implicitly excluded from the scope of all opinion letters of Florida counsel under Florida customary practice</u>

(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, statutes, 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;

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[31] Some Opining Counsel exclude this item from the list of excluded laws in situations were 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 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 opinions under the particular circumstances in which the opinion letter is being rendered);*

Exclusions applicable to all laws 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 Qualifications[32]

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 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” qualification[35] 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 exclusions[38] *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) waivers of any statute of limitations; (iv) waivers of 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;

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[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]

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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 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;

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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 interest granted in the personal property collateral, or (ii) any security agreement that creates such security interest.

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 SIGNATURE[50]

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[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 COUNSEL[1]

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 shareholder agreement, voting trust agreement or agreement among shareholders is Exhibit A-1 to this Certificate."]

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[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/partners/members/managers], 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 contempleted. 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.

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[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, customary 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.

1 A bill to be entitled
2 An act relating to the Uniform Commercial Code;
3 revising and providing provisions of the Uniform
4 Commercial Code relating to secured transactions to
5 conform to the revised Article 9 of the Uniform
6 Commercial Code as prepared by the National Conference
7 of Commissioners on Uniform State Laws; amending s.
8 679.1021, F.S.; revising and providing definitions;
9 amending s. 679.1051, F.S.; revising provisions
10 relating to control of electronic chattel paper;
11 amending s. 679.3071, F.S.; revising provisions
12 relating to the location of debtors; amending s.
13 679.3111, F.S.; making editorial changes; amending s.
14 679.3161, F.S.; providing rules that apply to certain
15 collateral to which a security interest attaches;
16 providing rules relating to certain financing
17 statements; amending s. 679.3171, F.S.; revising
18 provisions relating to interests that take priority
19 over or take free of a security interest or
20 agricultural lien; amending s. 679.326, F.S.; revising
21 priority of security interests created by a new
22 debtor; amending ss. 679.4061 and 679.4081, F.S.;
23 revising application; amending s. 679.5021, F.S.;
24 revising when a record of a mortgage satisfying the
25 requirements of chapter 697 is effective as a filing
26 statement; amending s. 679.5031, F.S.; revising when a
27 financing statement sufficiently provides the name of
28 the debtor; amending s. 679.5071, F.S.; revising the

29 effect of certain events on the effectiveness of a
30 financing statement; amending s. 679.515, F.S.;
31 revising the duration and effectiveness of a financing
32 statement; amending s. 679.516, F.S.; revising
33 instances when filing does not occur with respect to a
34 record that a filing office refuses to accept;
35 amending s. 679.518, F.S.; revising requirements for
36 claims concerning an inaccurate or wrongfully filed
37 record; amending s. 679.607, F.S.; revising recording
38 requirements for the enforcement of mortgages
39 nonjudicially outside this state; creating part VIII
40 of chapter 679, F.S., relating to transition from
41 prior law under the chapter to law under the chapter
42 as amended by this act; creating s. 679.801, F.S.;
43 providing scope of application and limitations;
44 creating s. 679.802, F.S.; providing that security
45 interests perfected under prior law that also satisfy
46 the requirements for perfection under this act remain
47 effective; creating s. 679.803, F.S.; providing that
48 security interests unperfected under prior law but
49 that satisfy the requirements for perfection under
50 this act will become effective July 1, 2013; creating
51 s. 679.804, F.S.; providing when financing statements
52 effective under prior law in a different jurisdiction
53 remain effective; creating s. 679.805, F.S.; requiring
54 the recording of a financing statement in lieu of a
55 continuation statement under certain conditions;
56 providing for the continuation of the effectiveness of

57 a financing statement filed before the effective date
58 of this act under certain conditions; creating s.
59 679.806, F.S.; providing requirements for the
60 amendment of financing statements filed before the
61 effective date of this act; providing requirements for
62 financing statements prior to amendment; creating s.
63 679.807, F.S.; providing person entitled to file
64 initial financing statement or continuation statement;
65 creating s. 679.808, F.S.; providing priority of
66 conflicting claims to collateral; amending s.
67 680.1031, F.S.; conforming a cross-reference;
68 providing an effective date.
69
70 Be It Enacted by the Legislature of the State of Florida:
71
72 Section 1. Paragraphs (ooo) through (aaaa) of subsection
73 (1) of section 679.1021, Florida Statutes, are redesignated as
74 paragraphs (ppp) through (bbbb), respectively, a new paragraph
75 (ooo) is added to that subsection, and present paragraphs (g),
76 (j), (xx), and (qqq) of subsection (1) of that section are
77 amended to read:
78 679.1021 Definitions and index of definitions.—
79 (1) In this chapter, the term:
80 (g) "Authenticate" means:
81 1. To sign; or
82 2. ~~To execute or otherwise adopt a symbol, or encrypt or~~
83 ~~similarly process a record in whole or in part,~~ With the present
84 intent of the authenticating person to ~~identify the person and~~

85 adopt or accept a record, to attach to or logically associate
86 with the record an electronic sound, symbol, or process.
87 (j) "Certificate of title" means a certificate of title
88 with respect to which a statute provides for the security
89 interest in question to be indicated on the certificate as a
90 condition or result of the security interest's obtaining
91 priority over the rights of a lien creditor with respect to the
92 collateral. The term includes another record maintained as an
93 alternative to a certificate of title by the governmental unit
94 that issues certificates of title if a statute permits the
95 security interest in question to be indicated on the record as a
96 condition or result of the security interest's obtaining
97 priority over the rights of a lien creditor with respect to the
98 collateral.
99 (xx) "Jurisdiction of organization," with respect to a
100 registered organization, means the jurisdiction under whose law
101 the organization is formed or organized.
102 (ooo) "Public organic record" means a record that is
103 available to the public for inspection and that is:
104 1. A record consisting of the record initially filed with
105 or issued by a state or the United States to form or organize an
106 organization and any record filed with or issued by the state or
107 the United States that amends or restates the initial record;
108 2. An organic record of a business trust consisting of the
109 record initially filed with a state and any record filed with
110 the state that amends or restates the initial record, if a
111 statute of the state governing business trusts requires that the
112 record be filed with the state; or

113 3. A record consisting of legislation enacted by the
114 Legislature of a state or the Congress of the United States that
115 forms or organizes an organization, any record amending the
116 legislation, and any record filed with or issued by the state or
117 the United States that amends or restates the name of the
118 organization.
119 (rrr) ~~(qqq)~~ "Registered organization" means an organization
120 formed or organized solely under the law of a single state or
121 the United States by the filing of a public organic record with,
122 the issuance of a public organic record by, or the enactment of
123 legislation by ~~and as to which~~ the state or the United States
124 ~~must maintain a public record showing the organization to have~~
125 ~~been organized~~. The term includes a business trust that is
126 formed or organized under the law of a single state if a statute
127 of the state governing business trusts requires that the
128 business trust's organic record be filed with the state.
129 Section 2. Section 679.1051, Florida Statutes, is amended
130 to read:
131 679.1051 Control of electronic chattel paper.—
132 (1) A secured party has control of electronic chattel
133 paper if a system employed for evidencing the transfer of
134 interests in the chattel paper reliably establishes the secured
135 party as the person to which the chattel paper was assigned.
136 (2) A system satisfies subsection (1), and a secured party
137 has control of electronic chattel paper, if the record or
138 records comprising the chattel paper are created, stored, and
139 assigned in such a manner that:
140 (a) ~~(1)~~ A single authoritative copy of the record or

141 records exists which is unique, identifiable and, except as
142 otherwise provided in <u>paragraphs (d), (e), and (f)</u> ~~subsections~~
143 ~~(4), (5), and (6)~~, unalterable;
144 <u>(b)</u>~~(2)~~ The authoritative copy identifies the secured party
145 as the assignee of the record or records;
146 <u>(c)</u>~~(3)~~ The authoritative copy is communicated to and
147 maintained by the secured party or its designated custodian;
148 <u>(d)</u>~~(4)~~ Copies or <u>amendments</u> ~~revisions~~ that add or change
149 an identified assignee of the authoritative copy can be made
150 only with the <u>consent</u> ~~participation~~ of the secured party;
151 <u>(e)</u>~~(5)~~ Each copy of the authoritative copy and any copy of
152 a copy is readily identifiable as a copy that is not the
153 authoritative copy; and
154 <u>(f)</u>~~(6)~~ Any <u>amendment</u> ~~revision~~ of the authoritative copy is
155 readily identifiable as ~~an~~ authorized or unauthorized ~~revision~~.
156 Section 3. Subsection (6) of section 679.3071, Florida
157 Statutes, is amended to read:
158 679.3071 Location of debtor.—
159 (6) Except as otherwise provided in subsection (9), a
160 registered organization that is organized under the law of the
161 United States and a branch or agency of a bank that is not
162 organized under the law of the United States or a state are
163 located:
164 (a) In the state that the law of the United States
165 designates, if the law designates a state of location;
166 (b) In the state that the registered organization, branch,
167 or agency designates, if the law of the United States authorizes
168 the registered organization, branch, or agency to designate its

169 state of location, including by designating its main office,
170 home office, or other comparable office; or
171 (c) In the District of Columbia, if neither paragraph (a)
172 nor paragraph (b) applies.
173 Section 4. Paragraph (c) of subsection (1) of section
174 679.3111, Florida Statutes, is amended to read:
175 679.3111 Perfection of security interests in property
176 subject to certain statutes, regulations, and treaties.—
177 (1) Except as otherwise provided in subsection (4), the
178 filing of a financing statement is not necessary or effective to
179 perfect a security interest in property subject to:
180 (c) A ~~certificate-of-title~~ statute of another jurisdiction
181 which provides for a security interest to be indicated on a ~~the~~
182 certificate of title as a condition or result of the security
183 interest's obtaining priority over the rights of a lien creditor
184 with respect to the property.
185 Section 5. Subsections (8) and (9) are added to section
186 679.3161, Florida Statutes, to read:
187 679.3161 Effect ~~Continued perfection~~ of ~~security interest~~
188 ~~following~~ change in governing law.—
189 (8) The following rules apply to collateral to which a
190 security interest attaches within 4 months after the debtor
191 changes its location to another jurisdiction:
192 (a) A financing statement filed before the change of the
193 debtor's location pursuant to the law of the jurisdiction
194 designated in s. 679.3011(1) or s. 679.3051(3) is effective to
195 perfect a security interest in the collateral if the financing
196 statement would have been effective to perfect a security

197 interest in the collateral if the debtor had not changed its
198 location.
199 (b) If a security interest that is perfected by a
200 financing statement that is effective under subsection (1)
201 becomes perfected under the law of the other jurisdiction before
202 the earlier of the time the financing statement would have
203 become ineffective under the law of the jurisdiction designated
204 in s. 679.3011(1) or s. 679.3051(3) or the expiration of the 4-
205 month period, it remains perfected thereafter. If the security
206 interest does not become perfected under the law of the other
207 jurisdiction before the earlier time or event, it becomes
208 unperfected and is deemed never to have been perfected as
209 against a purchaser of the collateral for value.
210 (9) If a financing statement naming an original debtor is
211 filed pursuant to the law of the jurisdiction designated in s.
212 679.3011(1) or s. 679.3051(3) and the new debtor is located in
213 another jurisdiction, the following rules apply:
214 (a) The financing statement is effective to perfect a
215 security interest in collateral in which the new debtor has or
216 acquires rights before or within 4 months after the new debtor
217 becomes bound under s. 679.2031(4), if the financing statement
218 would have been effective to perfect a security interest in the
219 collateral if the collateral had been acquired by the original
220 debtor.
221 (b) A security interest that is perfected by the financing
222 statement and that becomes perfected under the law of the other
223 jurisdiction before the earlier of the expiration of the 4-month
224 period or the time the financing statement would have become

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225 ineffective under the law of the jurisdiction designated in s.
226 679.3011(1) or s. 679.3051(3) remains perfected thereafter. A
227 security interest that is perfected by the financing statement
228 but that does not become perfected under the law of the other
229 jurisdiction before the earlier time or event becomes
230 unperfected and is deemed never to have been perfected as
231 against a purchaser of the collateral for value.
232 Section 6. Subsections (2) and (4) of section 679.3171,
233 Florida Statutes, are amended to read:
234 679.3171 Interests that take priority over or take free of
235 security interest or agricultural lien.—
236 (2) Except as otherwise provided in subsection (5), a
237 buyer, other than a secured party, of tangible chattel paper,
238 tangible documents, goods, instruments, or a certificated
239 security ~~certificate~~ takes free of a security interest or
240 agricultural lien if the buyer gives value and receives delivery
241 of the collateral without knowledge of the security interest or
242 agricultural lien and before it is perfected.
243 (4) A licensee of a general intangible or a buyer, other
244 than a secured party, of collateral ~~accounts, electronic chattel~~
245 ~~paper, electronic documents, general intangibles, or investment~~
246 ~~property~~ other than tangible chattel paper, tangible documents,
247 goods, instruments, or a certificated security takes free of a
248 security interest if the licensee or buyer gives value without
249 knowledge of the security interest and before it is perfected.
250 Section 7. Section 679.326, Florida Statutes, is amended
251 to read:
252 679.326 Priority of security interests created by new

253 debtor.—
254 (1) Subject to subsection (2), a security interest that is
255 created by a new debtor in collateral in which the new debtor
256 has or acquires rights and which is perfected by a filed
257 financing statement that would be ineffective to perfect the
258 security interest but for the application of s. 679.508 or ss.
259 679.508 and 679.3161(9)(a) is effective solely under s. 679.508
260 in collateral in which a new debtor has or acquires rights is
261 subordinate to a security interest in the same collateral which
262 is perfected other than by such a filed financing statement that
263 is effective solely under s. 679.508.
264 (2) The other provisions of this part determine the
265 priority among conflicting security interests in the same
266 collateral perfected by filed financing statements described in
267 subsection (1) that are effective solely under s. 679.508.
268 However, if the security agreements to which a new debtor became
269 bound as debtor were not entered into by the same original
270 debtor, the conflicting security interests rank according to
271 priority in time of the new debtor's having become bound.
272 Section 8. Subsection (5) of section 679.4061, Florida
273 Statutes, is amended to read:
274 679.4061 Discharge of account debtor; notification of
275 assignment; identification and proof of assignment; restrictions
276 on assignment of accounts, chattel paper, payment intangibles,
277 and promissory notes ineffective.—
278 (5) Subsection (4) does not apply to the sale of a payment
279 intangible or promissory note, other than a sale pursuant to a
280 disposition under s. 679.610 or an acceptance of collateral

281 under s. 679.620.
282 Section 9. Subsection (2) of section 679.4081, Florida
283 Statutes, is amended to read:
284 679.4081 Restrictions on assignment of promissory notes,
285 health-care-insurance receivables, and certain general
286 intangibles ineffective.—
287 (2) Subsection (1) applies to a security interest in a
288 payment intangible or promissory note only if the security
289 interest arises out of a sale of the payment intangible or
290 promissory note, other than a sale pursuant to a disposition
291 under s. 679.610 or an acceptance of collateral under s.
292 679.620.
293 Section 10. Subsection (3) of section 679.5021, Florida
294 Statutes, is amended to read:
295 679.5021 Contents of financing statement; record of
296 mortgage as financing statement; time of filing financing
297 statement.—
298 (3) A record of a mortgage satisfying the requirements of
299 chapter 697 is effective, from the date of recording, as a
300 financing statement filed as a fixture filing or as a financing
301 statement covering as-extracted collateral or timber to be cut
302 only if:
303 (a) The record of a mortgage indicates the goods or
304 accounts that it covers;
305 (b) The goods are or are to become fixtures related to the
306 real property described in the record of a mortgage or the
307 collateral is related to the real property described in the
308 mortgage and is as-extracted collateral or timber to be cut;

309 (c) The record satisfies ~~of a mortgage complies with~~ the
310 requirements for a financing statement in this section,
311 although:
312 1. The record need not indicate ~~other than an indication~~
313 that it is to be filed in the real property records; and
314 2. The record sufficiently provides the name of a debtor
315 who is an individual if it provides the individual name of the
316 debtor or the surname and first personal name of the debtor,
317 even if the debtor is an individual to whom s. 679.5031(1)(d) or
318 (e) applies; and
319 (d) The record of a mortgage is recorded as required by
320 chapter 697.
321 Section 11. Subsections (1) and (2) of section 679.5031,
322 Florida Statutes, are amended, and subsections (6), (7), and (8)
323 are added to that section, to read:
324 679.5031 Name of debtor and secured party.—
325 (1) A financing statement sufficiently provides the name
326 of the debtor:
327 (a) Except as otherwise provided in paragraph (c), if the
328 debtor is a registered organization or the collateral is held in
329 a trust that is a registered organization, only if the financing
330 statement provides the name that is stated to be the registered
331 organization's name ~~of the debtor indicated~~ on the public
332 organic record most recently filed with or issued or enacted by
333 ~~of~~ the registered organization's ~~debtor's~~ jurisdiction of
334 organization that purports to state, amend, or restate the
335 registered organization's name ~~which shows the debtor to have~~
336 ~~been organized~~;

337 (b) Subject to subsection (6), if the collateral is being
338 administered by the personal representative of a decedent ~~debtor~~
339 ~~is a decedent's estate~~, only if the financing statement
340 provides, as the name of the debtor, the name of the decedent
341 and, in a separate part of the financing statement, indicates
342 that the collateral is being administered by a personal
343 representative ~~debtor is an estate~~;
344 (c) If the collateral ~~debtor~~ is held in a trust that is
345 not a registered organization ~~or a trustee acting with respect~~
346 ~~to property held in trust~~, only if the financing statement:
347 1. Provides, as the name of the debtor:
348 a. If the organic record of the trust specifies a name~~, if~~
349 ~~any, specified~~ for the trust, the ~~in its organic documents or,~~
350 ~~if no~~ name so ~~is~~ specified; or
351 b. If the organic record of the trust does not specify a
352 name for the trust, ~~provides~~ the name of the settlor or testator
353 ~~and additional information sufficient to distinguish a debtor~~
354 ~~from other trusts having one or more of the same settlors~~; and
355 2. In a separate part of the financing statement:
356 a. If the name is provided in accordance with sub-
357 subparagraph 1.a., indicates~~, in the debtor's name or otherwise,~~
358 that the collateral ~~debtor~~ is held in a trust ~~or is a trustee~~
359 ~~acting with respect to property held in trust~~; or
360 b. If the name is provided in accordance with sub-
361 subparagraph 1.b., provides additional information sufficient to
362 distinguish the trust from other trusts having one or more of
363 the same settlors or the same testator and indicates that the
364 collateral is held in a trust, unless the additional information

365 so indicates;
366 (d) Subject to subsection (7), if the debtor is an
367 individual to whom this state has issued a driver license that
368 has not expired or to whom the agency of this state that issues
369 driver licenses has issued, in lieu of a driver license, a
370 personal identification card that has not expired, only if the
371 financing statement provides the name of the individual that is
372 indicated on the driver license or personal identification card;
373 (e) If the debtor is an individual to whom paragraph (d)
374 does not apply, only if the financing statement provides the
375 individual name of the debtor or the surname and first personal
376 name of the debtor; and
377 (f) ~~(d)~~ In other cases:
378 1. If the debtor has a name, only if it provides the
379 ~~individual or~~ organizational name of the debtor; and
380 2. If the debtor does not have a name, only if it provides
381 the names of the partners, members, associates, or other persons
382 comprising the debtor, in a manner that each name provided would
383 be sufficient if the person named were the debtor.
384 (2) A financing statement that provides the name of the
385 debtor in accordance with subsection (1) is not rendered
386 ineffective by the absence of:
387 (a) A trade name or other name of the debtor; or
388 (b) Unless required under subparagraph (1)(f)2. ~~(1)(d)2.~~,
389 names of partners, members, associates, or other persons
390 comprising the debtor.
391 (6) The name of the decedent indicated on the order
392 appointing the personal representative of the decedent issued by

393 the court having jurisdiction over the collateral is sufficient
394 as the name of the decedent under paragraph (1)(b).
395 (7) If this state has issued to an individual more than
396 one driver license or, if none, more than one identification
397 card, of a kind described in paragraph (1)(d), the driver
398 license or identification card, as applicable, that was issued
399 most recently is the one to which paragraph (1)(d) refers.
400 (8) As used in this section, the term "name of the settlor
401 or testator" means:
402 (a) If the settlor is a registered organization, the name
403 of the registered organization indicated on the public organic
404 record filed with or issued or enacted by the registered
405 organization's jurisdiction of organization; or
406 (b) In other cases, the name of the settlor or testator
407 indicated in the trust's organic record.
408 Section 12. Subsection (3) of section 679.5071, Florida
409 Statutes, is amended to read:
410 679.5071 Effect of certain events on effectiveness of
411 financing statement.—
412 (3) If the ~~a debtor so changes its~~ name that a filed
413 financing statement provides for a debtor becomes insufficient
414 as the name of the debtor under s. 679.5031(1) so that the
415 financing statement becomes seriously misleading under the
416 standard set forth in s. 679.5061:
417 (a) The financing statement is effective to perfect a
418 security interest in collateral acquired by the debtor before,
419 or within 4 months after, the filed financing statement becomes
420 seriously misleading ~~change~~; and

421 (b) The financing statement is not effective to perfect a
422 security interest in collateral acquired by the debtor more than
423 4 months after the filed financing statement becomes seriously
424 misleading ~~change~~, unless an amendment to the financing
425 statement which renders the financing statement not seriously
426 misleading is filed within 4 months after that event ~~the change~~.
427 Section 13. Subsection (6) of section 679.515, Florida
428 Statutes, is amended to read:
429 679.515 Duration and effectiveness of financing statement;
430 effect of lapsed financing statement.—
431 (6) If a debtor is a transmitting utility and a filed
432 initial financing statement so indicates, the financing
433 statement is effective until a termination statement is filed.
434 Section 14. Subsection (2) of section 679.516, Florida
435 Statutes, is amended to read:
436 679.516 What constitutes filing; effectiveness of filing.—
437 (2) Filing does not occur with respect to a record that a
438 filing office refuses to accept because:
439 (a) The record is not communicated by a method or medium
440 of communication authorized by the filing office;
441 (b) An amount equal to or greater than the applicable
442 processing fee is not tendered;
443 (c) The filing office is unable to index the record
444 because:
445 1. In the case of an initial financing statement, the
446 record does not provide an organization's name or, if an
447 individual, the individual's last name and first name;
448 2. In the case of an amendment or information ~~correction~~

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449 statement, the record:
450 a. Does not correctly identify the initial financing
451 statement as required by s. 679.512 or s. 679.518, as
452 applicable; or
453 b. Identifies an initial financing statement the
454 effectiveness of which has lapsed under s. 679.515;
455 3. In the case of an initial financing statement that
456 provides the name of a debtor identified as an individual or an
457 amendment that provides a name of a debtor identified as an
458 individual which was not previously provided in the financing
459 statement to which the record relates, the record does not
460 identify the debtor's surname ~~last name~~ and first name; or
461 4. In the case of a record filed or recorded in the filing
462 office described in s. 679.5011(1)(a), the record does not
463 provide a sufficient description of the real property to which
464 it relates;
465 (d) In the case of an initial financing statement or an
466 amendment that adds a secured party of record, the record does
467 not provide an organization's name or, if an individual, the
468 individual's last name and first name and mailing address for
469 the secured party of record;
470 (e) In the case of an initial financing statement or an
471 amendment that provides a name of a debtor which was not
472 previously provided in the financing statement to which the
473 amendment relates, the record does not:
474 1. Provide a mailing address for the debtor;
475 2. Indicate whether the debtor is an individual or an
476 organization; or

477 3. If the financing statement indicates that the debtor is
478 an organization, provide:
479 a. A type of organization for the debtor;
480 b. A jurisdiction of organization for the debtor; or
481 c. An organizational identification number for the debtor
482 or indicate that the debtor has none;
483 (f) In the case of an assignment reflected in an initial
484 financing statement under s. 679.514(1) or an amendment filed
485 under s. 679.514(2), the record does not provide an
486 organization's name or, if an individual, the individual's last
487 name and first name and mailing address for the assignee;
488 (g) In the case of a continuation statement, the record is
489 not filed within the 6-month period prescribed by s. 679.515(4);
490 (h) In the case of an initial financing statement or an
491 amendment, which amendment requires the inclusion of a
492 collateral statement but the record does not provide any, the
493 record does not provide a statement of collateral; or
494 (i) The record does not include the notation required by
495 s. 201.22 indicating that the excise tax required by chapter 201
496 had been paid or is not required.
497 Section 15. Section 679.518, Florida Statutes, is amended
498 to read:
499 679.518 Claim concerning inaccurate or wrongfully filed
500 record.—
501 (1) A person may file in the filing office an information
502 ~~a correction~~ statement with respect to a record indexed there
503 under the person's name if the person believes that the record
504 is inaccurate or was wrongfully filed.

505 (2) An information ~~A correction~~ statement must:
506 (a) Identify the record to which it relates by the file
507 number assigned to the initial financing statement, the debtor,
508 and the secured party of record to which the record relates;
509 (b) Indicate that it is an information ~~a correction~~
510 statement; and
511 (c) Provide the basis for the person's belief that the
512 record is inaccurate and indicate the manner in which the person
513 believes the record should be amended to cure any inaccuracy or
514 provide the basis for the person's belief that the record was
515 wrongfully filed.
516 (3) The filing of an information ~~a correction~~ statement
517 does not affect the effectiveness of an initial financing
518 statement or other filed record.
519 (4) A person may file in the filing office an information
520 statement with respect to a record filed there if the person is
521 a secured party of record with respect to the financing
522 statement to which the record relates and believes that the
523 person that filed the record was not entitled to do so under s.
524 679.509(3).
525 (5) An information statement under subsection (4) must:
526 (a) Identify the record to which it relates by file number
527 assigned to the initial financing statement to which the record
528 relates;
529 (b) Indicate that it is an information statement; and
530 (c) Provide the basis for the person's belief that the
531 record is inaccurate and indicate the manner in which the person
532 believes the record should be amended to cure any inaccuracy or

533 provide the basis for the person's belief that the record was
534 wrongfully filed.
535 Section 16. Subsection (2) of section 679.607, Florida
536 Statutes, is amended to read:
537 679.607 Collection and enforcement by secured party.—
538 (2) If necessary to enable a secured party to exercise
539 under paragraph (1)(c) the right of a debtor to enforce a
540 mortgage nonjudicially outside this state, the secured party may
541 record in the office in which a record of the mortgage is
542 recorded:
543 (a) A copy of the security agreement that creates or
544 provides for a security interest in the obligation secured by
545 the mortgage; and
546 (b) The secured party's sworn affidavit in recordable form
547 stating that:
548 1. A default has occurred with respect to the obligation
549 secured by the mortgage; and
550 2. The secured party is entitled to enforce the mortgage
551 nonjudicially outside this state.
552 Section 17. Part VIII of chapter 679, Florida Statutes,
553 consisting of sections 679.801, 679.802, 679.803, 679.804,
554 679.805, 679.806, 679.807, and 679.808, Florida Statutes, is
555 created to read:
556 679.801 Saving clause.—
557 (1) Except as otherwise provided in this part, this part
558 applies to a transaction or lien within its scope, even if the
559 transaction or lien was entered into or created before July 1,
560 2013.

561 (2) The amendments to this chapter by this act do not
562 affect an action, case, or proceeding commenced before July 1,
563 2013.
564 679.802 Security interest perfected before effective
565 date.—
566 (1) A security interest that is a perfected security
567 interest immediately before July 1, 2013, is a perfected
568 security interest under this chapter, as amended by this act, on
569 July 1, 2013, if the applicable requirements for attachment and
570 perfection under this chapter, as amended by this act, are
571 satisfied without further action.
572 (2) Except as otherwise provided in s. 679.804, if a
573 security interest is a perfected security interest immediately
574 before July 1, 2013, but the applicable requirements for
575 perfection under this chapter, as amended by this act, are not
576 satisfied on July 1, 2013, the security interest remains
577 perfected thereafter only if the applicable requirements for
578 perfection under this chapter, as amended by this act, are
579 satisfied no later than July 1, 2014.
580 679.803 Security interest unperfected before effective
581 date.-A security interest that is an unperfected security
582 interest immediately before July 1, 2013, becomes a perfected
583 security interest:
584 (1) Without further action, on July 1, 2013, if the
585 applicable requirements for perfection under this chapter, as
586 amended by this act, are satisfied before or at that time; or
587 (2) When the applicable requirements for perfection are
588 satisfied if the requirements are satisfied after that time.

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589 679.804 Effectiveness of action taken before effective
590 date.—
591 (1) The filing of a financing statement before July 1,
592 2013, is effective to perfect a security interest to the extent
593 the filing would satisfy the applicable requirements for
594 perfection under this chapter, as amended by this act.
595 (2) The amendments to this chapter by this act do not
596 render ineffective an effective financing statement that was
597 filed before July 1, 2013, and satisfies the applicable
598 requirements for perfection under the law of the jurisdiction
599 governing perfection as provided in this chapter as it existed
600 before July 1, 2013. However, except as otherwise provided in
601 subsections (3) and (4) and s. 679.805, the financing statement
602 ceases to be effective:
603 (a) If the financing statement is filed in this state, at
604 the time the financing statement would have ceased to be
605 effective had this act not taken effect; or
606 (b) If the financing statement is filed in another
607 jurisdiction, at the earlier of:
608 1. The time the financing statement would have ceased to
609 be effective under the law of that jurisdiction; or
610 2. By June 30, 2018.
611 (3) The filing of a continuation statement on or after
612 July 1, 2013, does not continue the effectiveness of the
613 financing statement filed before July 1, 2013. However, on the
614 timely filing of a continuation statement on or after July 1,
615 2013, and in accordance with the law of the jurisdiction
616 governing perfection as provided in this chapter, as amended by

617 this act, the effectiveness of a financing statement filed in
618 the same office in that jurisdiction before July 1, 2013,
619 continues for the period provided by the law of that
620 jurisdiction.
621 (4) Subparagraph (2)(b)2., applies to a financing
622 statement that was filed before July 1, 2013, against a
623 transmitting utility and satisfies the applicable requirements
624 for perfection under the law of the jurisdiction governing
625 perfection as provided in this chapter as it existed before July
626 1, 2013, only to the extent that this chapter, as amended by
627 this act, provides that the law of a jurisdiction other than the
628 jurisdiction in which the financing statement is filed governs
629 perfection of a security interest in collateral covered by the
630 financing statement.
631 (5) A financing statement that includes a financing
632 statement filed before July 1, 2013, or a continuation statement
633 filed on or after July 1, 2013, is effective only to the extent
634 that it satisfies the requirements of part V, as amended by this
635 act, for an initial financing statement. A financing statement
636 that indicates that the debtor is a decedent's estate indicates
637 that the collateral is being administered by a personal
638 representative within the meaning of s. 679.5031(1)(b), as
639 amended by this act. A financing statement that indicates that
640 the debtor is a trust or is a trustee acting with respect to
641 property held in trust indicates that the collateral is held in
642 a trust within the meaning of s. 679.5031(1)(c), as amended by
643 this act.

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644 679.805 When initial financing statement suffices to
645 continue effectiveness of financing statement.—
646 (1) The filing of an initial financing statement in the
647 office specified in s. 679.5011 continues the effectiveness of a
648 financing statement filed before July 1, 2013, if:
649 (a) The filing of an initial financing statement in that
650 office would be effective to perfect a security interest under
651 this chapter, as amended by this act;
652 (b) The financing statement filed before July 1, 2013, was
653 filed in an office in another state; and
654 (c) The initial financing statement satisfies subsection
655 (3).
656 (2) The filing of an initial financing statement under
657 subsection (1) continues the effectiveness of the financing
658 statement filed before July 1, 2013, if:
659 (a) The initial financing statement is filed before July
660 1, 2013, for the period provided in s. 679.515, as it existed
661 before its amendment by this act, with respect to an initial
662 financing statement; and
663 (b) The initial financing statement is filed on or after
664 July 1, 2013,, for the period provided in s. 679.515, as amended
665 by this act, with respect to an initial financing statement.
666 (3) To be effective for purposes of subsection (1), an
667 initial financing statement must:
668 (a) Satisfy the requirements of part IV, as amended by
669 this act, for an initial financing statement;
670 (b) Identify the financing statement filed before July 1,
671 2013, by indicating the office in which the financing statement

672 was filed and providing the dates of filing and file numbers, if
673 any, of the financing statement and of the most recent
674 continuation statement filed with respect to the financing
675 statement; and
676 (c) Indicate that the financing statement filed before
677 July 1, 2013, remains effective.
678 679.806 Amendment of financing statement filed before July
679 1, 2013.—
680 (1) After the 2013 amendments take effect, a person may
681 add or delete collateral covered by, continue or terminate the
682 effectiveness of, or otherwise amend the information provided
683 in, a pre-effective date financing statement only in accordance
684 with the law of the jurisdiction governing perfection as
685 provided in this chapter, as amended by this act. However, the
686 effectiveness of a pre-effective date financing statement also
687 may be terminated in accordance with the law of the jurisdiction
688 in which the financing statement is filed.
689 (2) Except as otherwise provided in subsection (3), if the
690 law of this state governs perfection of a security interest, the
691 information in a financing statement filed before July 1, 2013,
692 may be amended after July 1, 2013, only if:
693 (a) The financing statement filed before July 1, 2013, and
694 an amendment are filed in the office specified in s. 679.5011;
695 (b) An amendment is filed in the office specified in s.
696 679.5011 concurrently with, or after the filing in that office
697 of, an initial financing statement that satisfies s. 679.805(3);
698 or

699 (c) an initial financing statement that provides the
700 information as amended and satisfies s. 679.805(3) is filed in
701 the office specified in s. 679.5011.
702 (3) If the law of this state governs perfection of a
703 security interest, the effectiveness of a pre-effective-date
704 financing statement may be continued only under s. 679.804(3)
705 and (5) or s. 679.805.
706 (4) Whether or not the law of this state governs
707 perfection of a security interest, the effectiveness of a pre-
708 effective date financing statement filed in this state may be
709 terminated after the 2013 amendments take effect by filing a
710 termination statement in the office in which the pre-effective
711 date financing statement is filed, unless an initial financing
712 statement that satisfies s. 679.805(3) has been filed in the
713 office specified by the law of the jurisdiction governing
714 perfection as provided in this chapter, as amended by this act,
715 as the office in which to file a financing statement.
716 679.807 Person entitled to file initial financing
717 statement or continuation statement.-A person may file an
718 initial financing statement or a continuation statement under
719 this part if:
720 (1) The secured party of record authorizes the filing; and
721 (2) The filing is necessary under this part:
722 (a) To continue the effectiveness of a financing statement
723 filed before July 1, 2013; or
724 (b) To perfect or continue the perfection of a security
725 interest.

CODING: Words ~~stricken~~ are deletions; words underlined are additions.

726 679.808 Priority.—This part and the amendments to this
727 chapter by this act determine the priority of conflicting claims
728 to collateral. However, if the relative priorities of the claims
729 were established before July 1, 2013, this chapter as it existed
730 before July 1, 2013, determines priority.
731 Section 18. Paragraph (m) of subsection (3) of section
732 680.1031, Florida Statutes, is amended to read:
733 680.1031 Definitions and index of definitions.—
734 (3) The following definitions in other chapters of this
735 code apply to this chapter:
736 (m) "Pursuant to a commitment," s. 679.1021(1)(ppp)
737 ~~679.1021(1)(ooo)~~.
738 Section 19. This act shall take effect July 1, 2013.

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 483 Uniform Commercial Code
SPONSOR(S): Passidomo
TIED BILLS: None **IDEN./SIM. BILLS:** None

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Civil Justice Subcommittee		Caridad	Bond
2) Insurance & Banking Subcommittee			
3) Judiciary Committee			

SUMMARY ANALYSIS

The Uniform Commercial Code is a set of uniform laws regulating various business transactions and trade. The drafts of the code are developed by the Uniform Law Commissioners, a group of scholars and business representatives. The term "uniform" refers to how the separate states of the Union have separately enacted the various parts of the Uniform Commercial Code in laws that are uniform to one another.

Article 9 of the UCC governs secured transactions of personal property. In 1998, Article 9 was substantially revised and adopted by all states. In 2010, the Commission drafted and adopted amendments to Article 9. The 2010 amendments modify Article 9 to address filing issues and other matters that have arisen since the 1998 revision.

The bill adopts the 2010 amendment to Article 9. The most significant revision to statute includes changes to the provision governing the name of a debtor for purposes of filing a financing statement. The bill also provides the following changes to Article 9:

- Modifies certain definitions;
- Makes minor revisions to s. 679.301, F.S., relating to the location of debtors;
- Modifies provisions relating to guidelines for the continued perfection of security interests that were perfected according to the law of another jurisdiction;
- Provides rules for transition to the proposed version of Article 9; and
- Makes numerous stylistic and grammatical changes.

The effective date of the bill is July 1, 2013.

This bill does not appear to have a fiscal impact on state or local governments.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Background

The Uniform Commercial Code (UCC) is a set of uniform laws regulating various business transactions and trade. The drafts of the code are developed by the Uniform Law Commissioners (ULC), who are members of the National Conference of Commissioners on Uniform State Laws, a group of scholars and business representatives. “Conference members must be lawyers, qualified to practice law. They are practicing lawyers, judges, legislators and legislative staff and law professors, who have been appointed by state governments as well as the District of Columbia, Puerto Rico and the U.S Virgin Islands to research, draft and promote enactment of uniform state laws in areas of state law where uniformity is desirable and practical.”[1]

Participation in the Conference is not limited to lawyers since “stakeholder” meetings are held, where the opinions of all groups concerned with a particular area can be heard.[2] Every state, the District of Columbia, Puerto Rico and the U.S. Virgin Islands is assessed a specific amount for the maintenance of the ULC based upon state population. Florida's assessment for 2009-2010 is $96,700.[3]

Article 9 of the UCC governs secured transactions in personal property. A secured transaction is a "business arrangement by which a buyer or borrower gives collateral to the seller or lender to guarantee payment of an obligation."[4] In 1998, Article 9 was substantially revised and adopted by all states and U.S. territories except Puerto Rico where it is currently being considered. In 2010, the Commission drafted and adopted amendments to Article 9.

The 2010 Amendments to Article 9 modify the existing statute to respond to filing issues and address other matters that have arisen in practice following passage of the 1998 version of Article 9. The Article 9 amendments have been adopted in Connecticut, Indiana, Minnesota, Nebraska, Nevada, North Dakota, Rhode Island, Texas, and Washington. They are also currently being considered in a number of other states and U.S. territories.[5]

Issues Concerning Filing

Identifying the Debtor

The purpose of the UCC filing system is to give notice to creditors and other interested parties that there is a valid, perfected security interest in property of the debtor.[6] A security interest is a "property interest created by agreement or by operation of law to secure performance of an obligation" (i.e. payment of a debt).[7] An individual or entity files a financial statement to notify third parties — typically prospective buyers and lenders — of a secured party's security interest in goods or real property. Financing statements are indexed under the name of the debtor; therefore, an individual looking for a specific financing statement will search for it under the debtor’s name.

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[1] http://www.nccusl.org/Update/DesktopDefault.aspx?tabindex=0&tabid=9
[2] *2008 Commission Annual Report*, p.10, available online: http://www.nccusl.org/nccusl/docs/AnnReport_08_web.pdf
[3] *2009 Annual Report of the Florida Commissioners to the National Conference on Uniform State Laws, January 2010*, p. 4; the report was prepared by the Office of Legislative Services for submission to the Governor and both houses of the Legislature through their respective presiding officers.
[4] Black's Law Dictionary (9th ed. 2009).
[5] http://www.nccusl.org/Act.aspx?title=UCC Article 9 Amendments (2010) (legislation has been introduced and is pending in Washington D.C., Kentucky, Massachusetts, Oklahoma, and Puerto Rico).
[6] *See Matter of Glasco, Inc.*, 642 F.2d 793, 795 (5th Cir. 1981).
[7] Black's Law Dictionary (9th ed. 2009).

Section 679.5031(1), F.S., explains what constitutes the debtor's name for purposes of a financing statement where the debtor is a registered organization,[8] a decedent's estate, or a trust or trustee acting regarding property in trust.[9] Under current law, a financing statement sufficiently provides the name of a debtor that is a registered organization if it provides the name as indicated on the public record of the jurisdiction where the debtor organized. If the debtor is a decedent's estate, the financing statement must provide the decedent's name and indicate that the debtor is an estate. If the debtor is a trust or trustee acting regarding property in trust, the financing statement must:

- Provide the name for the trust in its organic record or, if no name is specified, the settlor's name and additional information to distinguish the debtor from other trusts with one or more of the same settlors; and
- Indicate in the debtor's name or otherwise that the debtor is a trust or trustee acting for trust property.

In other cases, if the debtor has a name, current law requires the financing statement to provide the debtor's individual or organizational name. If the debtor does not have a name, it must provide the names of the partners, members, associates, or other persons comprising the debtor.

The bill revises standards regarding the name of a debtor to be provided on a financing statement. If the debtor is a registered organization, the financing statement sufficiently provides the name of the debtor where it lists the name of the registered organization provided on the most recent public organic record[10] filed or issued by the registered organization's jurisdiction of organization. This also applies to a registered organization that holds collateral in trust.

Where the collateral is being administered by a personal representative of a decedent, the financing statement is sufficient if it provides the name of the decedent as the debtor and indicates that the collateral is being administered by a personal representative. The name of the decedent indicated on the order appointing the personal representative of the decedent, which was issued by a court having jurisdiction over the collateral, is sufficient as the name of the decedent.

If the collateral is held in a trust that is not a registered organization, the financing statement must indicate the name specified in the organic record of the trust and that the collateral is held in trust. If the organic record does not specify a name, the financing statement must indicate the name of the settlor or testator, additional information sufficient to distinguish the trust from other trusts that may have the same settlors or testator, and an indication that the collateral is held in a trust.

The bill also provides standards regarding the name of an individual debtor to be provided on a financing statement. If the debtor is an individual, the financing statement must provide the name on

[8] Current law provides that a registered organization is "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 679.1021(1)(qqq), F.S. The bill revises the definition to include a business trust that is formed or organized in a state where the public organic record of a business trust must be filed with such state.

[9] Section 679.5031(1), F.S.

[10] The bill replaces all references to the "public record" with the "public organic record." It further creates a new definition for the term, as "public record" is not currently defined under the statute. The bill defines “public organic record” as:

> [A] record that is available to the public for inspection and that is:
> 1. A record consisting of the record initially filed with or issued by a state or the United States to form or organize an organization and any record filed with or issued by the state or the United States which amends or restates the initial record;
> 2. An organic record of a business trust consisting of the record initially filed with a state and any record filed with the state that amends or restates the initial record, if a statute of the state governing business trusts requires that the record be filed with the state; or
> 3. A record consisting of legislation enacted by the legislature of a state or the Congress of the United States that forms or organizes an organization, any record amending the legislation, and any record filed with or issued by the state or United States which amends or restates the name of the organization.

the debtor's driver's license if the license has not on its face expired. If the state has issued a non-driver's identification card in lieu of a driver's license, the name provided on the identification card may be used with the same effect as a driver's license name. If the state has issued to an individual more than one driver's license or more than one identification card, the most recent driver's license or identification card applies.

If the debtor does not have a driver's license or identification card, the financing statement must provide either the individual name of the debtor (i.e. whatever the debtor's name is under current law) or the debtor's surname and first personal name.

In other cases, if the debtor does not have a name, the financing statement must include the name of partners, members, associates, or others comprising the debtor. The names must be provided in a manner so that each name provided would be sufficient if the person named was the debtor.

The bill also defines the term "name of the settlor or testator" as follows:

- If the settlor is a registered organization, the name of the registered organization indicated on the public organic record filed with or issued by the registered organization's jurisdiction of organization; or
- In other cases, the name of the settlor or testator indicated in the trust's organic record.

Claim Concerning Inaccurate or Wrongfully Filed Record

Current law authorizes the debtor to file a correction statement: a claim that a financing statement filed against it was in fact unauthorized.[11] While this filing has no legal effect on the underlying claim, it does put in the public record the debtor's claim that the financing statement was wrongfully filed.

The bill revises current law in two ways. First, the filing is no longer called a “correction statement,” but is instead referred to as an “information statement.” Second, the bill authorizes the secured party of record to also file an information statement if the secured party believes that an amendment to its financing statement was not authorized. The change addresses concerns of secured parties that an amendment to a different financing statement may be inadvertently filed on the secured party’s financing statement because the amendment contains an error when referring to the file number of the financing statement to be amended. It is important to note that the secured party has no duty to file an information statement, even if it is aware of the unauthorized filing.

Perfection of Security Interests

"Perfection of a security interest gives constructive notice to the world of the claim or interest of the one asserting it."[12] Article 9 provides guidelines for the continued perfection of security interests that have been perfected according to the law of another jurisdiction.[13] Generally, a security interest perfected according to another jurisdiction, or state's law is not automatically "unperfected." Current law provides that a security interest perfected by filing continues for four months after the jurisdiction in which the debtor is located changes. However, this temporary period of perfection applies only with respect to collateral owned by the debtor at the time of the change. Even if the security interest attaches to after-acquired collateral, there is currently no perfection with respect to such new collateral unless and until the secured party perfects pursuant to the law of the new jurisdiction.

The bill provides the filer perfection for four months in collateral acquired post-move. A similar change is made with respect to a new debtor that is a successor by merger. The new rule provides for temporary perfection in collateral owned by the successor before the merger or collateral acquired by the successor within four months after the merger.

[11] Section 679.518, F.S.
[12] *Bay Co. Sheriff's Office v. Tyndall Fed. Credit Union*, 738 So. 2d 456, 458 (Fla. 1st DCA 1999).
[13] Section 679.3161, F.S.

The bill also provides various minor and stylistic changes to provisions affecting perfection of security interests.

Control of Electronic Chattel Paper

Current law provides that control of electronic chattel paper is the functional equivalent of possession of tangible chattel paper. "Chattel paper" is a record or records that show both a monetary obligation and a security interest in specific goods.[14] "Electronic chattel paper" is "chattel paper evidenced by record or records consisting of information stored in an electronic medium."[15] Current law provides that a secured party has control of electronic chattel paper if the record comprising the chattel paper are created, stored and assigned according to six requirements.[16]

The bill provides a general test for establishing when a secured party has control of electronic chattel paper. Specifically, a party has control of electronic chattel paper "if a system employed for evidencing the transfer of interests in the chattel paper reliably establishes the secured party as the person to which the chattel paper was assigned." The bill also provides a safe harbor test that if satisfied, establishes control under the aforementioned general test. The safe harbor test is consistent with the original six requirements in current law.

Other Changes

The bill also makes the following changes to Article 9:

- Modifies the definitions of the terms "authenticate," "certificate of title," and "registered organization;" and creates a definition for "public organic record."
- Makes minor revisions to s. 679.301, F.S., relating to the location of debtors;
- Makes minor revisions to provisions governing priority of security interests;
- Makes minor revisions to provisions relating to the information that must be included in a financing statement;
- Provides additional rules regarding the enforceability of contractual provisions restricting the assignment of receivables;
- Provides various clarifying and conforming revisions to current law, and provides rules for transition to the proposed version of Article 9.
- Makes numerous stylistic and grammatical changes.

B. SECTION DIRECTORY:

Section 1 amends s. 679.1021, F.S., to provide definitions.

Section 2 amends s. 679.1051, F.S., relating to control of electronic chattel paper.

Section 3 amends s. 679.3071, F.S., relating to the location of the debtor.

Section 4 amends s. 679.3111, F.S., relating to the perfection of security interests in property subject to certain statutes, regulations, and treaties.

Section 5 amends 679.3161, F.S., relating to perfection of security interests following a change in governing law.

Section 6 amends s. 679.3171, F.S., relating to interests that take propriety over or take free of security interest or agricultural lien.

Section 7 amends s. 679.326, F.S., to provide priority of security interests created by new debtor.

[14] Section 679.1021(1)(k), F.S.
[15] Section 679.1021(1)(ee), F.S.
[16] See s. 679.1051, F.S.

Section 8 amends s. 679.4061, F.S., relating to discharge of account debtor.

Section 9 amends s. 679.4081, F.S., relating to restrictions on assignment of promissory notes.

Section 10 amends s. 679.5021, F.S., relating to the contents of a financing statement.

Section 11 amends s. 679.5031, F.S., to provide guidelines for sufficiency of debtor name on financing statement.

Section 12 amends s. 67.5071, F.S., relating to the effect of certain events on effectiveness of financing statement.

Section 13 amends s. 679.515, F.S., relating to the duration and effectiveness of financing statement.

Section 14 amends s. 679.516, F.S., to provide what constitutes filing.

Section 15 amends s 679.518, F.S., relating to inaccurate or wrongly filed record.

Section 16 amends s. 679.607 relating to collection and enforcement by secured party.

Section 17 creates ss. 679.801, 679.802, 679.803, 679.804, 679.805, 679.806, 679.807, and 679.808, F.S., to provide guidelines for transition.

Section 18 amends s. 680.1031, F.S., to provide a definition.

Section 19 provides an effective date of July 1, 2013.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

   The bill does not appear to have any impact on state revenues.

2. Expenditures:

   The bill does not appear to have any impact on state expenditures.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

   The bill does not appear to have any impact on local government revenues.

2. Expenditures:

   The bill does not appear to have any impact on local government expenditures.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

The bill does not appear to have any impact on the private sector.

D. FISCAL COMMENTS:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

   The bill does not appear to require counties or municipalities to take an action requiring the expenditure of funds, reduce the authority that counties or municipalities have to raise revenue in the aggregate, nor reduce the percentage of state tax shared with counties or municipalities.

2. Other:

   None.

B. RULE-MAKING AUTHORITY:

The bill does not appear to create a need for rulemaking or rulemaking authority.

C. DRAFTING ISSUES OR OTHER COMMENTS:

The effective date of the bill is July 1, 2013. This is consistent with the Commission's proposed amendments to Article 9. According to the Commission, the 2013 effective date is intended to allow states to adopt the amendments uniformly so the Article 9 revisions will become operative simultaneously thereby avoiding confusion with respect to interstate transactions.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

n/a

Amendment No. 3

COMMITTEE/SUBCOMMITTEE ACTION

ADOPTED __ (Y/N)
ADOPTED AS AMENDED __ (Y/N)
ADOPTED W/O OBJECTION __ (Y/N)
FAILED TO ADOPT __ (Y/N)
WITHDRAWN __ (Y/N)
OTHER ___

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1 Committee/Subcommittee hearing bill: Civil Justice Subcommittee
2 Representative Pilon offered the following:
3
4 **Amendment**
5 Remove line 459 and insert:
6 deposit to the high bidder as if it were excess proceeds. The
7 clerk may refuse
8

Amendment No. 1

COMMITTEE/SUBCOMMITTEE ACTION

ADOPTED ___ (Y/N)
ADOPTED AS AMENDED ___ (Y/N)
ADOPTED W/O OBJECTION ___ (Y/N)
FAILED TO ADOPT ___ (Y/N)
WITHDRAWN ___ (Y/N)
OTHER

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1 Committee/Subcommittee hearing bill: Civil Justice Subcommittee
2 Representative Passidomo offered the following:
3
4 **Amendment (with title amendment)**
5 Remove everything after the enacting clause and insert:
6
7 Section 1. Paragraphs (ooo) through (aaaa) of subsection
8 (1) of section 679.1021, Florida Statutes, are redesignated as
9 paragraphs (ppp) through (bbbb), respectively, a new paragraph
10 (ooo) is added to that subsection, and present paragraphs (g),
11 (j), (xx), and (qqq) of subsection (1) of that section are
12 amended to read:
13 679.1021 Definitions and index of definitions.—
14 (1) In this chapter, the term:
15 (g) "Authenticate" means:
16 1. To sign; or
17 2. ~~To execute or otherwise adopt a symbol, or encrypt or~~
18 ~~similarly process a record in whole or in part,~~ With the present
19 intent ~~of the authenticating person~~ to ~~identify the person and~~

20 adopt or accept a record, to attach to or logically associate
21 with the record an electronic sound, symbol, or process.
22 (j) "Certificate of title" means a certificate of title
23 with respect to which a statute provides for the security
24 interest in question to be indicated on the certificate as a
25 condition or result of the security interest's obtaining
26 priority over the rights of a lien creditor with respect to the
27 collateral. The term includes another record maintained as an
28 alternative to a certificate of title by the governmental unit
29 that issues certificates of title if a statute permits the
30 security interest in question to be indicated on the record as a
31 condition or result of the security interest's obtaining
32 priority over the rights of a lien creditor with respect to the
33 collateral.
34 (xx) "Jurisdiction of organization," with respect to a
35 registered organization, means the jurisdiction under whose law
36 the organization is formed or organized.
37 (ooo) "Public organic record" means a record that is
38 available to the public for inspection and that is:
39 1. A record consisting of the record initially filed with
40 or issued by a state or the United States to form or organize an
41 organization and any record filed with or issued by the state or
42 the United States that amends or restates the initial record;
43 2. An organic record of a business trust consisting of the
44 record initially filed with a state and any record filed with
45 the state that amends or restates the initial record, if a
46 statute of the state governing business trusts requires that the
47 record be filed with the state; or

48 3. A record consisting of legislation enacted by the
49 Legislature of a state or the Congress of the United States that
50 forms or organizes an organization, any record amending the
51 legislation, and any record filed with or issued by the state or
52 the United States that amends or restates the name of the
53 organization.
54 (rrr)~~(qqq)~~ "Registered organization" means an organization
55 formed or organized solely under the law of a single state or
56 the United States by the filing of a public organic record with,
57 the issuance of a public organic record by, or the enactment of
58 legislation by ~~and as to which~~ the state or the United States
59 ~~must maintain a public record showing the organization to have~~
60 ~~been organized~~. The term includes a business trust that is
61 formed or organized under the law of a single state if a statute
62 of the state governing business trusts requires that the
63 business trust's organic record be filed with the state.
64 Section 2. Section 679.1051, Florida Statutes, is amended
65 to read:
66 679.1051 Control of electronic chattel paper.—
67 (1) A secured party has control of electronic chattel
68 paper if a system employed for evidencing the transfer of
69 interests in the chattel paper reliably establishes the secured
70 party as the person to which the chattel paper was assigned.
71 (2) A system satisfies subsection (1), and a secured party
72 has control of electronic chattel paper, if the record or
73 records comprising the chattel paper are created, stored, and
74 assigned in such a manner that:

75 (a)~~(1)~~ A single authoritative copy of the record or
76 records exists which is unique, identifiable and, except as
77 otherwise provided in paragraphs (d), (e), and (f) ~~subsections~~
78 ~~(4), (5), and (6)~~, unalterable;
79 (b)~~(2)~~ The authoritative copy identifies the secured party
80 as the assignee of the record or records;
81 (c)~~(3)~~ The authoritative copy is communicated to and
82 maintained by the secured party or its designated custodian;
83 (d)~~(4)~~ Copies or amendments ~~revisions~~ that add or change
84 an identified assignee of the authoritative copy can be made
85 only with the consent ~~participation~~ of the secured party;
86 (e)~~(5)~~ Each copy of the authoritative copy and any copy of
87 a copy is readily identifiable as a copy that is not the
88 authoritative copy; and
89 (f)~~(6)~~ Any amendment ~~revision~~ of the authoritative copy is
90 readily identifiable as ~~an~~ authorized or unauthorized ~~revision~~.
91 Section 3. Subsection (6) of section 679.3071, Florida
92 Statutes, is amended to read:
93 679.3071 Location of debtor.—
94 (6) Except as otherwise provided in subsection (9), a
95 registered organization that is organized under the law of the
96 United States and a branch or agency of a bank that is not
97 organized under the law of the United States or a state are
98 located:
99 (a) In the state that the law of the United States
100 designates, if the law designates a state of location;
101 (b) In the state that the registered organization, branch,
102 or agency designates, if the law of the United States authorizes

103 the registered organization, branch, or agency to designate its
104 state of location, including by designating its main office,
105 home office, or other comparable office; or
106 (c) In the District of Columbia, if neither paragraph (a)
107 nor paragraph (b) applies.
108 Section 4. Paragraph (c) of subsection (1) of section
109 679.3111, Florida Statutes, is amended to read:
110 679.3111 Perfection of security interests in property
111 subject to certain statutes, regulations, and treaties.—
112 (1) Except as otherwise provided in subsection (4), the
113 filing of a financing statement is not necessary or effective to
114 perfect a security interest in property subject to:
115 (c) A ~~certificate-of-title~~ statute of another jurisdiction
116 which provides for a security interest to be indicated on a ~~the~~
117 certificate of title as a condition or result of the security
118 interest's obtaining priority over the rights of a lien creditor
119 with respect to the property.
120 Section 5. Subsections (8) and (9) are added to section
121 679.3161, Florida Statutes, to read:
122 679.3161 Effect ~~Continued perfection~~ of ~~security interest~~
123 ~~following~~ change in governing law.—
124 (8) The following rules apply to collateral to which a
125 security interest attaches within 4 months after the debtor
126 changes its location to another jurisdiction:
127 (a) A financing statement filed before the change of the
128 debtor's location pursuant to the law of the jurisdiction
129 designated in s. 679.3011(1) or s. 679.3051(3) is effective to
130 perfect a security interest in the collateral if the financing

statement would have been effective to perfect a security interest in the collateral if the debtor had not changed its location.

(b) If a security interest that is perfected by a financing statement that is effective under paragraph (a) becomes perfected under the law of the other jurisdiction before the earlier of the time the financing statement would have become ineffective under the law of the jurisdiction designated in s. 679.3011(1) or s. 679.3051(3) or the expiration of the 4-month period, it remains perfected thereafter. If the security interest does not become perfected under the law of the other jurisdiction before the earlier time or event, it becomes unperfected and is deemed never to have been perfected as against a purchaser of the collateral for value.

(9) If a financing statement naming an original debtor is filed pursuant to the law of the jurisdiction designated in s. 679.3011(1) or s. 679.3051(3) and the new debtor is located in another jurisdiction, the following rules apply:

(a) The financing statement is effective to perfect a security interest in collateral in which the new debtor has or acquires rights before or within 4 months after the new debtor becomes bound under s. 679.2031(4), if the financing statement would have been effective to perfect a security interest in the collateral if the collateral had been acquired by the original debtor.

(b) A security interest that is perfected by the financing statement and that becomes perfected under the law of the other jurisdiction before the earlier of the expiration of the 4-month

period or the time the financing statement would have become ineffective under the law of the jurisdiction designated in s. 679.3011(1) or s. 679.3051(3) remains perfected thereafter. A security interest that is perfected by the financing statement but that does not become perfected under the law of the other jurisdiction before the earlier time or event becomes unperfected and is deemed never to have been perfected as against a purchaser of the collateral for value.

Section 6. Subsections (2) and (4) of section 679.3171, Florida Statutes, are amended to read:

679.3171 Interests that take priority over or take free of security interest or agricultural lien.—

(2) Except as otherwise provided in subsection (5), a buyer, other than a secured party, of tangible chattel paper, tangible documents, goods, instruments, or a certificated security ~~certificate~~ takes free of a security interest or agricultural lien if the buyer gives value and receives delivery of the collateral without knowledge of the security interest or agricultural lien and before it is perfected.

(4) A licensee of a general intangible or a buyer, other than a secured party, of collateral ~~accounts, electronic chattel paper, electronic documents, general intangibles, or investment property~~ other than tangible chattel paper, tangible documents, goods, instruments, or a certificated security takes free of a security interest if the licensee or buyer gives value without knowledge of the security interest and before it is perfected.

Section 7. Section 679.326, Florida Statutes, is amended to read:

187 679.326 Priority of security interests created by new
188 debtor.—
189 (1) Subject to subsection (2), a security interest that is
190 created by a new debtor in collateral in which the new debtor
191 has or acquires rights and ~~which is~~ perfected by a filed
192 financing statement that would be ineffective to perfect the
193 security interest but for the application of s. 679.508 or ss.
194 679.508 and 679.3161(9)(a) ~~is effective solely under s. 679.508~~
195 ~~in collateral in which a new debtor has or acquires rights~~ is
196 subordinate to a security interest in the same collateral which
197 is perfected other than by such a filed financing statement ~~that~~
198 ~~is effective solely under s. 679.508~~.
199 (2) The other provisions of this part determine the
200 priority among conflicting security interests in the same
201 collateral perfected by filed financing statements described in
202 subsection (1) ~~that are effective solely under s. 679.508~~.
203 However, if the security agreements to which a new debtor became
204 bound as debtor were not entered into by the same original
205 debtor, the conflicting security interests rank according to
206 priority in time of the new debtor's having become bound.
207 Section 8. Subsection (5) of section 679.4061, Florida
208 Statutes, is amended to read:
209 679.4061 Discharge of account debtor; notification of
210 assignment; identification and proof of assignment; restrictions
211 on assignment of accounts, chattel paper, payment intangibles,
212 and promissory notes ineffective.—
213 (5) Subsection (4) does not apply to the sale of a payment
214 intangible or promissory note, other than a sale pursuant to a

215 disposition under s. 679.610 or an acceptance of collateral
216 under s. 679.620.
217 Section 9. Subsection (2) of section 679.4081, Florida
218 Statutes, is amended to read:
219 679.4081 Restrictions on assignment of promissory notes,
220 health-care-insurance receivables, and certain general
221 intangibles ineffective.—
222 (2) Subsection (1) applies to a security interest in a
223 payment intangible or promissory note only if the security
224 interest arises out of a sale of the payment intangible or
225 promissory note, other than a sale pursuant to a disposition
226 under s. 679.610 or an acceptance of collateral under s.
227 679.620.
228 Section 10. Subsection (3) of section 679.5021, Florida
229 Statutes, is amended to read:
230 679.5021 Contents of financing statement; record of
231 mortgage as financing statement; time of filing financing
232 statement.—
233 (3) A record of a mortgage satisfying the requirements of
234 chapter 697 is effective, from the date of recording, as a
235 financing statement filed as a fixture filing or as a financing
236 statement covering as-extracted collateral or timber to be cut
237 only if:
238 (a) The record of a mortgage indicates the goods or
239 accounts that it covers;
240 (b) The goods are or are to become fixtures related to the
241 real property described in the record of a mortgage or the

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242 collateral is related to the real property described in the
243 mortgage and is as-extracted collateral or timber to be cut;
244 (c) The record of a mortgage satisfies ~~complies with~~ the
245 requirements for a financing statement in this section,
246 although:
247 1. The record of a mortgage need not indicate ~~other than~~
248 ~~an indication~~ that it is to be filed in the real property
249 records; and
250 2. The record of a mortgage sufficiently provides the name
251 of a debtor who is an individual if it provides the individual
252 name of the debtor or the surname and first personal name of the
253 debtor, even if the debtor is an individual to whom s.
254 679.5031(1)(d) or (e) applies; and
255 (d) The record of a mortgage is recorded as required by
256 chapter 697.
257 Section 11. Subsections (1) and (2) of section 679.5031,
258 Florida Statutes, are amended, and subsections (6), (7), and (8)
259 are added to that section, to read:
260 679.5031 Name of debtor and secured party.—
261 (1) A financing statement sufficiently provides the name
262 of the debtor:
263 (a) Except as otherwise provided in paragraph (c), if the
264 debtor is a registered organization or the collateral is held in
265 a trust that is a registered organization, only if the financing
266 statement provides the name that is stated to be the registered
267 organization's name ~~of the debtor indicated~~ on the public
268 organic record most recently filed with or issued or enacted by
269 ~~of~~ the registered organization's ~~debtor's~~ jurisdiction of

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270 organization that purports to state, amend, or restate the
271 registered organization's name ~~which shows the debtor to have~~
272 ~~been organized~~;
273 (b) Subject to subsection (6), if the collateral is being
274 administered by the personal representative of a decedent ~~debtor~~
275 ~~is a decedent's estate~~, only if the financing statement
276 provides, as the name of the debtor, the name of the decedent
277 and, in a separate part of the financing statement, indicates
278 that the collateral is being administered by a personal
279 representative ~~debtor is an estate~~;
280 (c) If the collateral ~~debtor~~ is held in a trust that is
281 not a registered organization ~~or a trustee acting with respect~~
282 ~~to property held in trust~~, only if the financing statement:
283 1. Provides, as the name of the debtor:
284 a. If the organic record of the trust specifies a name~~, if~~
285 ~~any, specified~~ for the trust, the ~~in its organic documents or,~~
286 ~~if no~~ name so ~~is~~ specified; or
287 b. If the organic record of the trust does not specify a
288 name for the trust, ~~provides~~ the name of the settlor or testator
289 ~~and additional information sufficient to distinguish a debtor~~
290 ~~from other trusts having one or more of the same settlors~~; and
291 2. In a separate part of the financing statement:
292 a. If the name is provided in accordance with sub-
293 subparagraph 1.a., indicates~~, in the debtor's name or otherwise,~~
294 that the collateral ~~debtor~~ is held in a trust ~~or is a trustee~~
295 ~~acting with respect to property held in trust~~; or
296 b. If the name is provided in accordance with sub-
297 subparagraph 1.b., provides additional information sufficient to

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298 distinguish the trust from other trusts having one or more of
299 the same settlors or the same testator and indicates that the
300 collateral is held in a trust, unless the additional information
301 so indicates;
302 (d) Subject to subsection (7), if the debtor is an
303 individual to whom this state has issued a driver license that
304 has not expired or to whom the agency of this state that issues
305 driver licenses has issued, in lieu of a driver license, a
306 personal identification card that has not expired, only if the
307 financing statement provides the name of the individual that is
308 indicated on the driver license or personal identification card;
309 (e) If the debtor is an individual to whom paragraph (d)
310 does not apply, only if the financing statement provides the
311 individual name of the debtor or the surname and first personal
312 name of the debtor; and
313 (f) ~~(d)~~ In other cases:
314 1. If the debtor has a name, only if it provides the
315 ~~individual or~~ organizational name of the debtor; and
316 2. If the debtor does not have a name, only if it provides
317 the names of the partners, members, associates, or other persons
318 comprising the debtor, in a manner that each name provided would
319 be sufficient if the person named were the debtor.
320 (2) A financing statement that provides the name of the
321 debtor in accordance with subsection (1) is not rendered
322 ineffective by the absence of:
323 (a) A trade name or other name of the debtor; or

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324 (b) Unless required under subparagraph (1)(f)2. ~~(1)(d)2.~~,
325 names of partners, members, associates, or other persons
326 comprising the debtor.
327 (6) The name of the decedent indicated on the order
328 appointing the personal representative of the decedent issued by
329 the court having jurisdiction over the collateral is sufficient
330 as the name of the decedent under paragraph (1)(b).
331 (7) If this state has issued to an individual more than
332 one driver license or, if none, more than one identification
333 card, of a kind described in paragraph (1)(d), the driver
334 license or identification card, as applicable, that was issued
335 most recently is the one to which paragraph (1)(d) refers.
336 (8) As used in this section, the term "name of the settlor
337 or testator" means:
338 (a) If the settlor is a registered organization, the name
339 of the registered organization indicated on the public organic
340 record filed with or issued or enacted by the registered
341 organization's jurisdiction of organization; or
342 (b) In other cases, the name of the settlor or testator
343 indicated in the trust's organic record.
344 Section 12. Subsection (3) of section 679.5071, Florida
345 Statutes, is amended to read:
346 679.5071 Effect of certain events on effectiveness of
347 financing statement.—
348 (3) If the ~~a debtor so changes its~~ name that a filed
349 financing statement provides for a debtor becomes insufficient
350 as the name of the debtor under s. 679.5031(1) so that the

351 <u>financing statement becomes</u> seriously misleading under the
352 standard set forth in s. 679.5061:
353 (a) The financing statement is effective to perfect a
354 security interest in collateral acquired by the debtor before,
355 or within 4 months after, the <u>filed financing statement becomes</u>
356 <u>seriously misleading</u> ~~change~~; and
357 (b) The financing statement is not effective to perfect a
358 security interest in collateral acquired by the debtor more than
359 4 months after the <u>filed financing statement becomes seriously</u>
360 <u>misleading</u> ~~change~~, unless an amendment to the financing
361 statement which renders the financing statement not seriously
362 misleading is filed within 4 months after <u>that event</u> ~~the change~~.
363 Section 13. Subsection (6) of section 679.515, Florida
364 Statutes, is amended to read:
365 679.515 Duration and effectiveness of financing statement;
366 effect of lapsed financing statement.—
367 (6) If a debtor is a transmitting utility and a filed
368 <u>initial</u> financing statement so indicates, the financing
369 statement is effective until a termination statement is filed.
370 Section 14. Subsection (2) of section 679.516, Florida
371 Statutes, is amended to read:
372 679.516 What constitutes filing; effectiveness of filing.—
373 (2) Filing does not occur with respect to a record that a
374 filing office refuses to accept because:
375 (a) The record is not communicated by a method or medium
376 of communication authorized by the filing office;
377 (b) An amount equal to or greater than the applicable
378 processing fee is not tendered;

379 (c) The filing office is unable to index the record
380 because:
381 1. In the case of an initial financing statement, the
382 record does not provide an organization's name or, if an
383 individual, the individual's last name and first name;
384 2. In the case of an amendment or <u>information</u> ~~correction~~
385 statement, the record:
386 a. Does not correctly identify the initial financing
387 statement as required by s. 679.512 or s. 679.518, as
388 applicable; or
389 b. Identifies an initial financing statement the
390 effectiveness of which has lapsed under s. 679.515;
391 3. In the case of an initial financing statement that
392 provides the name of a debtor identified as an individual or an
393 amendment that provides a name of a debtor identified as an
394 individual which was not previously provided in the financing
395 statement to which the record relates, the record does not
396 identify the debtor's <u>surname</u> ~~last name~~ and first <u>personal</u> name;
397 or
398 4. In the case of a record filed or recorded in the filing
399 office described in s. 679.5011(1)(a), the record does not
400 provide a sufficient description of the real property to which
401 it relates;
402 (d) In the case of an initial financing statement or an
403 amendment that adds a secured party of record, the record does
404 not provide an organization's name or, if an individual, the
405 individual's last name and first name and mailing address for
406 the secured party of record;

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407 (e) In the case of an initial financing statement or an
408 amendment that provides a name of a debtor which was not
409 previously provided in the financing statement to which the
410 amendment relates, the record does not:
411 1. Provide a mailing address for the debtor; or
412 2. Indicate whether the name provided as the name of the
413 debtor is the name of an individual or an organization; ~~or~~
414 ~~3. If the financing statement indicates that the debtor is~~
415 ~~an organization, provide:~~
416 ~~a. A type of organization for the debtor;~~
417 ~~b. A jurisdiction of organization for the debtor; or~~
418 ~~c. An organizational identification number for the debtor~~
419 ~~or indicate that the debtor has none;~~
420 (f) In the case of an assignment reflected in an initial
421 financing statement under s. 679.514(1) or an amendment filed
422 under s. 679.514(2), the record does not provide an
423 organization's name or, if an individual, the individual's last
424 name and first name and mailing address for the assignee;
425 (g) In the case of a continuation statement, the record is
426 not filed within the 6-month period prescribed by s. 679.515(4);
427 (h) In the case of an initial financing statement or an
428 amendment, which amendment requires the inclusion of a
429 collateral statement but the record does not provide any, the
430 record does not provide a statement of collateral; or
431 (i) The record does not include the notation required by
432 s. 201.22 indicating that the excise tax required by chapter 201
433 had been paid or is not required.

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434 Section 15. Section 679.518, Florida Statutes, is amended
435 to read:
436 679.518 Claim concerning inaccurate or wrongfully filed
437 record.—
438 (1) A person may file in the filing office an information
439 ~~a correction~~ statement with respect to a record indexed there
440 under the person's name if the person believes that the record
441 is inaccurate or was wrongfully filed.
442 (2) An information ~~A correction~~ statement under subsection
443 (1) must:
444 (a) Identify the record to which it relates by the file
445 number assigned to the initial financing statement, the debtor,
446 and the secured party of record to which the record relates;
447 (b) Indicate that it is an information ~~a correction~~
448 statement; and
449 (c) Provide the basis for the person's belief that the
450 record is inaccurate and indicate the manner in which the person
451 believes the record should be amended to cure any inaccuracy or
452 provide the basis for the person's belief that the record was
453 wrongfully filed.
454 (3) A person may file in the filing office an information
455 statement with respect to a record filed there if the person is
456 a secured party of record with respect to the financing
457 statement to which the record relates and believes that the
458 person that filed the record was not entitled to do so under s.
459 679.509(3).
460 (4) An information statement under subsection (3) must:

461 (a) Identify the record to which it relates by file number
462 assigned to the initial financing statement to which the record
463 relates;
464 (b) Indicate that it is an information statement; and
465 (c) Provide the basis for the person's belief that the
466 record is inaccurate and indicate the manner in which the person
467 believes the record should be amended to cure any inaccuracy or
468 provide the basis for the person's belief that the record was
469 wrongfully filed.
470 (5)~~(3)~~ The filing of an information ~~a correction~~ statement
471 does not affect the effectiveness of an initial financing
472 statement or other filed record.
473 Section 16. Subsection (2) of section 679.607, Florida
474 Statutes, is amended to read:
475 679.607 Collection and enforcement by secured party.—
476 (2) If necessary to enable a secured party to exercise
477 under paragraph (1)(c) the right of a debtor to enforce a
478 mortgage nonjudicially outside this state, the secured party may
479 record in the office in which a record of the mortgage is
480 recorded:
481 (a) A copy of the security agreement that creates or
482 provides for a security interest in the obligation secured by
483 the mortgage; and
484 (b) The secured party's sworn affidavit in recordable form
485 stating that:
486 1. A default has occurred with respect to the obligation
487 secured by the mortgage; and

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488 2. The secured party is entitled to enforce the mortgage
489 nonjudicially outside this state.
490 Section 17. Part VIII of chapter 679, Florida Statutes,
491 consisting of sections 679.801, 679.802, 679.803, 679.804,
492 679.805, 679.806, 679.807, and 679.808, Florida Statutes, is
493 created to read:
494 679.801 Saving clause.—
495 (1) Except as otherwise provided in this part, this part
496 applies to a transaction or lien within its scope, even if the
497 transaction or lien was entered into or created before July 1,
498 2013.
499 (2) The amendments to this chapter by this act do not
500 affect an action, case, or proceeding commenced before July 1,
501 2013.
502 679.802 Security interest perfected before effective
503 date.—
504 (1) A security interest that is a perfected security
505 interest immediately before July 1, 2013, is a perfected
506 security interest under this chapter, as amended by this act, on
507 July 1, 2013, if the applicable requirements for attachment and
508 perfection under this chapter, as amended by this act, are
509 satisfied without further action.
510 (2) Except as otherwise provided in s. 679.804, if a
511 security interest is a perfected security interest immediately
512 before July 1, 2013, but the applicable requirements for
513 perfection under this chapter, as amended by this act, are not
514 satisfied on July 1, 2013, the security interest remains
515 perfected thereafter only if the applicable requirements for

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perfection under this chapter, as amended by this act, are satisfied no later than July 1, 2014.

679.803 Security interest unperfected before effective date.-A security interest that is an unperfected security interest immediately before July 1, 2013, becomes a perfected security interest:

(1) Without further action, on July 1, 2013, if the applicable requirements for perfection under this chapter, as amended by this act, are satisfied before or at that time; or

(2) When the applicable requirements for perfection are satisfied if the requirements are satisfied after that time.

679.804 Effectiveness of action taken before effective date.—

(1) The filing of a financing statement before July 1, 2013, is effective to perfect a security interest to the extent the filing would satisfy the applicable requirements for perfection under this chapter, as amended by this act.

(2) The amendments to this chapter by this act do not render ineffective an effective financing statement that was filed before July 1, 2013, and satisfies the applicable requirements for perfection under the law of the jurisdiction governing perfection as provided in this chapter as it existed before July 1, 2013. However, except as otherwise provided in subsections (3) and (4) and s. 679.805, the financing statement ceases to be effective:

(a) If the financing statement is filed in this state, at the time the financing statement would have ceased to be effective had this act not taken effect; or

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544 (b) If the financing statement is filed in another
545 jurisdiction, at the earlier of:
546 1. The time the financing statement would have ceased to
547 be effective under the law of that jurisdiction; or
548 2. By June 30, 2018.
549 (3) The filing of a continuation statement on or after
550 July 1, 2013, does not continue the effectiveness of the
551 financing statement filed before July 1, 2013. However, on the
552 timely filing of a continuation statement on or after July 1,
553 2013, and in accordance with the law of the jurisdiction
554 governing perfection as provided in this chapter, as amended by
555 this act, the effectiveness of a financing statement filed in
556 the same office in that jurisdiction before July 1, 2013,
557 continues for the period provided by the law of that
558 jurisdiction.
559 (4) Subparagraph (2)(b)2., applies to a financing
560 statement that was filed before July 1, 2013, against a
561 transmitting utility and satisfies the applicable requirements
562 for perfection under the law of the jurisdiction governing
563 perfection as provided in this chapter as it existed before July
564 1, 2013, only to the extent that this chapter, as amended by
565 this act, provides that the law of a jurisdiction other than the
566 jurisdiction in which the financing statement is filed governs
567 perfection of a security interest in collateral covered by the
568 financing statement.
569 (5) A financing statement that includes a financing
570 statement filed before July 1, 2013, or a continuation statement
571 filed on or after July 1, 2013, is effective only to the extent

that it satisfies the requirements of part V, as amended by this act, for an initial financing statement. A financing statement that indicates that the debtor is a decedent's estate indicates that the collateral is being administered by a personal representative within the meaning of s. 679.5031(1)(b), as amended by this act. A financing statement that indicates that the debtor is a trust or is a trustee acting with respect to property held in trust indicates that the collateral is held in a trust within the meaning of s. 679.5031(1)(c), as amended by this act.

679.805 When initial financing statement suffices to continue effectiveness of financing statement.—

(1) The filing of an initial financing statement in the office specified in s. 679.5011 continues the effectiveness of a financing statement filed before July 1, 2013, if:

(a) The filing of an initial financing statement in that office would be effective to perfect a security interest under this chapter, as amended by this act;

(b) The financing statement filed before July 1, 2013, was filed in an office in another state; and

(c) The initial financing statement satisfies subsection (3).

(2) The filing of an initial financing statement under subsection (1) continues the effectiveness of the financing statement filed before July 1, 2013, if:

(a) The initial financing statement is filed before July 1, 2013, for the period provided in s. 679.515, as it existed

599 before its amendment by this act, with respect to an initial
600 financing statement; and
601 (b) The initial financing statement is filed on or after
602 July 1, 2013, for the period provided in s. 679.515, as amended
603 by this act, with respect to an initial financing statement.
604 (3) To be effective for purposes of subsection (1), an
605 initial financing statement must:
606 (a) Satisfy the requirements of part IV, as amended by
607 this act, for an initial financing statement;
608 (b) Identify the financing statement filed before July 1,
609 2013, by indicating the office in which the financing statement
610 was filed and providing the dates of filing and file numbers, if
611 any, of the financing statement and of the most recent
612 continuation statement filed with respect to the financing
613 statement; and
614 (c) Indicate that the financing statement filed before
615 July 1, 2013, remains effective.
616 679.806 Amendment of financing statement filed before July
617 1, 2013.—
618 (1) On or after July 1, 2013, a person may add or delete
619 collateral covered by, continue or terminate the effectiveness
620 of, or otherwise amend the information provided in, a financing
621 statement only filed before July 1, 2013, in accordance with the
622 law of the jurisdiction governing perfection as provided in this
623 chapter, as amended by this act. However, the effectiveness of a
624 financing statement filed before July 1, 2013, also may be
625 terminated in accordance with the law of the jurisdiction in
626 which the financing statement is filed.

(2) Except as otherwise provided in subsection (3), if the law of this state governs perfection of a security interest, the information in a financing statement filed before July 1, 2013, may be amended after July 1, 2013, only if:

(a) The financing statement filed before July 1, 2013, and an amendment are filed in the office specified in s. 679.5011;

(b) An amendment is filed in the office specified in s. 679.5011 concurrently with, or after the filing in that office of, an initial financing statement that satisfies s. 679.805(3); or

(c) An initial financing statement that provides the information as amended and satisfies s. 679.805(3) is filed in the office specified in s. 679.5011.

(3) If the law of this state governs perfection of a security interest, the effectiveness of a financing statement filed before July 1, 2013, may be continued only under s. 679.804(3) and (5) or s. 679.805.

(4) Whether or not the law of this state governs perfection of a security interest, the effectiveness of a financing statement filed in this state before July 1, 2013, may be terminated on or after July 1, 2013, by filing a termination statement in the office in which the financing statement filed before July 1, 2013, is filed, unless an initial financing statement that satisfies s. 679.805(3) has been filed in the office specified by the law of the jurisdiction governing perfection as provided in this chapter, as amended by this act, as the office in which to file a financing statement.

654 679.807 Person entitled to file initial financing
655 statement or continuation statement.-A person may file an
656 initial financing statement or a continuation statement under
657 this part if:
658 (1) The secured party of record authorizes the filing; and
659 (2) The filing is necessary under this part:
660 (a) To continue the effectiveness of a financing statement
661 filed before July 1, 2013; or
662 (b) To perfect or continue the perfection of a security
663 interest.
664 679.808 Priority.—This part and the amendments to this
665 chapter made by this act determine the priority of conflicting
666 claims to collateral. However, if the relative priorities of the
667 claims were established before July 1, 2013, this chapter as it
668 existed before July 1, 2013, determines priority.
669 Section 18. Paragraph (m) of subsection (3) of section
670 680.1031, Florida Statutes, is amended to read:
671 680.1031 Definitions and index of definitions.—
672 (3) The following definitions in other chapters of this
673 code apply to this chapter:
674 (m) "Pursuant to a commitment," s. 679.1021(1)(ppp)
675 ~~679.1021(1)(ooo)~~.
676 Section 19. The Division of Statutory Revision is directed
677 to replace the phrase "this act" wherever it occurs in sections
678 679.801, 679.802, 679.803, 679.804, 679.805, 679.806, 679.807,
679 and 679.808, Florida Statutes, with the assigned chapter number
680 of this act.
681 Section 20. This act shall take effect July 1, 2013.

T I T L E A M E N D M E N T

Remove the entire title and insert:

A bill to be entitled

An act relating to the Uniform Commercial Code; revising and providing provisions of the Uniform Commercial Code relating to secured transactions to conform to the revised Article 9 of the Uniform Commercial Code as prepared by the National Conference of Commissioners on Uniform State Laws; amending s. 679.1021, F.S.; revising and providing definitions; amending s. 679.1051, F.S.; revising provisions relating to control of electronic chattel paper; amending s. 679.3071, F.S.; revising provisions relating to the location of debtors; amending s. 679.3111, F.S.; making editorial changes; amending s. 679.3161, F.S.; providing rules that apply to certain collateral to which a security interest attaches; providing rules relating to certain financing statements; amending s. 679.3171, F.S.; revising provisions relating to interests that take priority over or take free of a security interest or agricultural lien; amending s. 679.326, F.S.; revising priority of security interests created by a new debtor; amending ss. 679.4061 and 679.4081, F.S.; revising application; amending s. 679.5021, F.S.;

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710 revising when a record of a mortgage satisfying the
711 requirements of chapter 697 is effective as a filing
712 statement; amending s. 679.5031, F.S.; revising when a
713 financing statement sufficiently provides the name of
714 the debtor; amending s. 679.5071, F.S.; revising the
715 effect of certain events on the effectiveness of a
716 financing statement; amending s. 679.515, F.S.;
717 revising the duration and effectiveness of a financing
718 statement; amending s. 679.516, F.S.; revising
719 instances when filing does not occur with respect to a
720 record that a filing office refuses to accept;
721 amending s. 679.518, F.S.; revising requirements for
722 claims concerning an inaccurate or wrongfully filed
723 record; amending s. 679.607, F.S.; revising recording
724 requirements for the enforcement of mortgages
725 nonjudicially outside this state; creating part VIII
726 of chapter 679, F.S., relating to transition from
727 prior law under the chapter to law under the chapter
728 as amended by this act; creating s. 679.801, F.S.;
729 providing scope of application and limitations;
730 creating s. 679.802, F.S.; providing that security
731 interests perfected under prior law that also satisfy
732 the requirements for perfection under this act remain
733 effective; creating s. 679.803, F.S.; providing that
734 security interests unperfected under prior law but
735 that satisfy the requirements for perfection under
736 this act will become effective July 1, 2013; creating
737 s. 679.804, F.S.; providing when financing statements

effective under prior law in a different jurisdiction remain effective; creating s. 679.805, F.S.; requiring the recording of a financing statement in lieu of a continuation statement under certain conditions; providing for the continuation of the effectiveness of a financing statement filed before the effective date of this act under certain conditions; creating s. 679.806, F.S.; providing requirements for the amendment of financing statements filed before the effective date of this act; providing requirements for financing statements prior to amendment; creating s. 679.807, F.S.; providing person entitled to file initial financing statement or continuation statement; creating s. 679.808, F.S.; providing priority of conflicting claims to collateral; amending s. 680.1031, F.S.; conforming a cross-reference; providing a directive to the Division of Statutory Revision; providing an effective date.

TO: Real Property Probate and Trust Law Section of The Florida Bar

FROM: R. James Robbins, Jr., on behalf of The Mortgages & Other Encumbrances / UCC Subcommittee

DATE: November 17, 2011

RE: Proposed revisions to Article 9 of the Florida UCC (Chapter 679, Florida Statutes)

In 2010, the Uniform Law Commissioners (ULC), who are members of the National Conference of Commissioners on Uniform State Laws, drafted and adopted amendments to Article 9 of the UCC. The Bankruptcy/UCC Committee of The Business Law Section of The Florida Bar established a subcommittee, the UCC Study Group, to study and review the potential for adopting the Commission's revisions to Florida's Uniform Commercial Code. The UCC Study Group recommended that the Business Law Section's Executive Council support the adoption by the State of Florida of the revisions to Article 9.

Based upon the recommendations and with the support of The Business Law Section, HB 483 has been drafted and pre-filed for the 2012 legislative session. The following is a brief summary of the proposed legislation as it applies to the Florida Bar Real Property Probate and Trust Law Section, most specifically as it applies to mortgages filed as financing statements securing fixtures upon real property.

The proposed effective date of HB 483, if enacted, is July 1, 2013. A draft of HB 483 is enclosed, together with the House of Representative's Staff Analysis and the most recent proposed amendment to HB 483.

SUMMARY OF SIGNIFICANT PROPOSED CHANGES TO CH. 679

Ch. 679.1021 – Proposed modifications to various definitions, primarily focused with accommodating electronic records; definition of "Public organic record" has been added which provides a secured party with guidance on where to obtain the correct entity name for a debtor that is not an individual.

Ch. 679.3161 – Legislation provides for a 4 month grace period for perfection of a security interest in after-acquired property for a debtor that relocates (*note*: relocation may include reorganization under a different state); protection remains for bona fide purchasers of value in the event the creditor fails to perfect its security interest within the 4 month grace period.

Ch. 679.5021 – Clarifies filing requirements for mortgages filed as a financing statement. Generally speaking, HB 483 includes new requirements for effectively naming a debtor on a financing statement. As an example, if a debtor has a driver's license, the name as it appears on the license must be used on a non-mortgage financing statement. HB 483's suggested revisions to §679.5021 clarify the requirements for names of individual debtors on mortgages filed as financing statements. The creditor does not have to list the individual's name as it appears on a driver's license; it is sufficient to include the individual name or the surname and first name. Note that this only applies to individual debtors on mortgages and the new requirements for all other debtors on mortgages must be complied with the requirements of §679.5031 when a mortgage is filed as a financing statement.

Ch. 679.5031 – HB 483 modifies the requirements for effectively naming debtors on financing statements. If the debtor is a registered organization (i.e., a corporation or a business trust), the financing statement is sufficient if it provides the name of the debtor on its most recent "public organic record". For naming individual debtors, HB 483 suggests the "only if" method for individual debtors names; the name on the driver's license is to be used, and "only if" the debtor does not have a driver's license are you to use their first name and surname.

HB 483 further modifies the requirements for effectively naming debtors when the collateral is held in trust. The subcommittee is seeking clarification from the Business Law Section on the definition of "organic record" as it applies to trusts. In addition, the subcommittee is also seeking clarification on the naming requirements for trusts and how those requirements interface with real property requirements.

Based upon the proposed revisions §679.5031, real property practitioners will need to consider how to proceed with debtors on mortgages and other financing statements when the name per the statutory guidelines differs from how title is held in the public records.

Ch. 679.515/ Ch. 679.518 HB 483 revised the current legislation on how both debtors and creditors can file "information statements" when such party believes an erroneous financing statement, amendment or termination has been filed.

Ch. 679.607 – Clarification only with respect to collection and enforcement of a mortgage enforced non-judicially outside of the State of Florida; revision is not considered as material.

Ch. 679.801 – Ch. 679.808 Provides transition guidelines for effectively filing, continuing and amending financing statements after the enactment on July 1, 2013.

The other revisions of Article 9 included within HB 483 not mentioned herein are either limited to stylistic and grammatical changes or are not considered substantive to the Real Property Division.

SUMMARY:

Based upon the Subcommittee's review of HB 483, and notwithstanding the clarifications being sought by the Subcommittee from the Business Law Section surrounding the proposed edits to §679.5031, the Subcommittee is adopting the position of the Business Law Section, which recommends supporting HB 483. Of all of the proposed changes, in the event HB 483 is passed, real property practitioners will need to be particularly conscious of the statutory requirements for how to name debtors when the collateral is held in trust and how those requirements interface with real property requirements.

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FIFTH DISTRICT JANUARY TERM 2011

CITY OF PALM BAY,

Appellant,

v. Case No. 5D09-1810

WELLS FARGO BANK, N.A.,

Appellee.

___________________________________/

Opinion filed January 21, 2011

Appeal from the Circuit Court
for Brevard County,
Bruce W. Jacobus, Judge.

James D. Stokes, City Attorney, and Andrew P. Lannon, Deputy City Attorney, City of Palm Bay, for Appellant.

Tracy A. Mitchell and Keith Poliakoff of Becker & Poliakoff, P.A., Amicus Curiae, Town of Southwest Ranches, Fort Lauderdale, for Appellant.

Matthew J. Conigliaro and Stephanie C. Zimmerman of Carlton Fields, P.A., St. Petersburg, and Michael K. Winston of Carlton Fields, P.A., West Palm Beach, for Appellee.

COHEN, J.

The issue in this appeal is whether the City of Palm Bay can grant its code enforcement liens superpriority over a prior recorded mortgage. We conclude it cannot

because Palm Bay's ordinance conflicts with a state statute: section 695.11, Florida Statutes.

In 1997, Palm Bay enacted ordinance 97-07, creating its code enforcement board. Although incorporating by reference the procedures and remedies in Chapter 162, Florida Statutes,[1] ordinance 97-07 altered some of these statutory provisions to fit its individual needs. Among the changes, Palm Bay provided that any liens created by its code enforcement board and "recorded in the public record shall remain liens coequal with the liens of all state[,] county[,] district and municipal taxes, superior in dignity to all other liens[,] titles and claims until paid, and . . . may be foreclosed pursuant to the procedure set forth in Florida Statutes, Chapter 173."

In 2007, Wells Fargo filed an action to foreclose its mortgage, recorded in 2004, on residential property located in Palm Bay. Palm Bay was named a defendant in the foreclosure suit due to two code enforcement liens it recorded after the mortgage. In answering the complaint, Palm Bay asserted its code enforcement liens had priority pursuant to ordinance 97-07. At the hearing on Wells Fargo's motion for summary judgment, the trial court rejected Palm Bay's claims of lien superpriority. The trial court reasoned that the Legislature's failure to bestow code enforcement liens priority over a prior recorded mortgage or judgment lien indicated its intent that these liens not have priority and thus, the common law principle of first in time, first in right, applied.

Palm Bay's primary challenge to the trial court's ruling is that it had the authority to enact ordinance 97-07, and grant its code enforcement liens superpriority, under the

---

[1] Chapter 162, Florida Statutes, is entitled the "Local Government Code Enforcement Boards Act," and authorizes municipalities and counties to create administrative boards to enforce their codes and ordinances.

home rule powers granted by article VIII, section 2(b) of the Florida Constitution, and codified in section 166.021, Florida Statutes. Asserting that ordinance 97-07 does not encroach into any of the areas prohibited by section 166.021, Palm Bay concludes that it had the right to grant its code enforcement liens superpriority. Although a municipality has broad home rule powers to enact local ordinances, see Phantom of Brevard, Inc. v. Brevard County, 3 So. 3d 309, 314 (Fla. 2008); City of Kissimmee v. Florida Retail Federation, Inc., 915 So. 2d 205, 209 (Fla. 5th DCA 2005), the ordinances may not conflict with a state statute. See Art. VIII § 2(b), Fla. Const.

In relevant part, section 695.11, Florida Statutes, provides that any instruments required to be recorded pursuant to section 28.222, Florida Statutes, will be deemed recorded once an official register number is affixed. It further provides that recorded instruments with a lower official number will have priority over one with a higher number. This statute codifies, as Palm Bay recognized at oral argument, the common law rule of first in time, first in right. Thus, the Legislature has decided that priority for instruments such as mortgages and liens will generally follow the first in time rule. Ordinance 97-07 conflicts with this mandate by granting Palm Bay's code enforcement liens priority over a mortgage, even when the mortgage was recorded before the lien. The only way ordinance 97-07 can be effective is by violating the terms of section 695.11. Consequently, ordinance 97-07 must yield to the statute. See Phantom of Brevard, 3 So. 3d at 314 (ordinance conflicts with state statute when complying with one requires violating the other); F.Y.I. Adventures, Inc. v. City of Ocala, 698 So. 2d 583, 584 (Fla. 5th DCA 1997) (same).

Based on the foregoing, this court affirms the trial court's order granting summary judgment in favor of Wells Fargo.

AFFIRMED.

TORPY and EVANDER, JJ., concur.

Comprehensive Rider to the Residential Contract For Sale And Purchase

THIS FORM HAS BEEN APPROVED BY THE FLORIDA REALTORS AND THE FLORIDA BAR

If initialed by all parties, the clauses below will be incorporated into the Florida Realtors®/Florida Bar Residential Contract For Sale And Purchase between ____ (SELLER) and ____ (BUYER) concerning the Property described as ____

____

Buyer's Initials __________ __________ ***Seller's Initials*** __________ __________

C. SELLER FINANCING
(PURCHASE MONEY MORTGAGE; SECURITY AGREEMENT TO SELLER)

Seller agrees to hold a note secured by (**CHECK ONE**): ☐ a first ☐ a second purchase money mortgage, executed by Buyer in the principal amount of $_____________ at __________% interest per annum payable in equal (**CHECK ONE**): ☐ monthly ☐ quarterly ☐ annual payments of $_____________ each, including interest, with the first payment due __________ month(s) after Closing. This (**CHECK ONE**): ☐ is ☐ is not a balloon mortgage. If it is a balloon mortgage, the final payment will exceed the periodic payments thereon, and the entire unpaid principal balance plus accrued interest shall be due and payable in __________ months or __________ years from date of Closing. If a second mortgage, the amount of the first mortgage shall not exceed the amount set forth in Paragraph 2(c), and a default in the first mortgage shall, at the option of the holder, constitute a default of the second mortgage.

The purchase money mortgage and mortgage note to Seller shall provide for a 30 day grace period in the event of default if a first mortgage and a 15 day grace period if a second or lesser mortgage; shall provide for right of prepayment in whole or in part without penalty; shall permit acceleration in event of transfer of the Real Property; shall require all prior liens and encumbrances to be kept in good standing; shall forbid modifications of, or future advances under, prior mortgage(s); shall require Buyer to maintain policies of insurance containing a standard mortgagee clause covering all improvements located on the Real Property against fire and all perils included within the term "extended coverage endorsements" and such other risks and perils as Seller may reasonably require, in an amount equal to their highest insurable value; and the mortgage, mortgage note and security agreement shall be otherwise in form and content required by Seller, but Seller may only require clauses and coverage customarily found in mortgages, mortgage notes and security agreements generally utilized by state or national banks or other residential lending institutions located in the county where the Real Property is located. All Personal Property and leases being conveyed or assigned will, at Seller's option, be subject to the lien of a security agreement evidenced by recorded or filed financing statements or certificates of title.

Approved
Gary J Nash

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G. Thomas Ball
direct dial: 407.649.4004
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June 21, 2011

Paul F. Hill, Esquire
General Counsel
The Florida Bar
651 East Jefferson Street
Tallahassee, FL 32399-2300

Re: Licensing of the FAR/BAR Contract by The Florida Bar

Dear Paul:

Thank you for setting the meeting this Friday at the Convention for us to discuss The Florida Bar's ownership, control and use of the standard real estate forms that are produced by the Realtor Attorney Joint Committee ("Joint Committee"). Although I believe you and the other recipients of this letter are familiar with the pertinent facts, a little background may be helpful:

For the last several years Bill Haley, Fred Jones and I, as Bar appointees, along with Marcia Tabak, as counsel to Florida Realtors ("FR"), and other Realtor appointees have worked literally hundreds of hours as a Task force of the Joint Committee to formulate a complete and total redrafting of the FAR/BAR Contract, its companion "AS IS" form, as well as the "Comprehensive Riders" which supplement the standard forms. The creation and approval of these new forms and Riders (collectively, the "Contract") required countless hours of research, assimilation and revision to every material provision of the prior forms.

It has always been the position of the Joint Committee that the Contract must be an even-handed approach to the buying and selling of residential real estate and not drawn in favor of buyers sellers or brokers. This philosophy, which I believe has served the public and the legal and brokerage professions all very well, led to numerous negotiation sessions, resulting in concessions made on the part of The Bar, through the Real Property Probate and Trust Law Section, as well as concessions made by the Realtors.

In summary, in June 2010 a new standard form Contract was approved and placed into service and has quickly become widely acclaimed and accepted. In just the last few weeks, the copyright of the Contract – which is jointly owned and held by The Bar and FR - has been received.

Given this fresh new start we believe it is appropriate and timely to address how The Bar will in the future own, control and disseminate the Contract for the benefit of its members and the public. In making this determination it may helpful to consider how both The Bar and FR currently use and disseminate the Contract for the benefit of their members.

Although The Bar has in the past arranged through FLSSI to distribute or make Contract available to its members, we understand FLISSI has never been granted any ownership rights in the Contract. We assume FLISSI has been given no ownership interest in the newly-created form nor does it claim any proprietary interest. We understand further that FLISSI has made the Contract available to Bar members by allowing printed "books" of the Contract to be purchased in hard copy form. These "books" of forms are hand-delivered to the members.

In contrast, FR presently makes the Contract available to its members on-line via the FR website as a member service at no additional charge. As reported by Marcia Tabak, the Contract may be printed out by Realtors in blank, without data filled in, or if a member wants to complete the Contract on line, data can be inserted into each highlighted check box and blank online. When completed the Contract may be saved or printed.

We suggest The Bar adopt a similar user-friendly and flexible manner of access to the Contract for its members. If The Bar is unable to provide direct member access, as the co-owner of the copyright, it could enter into licensing agreements with one or more third party vendors to offer its members on-line access to the Contract, including the ability to use it in auto-population software and other applications.

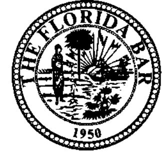
We look forward to discussing this matter on Friday.

Very truly yours,

G. Thomas Ball

cc: Terry L. Hill, Director, Programs Division, The Florida Bar
John F. Harkness, Executive Director, The Florida Bar
Marcia Tabak, Esquire
Frederick W. Jones, Esquire
William J. Haley, Esquire

The Florida Bar



Scott G. Hawkins
President

John F. Harkness, Jr.
Executive Director

Gwynne A. Young
President-Elect

September 26, 2011

George J. Meyer, Chair
The Florida Bar Real Property, Probate & Trust Law Section
Carlton Fields, P.A.
Post Office Box 3239
Tampa, Florida 33601-3239

DRAFT

Re: Florida Association of Realtors/Florida Bar Residential Contract For Sale And Purchase

Dear George:

The Bar has been approached by lawyer members of the Florida Realtor-Attorney Joint Committee that prepares the Florida Association of Realtors/Florida Bar Residential Contract For Sale And Purchase (FAR/BAR Contract), seeking an arrangement within our organization similar to that of the realtors association: whereby every Bar member could have free access to a static copy of the basic form – but more creative uses of that work would be reserved for separate treatment.

Under this suggested arrangement within the Bar, the FAR/BAR Contract could be accessed via a "member-only" portion of The Florida Bar's main website, for printing out or saving in blank, or for completion on line and for printing – just as the realtors association does now as a standard member service. Any additional use of FAR/BAR Contract within the Bar family and beyond, in auto-population software or other applications, would be a different deal – again, just as we understand that the realtors association acts now.

The Florida Bar and the Florida Association of Realtors jointly possess copyright to the Contract for Sale and Purchase. A newly revised version of the form was registered on February 9, 2011. Aside from the realtors association's separate uses of this work, since 1994 the Real Property, Probate & Trust Law (RPPTL) Section has enjoyed a revocable nonexclusive license from The Florida Bar to both print that contract and to grant additional rights for software containing the contract – presumably to Florida Lawyers Support Services, Inc. (FLSSI). The Bar has made no other use of this work during that period of licensure.

The Bar's general counsel and programs division director have had some follow-up discussions with the members of the joint committee who proposed this idea for greater lawyer access to their form. They have consulted with representatives of the Florida Association of Realtors as well. The notion of free and full Florida Bar membership access to the basic static version of the FAR/BAR contractual document strikes them – and me – as a worthwhile and workable idea. However, if the Bar were to further pursue this, I would be inclined to revisit the 1994 authorization to the RPPTL Section, and would likely limit the section's nonexclusive license to merely granting additional rights for software containing the FAR/ Bar contract in any future activities regarding this work.

I have enclosed various documents regarding this issue which may be of further assistance to your review of this matter. Because of the changes inherent in such a decision regarding the FAR/BAR contract, I thought I should share these developments with you and the RPPTL Section for your further comment. I would appreciate the section's sentiments regarding this proposal.

Cordially yours,

John F. Harkness, Jr.

Enclosures

cc: Scott G. Hawkins, President
Gwynne A. Young, President-elect
Paul F. Hill, General Counsel
Terry Hill, Director, Programs Division
G. Thomas Ball, Joint Committee Member
Frederick W. Jones, Joint Committee Member
William J. Haley, Former Joint Committee Member
Marcia Tabak, Deputy Legal Counsel, Florida Association of Realtors

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The Florida Bar
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(904) 561-5619
FAX: (904) 561-5825

August 29, 1994

Mr. Paul Hill, Bar Counsel
The Florida Bar
650 Apalachee Parkway
Tallahassee, FL 32399-2300

Dear Paul:

I am sure you have heard from several members of the Section that, we are experiencing problems with the Florida Association of Realtors because the realtors have adopted a new contract which is not the work product of the joint Florida Bar/Board of Realtors Committee established by the Bar and the State Board of Realtors a number of years ago.

Until recently, the Florida Association of Realtors printed the joint contract and sold it to the Bar for distribution.

Two years ago we were advised that the Board of Realtors had granted an "exclusive distribution" agreement for software which encompassed the Florida Bar/Board of Realtors contract. Enclosed is a copy of the original copyright reservation. You will note that the copyright was reserved in favor of both the Florida Bar and the Florida Association of Realtors. The Real Property, Probate and Trust Law Section would like to authorize Florida Lawyers Support Systems, Inc. to print the contract for distribution to and among lawyers (and for sale) just as we currently deal with probate and other forms for the Section.

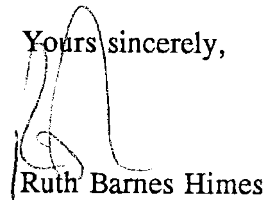
Please advise what we need to do to secure for FLSSI an assignment or licensing by the Florida Bar in order to use the Florida Bar copyright to print the

subject contract, as amended from time to time, and to grant licenses for the software.

If you have any questions, please give me a call.

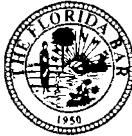
With very best regards.

Yours sincerely,



Ruth Barnes Himes

cc: Mr. Chris Hart
Mr. Bruce Marger
Ms. Julie A.S. Williamson
Mr. Robert W. Goldman
Mr. Tom Smith
Mr. Michael Dribin
Mr. Michael Swaine
Mr. Roland D. "Chip" Waller
Ms. Bonnie Elliott Bevis



THE FLORIDA BAR

650 Apalachee Parkway
Tallahassee, FL 32399-2300

John F. Harkness, Jr.
Executive Director

904/561-5600

November 3, 1994

Ms. Ruth Barnes Himes
P.O. Box 3239
Tampa, Florida 33601-3239

Re: Contract for Sale and Purchase

Dear Ruth:

I respond to your August 29, 1994 inquiry of Paul Hill regarding the assignment of rights to the Contract for Sale and Purchase developed by The Florida Bar and the Florida Association of Realtors.

Your report that the Realtors have granted "exclusive distribution" rights for software encompassing this product is noted. Assuming that the original copyright reservation for this contract resulted in joint and several rights for both the Bar and the Realtors, I am comfortable with the Realtors' assignment of their rights notwithstanding lack of notice to the Bar of such action. Presumably, the Bar may similarly assign its own rights to this contract.

On that premise, I grant to the Real Property, Probate & Trust Law Section -- and with notice to the Florida Association of Realtors -- a nonexclusive license of The Florida Bar's right to print the Contract for Sale and Purchase, and a nonexclusive license to the Section to grant additional rights for software containing this contract. You can authorize Florida Lawyers Support Systems to perform the same function for these as they do for the probate forms.

This authorization is valid until revoked by me, my successor, or by the Board of Governors. All such media produced as a result of this authorization should include appropriate references to The Florida Bar's basic copyright to this work.

I hope this action is otherwise responsive to your request. If you have questions regarding this matter, please let me know.

Cordially yours,

John F. Harkness, Jr.
Executive Director

cc: Mindy Boggs
Bonnie Elliott Bevis
Florida Association of Realtors

COPY

Certificate of Registration

This Certificate issued under the seal of the Copyright Office in accordance with title 17, *United States Code*, attests that registration has been made for the work identified below. The information on this certificate has been made a part of the Copyright Office records.

Maria A. Pallante

Acting Register of Copyrights, United States of America

Registration Number
TX 7-365-884

Effective date of registration:
February 9, 2011

Title

Title of Work: Residential Contract For Sale And Purchase
"AS IS" Residential Contract For Sale And Purchase
Comprehensive Rider to the Residential Contract For Sale And Purchase

Completion/Publication

Year of Completion: 2010

Date of 1st Publication: June 30, 2010 **Nation of 1st Publication:** United States

Author

- **Author:** Florida Association of Realtors, dba Florida Realtors

  Author Created: text

  Work made for hire: Yes

  Domiciled in: United States

- **Author:** The Florida Bar

  Author Created: text

  Work made for hire: Yes

  Citizen of: United States

Copyright claimant

Copyright Claimant: Florida Association of Realtors, dba Florida Realtors

7025 Augusta National Drive, Orlando, FL, 32822, United States

Copyright Claimant: The Florida Bar

651 E. Jefferson Street, Tallahassee, FL, 32399-2300, United States

Certification

Name: Marcia C. Tabak

Date: February 8, 2011

Registration #: TX0007365884

Service Request #: 1-561577360

Florida Realtors
Marcia C. Tabak
7025 Augusta National Drive
Orlando, FL 32822 United States

A bill to be entitled

An act relating to trust accountings; amending s. 736.0813(1)(d); clarifying the duties of a trustee to account; providing an effective date.

Be It Enacted by the Legislature of the State of Florida.

Section 1. Paragraph (d) of subsection (1) of section 736.0813, Florida Statutes, is amended to read:

(d) A trustee of an irrevocable trust shall provide a trust accounting as set forth in s. 736.08135, from the date of the last accounting or, if none, from the date on which the trustee became accountable, to each qualified beneficiary at least annually and on termination of the trust or on change of the trustee.

Section 2. This act shall take effect October 1, 2013.

LEGISLATIVE POSITION REQUEST FORM

GOVERNMENTAL AFFAIRS OFFICE

Date Form Received ____________

GENERAL INFORMATION

Submitted By Shane Kelley, Chair, Trust Law Committee of the Real Property Probate & Trust Law Section (RPPTL Approval Date____________________, 2011)

Address 3365 Galt Ocean Drive
Fort Lauderdale, FL 33308
Telephone: (954) 563-1400

Position Type Trust Law Committee, RPPTL Section, The Florida Bar
(Florida Bar, section, division, committee or both)

CONTACTS

Board & Legislation Committee Appearance

Shane Kelley, The Kelley Law Firm, PL, 3365 Galt Ocean Drive, Fort Lauderdale, FL 33308
Barry F. Spivey, Spivey & Fallon, PA, 1515 Ringling Blvd., Suite 885, Sarasota, FL 34236 Telephone 941-840-1991
Peter M. Dunbar, Pennington, Moore, Wilkinson, Bell & Dunbar, P.O. Box 10095, Tallahassee, Florida 32302-2095, Telephone (850) 222-3533
Martha J. Edenfield, Pennington, Moore, Wilkinson, Bell & Dunbar, P.O. Box 10095, Tallahassee FL 32302-2095, Telephone (850) 222-3533
(List name, address and phone number)

Appearances Before Legislators (SAME)
(List name and phone # of those having face to face contact with Legislators)

Meetings with Legislators/staff (SAME)
(List name and phone # of those having face to face contact with Legislators)

PROPOSED ADVOCACY

All types of partisan advocacy or nonpartisan technical assistance should be presented to the Board of Governors via this request form. All proposed legislation that has *not* been filed as a bill or a proposed committee bill (PCB) should be attached to this request in legislative format - Standing Board Policy 9.20(c). Contact the Governmental Affairs office with questions.

If Applicable, List The Following N/A
(Bill or PCB #) (Bill or PCB Sponsor)

Indicate Position Support _____ Oppose _____ Tech Asst. _____ Other _____

Proposed Wording of Position for Official Publication:

Support amending F.S. 736.0813(1)(d) to clarify the duty of a trustee to account and provide that a trustee may account more often than annually and satisfy the requirements of the statute.

Reasons For Proposed Advocacy:

Confusion has arisen in Florida concerning the meaning of F.S. 736.0813(d) and whether the statute allows a trustee to provide the beneficiaries with accountings more frequently than annually. The statute implies, but does not make explicit, that a trustee who provides more frequent accountings to a qualified beneficiary satisfies its duty to account to qualified beneficiaries. The proposed amendment to F.S. 736.0813(1)(d) clarifies that a trustee may provide accountings to qualified beneficiaries more frequently than annually and satisfy the duty to account. Furthermore, it will clarify that the trustee does not need to perform an additional annual accounting covering that same period if they have already filed an accounting covering a portion of that time period.

PRIOR POSITIONS TAKEN ON THIS ISSUE

Please indicate any prior Bar or section positions on this issue to include opposing positions. Contact the Governmental Affairs office if assistance is needed in completing this portion of the request form.

Most Recent Position NONE

(Indicate Bar or Name Section) (Support or Oppose) (Date)

Others
(May attach list if more than one) NONE

(Indicate Bar or Name Section) (Support or Oppose) (Date)

REFERRALS TO OTHER SECTIONS, COMMITTEES OR LEGAL ORGANIZATIONS

The Legislation Committee and Board of Governors do not typically consider requests for action on a legislative position in the absence of responses from all potentially affected Bar groups or legal organizations - Standing Board Policy 9.50(c). Please include all responses with this request form.

Referrals

None

(Name of Group or Organization) (Support, Oppose or No Position)

(Name of Group or Organization) (Support, Oppose or No Position)

(Name of Group or Organization) (Support, Oppose or No Position)

Please submit completed Legislative Position Request Form, along with attachments, to the Governmental Affairs Office of The Florida Bar. Upon receipt, staff will further coordinate the scheduling for final Bar action of your request which usually involves separate appearances before the Legislation Committee and the Board of Governors unless otherwise advised. For information or assistance, please telephone (904) 561-5662 or 800-342-8060, extension 5662.

WHITE PAPER

PROPOSED AMENDMENT TO F.S 736.0813(1)(d)

I. SUMMARY

This legislation clarifies that a trustee who furnishes an accounting more frequently than annually satisfies its duty to account to qualified beneficiaries pursuant to F.S. 736.0813 and that the trustee does not need to perform another accounting covering that period on an annual basis. The bill does not have a fiscal impact on state funds.

II. CURRENT SITUATION

The current statutory provision concerning the duty to account by a trustee provides in F.S. 736.0813(1)(d), "A trustee of an irrevocable trust shall provide a trust accounting, as set forth in s. 736.08135, to each qualified beneficiary annually and on termination of the trust or on change of the trustee." The accounting shall be in the format dictated by F.S. 736.08135. There are no express provisions regarding what the resulting duties are if the trustee accounts on a period more often than annually. The statute implies, but does not make explicit, that a trustee who provides more frequent accountings to a qualified beneficiary satisfies its duty to account to qualified beneficiaries. The purpose of the statute is to encourage disclosure of information through accountings to qualified beneficiaries. Corporate fiduciaries commonly provide monthly or quarterly accountings to qualified beneficiaries. Limited confusion has arisen at the trial court level about whether accountings provided more frequently than annually satisfy the trustee's duty to account. The proposed legislation will eliminate that confusion among the trustees in Florida.

III. EFFECT OF PROPOSED CHANGES

Proposed F.S. 736.0813(1)(d) clarifies that a trustee may provide accountings to qualified beneficiaries more frequently than annually and satisfy the duty to account. Furthermore, it will clarify that the trustee does not need to perform an additional annual accounting covering that same period if they have already filed an accounting covering a portion of that time period. Any subsequent accounting

must cover the time period from the last accounting or, if there are no previous accountings, from the date the trustee first became accountable.

IV. FISCAL IMPACT ON STATE AND LOCAL GOVERNMENTS

The proposal does not have a fiscal impact on state or local governments.

V. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR

The proposal will not have a direct economic impact on the private sector.

VI. CONSTITUTIONAL ISSUES

There are no constitutional issues raised by this proposal.

VII. OTHER INTERESTED PARTIES

Florida Bankers Association

RPPTL Section
Chair
George J. Meyer

The Florida Bar
651 E. Jefferson Street
Tallahassee, FL 32399-2300

Tax Section
Chair
Domenick R. Lioce

November 7, 2011

CC:PA:LPD:PR (Notice 2011-82)
Room 5203
Internal Revenue Service
P.O. Box 7604
Ben Franklin Station
Washington, DC 20044

By email to: Notice.Comments@irscounsel.treas.gov

Re: IRS Notice 2011-82, Guidance on Electing Portability of Deceased Spousal Unused Exclusion Amount

To Whom It May Concern:

The Treasury Department recently issued IRS Notice 2011-82, requesting comments on certain specific issues for consideration in proposed regulations to be issued under Section 2010(c) of the Internal Revenue Code of 1986, as amended ("IRC"). We are pleased to submit these comments on behalf of the Tax Section and the Real Property Probate and Trust Law Section of The Florida Bar.

Although the members of The Florida Bar Tax Section and Real Property Probate and Trust Law Section who participated in preparing these comments may have clients who would be affected by the Proposed Regulations, no such member has been engaged by a client to make a government submission with respect to, or otherwise to influence the development or outcome of the specific subject matter of these comments.

Principal responsibility for these comments was exercised by David M. Silberstein, Esq., and Taso M. Milonas, Esq. These comments were reviewed by James Barrett, Esq., Lester Law, Esq., and Elaine Bucher, Esq. Contact information is as follows:

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If you have questions regarding these comments, please contact Mr. Silberstein or Mr. Milonas.

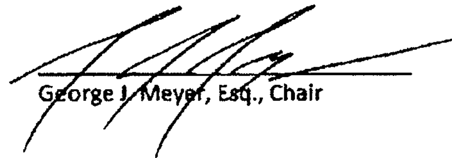
The Florida Bar is the third largest organized state bar association in the United States. The Tax Section is comprised of more than 2,000 members and the Real Property Probate and Trust Law Section is comprised of more than 9,300 members. These materials were prepared by the Comment Projects Subcommittees of both the Tax Section and the Real Property, Probate and Trust Law Section.

As always, we will be pleased to provide additional commentary as requested. If you have any questions, please do not hesitate to contact us.

THE TAX SECTION OF
THE FLORIDA BAR

By: ______________________
Dominick R. Lioce, Esq., Chair

THE REAL PROPERTY, PROBATE
AND TRUST LAW SECTION OF THE
FLORIDA BAR



By: ______________________
George J. Meyer, Esq., Chair

Enclosure

THE FLORIDA BAR

TAX SECTION
AND
REAL PROPERTY, PROBATE, AND TRUST LAW SECTION

COMMENTS TO IRS NOTICE 2011-82, GUIDANCE ON ELECTING PORTABILITY OF DECEASED SPOUSAL UNUSED EXCLUSION AMOUNT

To Whom It May Concern:

These comments are written on behalf of the Tax Section ("Tax Section") and the Real Property Probate and Trust Law Section ("RPPTL Section") of The Florida Bar, and are being submitted in response to the request of the Internal Revenue Service and Treasury Department (collectively referred to herein as "Treasury") in IRS Notice 2011-82 (the "Notice") for comments for consideration in issuing proposed regulations under Section 2010(c) of the Internal Revenue Code of 1986, as amended ("IRC"). IRC Section 2010(c) was amended by the Tax Relief, Unemployment Insurance Reauthorization, and Job Creation Act of 2010 (the "TRUICA").

We would like to acknowledge and thank the ABA Section of Real Property, Trust and Estate Law for its generosity in sharing a draft of its comments with us. We do not intend to repeat the ABA's positions and comments, but would like to acknowledge its thoroughness and request that the Treasury give thoughtful consideration to its positions and comments.

The Notice requested comments on the following five specific issues:

1. The determination in various circumstances of the deceased spousal unused exclusion amount (the "DSUEA") and the applicable exclusion amount;
2. The order in which exclusions are deemed to be used;
3. The effect of the last predeceasing spouse limitation described in IRC Section 2010(c)(4)(B)(i);
4. The scope of Treasury's right to examine a return of the first spouse to die without regard to any period of limitation in IRC Section 6501; and
5. Any additional issues that should be considered for inclusion in the proposed regulations.

We do not intend to address each of the foregoing issues, which we believe the ABA addressed thoroughly and at length in its comments. We would like to address the following issues: (i) the scope of Treasury's right to examine returns; (ii) the determination of "clawbacks"; (iii) what constitutes a timely filed return in certain circumstances; and (iv) the asymmetrical application of the portability election under current tax law.

1. Proposed Regulations should clarify the scope of the Treasury's right to examine a return of the first spouse to die without regard to any period of limitation in IRC Section 6501.

Under TRUICA, Treasury is authorized "to examine a return of the deceased spouse to make determinations with respect to such amount [the DSEUA] for purposes of carrying out this subsection." The Proposed Regulations should specifically limit such review to estate and gift taxes, and state that such review does not apply to income taxes or generation skipping transfer taxes.

A second issue involves the difference in scope of such review under TRUICA and under other Gift and Estate Tax Returns. For example reviews of Gift Tax returns that have adequately disclosed items are limited to three (3) years, but use of a DSEUA by a surviving spouse could extend that period indefinitely. This can create record keeping issues for the surviving spouse and his or her professional advisors.

Prior to completing distribution of the surviving spouse's estate, all tax matters will need to be resolved. The Proposed Regulations should provide that the applicable periods of limitations will cease coincidently with the termination of those periods of limitation applicable to the surviving spouse.

2. Proposed Regulations should clarify that no clawback of the DSEUA will result in the imposition of Estate or Gift Tax.

It is recognized and should be noted that the issue of clawback or recapture is not unique to the portability analysis and could exist even where no portability issue is present. For example, the issue can arise anytime the applicable exclusion amount at the decedent's death is less than the amount the decedent previously allocated to a lifetime transfer. Portability does, however, have the potential to magnify or exacerbate the problem.

It is possible that the clawback or recapture of a DSEAU could occur in the event of a remarriage by and subsequent death of the surviving spouse or a future reduction in the basic exclusion amount that would apply to the surviving spouse. There are a number of other instances where a clawback or recapture could create an unintended result. The Proposed Regulations should provide that no such clawback of the DSEAU would result in the imposition of either gift or estate tax.

3. A Filing Trap for the Unwary.

A theme inherent in IRS Notice 2011-82 and the legislative history of TRUICA as it relates to IRC Section 2010(c)(5)(A) is simplification in planning for taxpayers and their advisors. The Notice states that the procedure for making the portability election should be "as straightforward and uncomplicated as possible." The reality is that application as described will likely create far more complexity, uncertainty and costs to taxpayers, their advisors and the Service. Currently, the great majority of decedent's estates do not require the preparation and filing of a federal estate tax return. The new rules would impose a *de facto* filing requirement on

each and every decedent's estate or risk losing the portability benefit upon the death of the survivor. For example, assume A has a modest estate and dies in 2011 without filing an estate tax return. Years later, A's spouse B dies after winning $20 million in the lottery. Under this scenario, B's estate would be denied the benefits of portability. We believe the added cost and complexity to A's estate in the preparation and filing of a return when none was otherwise due, the cost and administrative burden put upon the Service to review each such return, and the potential claim for malpractice that now might lie against every practitioner dealing with an otherwise simple, non-taxable estate situation militates against such a draconian application and instead suggests the need for a simpler and more practical approach.

This could include an optional "look-back" approach. Under this approach, a schedule could be attached to and made part of the surviving spouse's estate tax return verifying that the exclusion was unused at the death of the first spouse and is being allocated at the second death. This approach recognizes the reality that it is only upon the death of the survivor that all relevant facts (e.g., value of survivor's estate, current available exclusion) will be known. There is precedent in the estate and gift tax law for this type of approach in the common use of disclaimers and we believe such an approach would go a long way toward achieving the Service's stated goal of making the election as "straightforward and uncomplicated" as possible. It would relieve the vast majority of taxpayers of the undue cost and expense of filing of an estate tax return when one is otherwise not necessary, lessen the administrative burden on the Service in reviewing such returns, and eliminate the potential malpractice claim against an otherwise competent advisor not routinely advising taxable estate situations.

Another issue the Proposed Regulations should address is the determination of what constitutes a "timely" filed return (including extensions). Under current law, the time for filing begins if and only if the value of the gross estate plus taxable gifts of the first spouse's estate is at or above the minimum filing requirement. Conversely, for estates below the minimum, the clock never begins to run. The look-back approach suggested above would obviate this issue altogether. Another alternative would be to include a definition along the following lines: "In determining whether a decedent has timely filed a return (including extensions) for portability election purposes, the return must be filed if at all within nine months of the decedent's death, excluding extensions, *regardless* of the value of the decedent's gross estate." We believe this alternative is inferior to the look-back approach, but superior to the current proposal.

Finally, the Proposed Regulations should also permit extension of the filing requirements to permit late filings and reformation of improperly calculated DSEAU's. Treasury should revise the Forms 706 and 709 to include calculations of DSEAU.

4. Asymmetrical Application.

Symmetry is a characteristic or theme pervasive throughout current tax law. For example, where one party has income another typically has a corresponding and equal deduction. Symmetry is evident in estate and generation-skipping transfer ("GST") tax law in that the current GST amount equals the amount of the taxpayer's applicable exclusion amount for estate tax purposes. The portability election as enacted is asymmetrical in application and contradicts the long-standing notion of tax symmetry because it focuses only on the unused applicable

exclusion remaining for estate but not GST tax purposes. While technically beyond the scope of the requested comments, this disconnect should be noted and addressed in account in future revisions of the law.

5. Summary Comments.

In summary, we believe that portability is beneficial to taxpayers, but it should not become a trap for the unwary. Taxpayers and their professional representatives should be able to rely on rules that are clear as to filing and election requirements. The Proposed Regulations should strive to create more certainty in the application of these rules without imposing an undue administrative burden on the Service.

Taxpayers will be relying on the use of a DSEUA in executing pre- and post- nuptial agreements, making gifts, and planning their estates. They will need as much certainty as possible to make appropriate decisions and be able in accordance with applicable law. Taxpayers will rely on these rules in structuring their lives, and taxpayers need a system on which they can rely.

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Part III – Administrative, Procedural, and Miscellaneous

Guidance on Electing Portability of Deceased Spousal Unused Exclusion Amount

Notice 2011-82

PURPOSE

This notice alerts executors of the estates of decedents dying after December 31, 2010, of the need to file a Form 706, United States Estate (and Generation-Skipping Transfer) Tax Return, within the time prescribed by law (including extensions) in order to elect to allow the decedent's surviving spouse to take advantage of the deceased spouse's unused exclusion amount, if any, pursuant to section 303(a) of the Tax Relief, Unemployment Insurance Reauthorization, and Job Creation Act of 2010, P.L. 111-312 (124 Stat. 3302) (TRUIRJCA) and section 2010(c)(5)(A) of the Internal Revenue Code (Code). In particular, for the executor of the estate of a decedent to elect under section 2010(c)(5)(A) (a "portability election") to allow the decedent's surviving spouse to use the decedent's unused exclusion amount, the executor is required to file a Form 706 for the decedent's estate, even if the executor is not otherwise obligated to file a Form 706. This notice also alerts executors of the estates of decedents dying after December 31, 2010, that the estate of such a decedent will be considered to have made a portability election if a Form 706 is timely filed in accordance with the

instructions for that form. For those estates filing a Form 706 that choose not to make a portability election, this notice addresses how to avoid making the election. This notice also reminds taxpayers that a portability election can be made only on a Form 706 timely filed by the estate of a decedent dying after December 31, 2010, and any attempt to make a portability election on a Form 706 filed for the estate of a decedent dying on or before December 31, 2010, will be ineffective. Finally, this notice alerts taxpayers that the Treasury Department and the Internal Revenue Service (Service) intend to issue regulations under section 2010(c) of the Code to address issues arising with respect to the portability election, and anticipate that those regulations will be consistent with the provisions of this notice.

BACKGROUND

Sections 302(a)(1) and 303(a) of TRUIRJCA, enacted on December 17, 2010, amended section 2010(c) of the Code. Section 2010(c), as amended, generally allows the surviving spouse of a decedent dying after December 31, 2010, to use the decedent's unused exclusion amount in addition to the surviving spouse's own basic exclusion amount. Thus, sections 302(a)(1) and 303(a) of TRUIRJCA eliminate the need for spouses to retitle property and create trusts solely to take full advantage of each spouse's basic exclusion amount.

Section 2010(c)(1) of the Code provides that the applicable credit amount is the amount of the tentative tax that would be determined under section 2001(c) if the amount with respect to which the tentative tax is to be computed were equal to the applicable exclusion amount. Thus, generally, the applicable credit amount effectively

exempts from federal estate and gift tax a person's taxable transfers with a cumulative value not exceeding the applicable exclusion amount.

Under section 2010(c)(2), a person's applicable exclusion amount is the sum of (A) the basic exclusion amount and (B) in the case of a surviving spouse, the deceased spousal unused exclusion amount, if any.

Section 2010(c)(3) sets the basic exclusion amount at $5,000,000 in 2011, to be adjusted annually for inflation after 2011.

Section 2010(c)(4) defines the term "deceased spousal unused exclusion amount" to mean, with respect to the surviving spouse of a decedent dying after December 31, 2010, the lesser of (A) the basic exclusion amount, or (B) the excess of (i) the basic exclusion amount of the last such deceased spouse of such surviving spouse, over (ii) the amount with respect to which the tentative tax is determined under section 2001(b)(1) on the estate of such deceased spouse. The unused exclusion amount of a deceased spouse who died before January 1, 2011, cannot be used by the surviving spouse, regardless of the date of the surviving spouse's death.

Under section 2010(c)(5)(A), a deceased spousal unused exclusion amount may be taken into account by a surviving spouse in determining the surviving spouse's applicable exclusion amount only if the executor of the deceased spouse timely files a Form 706 for the deceased spouse's estate, on which the executor computes the deceased spousal unused exclusion amount and makes a portability election. An election, once made, is irrevocable. However, no election may be made if the Form 706 is filed after the time prescribed by law (including extensions) for filing a Form 706.

Section 6075(a) requires the executor of a decedent's estate filing a tax return to file the Form 706 within 9 months after the date of the decedent's death. Section 6081(a) provides that the Secretary may grant a reasonable extension of time for filing any return; however, generally, no such extension may be for more than 6 months. Section 20.6081-1(b) of the Estate Tax Regulations grants executors of decedents' estates an automatic 6-month extension of time to file the Form 706. Executors currently may request the automatic extension of time to file Form 706 by timely filing Form 4768, "Application for Extension of Time To File a Return and/or Pay U.S. Estate (and Generation-Skipping Transfer) Taxes."

Section 2010(c)(5)(B) allows the Secretary to examine a return of the predeceased spouse, even after the time has expired under section 6501 for assessing tax under chapter 11 or 12, to make determinations with respect to the deceased spousal unused exclusion amount, notwithstanding any period of limitation in section 6501.

Section 2010(c)(6) provides that the Secretary shall prescribe regulations as may be necessary or appropriate to implement section 2010(c).

DISCUSSION

The Treasury Department and the Service anticipate that, as a general rule, married couples will want to ensure that the unused basic exclusion amount of the first spouse to die will be available to the surviving spouse and, thus, that the estates of most (if not all) married decedents dying after December 31, 2010, will want to make the portability election. As indicated above, because the election is to be made on a timely-filed Form 706, the Treasury Department and the Service anticipate a significant

increase in the number of Forms 706 that will be filed by the estates of decedents dying after December 31, 2010, and that many of those returns will be filed by the estates of decedents whose gross estates have a value below the applicable exclusion amount.

As a result, the Treasury Department and the Service believe that the procedure for making the portability election on the Form 706 should be as straightforward and uncomplicated as possible to reduce the risk of inadvertently missed elections. To that end, the Treasury Department and the Service have determined that the timely filing of a Form 706, prepared in accordance with the instructions for that form, will constitute the making of a portability election by the estate of a decedent dying after December 31, 2010. Thus, by timely filing a properly-prepared and complete Form 706, an estate will be considered to have made the portability election without the need to make an affirmative statement, check a box, or otherwise affirmatively elect, on the Form 706. Until such time as the IRS revises the Form 706 to expressly contain the computation of the deceased spousal unused exclusion amount, a timely-filed and complete Form 706 that is prepared in accordance with the instructions for that form will be deemed to contain the computation of the deceased spousal unused exclusion amount, thereby satisfying the requirements in section 2010(c)(5)(A) for making an effective election.

The Treasury Department and the Service acknowledge that an estate may not want to make the portability election. Not filing a timely Form 706 will prevent the making of that election. However, if such an estate is obligated to file a Form 706 because the value of the gross estate exceeds the applicable exclusion amount, or files a Form 706 for another reason, the executor must follow the instructions for Form 706 that will describe the necessary steps to avoid making the election.

The Treasury Department and the Service recognize that the due date for filing Form 706 for those decedents dying in the first quarter of 2011 is fast approaching and remind executors of the ability to request an automatic 6-month extension by filing Form 4768 before the due date for filing Form 706. See § 20.6081-1(a) and (b) of the Estate Tax Regulations.

The Treasury Department and the Service intend to issue regulations, pursuant to the specific authority provided in section 2010(c)(6), to address various issues arising with respect to implementation of the provisions of section 2010(c).

GUIDANCE

1. If the executor of the estate of a decedent dying after December 31, 2010, intends to make the portability election to allow the decedent's surviving spouse to use the deceased spousal unused exclusion amount, the executor must file a complete Form 706 within the time prescribed by law (including extensions), regardless of whether or not the gross estate has a value in excess of the exclusion amount or otherwise is obligated to file a Form 706.

2. The estate of a decedent dying after December 31, 2010, will be deemed to make the portability election to allow the decedent's surviving spouse to use the deceased spousal unused exclusion amount by the timely filing of a complete and properly-prepared Form 706. To ensure the correct exclusion amount and tax rates, executors should use the Form 706 issued for the year of the decedent's death. Until such time as the IRS revises the Form 706 to expressly contain the computation of the deceased spousal unused exclusion amount, a complete and properly-prepared

Form 706 will be deemed to contain the computation of the deceased spousal unused exclusion amount.

3. The executor of the estate of a decedent dying after December 31, 2010, that timely files a complete Form 706, but that chooses not to make the portability election to allow the decedent's surviving spouse to use the deceased spousal unused exclusion amount, must follow the instructions for Form 706 that will describe the steps the executor must take to notify the Service that the decedent's estate is not making the portability election. If the executor of such an estate chooses not to make the portability election and is not otherwise obligated to file a Form 706, not timely filing a Form 706 will effectively prevent the making of that election.

4. The estate of a decedent dying on or before December 31, 2010, is not entitled to make a portability election. Any attempt to make a portability election on a Form 706 filed for the estate of such a decedent will be ineffective.

5. The Treasury Department and the Service intend to issue regulations to implement the provisions of section 2010(c).

REQUEST FOR COMMENTS

Comments are invited on the following specific issues, which have been identified for consideration in proposed regulations to be issued under section 2010(c):

1. The determination in various circumstances of the deceased spousal unused exclusion amount and the applicable exclusion amount;

2. The order in which exclusions are deemed to be used;

3. The effect of the last predeceasing spouse limitation described in section 2010(c)(4)(B)(i);

4. The scope of the Service's right to examine a return of the first spouse to die without regard to any period of limitation in section 6501; and

5. Any additional issues that should be considered for inclusion in the proposed regulations.

Comments will be considered if submitted in writing by October 31, 2011. All comments will be available for public inspection and copying. Comments may be submitted in one of three ways:

(a) By mail to CC:PA:LPD:PR (Notice 2011-82), Room 5203, Internal Revenue Service, P.O. Box 7604, Ben Franklin Station, Washington, DC 20044.

(b) Electronically to Notice.Comments@irscounsel.treas.gov. Please include "Notice 2011-82" in the subject line of any electronic communications.

(c) By hand-delivery Monday through Friday between the hours of 8 a.m. and 4 p.m. to CC:PA:LPD:PR (Notice 2010-82), Courier's Desk, Internal Revenue Service, 1111 Constitution Ave., NW, Washington, DC 20224.

EFFECTIVE DATE

This notice is applicable with respect to the estates of decedents dying after December 31, 2010.

DRAFTING INFORMATION

The principal author of this notice is Karlene Lesho of the Office of Associate Chief Counsel (Passthroughs and Special Industries). For further information regarding this notice, contact Karlene Lesho at (202) 622-3090 (not a toll-free call).

Supreme Court of Florida

No. SC11-192

IN RE: AMENDMENTS TO THE FLORIDA RULES OF APPELLATE PROCEDURE.

[November 3, 2011]

PER CURIAM.

The Appellate Court Rules Committee (Rules Committee) has filed its regular-cycle report of proposed rule changes in accordance with Florida Rule Judicial of Administration 2.140(b)(4). We have jurisdiction. See art. V, § 2(a), Fla. Const.

BACKGROUND

The Rules Committee proposes amendments to existing rules 9.100(b) (Original Proceedings); 9.110(b) (Appeal Proceedings to Review Final Orders of Lower Tribunals and Orders Granting New Trial in Jury and Non-Jury Cases); 9.120(b) (Discretionary Proceedings to Review Decisions of District Courts of Appeal); 9.125 (Review of Trial Court Orders and Judgments Certified by the

District Courts of Appeal as Requiring Immediate Resolution by the Supreme Court); 9.130 (Proceedings to Review Non-Final Orders and Specified Final Orders); 9.140 (Appeal Proceedings in Criminal Cases); 9.150 (Discretionary Proceedings to Review Certified Questions from Federal Courts); 9.160 (Discretionary Proceedings to Review Decisions of County Courts); 9.180 (Appeal Proceedings to Review Workers' Compensation Cases); 9.190 (Judicial Review of Administrative Action); 9.200(b)(4) (The Record; Transcript(s) of Proceedings); 9.225 (Notice of Supplemental Authority); 9.370 (Amicus Curiae); 9.420 (Filing; Service of Copies; Computation of Time); and 9.800 (Uniform Citation System). The Rules Committee also proposes new rule 9.170 (Appeal Proceedings in Probate and Guardianship Cases) and new form 9.900(j) (Notice of Supplemental Authority), which corresponds to its proposed amendments to rule 9.225.

The Rules Committee proposed new and amended rules; it published the proposals for comment in accordance with rule 2.140(b)(2). Three comments were received and considered by the Rules Committee. The Florida Bar Board of Governors unanimously approved the proposals.

The Court published the proposals for comment and received four comments: one comment addressing amendments to rule 9.140; one comment addressing new rule 9.170; and two comments addressing proposed amendments to

rule 9.420. The Rules Committee filed a response, which includes revised proposed amendments for rules 9.140 and 9.420, respectively.

AMENDMENTS

Oral argument was held on the proposals.[1] Having considered the Committee's proposals, the comments, and the responses, and having heard oral argument, we adopt the new rules and the amendments, with modifications to the proposal for rule 9.140 as explained below.

Rule 9.140(d)(1)(E) (Appeal Proceedings in Criminal Cases; Withdrawal of Defense Counsel After Judgment and Sentence or After Appeal by State) is amended to recognize the recently created Office of Criminal Conflict and Civil Regional Counsel and to clarify the procedures regarding representation in criminal cases. We modify the proposed amendment because chapter 27, Florida Statutes, provides that private counsel may be appointed by court order and compensated with public funds. See § 27.40(7)(a), Fla. Stat. (2011).[2]

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1. There was no opposition to the proposals at oral argument.

2. Section 27.40(7)(a) provides:

> A private attorney appointed by the court from the registry to represent a client is entitled to payment as provided in s. 27.5304. An attorney appointed by the court who is not on the registry list may be compensated under s. 27.5304 if the court finds in the order of appointment that there were no registry attorneys available for representation for that case.

Accordingly, we amend the Florida Rules of Appellate Procedure as set forth in the appendix to this opinion. New language is indicated by underscoring; deletions are indicated by struck-through type. The committee notes are offered for explanation only and are not adopted as an official part of the rules. These amendments shall become effective on January 1, 2012, at 12:01 a.m.

It is so ordered.

CANADY, C.J. and PARIENTE, LEWIS, QUINCE, POLSTON, LABARGA, and PERRY, JJ., concur.

THE FILING OF A MOTION FOR REHEARING SHALL NOT ALTER THE EFFECTIVE DATE OF THESE AMENDMENTS.

Original Proceeding – The Florida Rules of Appellate Procedure Committee

John G. Crabtree, Chair, Appellate Court Rules Committee, Crabtree and Associates, P.A., Key Biscayne, Florida, John F. Harkness, Jr., Executive Director, and Krys Godwin, Staff Liaison, The Florida Bar, Tallahassee, Florida,

for Petitioner

Judge Mark King Leban, Eleventh Judicial Circuit, Miami, Florida; Harvey Ruvin, Clerk of Courts, Miami-Dade County, Miami, Florida; Michael A. Catalano, P.A., Miami, Florida; Michael R. Rollo, P.A., Pensacola, Florida,

Responding with comments

Committee Notes

[No change]

RULE 9.160. DISCRETIONARY PROCEEDINGS TO REVIEW DECISIONS OF COUNTY COURTS

(a) [No change]

(b) Commencement. Any appeal of an order certified by the county court to be of great public importance must be taken to the district court of appeal. Jurisdiction of the district court of appeal under this rule shall be invoked by filing 2 copies of a notice and a copy of the order containing certification, accompanied by ~~the~~any filing fees prescribed by law, with the clerk of the lower tribunal. The time for filing the appeal shall be the same as if the appeal were being taken to the circuit court.

(c) – (j) [No change]

Committee Notes

[No change]

RULE 9.170. APPEAL PROCEEDINGS IN PROBATE AND GUARDIANSHIP CASES

(a) Applicability. Appeal proceedings in probate and guardianship cases shall be as in civil cases, except as modified by this rule.

(b) Appealable Orders. Except for proceedings under rule 9.100 and rule 9.130(a), appeals of orders rendered in probate and guardianship cases shall be limited to orders that finally determine a right or obligation of an interested person as defined in the Florida Probate Code. Orders that finally determine a right or obligation include, but are not limited to, orders that:

(1) determine a petition or motion to revoke letters of administration or letters of guardianship;

(2) determine a petition or motion to revoke probate of a will;

(3) determine a petition for probate of a lost or destroyed will;

(4) grant or deny a petition for administration pursuant to section 733.2123, Florida Statutes;

(5) grant heirship, succession, entitlement, or determine the persons to whom distribution should be made;

(6) remove or refuse to remove a fiduciary;

(7) refuse to appoint a personal representative or guardian;

(8) determine a petition or motion to determine incapacity or to remove rights of an alleged incapacitated person or ward;

(9) determine a motion or petition to restore capacity or rights of a ward;

(10) determine a petition to approve the settlement of minors' claims;

(11) determine apportionment or contribution of estate taxes;

(12) determine an estate's interest in any property;

(13) determine exempt property, family allowance, or the homestead status of real property;

(14) authorize or confirm a sale of real or personal property by a personal representative;

(15) make distributions to any beneficiary;

(16) determine amount and order contribution in satisfaction of elective share;

(17) determine a motion or petition for enlargement of time to file a claim against an estate;

(18) determine a motion or petition to strike an objection to a claim against an estate;

(19) determine a motion or petition to extend the time to file an objection to a claim against an estate;

(20) determine a motion or petition to enlarge the time to file an independent action on a claim filed against an estate;

(21) settle an account of a personal representative, guardian, or other fiduciary;

(22) discharge a fiduciary or the fiduciary's surety;

(23) award attorneys' fees or costs; or

(24) approve a settlement agreement on any of the matters listed above in (1)–(23) or authorizing a compromise pursuant to section 733.708, Florida Statutes.

(c) Record; Alternative Appendix. An appeal under this rule may proceed on a record prepared by the clerk of the lower tribunal or on appendices to the briefs, as elected by the parties within the time frames set forth in rule 9.200(a)(3) for designating the record. The clerk of the lower tribunal shall prepare a record on appeal in accordance with rule 9.200 unless the appellant directs that no record shall be prepared. However, any other party may direct the clerk to prepare a record in accordance with rule 9.200. If no record is prepared under this rule, the appeal shall proceed using appendices pursuant to rule 9.220.

(d) Briefs. The appellant's initial brief, accompanied by an appendix as prescribed by rule 9.220 (if applicable), shall be served within 70 days of filing the notice of appeal. Additional briefs shall be served as prescribed by rule 9.210.

(e) Scope of Review. The court may review any ruling or matter related to the order on appeal occurring before the filing of the notice of appeal, except any order that was appealable under this rule. Multiple orders that are separately appealable under rule 9.170(b) may be reviewed by a single notice if the notice is timely filed as to each such order.

	09-10 Actual	10-11 Actual	11-12 Budget	11-12 Projected Actual	12-13 Proposed Budget
Real Prop Probate & Trust Revenue	951,489	1,014,914	896,460	848,094	887,246
Dues	300,287	302,610	298,300	300,050	290,025
31431 Dues	459,250	460,550	460,000	460,000	450,000
31432 Affiliate Dues	3,000	2,750	1,750	1,750	2,000
31433 Dues-Retained TFB Ge	(161,963)	(160,690)	(163,450)	(161,700)	(161,975)
Revenue	651,202	712,304	598,160	548,044	597,221
31435 Admin Fee Adj	8,250	0	0	0	0
32191 CLE Courses	243,926	205,449	205,000	214,500	214,500
32293 Section Differential	29,063	30,115	28,500	29,750	30,000
34704 Actionline Advertisi	7,425	21,550	7,500	7,500	15,000
35003 Ticket Events	67,710	72,914	0	0	0
35201 Sponsorships	141,645	197,724	175,000	175,000	175,000
35603 Bd/Council Mtg Regis	67,634	59,907	132,000	132,000	132,000
38499 Investment Allocatio	85,549	124,645	50,160	(10,706)	30,721
Real Prop Probate & Trust Expense	734,332	831,045	959,648	850,115	968,206
71001 Telephone/Direct	1,361	1,150	1,375	1,375	1,375
71005 Internet Charges	1,128	760	830	830	850
51101 Employee Travel	6,277	4,927	6,990	6,990	7,200
36998 Credit Card Fees	2,511	2,886	3,000	3,000	3,800
81411 Promotional Printing	1	1	0	0	0
84001 Postage	1,914	2,759	3,000	3,000	3,000
84002 Printing	123	377	1,500	500	1,500
84006 Newsletter	42,829	42,654	43,000	43,000	43,000
84009 Supplies	72	54	300	300	300
84010 Photocopying	272	405	500	500	500
84015 Officers Conference	310	610	1,200	1,200	5,000
84016 Scrivener	0	0	5,000	5,000	5,000
84051 Officers Travel Expe	359	2,362	3,000	3,000	3,000
84054 CLE Speaker Expense	2,990	2,216	4,500	4,500	4,500
84101 Committee Expenses	62,773	67,392	65,000	65,000	80,000
84106 Realtor Relations	2,150	3,150	5,000	5,000	5,000
84107 Diversity Initiative	2,775	2,234	15,000	15,000	15,000
84109 Spouse Program	92	0	0	0	0
84115 Entertainment	0	18,275	0	0	0
84201 Board Or Council Mee	360,206	411,126	400,000	400,000	440,000
84216 Strategic Planning M	143	5,320	10,000	10,000	1,000
84238 Council Mtg Recreati	42,888	49,384	40,000	40,000	0
84239 Hospitality Suite	7,530	14,967	25,000	25,000	25,000
84241 Spouse Functions	2,785	0	0	0	0

	09-10 Actual	10-11 Actual	11-12 Budget	11-12 Projected Actual	12-13 Proposed Budget
84279 Council Members Hand	2,831	2,055	3,500	3,500	3,500
84310 Law School Liaison	503	138	7,500	7,500	7,500
84322 Fellowships-Exc Cou	4,763	8,207	10,000	10,000	10,000
84422 Website	41,533	46,898	75,000	48,000	50,000
84501 Legislative Consulta	100,000	100,000	100,000	100,000	110,000
84503 Legislative Travel	12,335	14,424	20,000	20,000	20,000
84524 Memorial Tributes	46	0	500	500	500
84701 Council Of Sections	300	300	300	300	300
84998 Operating Reserve	0	0	84,923	0	88,019
84999 Miscellaneous	90	0	500	500	500
85064 Service Recognition	6,757	5,230	6,800	6,800	6,800
85084 OSCA E-Filing Proj	7,667	0	0	0	0
88221 Speaker Workshops	0	0	0	0	0
88230 Speakers Expense	1,736	0	0	0	0
88239 Speakers Other Exp	750	0	0	0	0
86431 Meetings Administrat	6,840	10,777	6,986	9,978	10,277
86543 Graphics & Art	6,692	10,007	9,444	9,842	10,285
Beginning Fund Balance	908,659	1,024,000	1,003,205	1,070,640	1,024,020

Given the scheduling demands of the budget process the Budget Committee requests that the Executive Council delegate to the Executive Committee the appropriate authority to recommend the most advantageous course categorization* (for ATO and CLI) in the event Bar policy changes may impact their successful operations or profits. *CLE or Section Service

	09-10 Actual	10-11 Actual	11-12 Budget	11-12 Projected Actual	12-13 Proposed Budget
Legislative Update Revenue	49,635	50,867	41,830	52,950	54,250
32006 Live Web Cast	7,000	11,500	11,250	13,750	12,500
32010 Legal Span On-line	5,850	2,177	1,000	1,000	2,500
32205 Compact Disc	16,215	16,215	10,080	15,500	16,250
32207 DVD	5,170	5,875	5,000	7,750	7,500
32301 Course Materials	1,900	2,600	2,000	2,000	3,000
35101 Exhibit Fees	13,500	12,500	12,500	12,950	12,500
Legislative Update Expense	96,209	83,106	112,390	79,040	93,758
61201 Equipment Rental	6,787	9,200	10,000	9,556	10,000
51101 Employee Travel	2,118	993	2,980	621	2,472
36998 Credit Card Fees	547	669	500	520	720
75102 1st Class & Misc Mai	45	34	300	24	42
75401 Express Mail	1,950	728	1,500	483	802
81411 Promotional Printing	0	0	1,000	0	500
81412 Promotional Mailing	0	620	1,000	0	650
84001 Postage	386	49	500	275	320
84002 Printing	300	0	700	21	89
84012 Registration Support	2,899	5,079	5,500	5,108	5,500
84061 Reception	1,262	494	2,000	659	1,250
84062 Luncheons	29,936	23,333	30,000	22,221	25,000
84254 Speaker Gifts	1,837	1,591	2,000	885	1,800
84258 Web Services	3,538	5,025	6,000	4,685	5,000
84999 Miscellaneous	1,549	0	0	0	50
88230 Speakers Expense	486	1,319	0	1,168	1,500
88233 Speakers Hotel	3,722	4,062	5,500	3,745	4,500
88239 Speakers Other Exp	0	24	250	12	150
88241 Outline Prt-Inhouse	1,413	92	1,000	707	1,000
88242 Outline Prt-Contract	9,936	11,403	13,000	8,809	10,000
88252 Course Credit Fee	150	150	150	0	150
88265 Refreshment Breaks	9,334	4,309	5,500	1,071	5,000
88269 Breakfast	9,457	7,328	10,000	10,824	9,500
88281 A/V Ctr Dup/Prod	49	0	1,600	50	50
86432 Time Taping Editing	4,328	4,487	4,500	4,200	4,500
86532 Advertising News	2,397	1,614	2,641	1,654	1,736
86543 Graphics & Art	1,619	503	1,769	1,414	1,477
86623 Registrars	99	0	2,500	0	0

	09-10 Actual	10-11 Actual	11-12 Budget	11-12 Projected Actual	12-13 Proposed Budget
RPPTL Convention Revenue	42,170	41,071	87,000	84,000	91,000
32001 Registrations	38,655	30,896	35,000	32,000	33,000
35003 Ticket Events	65	0	0	0	0
35101 Exhibit Fees	0	0	13,000	13,000	13,000
35201 Sponsorships	3,450	10,175	39,000	39,000	45,000
RPPTL Convention Expense	99,211	145,289	118,042	102,509	120,421
61201 Equipment Rental	6,004	17,617	6,000	6,000	15,000
62202 Meeting Room Rental	(889)	0	0	0	0
51101 Employee Travel	2,044	1,944	2,034	2,034	2,092
36998 Credit Card Fees	725	598	1,020	790	980
84001 Postage	83	0	100	100	180
84002 Printing	131	68	250	200	230
84061 Reception	0	0	0	0	10,000
84062 Luncheons	0	0	0	0	12,000
84069 Dinners	0	0	0	0	50,000
84110 Exhibitor Fees	1,059	0	1,060	1,060	1,800
84115 Entertainment	4,990	22,284	5,000	5,000	5,000
84201 Board Or Council Mee	10	0	15,000	0	0
84253 Sleeping Rooms	0	0	2,500	2,500	1,800
84999 Miscellaneous	0	0	500	500	500
88262 Meeting Meals	84,701	102,684	84,000	84,000	0
88263 Meeting Hospitality	0	0	0	0	8,000
88265 Refreshment Breaks				0	6,000
88269 Breakfast	0	0	0	0	6,500
86543 Graphics & Art	353	94	578	325	339

Section Budget Summary
12-13

Section: Real Prop, Probate & Trust Law

Date Approved by Executive Council:

Date Budget Published to Members:

Date of Audit/Actuals Info:

Center: RPGNRL

Staff Liaison: Yvonne Sherron

	09-10 Actual	10-11 Actual	11-12 Budget	11-12 Projected Actual	12-13 Proposed Budget
Beginning Fund Balance	908,659	1,024,000	1,003,205	1,070,640	1,024,020
Net Operations	217,157	183,869	-63,188	-2,021	-80,960
Net Operations (from other centers)	-101,815	-137,228	-102,082	-44,599	-68,929
Ending Fund Balance	**1,024,001**	**1,070,641**	**837,935**	**1,024,020**	**874,131**

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RPPTL 2011-2012 CLE Calendar				
DATE	SEMINAR	COURSE #	CITY	HOTEL
July 22, 2011	The Florida Power of Attorney Act	1386	*Tampa	Airport Marriott
August 3, 2011			Palm Beach	The Breakers Resort
August 26, 2011			Orlando	Hyatt Regency Airport
August 5, 2011	RPPTL Legislative Update	1282	*Palm Beach	The Breakers Resort
September 8, 2011	Trim those Taxes	1398	Telephonic	N/A
February 1, 2012	RPPTL ADR Committee	TBD	*Tampa	Airport Marriott
February 17, 2012	RPPTL Real Property Litigation Committee Seminar	TBD	*Tampa	Airport Marriott
February 29, 2012	RPPTL Estate & Trust Tax Law & IRA	1301	Tampa	Airport Marriott
March 9-10, 2012	Real Property Certification Review Course	1344	*Orlando	Hyatt Regency Airport
March 9-10, 2012	Wills, Trust & Estate Certification Review Course	1345	*Orlando	Hyatt Regency Airport
March 22, 2012	RPPTL Probate Law	1325	Fort Lauderdale	TBD
March 23, 2012	RPPTL Probate Law	1325	*Tampa	Airport Marriott
March 22-24, 2012	Construction Law Certification Review Course	1335	Orlando	TBD
March 22-24, 2012	4th Annual Construction Law Institute	1336	Orlando	TBD
April 27, 2012	RPPTL Condo Association Law	1346	* Tampa	Airport Marriott
May 10, 2012	RPPTL Trust & Estate Symposium	1349	Fort Lauderdale	TBD
May 11, 2012	RPPTL Trust & Estate Symposium	1349	*Tampa	Airport Marriott
June 1, 2012	RPPTL Convention Seminar	1360	St. Petersburg	Don Ce Sar
June 21-24, 2012	Attorney/Trust Officer Liaison Conference	1363	* Naples	Ritz Carlton Golf Resort

* Webcast & Live

IN THE SUPREME COURT OF FLORIDA

IN RE: AMENDMENTS TO THE FLORIDA RULES OF CIVIL PROCEDURE, FLORIDA RULES OF JUDICIAL ADMINISTRATION, FLORIDA RULES OF CRIMINAL PROCEDURE, FLORIDA PROBATE RULES, FLORIDA SMALL CLAIMS RULES, FLORIDA RULES OF JUVENILE PROCEDURE, FLORIDA RULES OF APPELLATE PROCEDURE, FLORIDA FAMILY LAW RULES OF PROCEDURE

Case No. SC11-399

COMMENT OF THE REAL PROPERTY, PROBATE AND TRUST LAW SECTION OF THE FLORIDA BAR

The Real Property, Probate and Trust Law Section of The Florida Bar ("RTTPL"), through its Chair, George J. Meyer, files this comment regarding the proposed rule 2.520 of the Florida Rules of Judicial Administration requiring, *inter alia*, mandatory e-filing by attorneys. Specifically, this comment pertains to the Supplemental Comment of the Florida Court Technology Commission (FCTC) filed in this proceeding on October 7, 2011. Authority for this comment is provided by orders of this court dated August 8, 2011 and August 18. 2011.

Real Property, Probate and Trust Law Section of The Florida Bar. RPPTL consists of nearly 10,000 members of The Florida Bar, most of whom are impacted in some manner by the civil divisions of trial courts and the appellate courts in Florida. RPPTL is governed by an Executive Council of over 250 members, which

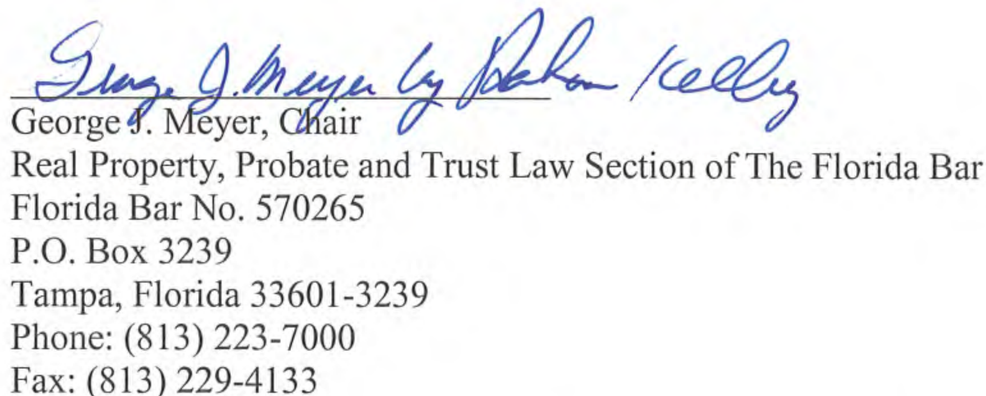
meets five times each year, and has established numerous general standing committees, one of which is the Florida Electronic Filing and Service Committee. That committee monitors the progress of electronic court filing in Florida, and provides assistance to the participating parties as necessary and possible. As part of RPPTL's core mission, over 16 continuing education seminars are provided each year. RPPTL has included updates regarding e-filing and related issues in several of its recent continuing education programs and its Executive Council meetings, and intends to be very active in educating its members regarding court e-filing as more information becomes available and the system becomes more efficient.

Proposal by Florida Court Technology Commission. The FCTC has proposed that mandatory e-filing would become effective no later than March 1, 2013 for all civil divisions of trial courts and that e-filing in all appellate cases would become mandatory for all attorneys by October 1, 2012. (The FCTC also proposes mandatory e-filing in all criminal divisions no later than September 30, 2013.)

Position of RPPTL. RPPTL endorses the concept of mandatory e-filing for all Florida attorneys in all Florida courts. The schedule proposed by the FCTC is reasonable and should be adopted.

RPPTL stands ready to assist the court and The Florida Bar regarding the implementation of mandatory e-filing for all Florida attorneys. Specifically, RPPTL is committed to increase its delivery of training and education of its members, and other Florida attorneys, regarding court e-filing and related issues on a schedule that will accommodate the court's adoption of the FCTC's proposal.

Respectfully submitted,



George J. Meyer, Chair
Real Property, Probate and Trust Law Section of The Florida Bar
Florida Bar No. 570265
P.O. Box 3239
Tampa, Florida 33601-3239
Phone: (813) 223-7000
Fax: (813) 229-4133

In the absence of George J. Meyer, signed on his behalf and at his direction for the Section by Rohan Kelley, Florida Bar No. 42060

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original and nine copies of the foregoing have been filed with the Clerk of the Florida Supreme Court; and that a true and correct copy of the foregoing has been furnished to those listed below, this 13th day of October 2011, by U.S. Mail at the address indicated:

John F. Harkness, Jr.
Executive Director
The Florida Bar
651 E. Jefferson Street
Tallahassee, Florida 32399-2300

Ashley J. McCorvey Myers, Chair
Family Law Rules Committee
McCorvey & Myers
1912 Hamilton St., Suite 204
Jacksonville, Florida 32210-2078

Hon. Judith L. Kreeger, Chair
Florida Court Technology Commission
2000 S Bayshore Dr Apt 61
Miami, Florida 33133

Keith H. Park, Chair
Rules of Judicial Administration
Committee
P.O. Box 3563
West Palm Beach, Florida 33402-3563

Alicia M. Menendez, Chair
Code and Rules of Evidence Committee
Shook, Hardy & Bacon, L.L.P.
201 S. Biscayne Blvd. Suite 2400
Miami, Florida 33131-4339

Kevin David Johnson, Chair
Civil Procedure Rules Committee
Thompson Sizemore Gonzalez
& Hearing, P.A.
201 N Franklin St Ste 1600
Tampa, Florida 33602-5110

Jamie Billotte Moses, Chair
Appellate Court Rules Committee
Fisher Rushmer et al., P.A.
P.O. Box 712
Orlando, Florida 32802-0712

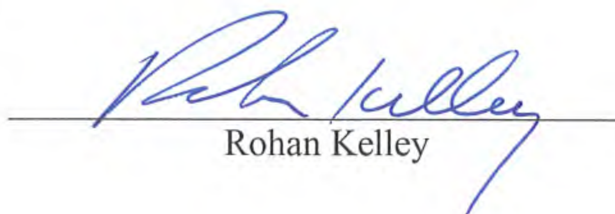
Hon. Donald Eugene Scaglione, Chair
Criminal Procedure Rules Committee
20 N Main St, Rm 359
Brooksville, Florida 34601-2817

Joel M. Silvershein, Chair
Juvenile Court Rules Committee
State Attorney's Office
201 SE 6th Street, Suite 660
Fort Lauderdale, Florida 33301-3334

Judson Lee Cohen, Chair
Small Claims Rules Committee
Cohen Law Offices
1 SE 3rd Ave, Suite 2900
Miami, Florida 33131-1711

Jill Marie Hampton, Chair
Traffic Court Rules Committee
Private Counsel LLC
733 W. Colonial Dr.
Orlando, Florida 32804-7343

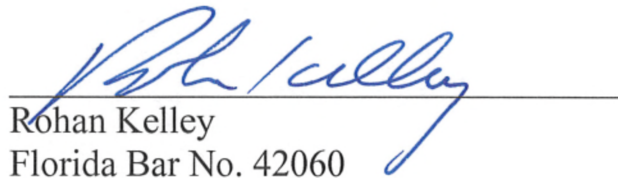
John C. Moran, Chair
Probate Rules Committee
Gunster Yoakley & Steward, P.A.
777 S. Flagler Dr., Suite 500 E
West Palm Beach, Florida 33401-6121



Rohan Kelley

CERTIFICATE OF COMPLIANCE

I certify that the foregoing has been submitted in compliance with the requirements of Fla. R. App. P. 9.210(a)(2).



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REAL PROPERTY, PROBATE & TRUST LAW SECTION
OF
<u>THE FLORIDA BAR</u>

MINUTES
OF THE
<u>EXECUTIVE COMMITTEE</u>
(SEPTEMBER 12, 2011 E-MAIL CONSIDERATION)

<u>PROPOSAL</u>. By e-mail on Monday, September 12, 2011, Chair George J. Meyer notified the Executive Committee of the Real Property Probate and Trust Law Section of the Florida Bar of a request submitted by the Probate and Trust Law Division Chair, Michael Dribin:

> Motion to substitute text containing improvements and clarifications to the Uniform Principal and Interest Act Legislation Position Request which was approved at the Section's "Breakers Legislative Update" Executive Committee Meeting of August 6, 2011.

[*<u>Sec. Note</u>*:The proposed text, revised white paper, and summary of changes, are attached as Exhibits "A" "B" and "C" respectively.]

<u>APPROVAL</u>. The Executive Committee unanimously approved by e-mail the proposal, attached to these minutes, all but two Executive Committee members submitting affirmative e-mails by Thursday, September 15, 2011, and the remaining two providing responses thereafter.

Respectfully Submitted,

Michael J . Gelfand, Esq.
Respectfully Submitted,

Michael J . Gelfand, Esq.

EXHIBIT “A”
UPIA BILL TEXT

A bill to be entitled

An act relating to the Principal and Income Act, Florida Statutes Ch. 738; amending s.738.102, F.S.; adding a definition of "Carrying Value"; amending s. 738.103, F.S.; clarifying the applicability of Florida Statutes Ch. 738 to all trusts and estates administered in this state or under Florida law; amending s. 738.104, F.S.; deleting language as a result of the amendment to s. 738.103, F.S.; amending s. 738.1041, F.S.; providing for the definition of "Average Fair Market Value";deleting duplicative language in s. 1041(4); clarifying requirements for express total return unitrust; amending s. 738.105, F.S.; clarifying the applicability of the section to trustees only; amending s. 738.201, F.S.; clarifying that section applies to all fiduciaries; clarifying rules for payment of interest on pecuniary devises not in trust; amending s. 738.202, F.S.; modifying and clarifying the method by which income is to be distributed to certain beneficiaries; amending s. 738.301, F.S.; clarifying that section applies to all fiduciaries; amending s. 738.302, F.S.; clarifying that section applies to all fiduciaries; amending s. 738.303, F.S.; clarifying that section applies to all fiduciaries; amending s. 738.401, F.S.; clarifying that section applies to all fiduciaries; modifying the method by which distributions from entities are allocated between income and principal; amending s. 738.402, F.S.; clarifying that section applies to all fiduciaries; amending s. 738.403, F.S.; clarifying that section applies to all fiduciaries; correcting improper cross-reference; amending s. 738.501, F.S.; clarifying that section applies to all fiduciaries; amending s. 738.502, F.S.; clarifying that section applies to all fiduciaries; amending s. 738.503, F.S.; clarifying that section applies to all fiduciaries; amending s. 738.504, F.S.; clarifying that section applies to all fiduciaries; amending s. 738.601, F.S.; clarifying that section applies to all fiduciaries; amending s. 738.602,

F.S.; clarifying that section applies to all fiduciaries; modifying section to remove disparate treatment of trusts so that all trust are treated the same; amending s. 738.603, F.S.; clarifying that section applies to all fiduciaries; modifying method used to allocate between income and principal for liquidating assets; amending s. 738.604, F.S.; clarifying that section applies to all fiduciaries; amending s. 738.605, F.S.; clarifying that section applies to all fiduciaries; amending s. 738.606, F.S.; clarifying that section applies to all fiduciaries; amending s. 738.607, F.S.; clarifying that section applies to all fiduciaries; amending s. 738.608, F.S; clarifying that section applies to all fiduciaries; amending s. 738.701, F.S.; clarifying that section applies to all fiduciaries; amending s. 738.702, F.S.; clarifying that section applies to all fiduciaries; amending s. 738.703, F.S.; clarifying that section applies to all fiduciaries; amending s. 738.704, F.S.; clarifying that section applies to all fiduciaries; amending s. 738.705, F.S.; clarifying that section applies to all fiduciaries; clarifying the method used to allocate income taxes between income and principal; restating s. 738.801. F.S.; clarifying responsibilities of tenants and remaindermen; providing for an effective date for the provisions of this Act.

Be It Enacted by the Legislature of the State of Florida:

Section 1. Subsection (3) through (13) of section 738.102, Florida Statutes, are renumbered as subsections (4) through (14), respectively, and a new subsection (3) is added to that section to read:

738.102 Definitions.—

(3) "Carrying Value" (also known as "Inventory Value" and "Fiduciary Acquisition Value") means the fair market value at the time the assets are

received by the fiduciary. For estates of decedents, and trusts described in s. 733.707(3) after the grantor's death, the assets are considered as received at the date of death. If there is a change in fiduciaries, a majority of the continuing fiduciaries may elect to adjust the carrying values to reflect the fair market value of the assets at the beginning of their administration. If that election is made, it must be reflected on the first accounting filed after the election. For assets acquired during the administration of the estate or trust, the carrying value will be equal to the acquisition cost of the asset.

Section 2. Subsection (3) is added to section 738.103, Florida Statutes, to read:

738.103 Fiduciary duties; general principles.—

(3) Except as provided in Section 738.1041(9), this chapter shall be construed as pertaining to the administration of a trust and is applicable to any trust that is administered either in this state or under Florida law. All provisions of this chapter also apply to any estate that is administered in Florida, unless the provision is limited in application to a trustee, rather than a fiduciary.

Section 3. Subsection (11) of section 738.104, Florida Statutes, is deleted:

738.104 Trustee's power to adjust.—

~~(11) This section shall be construed as pertaining to the administration of a trust and is applicable to any trust that is administered either in this state or under Florida law.~~

Section 4. Paragraphs (a), (c), (d) and (e) of subsection (1) of section 738.1041, Florida Statutes, are redesignated as paragraphs (b), (d), (e) and (f), respectively, present paragraph (b) is redesignated as paragraph

(c) and amended, present paragraph (f) is redesignated as paragraph (g) and amended, and a new paragraph (a) is added to that subsection to read:

738.1041 Total return unitrust.—

(1)

(a) "Average fair market value" means the average of the fair market values of assets held by the trust at the beginning of the current and each of the two preceding years, or for the entire term of the trust if there are fewer than two preceding years, adjusted as follows:

(i) If assets have been added to the trust at any time during the years used to determine the average, then the amount of each addition will be added to all years in which that addition was not included.

(ii) If assets have been distributed from the trust at any time during the years used to determine the average, other than in satisfaction of the unitrust amount, then the amount of each distribution will be subtracted from all years in which that distribution was not included.

(~~a~~b) "Disinterested person" means a person who is not a "related or subordinate party" as defined in s. 672(c) of the United States Internal Revenue Code, 26 U.S.C. ss. 1 et seq., or any successor provision thereof, with respect to the person then acting as trustee of the trust and excludes the grantor and any interested trustee.

(~~b~~c) "Fair market value" means the fair market value of theassets held by the trust as otherwise determined under this chapter, reduced by all known non-contingent~~noncontingent~~liabilities.

(~~c~~d) "Income trust" means a trust, created by either an inter vivos or a testamentary instrument, which directs or permits the trustee to distribute the net income of the trust to one or more persons, either in fixed

proportions or in amounts or proportions determined by the trustee and regardless of whether the trust directs or permits the trustee to distribute the principal of the trust to one or more such persons.

(de) "Interested distributee" means a person to whom distributions of income or principal can currently be made who has the power to remove the existing trustee and designate as successor a person who may be a "related or subordinate party," as defined in the Internal Revenue Code, 26 U.S.C. s. 672(c), with respect to such distributee.

(ef) "Interested trustee" means an individual trustee to whom the net income or principal of the trust can currently be distributed or would be distributed if the trust were then to terminate and be distributed, any trustee whom an interested distributee has the power to remove and replace with a related or subordinate party as defined in paragraph (d), or an individual trustee whose legal obligation to support a beneficiary may be satisfied by distributions of income and principal of the trust.

(fg) "Unitrust amount" means the amount determined by multiplying theaverage fair market value of the assets as defined in paragraph (b1)(a)by the percentage calculated under paragraph (2)(b).

Section 5. Subparagraph 2. of paragraph (b) of subsection (2) of section 738.1041, Florida Statutes, is amended to read:

738.1041 Total return unitrust.—

2. The interested trustee or disinterested trustee administers the trust such that:

a. The percentage used to calculate the unitrust amount is 50 percent of the applicable federalrate as defined in the Internal Revenue Code, 26 U.S.C. s. 7520, in effect for the month the conversion under this section becomes effective and for each January thereafter; however, if the percentage calculated exceeds 5 percent, the unitrust percentage shall be 5 percent and

if the percentage calculated is less than 3 percent, the unitrust percentage shall be 3 percent; and

b. The fair market value of the trust shall be determined at least annually on an asset-by-asset basis, reasonably and in good faith, in accordance with the provisions of s. 738.202(5), except the following property shall not be included in determining the value of the trust:

(I) Any residential property or any tangible personal property that, as of the first business day of the current valuation year, one or more current beneficiaries of the trust have or have had the right to occupy, or have or have had the right to possess or control (other than in his or her capacity as trustee of the trust), and instead the right of occupancy or the right to possession and control shall be deemed to be the unitrust amount with respect to such property; however, the unitrust amount shall be adjusted to take into account partial distributions from or receipt into the trust of such property during the valuation year;~~.~~

(II) Any asset specifically given to a beneficiary and the return on investment on such property, which return on investment shall be distributable to such beneficiary; or~~.~~

(III) Any asset while held in adecedent's~~testator 's~~estate.~~;~~

Section 6. Subsection (4) of section 738.1041, Florida Statutes, is deleted, subsections (5) through (9) are renumbered as subsections (4) through (8), respectively, present subsection (10) is renumbered as subsection (9) and amended, and present subsection (11) is renumbered as subsection (10) and amended, to read as follows:

738.1041 Total return unitrust.—

(4) ~~All determinations made pursuant to sub-subparagraph (2)(b)2.b. shall be conclusive if reasonable and made in good faith. Such determination shall be conclusively presumed to have been made reasonably and in good faith~~

~~unless proven otherwise in a proceeding commenced by or on behalf of a person interested in the trust within the time provided in s. 736.1008. The burden will be on the objecting interested party to prove that the determinations were not made reasonably and in good faith.~~

(9~~10~~) This section shall be construed as pertaining to the administration of a trust and is applicable to any trust that is administered either in this state or under Florida law unless:

(a) The governing instrument reflects an intention that the current beneficiary or beneficiaries are to receive an amount other than a reasonable current return from the trust;

(b) The trust is a trust described in the Internal Revenue Code, 26 U.S.C. s. 170(f)(2)(B), s. 642(c)(5), s. 664(d), s. 2702(a)(3), or s. 2702(b);

(c) One or more persons to whom the trustee could distribute income have a power of withdrawal over the trust:

1. That is not subject to an ascertainable standard under the Internal Revenue Code, 26 U.S.C. s. 2041 or s. 2514, and exceeds in any calendar year the amount set forth in the Internal Revenue Code, 26 U.S.C. s. 2041(b)(2) or s. 2514(e); or

2. A power of withdrawal over the trust that can be exercised to discharge a duty of support he or she possesses;or

(d) The governing instrument expressly prohibits use of this section by specific reference to the section. A provision in the governing instrument that, "The provisions of section 738.1041, Florida Statutes, as amended, or any corresponding provision of future law, shall not be used in the administration of this trust," or similar words reflecting such intent shall be sufficient to preclude the use of this section.~~; or~~

~~(c) The trust is a trust with respect to which a trustee currently possesses the power to adjust under s.738.104.~~

(10~~11~~) The grantor of a trust may create an express total return unitrust which will become effective as provided in the trustinstrument~~document~~ without requiring a conversion under this section. An express total return unitrust created by the grantor of the trust shall be treated as a unitrust under this section only if the terms of the trustinstrument~~document~~ contain ~~all~~bothof the following provisions:

(a) That distributions from the trust will be unitrust amounts and the manner in which the unitrust amount will be calculated;~~ and the method in which the fair market value of the trust will be determined.~~and

(b) The percentage to be used to calculate the unitrustamount, provided the percentage used is not greater than 5 percent nor less than 3 percent.

In addition, the trust instrument may contain provisions specifying:

(c) The method to be used in determining the fair market value of the trust(including whether to use an average fair market value or just the fair market value of the assets held by the trust at the beginning of the current year); or~~.~~

(d) Which assets, if any, are to be excluded in determining the unitrustamount.

The remaining provisions of this section shall apply to establish the method of determining the fair market value of the trust if the trust instrument is silent as to paragraph (c), and to specify those assets, if any, that are to be excluded in determining the unitrust amount if the trust instrument is silent as to paragraph (d).

Section 7. Subsections (1) and (3) of section 738.105, Florida Statutes, are amended to read as follows:

738.105 Judicial control of discretionary powers.—

(1) A court shall not change a trustee's ~~fiduciary~~ decision to exercise or not to exercise a discretionary power conferred by this chapter unless the court determines that the decision was an abuse of the trustee's ~~fiduciary~~ discretion. A court shall not determine that a trustee ~~fiduciary~~ abused its discretion merely because the court would have exercised the discretion in a different manner or would not have exercised the discretion.

(3) If a court determines that a trustee ~~fiduciary~~ has abused its discretion, the remedy shall be to restore the income and remainder beneficiaries to the positions they would have occupied if the trustee ~~fiduciary~~ had not abused its discretion, according to the following rules:

(a) To the extent the abuse of discretion has resulted in no distribution to a beneficiary or a distribution that is too small, the court shall require the trustee ~~fiduciary~~ to distribute from the trust to the beneficiary an amount the court determines will restore the beneficiary, in whole or in part, to his or her appropriate position.

(b) To the extent the abuse of discretion has resulted in a distribution to a beneficiary that is too large, the court shall restore the beneficiaries, the trust, or both, in whole or in part, to their appropriate positions by requiring the trustee ~~fiduciary~~ to withhold an amount from one or more future distributions to the beneficiary who received the distribution that was too large or requiring that beneficiary to return some or all of the distribution to the trust.

(c) To the extent the court is unable, after applying paragraphs (a) and (b), to restore the beneficiaries, the trust, or both, to the positions

they would have occupied if thetrusteefiduciary had not abused its discretion, the court may require thetrusteefiduciary to pay an appropriate amount from its own funds to one or more of the beneficiaries or the trust or both.

(4) Upon the filing of a petition by thetrusteefiduciary, the court having jurisdiction over the trust shall determine whether a proposed exercise or nonexercise by thetrusteefiduciary of a discretionary power conferred by this chapter will result in an abuse of the trustee'sfiduciary discretion. If the petition describes the proposed exercise or nonexercise of the power and contains sufficient information to inform the beneficiaries of the reasons for the proposal, the facts upon which the trusteefiduciary relies, and an explanation of how the income and remainder beneficiaries will be affected by the proposed exercise or nonexercise of the power, a beneficiary who challenges the proposed exercise or nonexercise has the burden of establishing that such exercise or nonexercise will result in an abuse of discretion.

Section 8. Section 738.201, Florida Statutes, is amended to read:

738.201 Determination and distribution of net income.—After a decedent dies, in the case of an estate, or after an income interest in a trust ends, the following rules apply:

(1) A fiduciary of an estate or of a terminating income interest shall determine the amount of net income and net principal receipts received from property specifically given to a beneficiary under the rules in ss. 738.301-738.706which apply to trustees and the rules in subsection (5). The fiduciary shall distribute the net income and net principal receipts to the beneficiary who is to receive the specific property.

(2) A fiduciary shall determine the remaining net income of a decedent's estate or a terminating income interest under the rules in ss. 738.301-738.706~~which apply to trustees~~ and by:

(a) Including in net income all income from property used to discharge liabilities.

(b) Paying from income or principal, in the fiduciary's discretion, fees of attorneys, accountants, and fiduciaries; court costs and other expenses of administration; and interest on death taxes, but the fiduciary may pay those expenses from income of property passing to a trust for which the fiduciary claims an estate tax marital or charitable deductionunder the Internal Revenue Code or comparable law of any state only to the extent the payment of those expenses from income will not cause the reduction or loss of the deduction.

(c) Paying from principal all other disbursements made or incurred in connection with the settlement of a decedent's estate or the winding up of a terminating income interest, including debts, funeral expenses, disposition of remains, family allowances, and death taxes and related penalties that are apportioned to the estate or terminating income interest by the will, the terms of the trust, or applicable law.

(3) If~~A fiduciary shall distribute to~~a beneficiary who receives a pecuniary amount outright is also entitled to receive~~the~~interest on that amountor any other amount provided by the will or~~,~~the terms of the trust, a fiduciary shall distribute the interest~~or applicable law~~from net income determined under subsection (2) or from principal to the extent net income is insufficient. ~~If a beneficiary is to receive a pecuniary amount outright from a trust after an income interest ends and no interest or other amount is provided for by the terms of the trust or applicable law, the fiduciary shall distribute the interest or other amount to which the beneficiary would be~~

~~entitled under applicable law if the pecuniary amount were required to be paid under a will.~~

(4) A fiduciary shall distribute the net income remaining after distributions required bysubsections (1) through~~subsection~~ (3) in the manner described in s. 738.202 to all other beneficiaries, including a beneficiary who receives a pecuniary amount in trust, even if the beneficiary holds an unqualified power to withdraw assets from the trust or other presently exercisable general power of appointment over the trust.

(5) A fiduciary may not reduce principal or income receipts from property described in subsection (1) because of a payment described in s. 738.701 or s. 738.702 to the extent the will, the terms of the trust, or applicable law requires the fiduciary to make the payment from assets other than the property or to the extent the fiduciary recovers or expects to recover the payment from a third party. The net income and principal receipts from the property are determined by including all of the amounts the fiduciary receives or pays with respect to the property, whether those amounts accrued or became due before, on, or after the date of a decedent's death or an income interest's terminating event, and by making a reasonable provision for amounts the fiduciary believes the estate or terminating income interest may become obligated to pay after the property is distributed.

Section 9. Subsections (1), (2) and (5) of section 738.202, Florida Statutes, are amended, and a new subsection (6) is added to that section, to read:

738.202 Distribution to residuary and remainder beneficiaries.—

(1) Each beneficiary described in s. 738.201(4) is entitled to receive a portion of the net income remaining after the application of s. 738.201(1)-(3), that is equal to the beneficiary's fractional interest in undistributed principal assets, usingcarrying values as of the distribution date. If a

fiduciary makes more than one distribution of assets to beneficiaries to whom this section applies, each beneficiary, including one who does not receive part of the distribution, is entitled, as of each distribution date, to the net income the fiduciary has received after the date of death or terminating event or earlier distribution date but has not distributed as of the current distribution date.

(2) In determining a beneficiary's share of net income, the following rules apply:

(a) The beneficiary is entitled to receive a portion of the net income equal to the beneficiary's fractional interest inthe carrying value of the undistributed principal assets immediatelyprior to~~before~~ the distribution date,excluding the amount of unpaid liabilities~~including assets that later may be sold to meet principal obligations~~.

(b) The beneficiary's fractional interest in the undistributed principal assets shall be calculated:~~without regard to~~

1. At the time the interest began and adjusted for any disproportionate distributions since the interest began;

2. By excluding any liabilities of the estate or trust from the calculation;

3. By also excluding property specifically given to a beneficiary and property required to pay pecuniary amounts not in trust; and~~.~~

4.~~(c) The beneficiary's fractional interest in the undistributed principal assets shall be calculated on~~On the basis of the aggregate carrying value of those assets determined under section (1),as of the distribution date~~without reducing the value by any unpaid principal obligation~~.

~~(d) The distribution date for purposes of this section may be the date as of which the fiduciary calculates the value of~~

~~the assets if that date is reasonably near the date on which assets are actually distributed.~~

(c) If a disproportionate distribution of principal is made to any beneficiary, the respective fractional interests of all beneficiaries in the remaining underlying assets will be recomputed by:

(i) adjusting the carrying value of the principal assets to their fair market value prior to the distribution;

(ii) reducing the fractional interest of the recipient of the disproportionate distribution in the remaining principal assets by the fair market value of the principal distribution; and

(iii) recomputing the fractional interests of all beneficiaries in the remaining principal assets based upon the now restated carrying values.

(5) The carrying value or fair market value of trust assets shall be determined on an asset-by-asset basis and shall be conclusive if reasonable and determined in good faith. Determinations of fair market valuebasedupon~~on~~appraisals performed within 2 years before ~~or after~~the valuation date shall be presumed reasonable. The values of trust assets shall be conclusively presumed to be reasonable and determined in good faith unless proven otherwise in a proceeding commenced by or on behalf of a person interested in the trust within the time provided in s. 736.1008.

(6) All distributions to a beneficiary shall be valued based upon their fair market value on the date of distribution.

Section 10. Subsection (4) of section 738.301, Florida Statutes, is amended to read:

738.301 When right to income begins and ends.—

(4) An income interest ends on the day before an income beneficiary dies or another terminating event occurs, or on the last day of a period

during which there is no beneficiary to whom a fiduciary~~trustee~~ may distribute income.

Section 11. Subsections (1) and (2) of section 738.302, Florida Statutes, are amended to read:

738.302 Apportionment of receipts and disbursements when decedent dies or income interest begins.—

(1) A fiduciary~~trustee~~shall allocate an income receipt or disbursement other than one to which s. 738.201(1) applies to principal if the due date of the receipt or disbursement occurs before a decedent dies in the case of an estate or before an income interest begins in the case of a trust or successive income interest.

(2) A fiduciary~~trustee~~shall allocate an income receipt or disbursement to income if the due date of the receipt or disbursement occurs on or after the date on which a decedent dies or an income interest begins and the due date is a periodic due date. An income receipt or disbursement shall be treated as accruing from day to day if the due date of the receipt or disbursement is not periodic or the receipt or disbursement has no due date. The portion of the receipt or disbursement accruing before the date on which a decedent dies or an income interest begins shall be allocated to principal and the balance shall be allocated to income.

Section 12. Subsections (2) and (3) of section 738.303, Florida Statutes, are amended to read:

738.303 Apportionment when income interest ends.—

(2) When a mandatory income interest ends, thefiduciary~~trustee~~shall pay to a mandatory income beneficiary who survives that date, or the estate of a deceased mandatory income beneficiary whose death causes the interest to end, the beneficiary's share of the undistributed income that is not disposed of under the terms of the trust unless the beneficiary has an unqualified

power to revoke more than 5 percent of the trust immediately before the income interest ends. In the latter case, the undistributed income from the portion of the trust that may be revoked shall be added to principal.

(3) When a fiduciary’s ~~trustee~~ obligation to pay a fixed annuity or a fixed fraction of the value of the trust's assets ends, the fiduciary ~~trustee~~ shall prorate the final payment if and to the extent required by applicable law to accomplish a purpose of the trust or its grantor relating to income, gift, estate, or other tax requirements.

Section 13. Section 738.401, Florida Statutes, is amended to read:

738.401 Character of receipts.—

(1) For purposes of this section, "entity" means a corporation, partnership, limited liability company, regulated investment company, real estate investment trust, common trust fund, or any other organization in which a fiduciary ~~trustee~~ has an interest other than a trust or estate to which s. 738.402 applies, a business or activity to which s. 738.403 applies, or an asset-backed security to which s. 738.608 applies.

(2) Except as otherwise provided in this section, a fiduciary ~~trustee~~ shall allocate to income money received from an entity.

(3) Except as otherwise provided in this section, a fiduciary ~~trustee~~ shall allocate the following receipts from an entity to principal:

(a) Property other than money.

(b) Money received in one distribution or a series of related distributions in exchange for part or all of a trust's or estate’s interest in the entity.

(c) Money received in total or partial liquidation of the entity.

(d) Money received from an entity that is a regulated investment company or a real estate investment trust if the money ~~distributed~~received represents short-term or long-term capital gain realized within the entity.

(e) Money received from an entity listed on a public stock exchange during any year of the trust or estate that that exceeds 10 percent of the fair market value of the trust’s or estate’s interest in the entity on the first day of that year of the trust or estate. The amount to be allocated to principal shall be reduced to the extent that the cumulative distributions from the entity to the trust or estate allocated to income do not exceed a cumulative annual return of 3 percent of the fair market value of the interest in the entity at the beginning of each year or portion of year for the number of years or portion of years in the period that the interest in the entity has been held by the trust or estate. If a trustee has exercised a power to adjust under s. 738.104 during any period the interest in the entity has been held by the trust, then the trustee must take into account in determining the total income distributions from that entity the extent to which the exercise of that power resulted in income to the trust from that entity for that period.If the income of the trust for any period was computed under s. 738.1041, then the trustee must take into account in determining the total income distributions from that entity for that period the portion of the unitrust amount paid as a result of the ownership of the trust’s interest in the entity for that period.

(4) If a fiduciary~~trustee~~elects, or continues an election made by its predecessor, to reinvest dividends in shares of stock of a distributing corporation or fund, whether evidenced by new certificates or entries on the books of the distributing entity, the new shares shall retain their character as income.

(5) Money is received in partial liquidation:

(a) To the extent the entity, at or near the time of a distribution, indicates that such money is a distribution in partial liquidation; or

(b) To the extent the total amount of money and property received in a distribution or series of related distributionsfrom an entity that is not listed on a public stock exchange exceeds 20 percent of the trust or estate's pro rata share of the entity's gross assets, as shown by the entity's year-end financial statements immediately preceding the initial receipt.

(c) This subsection does not apply to any entity to which subsection (7) applies.

(6) Moneymay not~~is not received in partial liquidation, nor may money~~ be taken into accountin determining any excess under paragraph (5)(b), to the extentthat the cumulative distributions from the entity to the trust or the estate allocated to income do not exceed the greater of:~~such money does not exceed the amount of income tax a trustee or beneficiary must pay on taxable income of the entity that distributes the money.~~

(a) A cumulative annual return of 3 percent of the entity's carrying value computed at the beginning of each period for the number of years or portion of years that the entity was held by the fiduciary.If a trustee has exercised a power to adjust under s. 738.104 during any period the interest in the entity has been held by the trust, then the trustee must take into account in determining the total income distributions from that entity the extent to which exercise of the power resulted in income to the trust from that entity for that period. If the income of a trust for any periodwas computed under the provisions ofs.738.1041, then the trustee must take into account in determining the total income distributions from the entity for that period the portion of the unitrust amount paid as a result of the ownership of the trust's interest in the entity for that period; or

(b) If the entity is treated as a partnership, subchapter S corporation, or disregarded entity pursuant to the Internal Revenue Code of 1986, as amended, then the amount of income tax attributable to the trust's or estate's ownership share of the entity, based upon its pro rata share of the taxable income of the entity that distributes the money, for the number of years or portion of years that the interest in the entity was held by the fiduciary, calculated as if all of that tax was incurred by the fiduciary.

(7) The following special rules shall apply to money or property received by a private trustee as a distribution from an investment entity described in this subsection:

(a) that is treated as a partnership, subchapter S corporation, or disregarded entity pursuant to the Internal Revenue Code of 1986, as amended The trustee shall first treat as income of the trust all of the money or property received from the investment entity in the current year that would be considered income under this chapter if the trustee had directly held the trust's pro rata share of the assets of the investment entity. For this purpose, all distributions received in the current year are to be aggregated.

(b) The trustee shall next treat as income of the trust any additional money or property received in the current year that would have been considered income in the prior two years under paragraph (a) if additional money or property had been received from the investment entity in any of those prior two years. The amount to be treated as income is to be reduced by any distributions of money or property made by the investment entity to the trust during the current and prior two years that were treated as income under this paragraph (b).

(c) The remainder of the distribution, if any,will be treated as principal.

(d) For purposes of this subsection, the following definitions shall apply:

1. "Investment entity" means any entity, other than a business activity conducted by the trustee described in s. 738.403 or an entity that is listed on a public stock exchange, that is treated as a partnership, subchapter S corporation, or disregarded entity pursuant to the Internal Revenue Code of 1986, as amended, and that normally derives 50 percent or more of its annual cumulative net income from interest, dividends, annuities, royalties, rental activity, or other passive investments, including income from the sale or exchange of such passive investments.

2. "Private trustee" means a trustee who is an individual, but only if the trustee is unable to utilize the power to adjust between income and principal with respect to receipts from entities described in this subsection pursuant to s. 738.104. A bank, trust company, or other commercial trustee shall not be considered to be a private trustee.

(8) This section shall be applied before applying ss. 738.705 and 738.706 and shall not be construed to modify or change any of the provisions of those sections.

~~The following special rules shall apply to money~~moneys ~~or property received by a private trusteefrom entities described in this subsection:~~

~~(a) Moneysor property received from a targeted entity that is not an investment entity which do not exceed the trust's pro rata share of the undistributed cumulative net income of the targeted entity during the time an ownership interest in the targeted entity was held by the trust shall be allocated to income. The balance of moneysor property received from a targeted entity shall be allocated to principal.~~

~~(b) If trust assets include any interest in an investment entity, the designated amount of~~moneys~~ or property received from the investment entity shall be treated by the~~ trustee~~in the same manner as if the~~trustee~~had directly held the trust's pro rata share of the assets of the investment entity attributable to the distribution of such designated amount. Thereafter, distributions shall be treated as principal.~~

~~(c) For purposes of this subsection, the following definitions shall apply:~~

~~1. "Cumulative net income" means the targeted entity's net income as determined using the method of accounting regularly used by the targeted entity in preparing its financial statements, or if no financial statements are prepared, the net book income computed for federal income tax purposes, for every year an ownership interest in the entity is held by the trust. The trust's pro rata share shall be the cumulative net income multiplied by the percentage ownership of the trust.~~

~~2. "Designated amount" means~~ moneys~~ or property received from an investment entity during any year that is equal to the amount of the distribution that does not exceed the greater of:~~

~~a. The amount of income of the investment entity for the current year, as reported to the~~trustee~~by the investment entity for federal income tax purposes; or~~

~~b. The amount of income of the investment entity for the current year and the prior 2 years, as reported to the~~ trustee~~by the investment entity for federal income tax purposes, less any distributions of~~ moneys~~ or property made by the investment entity to the trustee~~~~during the prior 2 years.~~

~~3. "Investment entity" means a targeted entity that normally derives 50 percent or more of its annual cumulative net income from interest, dividends, annuities, royalties, rental activity, or other passive~~

~~investments, including income from the sale or exchange of such passive investments.~~

~~4. "Private trustee" means a trusteewho is an individual, but only if the trusteeis unable to utilize the power to adjust between income and principal with respect to receipts from entities described in this subsection pursuant to s. 738.104. A bank, trust company, or other commercialtrusteeshall not be considered to be a private trustee.~~

~~5. "Targeted entity" means any entity that is treated as a partnership, subchapter S corporation, or disregarded entity pursuant to the Internal Revenue Code of 1986, as amended, other than an entitydescribed in s. 738.403.~~

~~6. "Undistributed cumulative net income" means the trust's pro rata share of cumulative net income, less all prior distributions from the targeted entity to the trust that have been allocated to income.~~

~~(d) This subsection shall not be construed to modify or change any of the provisions of ss. 738.705 and 738.706 relating to income taxes.~~

~~(8) A trusteemay rely upon a statement made by an entity about the source or character of a distribution, about the amount of profits of a targeted entity, or about the nature and value of assets of an investment entity if the statement is made at or near the time of distribution by the entity's board of directors or other person or group of persons authorized to exercise powers to pay money or transfer property comparable to those of a corporation's board of directors.~~

Section 14. Section 738.402, Florida Statutes, is amended to read:

738.402 Distribution from trust or estate.—Afiduciary~~trustee~~shall allocate to income an amount received as a distribution of income from a trust or an estate in which the trust has an interest other than a purchased interest and shall allocate to principal an amount received as a distribution

of principal from such a trust or estate. If a fiduciary ~~trustee~~ purchases an interest in a trust that is an investment entity, or a decedent or donor transfers an interest in such a trust to a fiduciary ~~trustee~~, s. 738.401 or s. 738.608 applies to a receipt from the trust.

Section 15. Section 738.403, Florida Statutes, is amended to read:

738.403 Business and other activities conducted by fiduciary ~~trustee~~.—

(1) If a fiduciary ~~trustee~~ who conducts a business or other activity determines that it is in the best interest of all the beneficiaries to account separately for the business or activity instead of accounting for the business or activity as part of the trust's general accounting records, the fiduciary ~~trustee~~ may maintain separate accounting records for the transactions of such business or other activity, whether or not the assets of such business or activity are segregated from other trust assets.

(2) A fiduciary ~~trustee~~ who accounts separately for a business or other activity may determine the extent to which the net cash receipts of such business or activity must be retained for working capital, the acquisition or replacement of fixed assets, and other reasonably foreseeable needs of the business or activity, and the extent to which the remaining net cash receipts are accounted for as principal or income in the trust's general accounting records. If a fiduciary ~~trustee~~ sells assets of the business or other activity, other than in the ordinary course of the business or activity, the fiduciary ~~trustee~~ shall account for the net amount received as principal in the trust's general accounting records to the extent the fiduciary ~~trustee~~ determines that the amount received is no longer required in the conduct of the business.

(3) Activities for which a fiduciary ~~trustee~~ may maintain separate accounting records include:

(a) Retail, manufacturing, service, and other traditional business activities.

(b) Farming.

(c) Raising and selling livestock and other animals.

(d) Management of rental properties.

(e) Extraction of minerals and other natural resources.

(f) Timber operations.

(g) Activities to which s.738.607~~738.608~~ applies.

Section 16. Section 738.501, Florida Statutes, is amended to read:

738.501 Principal receipts.—A fiduciary~~trustee~~shall allocate to principal:

(1) To the extent not allocated to income under this chapter, assets received from a transferor during the transferor's lifetime, a decedent's estate, a trust with a terminating income interest, or a payor under a contract naming the trust or itsfiduciary~~trustee~~as beneficiary.

(2)Money or other property received from the sale, exchange, liquidation, or change in form of a principal asset, including realized profit, subject to this section.

(3)Amounts recovered from third parties to reimburse the trust because of disbursements described in s. 738.702(1)(g) or for other reasons to the extent not based on the loss of income.

(4)Proceeds of property taken by eminent domain but a separate award made for the loss of income with respect to an accounting period during which a current income beneficiary had a mandatory income interest is income.

(5) Net income received in an accounting period during which there is no beneficiary to whom afiduciary~~trustee~~may or shall distribute income.

(6) Other receipts as provided in ss. 738.601-738.608.

Section 17. Section 738.502, Florida Statutes, is amended to read:

738.502 Rental property.—To the extent a<u>fiduciary</u>~~trustee~~accounts for receipts from rental property pursuant to this section, the<u>fiduciary</u>~~trustee~~shall allocate to income an amount received as rent of real or personal property, including an amount received for cancellation or renewal of a lease. An amount received as a refundable deposit, including a security deposit or a deposit that is to be applied as rent for future periods, shall be added to principal and held subject to the terms of the lease and is not available for distribution to a beneficiary until the<u>fiduciary's</u>~~trustee~~contractual obligations have been satisfied with respect to that amount.

Section 18. Subsections (1) through (3) of section 738.503, Florida Statutes, are amended to read:

738.503 Obligation to pay money.—

(1) An amount received as interest, whether determined at a fixed, variable, or floating rate, on an obligation to pay money to the <u>fiduciary</u>~~trustee~~, including an amount received as consideration for prepaying principal, shall be allocated to income without any provision for amortization of premium.

(2) Except as otherwise provided herein, a<u>fiduciary</u>~~trustee~~shall allocate to principal an amount received from the sale, redemption, or other disposition of an obligation to pay money to the<u>fiduciary</u>~~trustee~~.

(3) The increment in value of a bond or other obligation for the payment of money bearing no stated interest but payable at a future time in excess of the price at which it was issued or purchased, if purchased after issuance, is distributable as income. If the increment in value accrues and becomes payable pursuant to a fixed schedule of appreciation, it may be distributed to the beneficiary who was the income beneficiary at this time of increment from the first principal cash available or, if none is available,

when the increment is realized by sale, redemption, or other disposition. When unrealized increment is distributed as income but out of principal, the principal shall be reimbursed for the increment when realized. If, in the reasonable judgment of the fiduciary ~~trustee~~, exercised in good faith, the ultimate payment of the bond principal is in doubt, the fiduciary ~~trustee~~ may withhold the payment of incremental interest to the income beneficiary.

Section 19. Subsections (1) and (2) of section 738.504, Florida Statutes, are amended to read:

738.504 Insurance policies and similar contracts.—

(1) Except as otherwise provided in subsection (2), a fiduciary ~~trustee~~ shall allocate to principal the proceeds of a life insurance policy or other contract in which the trust or its fiduciary ~~trustee~~ is named as beneficiary, including a contract that insures the trust or its fiduciary ~~trustee~~ against loss for damage to, destruction of, or loss of title to a trust asset. The fiduciary ~~trustee~~ shall allocate dividends on an insurance policy to income if the premiums on the policy are paid from income and to principal if the premiums are paid from principal.

(2) A fiduciary ~~trustee~~ shall allocate to income proceeds of a contract that insures the fiduciary ~~trustee~~ against loss of occupancy or other use by an income beneficiary, loss of income, or, subject to s. 738.403, loss of profits from a business.

Section 20. Section 738.601, Florida Statutes, is amended to read:

738.601 Insubstantial allocations not required.—If a fiduciary ~~trustee~~ determines that an allocation between principal and income required by s. 738.602, s. 738.603, s. 738.604, s. 738.605, or s. 738.608 is insubstantial, the fiduciary ~~trustee~~ may allocate the entire amount to principal unless one of the circumstances described in s. 738.104(3) applies to the allocation. This power may be exercised by a co-fiduciary ~~cotrustee~~ in the

circumstances described in s. 738.104(4) and may be released for the reasons and in the manner described in s. 738.104(5). An allocation is presumed to be insubstantial if:

(1) The amount of the allocation would increase or decrease net income in an accounting period, as determined before the allocation, by less than 10 percent; or

(2)The value of the asset producing the receipt for which the allocation would be made is less than 10 percent of the total value of the trust's assets at the beginning of the accounting period.

Section 21. Section 738.602, Florida Statutes, is amended to read:

738.602 Payments from deferred compensation plans, annuities, and retirement plans or accounts.—

(1) For purposes of this section:

(a) "Fund" means a private or commercial annuity, an individual retirement account, an individual retirement annuity, a deferred compensation plan, a pension plan, a profit-sharing plan, a stock-bonus plan, an employee stock-ownership plan, or another similar arrangement in which federal income tax is deferred.

(b) "Income of the fund" means income that is determined according to subsection (2) or subsection (3).

(c) "Nonseparate account" means a fund for which the value of the participant's or account owner's right to receive benefits can be determined only by the occurrence of a date or event as defined in the instrument governing the fund.

(d) "Payment" means a distribution from a fund that a fiduciary~~trustee~~may receive over a fixed number of years or during the life of one or more individuals because of services rendered or property transferred to the payor in exchange for future payments. The term includes a

distribution made in money or property from the payor's general assets or from a fund created by the payor or payee.

(e) "Separate account" means a fund holding assets exclusively for the benefit of a participant or account owner and:

1. The value of such assets or the value of the separate account is ascertainable at any time; or

2. The administrator of the fund maintains records that show receipts and disbursements associated with such assets.

(2)(a) For a fund that is a separate account, income of the fund shall be determined:

1. As if the fund were a trust subject to the provisions of ss. 738.401-738.706; or

2. As a unitrust amount calculated by multiplying the fair market value of the fund as of the first day of the first accounting period and, thereafter, as of the last day of the accounting period that immediately precedes the accounting period during which a payment is received by the percentage determined in accordance with s. 738.1041(2)(b)2.a. Thefiduciary~~trustee~~shall determine such percentage as of the first month that the fiduciary's~~trustee~~election to treat the income of the fund as a unitrust amount becomes effective. For purposes of this subparagraph, "fair market value" means the fair market value of the assets held in the fund as of the applicable valuation date determined as provided in this subparagraph. The fiduciary~~trustee~~is not liable for good faith reliance upon any valuation supplied by the person or persons in possession of the fund. If the fiduciary~~trustee~~makes or terminates an election under this subparagraph, thefiduciary~~trustee~~ shall make such disclosure in a trust disclosure document that satisfies the requirements of s. 736.1008(4)(a).

(b) The fiduciary~~trustee~~ shall have discretion to elect the method of determining the income of the fund pursuant to this subsection and may change the method of determining income of the fund for any future accounting period.

(3) For a fund that is a nonseparate account, income of the fund is a unitrust amount determined by calculating the present value of the right to receive the remaining payments under 26 U.S.C. s. 7520 of the Internal Revenue Code as of the first day of the accounting period and multiplying it by the percentage determined in accordance with s. 738.1041(2)(b)2.a. The fiduciary~~trustee~~ shall determine the unitrust amount as of the first month that the fiduciary's~~trustee~~ election to treat the income of the fund as a unitrust amount becomes effective.

(4) Except for those trusts described in subsection (5), the fiduciary~~trustee~~ shall allocate to income the lesser of the payment received from a fund, or the income determined under subsection (2) or subsection (3). Any remaining amount of the payment shall be allocated to principal.~~a payment from a fund as follows:~~

~~(a) That portion of the payment the payor characterizes as income shall be allocated to income, and any remaining portion of the payment shall be allocated to principal.~~

~~(b) To the extent that the payor does not characterize any portion of a payment as income or principal and the trustee can ascertain the income of the fund by the fund's account statements or any other reasonable source, the trustee shall allocate to income the lesser of the income of the fund or the~~

~~entire payment and shall allocate to principal any remaining portion of the payment.~~

~~(c) If the trustee, acting reasonably and in good faith, determines that neither paragraph (a) nor paragraph (b) applies and all or part of the payment is required to be made, the trustee shall allocate to income 10 percent of the portion of the payment that is required to be made during the accounting period and shall allocate the balance to principal. If no part of a payment is required to be made or the payment received is the entire amount to which the trustee is entitled, the trustee shall allocate the entire payment to principal. For purposes of this paragraph, a payment is not "required to be made" to the extent the payment is made because the trustee exercises a right of withdrawal.~~

(5) For a trust which, to qualify for the estate or gift tax marital deduction under the Internal Revenue Codeorcomparable law of any state, entitles the spouse to all of the income of the trust, and the terms of the trust are silent as to the time and frequency for distribution of the income of the fund, then:

(a) For a fund that is a separate account, unless the spouse directs the fiduciary~~trustee~~to leave the income of the fund in the fund, thefiduciary~~trustee~~shall withdraw and pay to the spouse, no less frequently than annually:

1. All of the income of the fund determined in accordance with subparagraph (2)(a)1.; or

2. The income of the fund as a unitrust amount determined in accordance with subparagraph (2)(a)2.

(b) For a fund that is a nonseparate account, the fiduciary ~~trustee~~ shall withdraw and pay to the spouse, no less frequently than annually, the income of the fund as a unitrust amount determined in accordance with subsection (3).

(6) This section does not apply to payments to which s. 738.603 applies.

Section 22. Section 738.603, Florida Statutes, is amended to read:

738.603 Liquidating asset.—

(1) For purposes of this section, "liquidating asset" means an asset the value of which will diminish or terminate because the asset is expected to produce receipts for a period of limited duration. The term includes a leasehold, patent, copyright, royalty right, and right to receive payments during a period of more than 1 year under an arrangement that does not provide for the payment of interest on the unpaid balance. The term does not include a payment subject to s. 738.602, resources subject to s. 738.604, timber subject to s. 738.605, an activity subject to s. 738.607, an asset subject to s. 738.608, or any asset for which the fiduciary ~~trustee~~ establishes a reserve for depreciation under s. 738.703.

(2) A fiduciary ~~trustee~~ shall allocate to income 5 ~~10~~ percent of the receipts from the carrying value of a liquidating asset and the balance to principal. Amounts allocated to principal will reduce the carrying value of the liquidating asset, but not below zero. Amounts received in excess of the remaining carrying value are to be allocated to principal.

Section 23. Subsections (1) and (4) of section 738.604, Florida Statutes, are amended to read:

738.604 Minerals, water, and other natural resources.—

(1) To the extent afiduciary~~trustee~~accounts for receipts from an interest in minerals or other natural resources pursuant to this section, the fiduciary~~trustee~~ shall allocate such receipts as follows:

(4) If a trust owns an interest in minerals, water, or other natural resources on January 1, 2003, the fiduciary~~trustee~~ may allocate receipts from the interest as provided in this chapter or in the manner used by the fiduciary~~trustee~~ before January 1, 2003. If the trust acquires an interest in minerals, water, or other natural resources after January 1, 2003, the fiduciary~~trustee~~ shall allocate receipts from the interest as provided in this chapter.

Section 24. Subsections (1), (2) and (4) of section 738.605, Florida Statutes, are amended to read:

738.605 Timber.—

(1) To the extent a fiduciary~~trustee~~ accounts for receipts from the sale of timber and related products pursuant to this section, the fiduciary~~trustee~~ shall allocate the net receipts:

(2) In determining net receipts to be allocated pursuant to subsection (1), a fiduciary~~trustee~~ shall deduct and transfer to principal a reasonable amount for depletion.

(4) If a trust owns an interest in timberland on January 1, 2003, the fiduciary~~trustee~~ may allocate net receipts from the sale of timber and related products as provided in this chapter or in the manner used by the fiduciary~~trustee~~ before January 1, 2003. If the trust acquires an interest in timberland after January 1, 2003, the fiduciary~~trustee~~ shall allocate net

receipts from the sale of timber and related products as provided in this chapter.

Section 25. Subsection (1) of section 738.606, Florida Statutes, is amended to read:

738.606 Property not productive of income.—

(1) If a marital deductionis allowed under either the Internal Revenue Code or comparable law of any state is allowed for all or part of a trust the income of which is required to be distributed to the grantor's spouse and the assets of which consist substantially of property that does not provide the spouse with sufficient income from or use of the trust assets, and if the amounts the fiduciary~~trustee~~ transfers from principal to income under s. 738.104 and distributes to the spouse from principal pursuant to the terms of the trust are insufficient to provide the spouse with the beneficial enjoyment required to obtain the marital deduction, the spouse may require the fiduciary~~trustee~~ to make property productive of income, convert property within a reasonable time, or exercise the power conferred by ss. 738.104 and 738.1041. The fiduciary~~trustee~~ may decide which action or combination of actions to take.

Section 26. Subsections (2) and (3) of section 738.607, Florida Statutes, are amended to read:

738.607 Derivatives and options.—

(2) To the extent a fiduciary~~trustee~~does not account under s. 738.403 for transactions in derivatives, the fiduciary~~trustee~~shall allocate to principal receipts from and disbursements made in connection with those transactions.

(3) If a fiduciary~~trustee~~ grants an option to buy property from the trust whether or not the trust owns the property when the option is granted, grants an option that permits another person to sell property to the trust,

or acquires an option to buy property for the trust or an option to sell an asset owned by the trust, and the fiduciary~~trustee~~ or other owner of the asset is required to deliver the asset if the option is exercised, an amount received for granting the option shall be allocated to principal. An amount paid to acquire the option shall be paid from principal. A gain or loss realized upon the exercise of an option, including an option granted to a grantor of the trust for services rendered, shall be allocated to principal.

Section 27. Subsections (2) and (3) of section 738.608, Florida Statutes, are amended to read:

738.608 Asset-backed securities.—

(2) If a trust receives a payment from interest or other current return and from other proceeds of the collateral financial assets, the fiduciary~~trustee~~ shall allocate to income the portion of the payment which the payor identifies as being from interest or other current return and shall allocate the balance of the payment to principal.

(3) If a trust receives one or more payments in exchange for the trust's entire interest in an asset-backed security during a single accounting period, the fiduciary~~trustee~~ shall allocate the payments to principal. If a payment is one of a series of payments that will result in the liquidation of the trust's interest in the security over more than a single accounting period, the fiduciary~~trustee~~ shall allocate 10 percent of the payment to income and the balance to principal.

Section 28. Section 738.701, Florida Statutes, is amended to read:

738.701 Disbursements from income.—A fiduciary~~trustee~~ shall make the following disbursements from income to the extent they are not disbursements to which s. 738.201(2)~~(a) or~~(c) applies:

(1) One-half of the regular compensation of the fiduciary~~trustee~~ and of any person providing investment advisory or custodial services to the fiduciary~~trustee~~.

(2) One-half of all expenses for accountings, judicial proceedings, or other matters that involve both the income and remainder interests.

(3)All of the other ordinary expenses incurred in connection with the administration, management, or preservation of trust property and the distribution of income, including interest, ordinary repairs, regularly recurring taxes assessed against principal, and expenses of a proceeding or other matter that concerns primarily the income interest.

(4)Recurring premiums on insurance covering the loss of a principal asset or the loss of income from or use of the asset.

Section 29. Subsection (1) of section 738.702, Florida Statutes, is amended to read:

738.702 Disbursements from principal.—

(1) A fiduciary~~trustee~~shall make the following disbursements from principal:

(a) The remaining one-half of the disbursements described in s. 738.701(1) and (2).

(b) All of the fiduciary's~~trustee's~~ compensation calculated on principal as a fee for acceptance, distribution, or termination and disbursements made to prepare property for sale.

(c) Payments on the principal of a trust debt.

(d) Expenses of a proceeding that concerns primarily principal, including a proceeding to construe the trust or will orto protect the trust, estate or its property.

(e) Premiums paid on a policy of insurance not described in s. 738.701(4) of which the trustor estate is the owner and beneficiary.

(f) Estate, inheritance, and other transfer taxes, including penalties, apportioned to the trust.

(g) Disbursements related to environmental matters, including reclamation, assessing environmental conditions, remedying and removing environmental contamination, monitoring remedial activities and the release of substances, preventing future releases of substances, collecting amounts from persons liable or potentially liable for the costs of such activities, penalties imposed under environmental laws or regulations and other payments made to comply with those laws or regulations, statutory or common law claims by third parties, and defending claims based on environmental matters.

(h) Payments representing extraordinary repairs or expenses incurred in making a capital improvement to principal, including special assessments; however, a fiduciary~~trustee~~ may establish an allowance for depreciation out of income to the extent permitted by s. 738.703.

Section 30. Subsection (2) of Section 738.703, Florida Statutes, is amended to read:

738.703 Transfers from income to principal for depreciation.—

(2) Afiduciary~~trustee~~may transfer to principal a reasonable amount of the net cash receipts from a principal asset that is subject to depreciation but may not transfer any amount for depreciation:

(a) Of that portion of real property used or available for use by a beneficiary as a residence or of tangible personal property held or made available for the personal use or enjoyment of a beneficiary;

(b) During the administration of a decedent's estate; or

(c) Under this section if the fiduciary~~trustee~~ is accounting under s. 738.403 for the business or activity in which the asset is used.

Section 31. Subsections (1) through (3) of section 738.704, Florida Statutes, are amended to read:

738.704 Transfers from income to reimburse principal.—

(1) If a fiduciary~~trustee~~makes or expects to make a principal disbursement described in this section, the fiduciary~~trustee~~ may transfer an appropriate amount from income to principal in one or more accounting periods to reimburse principal or to provide a reserve for future principal disbursements.

(2) Principal disbursements to which subsection (1) applies include the following, but only to the extent the fiduciary~~trustee~~ has not been and does not expect to be reimbursed by a third party:

(a)An amount chargeable to income but paid from principal because the amount is unusually large.

(b)Disbursements made to prepare property for rental, including tenant allowances, leasehold improvements, and broker’s commissions.

(c)Disbursements described in s. 738.702(1)(g).

(3) If the asset the ownership of which gives rise to the disbursements becomes subject to a successive income interest after an income interest ends, a fiduciary~~trustee~~ may continue to transfer amounts from income to principal as provided in subsection (1).

Section 32. Section 738.705, Florida Statutes, is amended to read:

738.705 Income taxes.—

(1) A tax required to be paid by a fiduciary~~trustee~~ based on receipts allocated to income shall be paid from income.

(2) A tax required to be paid by a fiduciary~~trustee~~ based on receipts allocated to principal shall be paid from principal, even if the tax is called an income tax by the taxing authority.

(3) A tax required to be paid by a fiduciary~~trustee~~ on the trust'sor estate'sshare of an entity's taxable income shall be paid proportionately:

(a) From income to the extent receipts from the entity are allocated to income; and

(b) From principal to the extent ~~(1)~~receipts from the entity are allocated to principal;~~and~~

(c) From principal to the extent that the income taxes payable by the trust or estate exceed the total distributions from the entity.

~~2. The trust's share of the entity's taxable income exceeds the total receipts described in paragraph (a) and subparagraph 1.~~

(4) After applying subsections (1) through (3), the fiduciary shall adjust income or principal receipts to the extent that the trust's or estate's income taxes are reduced, but not eliminated, because the trust or estate receives a deduction for payments made to a beneficiary. The amount distributable to that beneficiary as income as a result of this adjustment will be equal to (a)the cash received by the trust or estate, reduced (but not below zero) by (b) the entity's taxable income allocable to the trust or estate multiplied by the trust's or estate's income tax rate.This reduced amount shall then be divided by (c) the difference between one (1) and the trust's or estate's income tax rate to determine the amount distributable to that beneficiary as income before giving effect

to other receipts or disbursements allocable to that beneficiary's interest ~~receipts allocated to principal or income shall be reduced by the amount distributed to a beneficiary from principal or income for which the trust receives a deduction in calculating the tax~~.

Section 33. Section 738.801, Florida Statutes, is deleted and amended to read:

738.801 Apportionment of expenses; improvements.—

(1) For purposes of this section:

(a) "Tenant" means the holder of an estate for life or term of years in real property, personal property, or both.

(b) "Remainderman" means the holder of the remainder interests after the expiration of a tenant's estate in property.

(2) When no trust has been created, expenses shall be apportioned between the tenant and remainderman as follows:

(a) The following expenses are to be allocated to and paid by the tenant:

1. All ordinary expenses incurred in connection with the administration, management, or preservation of the property, including interest, ordinary repairs, regularly recurring taxes assessed against the property, and expenses of a proceeding or other matter than concerns primarily the tenant's estate or use of the property.

2. Recurring premiums on insurance covering the loss of the property or the loss of income from or use of the property.

3. Any of the expenses described in (2)(b)3 that are attributable to the use of the property by the tenant.

(b) The following expenses are to be allocated to and paid by the remainderman:

1. Payments on the principal of a debt secured by the property, except to the extent the debt is for expenses allocated to the tenant.

2. Expenses of a proceeding or other matter that concerns primarily the title to the property (other than title to the tenant's estate).

3. Except as provided in (2)(a)3, expenses related to environmental matters, including reclamation, assessing environmental conditions, remedying and removing environmental contamination, monitoring remedial activities and the release of substances, preventing future releases of substances, collecting amounts from persons liable or potentially liable for the costs of such activities, penalties imposed under environmental laws or regulations and other payments made to comply with those laws or regulations, statutory or common law claims by third parties, and defending claims based on environmental matters.

4. Extraordinary repairs.

(c) When either the tenant or remainderman has incurred an expense for the benefit of his or her own estate without consent or agreement of the other, he or she shall pay such expense in full.

(d) Except as provided in (2)(c), the cost of, or special taxes or assessments for, an improvement representing an addition of value to property forming part of the principal shall be paid by the tenant when the improvement is not reasonably expected to outlast the estate of the tenant. In all other cases a part only shall be paid by the tenant, while the remainder shall be paid by the remainderman. The part payable by the tenant shall be ascertainable by taking that percentage of the total that is found

by dividing the present value of the tenant's estate by the present value of an estate of the same form as that of the tenant except that it is limited for a period corresponding to the reasonably expected duration of the improvement. The computation of present values of the estates shall be made using the rate defined in 26 U.S.C. s. 7520, then in effect and, in the case of an estate for life, the official mortality tables then in effect under 26 U.S.C. s. 7520. No other evidence of duration or expectancy shall be considered.

(3) The provisions of this section shall not apply to the extent inconsistent with the instrument creating the estates, the agreement of the parties, or the specific direction of the taxing or other statutes.

(4) The common law applicable to tenants and remaindermen supplements this section, except to the extent modified by this section or other statutes.

Section 34. Theprovisions of this Act shall take effect January 1, 2013.

EXHIBIT "B"
UPIA REVISED WHITE PAPER

WHITE PAPER
ON
A PROPOSED BILL TO AMEND THE FLORIDA UNIFORM PRINCIPAL AND INCOME ACT, CHAPTER 738, FLORIDA STATUTES

I. SUMMARY

The 2002 Florida Legislature enacted the Florida Uniform Principal and Income Act (the "UPIA" or the "Act"), effective January 1, 2003. Contained in Chapter 2002-42, Laws of Florida, the UPIA made sweeping changes to Florida's principal and income laws. The UPIA has greatly improved the guidance offered to fiduciaries in administering trusts and estates in Florida. Interested industry groups that were proponents of the UPIA have continued working together to clarify language and to identify other shortfalls with this new law. As a result, further amendments and clarifications to the UPIA have been identified and are discussed below.

This proposal clarifies provisions of the Act related to both trustees and personal representatives. Additionally, this proposal makes a change to the statutes to address Internal Revenue Service Rev. Rul. 2006-26 which impacts the treatment of retirement plan distributions. The proposal also clarifies the computation of income payable to residual devises and pecuniary devises.

II. SECTION-BY-SECTION ANALYSIS

A. Summary of specific changes which impact multiple sections:

Current Situation:

With limited exceptions, the Act applies to all fiduciaries including, but not limited to, trustees and personal representatives(see F.S. 738.102(4)).Some confusion arose however, because certain sections of the Act that pertained to all fiduciaries contained the word "trustee". Additionally, the word "fiduciary(ies) was used in certain sections that were only intended to apply to "trustee(s)".

To clarify the fact that a few sections were intended to only apply to trustees, the following provision is added to F. S. 738.103: " All provisions of this chapter also apply to any estate that is administered in Florida, unless the provision is limited in application to a trustee, rather than a fiduciary."

Effect of Proposed Changes:

The proposed bill removes the word "trustee(s)" and replaces it with "fiduciary(ies)" where appropriate. Additionally, the word "fiduciary(ies)" was used in certain sections that was only intended to apply to "trustee(s)". The specific sections of the Florida Statutes impacted by this change are as follows:

F.S. 738.105 Judicial control of discretionary powers.
F.S. 738.301 When right to income begins and ends.
F.S. 738.302 Apportionment of receipts and disbursements when decedent dies or income interest begins.
F.S. 738.303 Apportionment when income interest ends.
F.S. 738.401 Character of receipts.
F.S. 738.402 Distribution from Trust orEstate

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F.S. 738.403 Business and other activities conducted by trustee.
F.S. 738.501 Principal receipts.
F.S. 738.502 Rental property.
F.S. 738.503 Obligation to pay money.
F.S. 738.504 Insurance policies and similar contracts.
F.S. 738.601 Insubstantial allocations not required.
F.S. 738.602 Payments from deferred compensation plans, annuities, and retirement plans or accounts.
F.S. 738.603 Liquidating asset.
F.S. 738.604 Minerals, water, and other natural resources.
F.S. 738.605 Timber.
F.S. 738.606 Property not productive of income.
F.S. 738.607 Derivatives and options.
F.S. 738.608 Asset-backed securities.
F.S. 738.701 Disbursements from income.
F.S. 738.702 Disbursements from principal.
F.S. 738.703 Transfers from income to principal for depreciation.
F.S. 738.704 Transfers from income to reimburse principal.
F.S. 738.705 Income taxes.
~~F.S. 738.804 Application.~~

B. Section 738.102 Definition of "Carrying Value"

Current Situation:

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Prior to the 2002 adoption of the current version of the Act, the Florida Principal and Income Act (the "1962 Act") included a definition of "Inventory Value" (F.S. 738.01(2), 1962 Act), also known as "carrying value". The definition was abandoned because it was only referenced in the 1962 Act (old F.S. 738.11). With the removal of this definition, however, Florida Statutes did not contain a definition. The only definition is found in Probate Rule 5.346 when referencing the inclusion of "carrying values" in the preparation of the fiduciary accountings.

Effect of proposed changes:

The proposed bill clarifies the meaning of "carrying value" for purposes of preparing fiduciary accountings. The meaning is also needed because proposed revisions to F.S. ss. 738.202, 738.401(6), and 738.603 make use of the term~~. Additionally, F.S. s. 738.603 make use of the term "carrying value"~~ when computing the allocation between principal and incomeof various receipts~~ from a liquidating asset~~.

Further, the proposed amendment allows for an adjustment of carrying value when there is a change in fiduciaries. This is in line with the Model Fiduciary Accounting Standards adopted by the American Bar Association, American Bankers Association, and the American Institute of Certified Public Accountants. This adjustment is not mandatory, but is intended to allow the new fiduciaries to adjust carrying values to establish the amount over which they are responsible, so that the beneficiaries have a benchmark to measure subsequent performance of the fiduciary. This would typically be applied when the prior fiduciary had incurred substantial unrealized losses that had yet to be recognized for fiduciary accounting purposes. Absent the

adjustment, the new fiduciary will be starting out with negative performance as reflected on the fiduciary accounting.

This is addressed in the comments to the Model Fiduciary Accounting Standards Section IV, wherein illustration 4.2 acknowledges that it may be appropriate, when allowed under applicable local law, to adjust carrying value of assets to reflect values at the start of his/her administration.

As the proposed amendment makes the provision election to adjust carrying values when there is a change in fiduciary elective, and is not mandatory, no additional burden is imposed upon successor trustees without their assent.

Additionally, iIf the fiduciary does elects to adjust carrying values, such adjustment must be reported on the first accounting filed after the election is made.

C. Sections 738.103(3) Fiduciary duties; general principles and 738.104(11)

Current Situation:

F.S. 738.103 "Fiduciary duties; general principles" outlines default duties that apply to all trusts. As written, it is not clear whether these duties are owed to all trusts administered within the state of Florida or under Florida law, regardless of any prior administrative situs the trust may have had in the past. The proposal clarifies F.S. 738.103 to provide that the Act applies to any trust or estate that is administered in this state or under Florida law. Similar language contained in F.S. 738.104(11) has been deleted as redundant to the above change.

D. Section 738.1041 Total Return Unitrust

Current Situation:

F.S. 738.1041 "Total return unitrust" provides for both the creation of an express unitrust and the conversion to or from a unitrust. The unitrust provision has gained wide acceptance with fiduciaries due to its ease of administration. Recent economic events, however, have demonstrated that large market fluctuations, either up or down, can cause large differences in amounts distributable to the unitrust beneficiary from year to year, which are undesirable. Further, there are a number of provisions in F.S. 738.1041 that are duplicative and which potentially conflict creating ambiguity in the statutes. Rather than rely on the statute, grantors are permitted to create an express unitrust in their documents.

Effect of Proposed Changes:

In order to ameliorate the changes to the unitrust distributions that can occur as a result of annual market fluctuations, the proposed revisions to the Act provide for the addition of a "smoothing rule" that uses an average of the fair market value of the trust assets computed for the current and two preceding years. The revisions also provide for an adjustment to the "Average Fair Market Value" if there is either an addition to principal (which can often occur

during an estate administration when a trust may be partially funded over several years) or a principal distribution to a beneficiary, so that the smoothing only relates to investment performance. The proposed revisions include a definition of both “Average Fair Market Value” and “Fair Market Value”. This will allow for more consistency of income distributions to the income beneficiaries.

Additionally, the changes to F.S. 738.1041(10) clarify the applicability of the smoothing rules to express unitrusts, unless another method is directed in the governing instrument; the grantor must provide that a unitrust approach is desired and what percentage (between 3% and 5% for IRS reasons) is to be used to calculate the unitrust amount. The grantor may also provide directions on how to determine the fair market value of the trust assets or what, if any, assets are to be excluded from the computation. If the trust is silent on either or both of these points, the applicable provisions of s. 738.1041 will apply.

Example #1: (for illustration purposes, market fluctuation has not been reflected)

The trustee of a unitrust wants to compute the unitrust distribution of 2013. This computation will involve averaging the market values of 2011-2013. The initial funding of the trust of $1,000,000 occurred sometime during 2011, which is the beginning of the 2011 period; because the purpose of smoothing is to minimize fluctuations due solely to investment performance, $1,000,000 is the Beginning Market Value for 2011, which would be used in determining the unitrust amount. (Under the provisions of FS s. 738.1041(6)(b), the trustee would likely exercise its discretion to prorate the payment over the remaining portion of the year.)

On July 1, 2012, the trustee receives an addition to principal in the amount of $1,000,000. Average Fair Market Value would be computed as follows:

	2011	2012	2013
Beginning Market Value	$1,000,000	$1,000,000	$2,000,000
Principal addition	1,000,000	1,000,000	
Total FMV	$2,000,000	$2,000,000	$2,000,000

Average FMV = $2,000,000

In 2014, the computation would be as follows:

	2012	2013	2014
Beginning Market Value	$1,000,000	$2,000,000	$2,000,000
Principal addition	1,000,000		
Total FMV	$2,000,000	$2,000,000	$2,000,000

Average FMV = $2,000,000

The principal addition in 2012 was added to the 2012 balance, as well as the balance in all prior periods used in the computation. (i.e. because the addition occurred after 01/01/12, the addition would be to both 2011 and 2012 balances, but in the computation for 2014, it is only included in the 2012 balance, because it already actually included in the 2013 and 2014 balances.)

Example #2:
Same facts as Example #1 with the addition of a principal distribution to a beneficiary of $500,000 in 2012.

	2011	2012	2013
Beginning Market Value	$1,000,000	$1,000,000	$1,500,000
Principal addition	1,000,000	1,000,000	
Principal distribution	(500,000)	(500,000)	
Total FMV	$1,500,000	$1,500,000	$1,500,000

Average FMV = $1,500,000

Computations for 2014

	2012	2013	2014
Beginning Market Value	$1,000,000	$1,500,000	$~~2,0~~1,500,000
Principal addition	1,000,000		

Principal distribution (500,000)

Total FMV $1,500,000 $1,500,000 $2,01,500,000

Average FMV = $1,666,6671,500,000

Example #3:

Assume the same facts as Example #2 except allow for market fluctuations– showing an increase of $200,000 during 2011, and an increase of $300,000 during 2012 as follows.

	2011	2012	2013
Beginning Market Value	$1,000,000	$1,200,000	$2,000,000
Principal addition	1,000,000	1,000,000	
Principal distribution	(500,000)	(500,000)	
Total FMV	$1,500,000	$1,700,000	$2,000,000

Average FMV = ($1,500,000 + $1,700,000 + $2,000,000)/3 = $1,733,333

Example #4:

Assume the same facts as above except the initial funding of the trust in 2011 occurred on July 1, 2011.

Beginning Market Value	$51,000,000	$1,200,000	$2,000,000
Principal addition	1,000,000	1,000,000	
Principal distribution	(500,000)	(500,000)	
Total FMV	$1,5000,000	$1,700,000	$2,000,000

Average FMV = ($1,00750,000 + $1,700,000 + $2,000,000)/2.53 = $1,780,000566,667

The funding on July 1 has been adjusted for only having been in the trust for ½ year. In all events the funding in the initial period will be adjusted for the number of months from the funding of the trust to the close of the measuring period.

Additionally, current F.S.738.1041(4) contains a paragraph that is duplicative of F.S. 738.1041(2)(b)(2)(b), so it is proposed that F.S.738.1041(4) be deleted as unnecessary. Also creating confusion in the current statute is the prohibition in F.S. 738.1041(10)(e)against the use of a unitrust if the trustee currently possesses the power to adjust that is granted under F.S. 738.104. Because the power to adjust is automatically granted to disinterested trustees of trusts becoming irrevocable after January 1, 2003, absent anything to the contrary in the trust document, this section implied that such trustees could not use the unitrust provisions of F.S.

738.1041. Conversely, F. S. 738.104(5)(a) provides that a trustee may release the entire power to adjust allowing the use of a unitrust but no method of release if isprovided. By removing F.S. 738.1041(10)(e), any possible conflict between the two sections is avoided, so the proposal deletes 738.1041(10)(e) as unnecessary. The proposal also removes a sentence in current F.S. 738.1041(11)(a) that contains language that is duplicative of current F.S. 738.1041(10)(c). Finally, references to "trust document" in F.S. 738.1041 have been changed to "trust instrument" to achieve uniformity with the Florida Trust Code, which uses the term "trust instrument" as a defined term.

E. Section 738.201 Determination and distribution of net income

Current Situation:

F.S. 738.201(1) & (2) contain wording that implies that estates may not be subject to all relevant provisions of the Act. The proposal deletes the language "which apply to trustees" as unnecessary. F.S. 738.201(3) provides that a fiduciary shall distribute to a beneficiary who receives a pecuniary amount outright the interest provided by will, the terms of the trust, or *applicable law*. The language "applicable law" creates confusion, because the Florida Statutes contain no such provision.

Effect of Proposed Changes:

The proposal deletes the language "which apply to trustees" as unnecessary, in F.S. 738.201(3) due to the clarification of the term fiduciary in other portions of the statute. The language has been modified to clarify that there is no statutory right to income on an outright pecuniary devise.

F. Section 738.202 Distribution to residuary and remainder beneficiaries

Current Situation:

The 2002 revisions to the Act required distributions to pecuniary devises in trust and remainder beneficiaries in proportion to their respective interests in the fair market value of the assets on the date of distribution. From an administrative perspective, this required a revaluation of all assets on each distribution date, unless the devises were fractional. The 1962 Act provided that distributions were to be based upon relative carrying values and not fair market value. This simplified administration and did not require recomputation of a beneficiary's proportionate

interest in income as long as no disproportionate distributions were made. (F.S. 738.04 1962 Act).

Effect of Proposed Changes:

The proposed changes will simplify administration by returning to the method of using carrying values to allocate income and provides a framework for dealing with disproportionate distributions.By using carrying values, the fiduciary will no longer need to revalue the assets on each distribution date, unless there is a non prorata distribution to one or more beneficiaries.If a fiduciary does make a principal distribution to one or more beneficiaries not in proportion to their respective interests in the trust principal, the beneficiary's interest in the remaining trust principal is changed and must be recomputed. To accomplish this, the proposed statute requires the fiduciary to restate the carrying value of all assets to their fair market values as of the distribution date (similar to what is now required every year whether or not there has been a disproportionate distribution) and recomputed the interests of all beneficiaries. This is illustrated as follows:

Example #1: The total principal of a trust remaining after all debts and expenses is $12,000,000. A pecuniary devise of $7,000,000 is to be held in further trust for the benefit of beneficiary A, with the residue left outright to beneficiary B. From the onset, the trust for beneficiary A is entitled to 7/12 of any income earned during administration and beneficiary B is entitled to 5/12.

Prior to the funding of the trust or payment of any of the residue, beneficiary B receives a principal distribution of $1,000,000. As of the date of this principal distribution, but prior to the actual distribution, the fair market value of the trust assets is $20,000,000. The fractional interests are recomputed as follows:

	Beneficiary A	Beneficiary B
Date of death values	$7,000,000	$5,000,000
Adjusted Carrying values	$7,000,000	$13,000,000
Principal Distribution		(1,000,000)
Remaining principal	$7,000,000	$12,000,000
Recomputed Fraction	7/19	12/19

Example #2: The total principal of a trust remaining after all debts and expenses is $12,000,000. The residue is to be split equally between beneficiary A and B. From the onset, both beneficiary A and B are entitled to 50% of any income earned during administration. Prior to the disbursement of the residual devises, beneficiary B receives a principal distribution of $1,000,000. As of the date of the principal distribution, but prior to the distribution, the fair market value of the trust assets is $20,000,000. The fractional interests are recomputed as follows:

	Beneficiary A	Beneficiary B
Date of death values	$6,000,000	$6,000,000
Adjusted Carrying values	$10,000,000	$10,000,000
Principal Distribution		(1,000,000)
Remaining principal	$10,000,000	$9,000,000
Recomputed Fraction	10/19	9/19

G. Section 738.401 Character of receipts

Current Situation:

As originally adopted, the Act provided a default rule that required that payments in excess of 20% of the entities' assets were presumed to be liquidating distributions which are allocable to principal. This became a problem for entities involved in the service industry that paid large dividends in proportion to their asset base. This also became a problem when Microsoft Corp. declared its first dividend, which exceeded 20% of its total assets, but was far less than 20% of its market value. Many fiduciaries were unsure of how to treat that dividend under current law, although most assumed it was principal. Additionally, Private Trustees have separate rules to follow as they relate to Targeted Entities as outlined in s. 738.401(7). Under the currentl law, it is not clear how to handle distributions from Targeted Entities that are not in excess of book income but do represent gain from the sale of a portion of the business. With the proposed changes made to s. 738.401(63), it was felt that s. 401(7) did does not need to apply to Targeted Entities other than Investment Entities.

Effect of Proposed Changes:

The proposed revision to F.S. 738.401(6) retains the 20% partial liquidation rule for non-publicly traded entities, but only after the trust or estate has received allows for the computation of a cumulative minimum return of 3% annually, which is required to be allocated to the income interest for entities that are not listed on a stock exchange. In addition, if the entity is a "pass-through" entity, causing its income to be taxed to its owners, rather than the entity itself, the trust or estate must also have received the amount of tax attributable to its ownership share of the entity for as long as the trust or estate held the ownership interest, if that tax exceeds the 3% cumulative return. This will serve to protect the interest of both the income and remainder beneficiaries, and falls within the income range authorized by the Internal Revenue Service for both marital and charitable trusts. This change is found in proposed 738.401(6).

The proposal limits the 20% rule to non-publicly traded entities.In computing the 20%,threshold, the proposed statute makes it clear that It also clarifies thatthe 20% rule applies to the trust's or estate's pro rata share of the entity.Targeted Entities (essentially those that "pass through" their income to their owners under the Internal Revenue Code) have their

~~own rules, so they are excluded from the 20% rule under the proposal.~~The 3% cumulative return test applies to the trust's share of the entity's distribution.

To preclude a "makeup" distribution of income from being characterized as principal for publicly traded entities, ~~a~~theproposed revision to 738.401(3)(e) provides that distributions from public entities must satisfy the same 3% cumulative income testbefore being categorized as principal. In addition, because the income interest will then be assured of a 3% return, the threshold for characterization as principal is reduced to 10% of the fair market value of the interest, which, in a company like Microsoft, would be much higher than ~~the~~ 20% of its asset value.

F.S. 738.401(7) was added in 2005 to address potential abuses of entities by private trustees. The section has been effective, but it was found to impose an undue burden on trusts that have a private trustee and invest in a publicly traded partnership. Because the private trustee is not involved with determining the dividend policy of such entities, the conflict of interest addressed in 738.401(7) does not exist. The proposed revision to F.S. 738.401(7)(c)(1) excludes entities listed on a public stock exchange from the application of F.S. 738.401(7).With the changes made to s. 738.401(6), it was felt that s. 738.401(7) did not need to apply to Targeted Entities other than Investment Entities. Nonetheless, in the case of non-publicly traded Investment Entities, it was felt that potential abuses exist that are not solved by s. 738.401(6), so s. 738.401(7) was revised to try to eliminate those potential abuse situations.

Finally, because of the other revisions to F.S. 738.401(5) and (6), existing F.S. 738.407(7)(e) was renumbered as a new subsection (8) that covers the whole section, so that the section is first applied before the tax provisions of F.S. 735.705 and 738.706 are applied.

H. Section 738.602 Payments from deferred compensation plans, annuities, and retirement plans or accounts

Current Situation:

F.S. 738.602 was amended in 2009 to change the method used to compute the income from payments from deferred compensation plans, annuities, and retirement plans in response to an IRS ruling that declared that the language in the Revised Uniform Principal and Income Act

could jeopardize the qualification of a trust for the marital deduction. The amendment adopted a method of computation of income from such assets held in marital trusts similar to that adopted by the National Conference of Commissioners on Uniform State Laws ("NCCUSL"). Under the amendment, however, non marital trusts continued to compute the allocation of income and principal using the method included in the original Act.

Effect of Proposed Changes:

The proposed revision to F.S. 738.602 would result in only one set of rules for all trusts holding such interests, thereby simplifying administration. In addition, the proposed change expands the references to an estate or gift tax and marital deduction to cover not only the federal tax laws, but those of any state to protect residents of other states whose trusts are administered in Florida.

I. Section 738.603 Liquidating asset

Current Situation:

F.S. 738.603 is used to allocate receipts from assets from which payments will diminish or terminate because the asset is expected to produce receipts for a period of limited duration, such as royalties, patents and leaseholds. NCCUSL's Uniform Principal and Income Act allocated 10% of such payments to income and the balance to principal. Florida adopted this approach in 2002. In light of the adverse ruling issued by the IRS relative to using a payment of 10% of total payments received to income and the balance to principal, this section should be amended to remove such language.

Effect of Proposed Changes:

The proposed amendment to F.S. 738.603 adopts the same rules that existed under the 1962 Act in F.S. 738.11, which required that payments be allocated first to income to the extent of 5% of the assets' carrying value at the beginning of the year and the balance to principal. This falls within the safe harbor permitted in IRS Regulations, which allows income to be from 3-5%.

J. Section 738.606 Property Not Productive of Income

Current Situation:

The statute applies to permit a beneficiary of a trust that qualified for a marital deduction under federal tax law to demand that the trust property be made productive, as required by federal law.

Effect of Proposed Changes:

The proposed amendment expands the protection to trusts that qualified for a marital deduction under the laws of any state, similar to the change in F.S. 738.602.

K. Section 738.705 Income taxes

Current Situation:

Since its original adoption in 2002, NCCUSL has amended the Uniform Principal and Income Act to clarify the method of income tax allocation for pass through entities such as partnerships and S Corporations.

Effect of Proposed Changes:

The proposed amendment adopts the methodology employed by NCCUSL in its whitepaper comments. The formula used by NCCUSL to determine the amount of a receipt from a pass through entity that is allocable to income and distributable to the income beneficiary is a follows:

$$D = [C- (R \times K)]/(1-R)$$

D = Distribution to income beneficiary

C = Cash paid by the entity to the trust

R = Tax rate on income

K = Entity's K-1 taxable income

Example: ABC Trust receives a K-1 from Partnership reflecting taxable income of $1 million. Partnership distributes $500,000 to the trust, which it represents to be income. The trust is in the 35 percent tax bracket.

In the example above, the partnership distribution exceeds the trust's $350,000 tax on the K-1 income by $150,000 ($500,000 - $350,000 = $150,000) allowing it to distribute the

remaining $150,000 to the beneficiary. But because the trust can deduct the $150,000 paid to the beneficiary in computing the trust's income tax liability, it must apply the algebraic formula above to derive the amount owed the beneficiary. After deducting the payment, the trust should have exactly enough to pay its tax on the remaining share of entity taxable income.

Taxable income per K-1	1,000,000
Payment to beneficiary	(230,769)
Trust taxable income	$ 769,231
Trust tax-35% Percent	269,231
Partnership distribution	$ 500,000
Trust tax	(269,231)
Payable to the beneficiary	$ 230,769

The proposed amendment incorporates this formula into F.S. 738.705.

L. Section 738.801 Application with respect to apportionment of expenses; improvements.

Current Situation:

Before the existence of modern trusts, interests in property were often divided into life estates (held by life tenants) and remainder interests (held by remaindermen). Life estates (and estates for a term of years) can be created by deed, will, or other instrument. Under the common law, the life tenant was responsible for the payment of expenses relating to the maintenance and upkeep of property, while the remainderman was generally responsible for capital improvements. In addition, the life tenant was responsible for preventing "waste" – any reduction in the value of the property. The life tenant was not responsible for making improvements to property, with some exceptions.

In the absence of a trust, the property must be maintained by either the life tenant or remainderman. While the tenant enjoys the current income or use of the property, the remainderman can benefit from the property only once the tenant's interest has ended. In a trust, a beneficiary has no obligation to pay the expenses of maintaining property. Consequently, allocating a given expense to the remainderman of property may be substantively different than allocating the same expense to the remainder beneficiary of a trust.

The existing UPIA codified common law as to the apportionment of specific expenses between life tenants and remaindermen, by incorporating the provisions of 738.701-738.705 as far as applicable. Those provisonsare expressed in trust terms of principal and income, adding to the confusion as to which provisonsapply to both trusts and lifetenants/remaindermen, andwhich apply only to trustsThis has caused some confusion becausemany of those provisions can apply only to trusts, or are expressed in trust terms such as principal and income..

The current statute provides for the allocation of expenses to the life tenant and thereamindermen in some circumstances based on the "official mortality tables". butthereis confusion as to what they are. In addition, because of the substantive differences between trust interests and other property interests, there are different considerations in allocating the expenses.

Effect of proposed changes:

The proposed bill al revises s.738.801 to clarify its applicability to life estates, as well as to estates for a term of years. The revised s.738.801 specifically includes those portions of ss. 738.701-738.705 that are intended to apply, and has expressed those provisions in terms applicable to life tenants and remaindermen. .This has caused some confusion because many of those provisions can apply only to trusts, or are expressed in trust terms such as principal and income. In addition, because of the substantive differences between trust interests and other property interests, there are different considerations in allocating the expenses.

The current statute anticipates that, before making any capital improvements to property, the tenant and remainderman will agree to the allocation of the cost of improvement. If the tenant and remainderman do not agree to the allocation,however, or if there is a special tax or assessment against the property for improvements, the current statute provides for an allocation

of the cost to the tenant based upon the expected duration of the improvement. If the tenant or remainderman incurs an expense for his or her own benefit, and has not obtained the agreement of the other, then he or she is solely responsible for paying the expense.

The current statute existing s.738.801 calls for determining present values where necessary by reference to the "official mortality tables," without definition.

The proposal ed revision revised s.738.801 provides a defines the "official mortality tables" by referring to tables published monthly by the federal government pursuant to 26 U..S.C. s. 7520. These tables areclearer method for allocating the value of improvements. The proposedrevision requires the use of interest rates and mortality tables prescribed under section 7520 of the Internal Revenue Code, which are published monthly and widely available to the public

The proposaledrevision providesconfirms that, tTo the extent that the revised statute does not address the allocation of a particular expense, the common law will apply.

III. FISCAL IMPACT ON STATE AND LOCAL GOVERNMENTS

The proposal does not have a fiscal impact on state or local governments.

IV. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR

The proposal does not have a direct economic impact on the private sector.

V. CONSTITUTIONAL ISSUES

None anticipated.

VI. OTHER INTERESTED PARTIES.

The Uniform Principal and Income Act Committee of the RPPTL Section worked directly with representatives of the Florida Banker's Association and the Florida Institute of Certified Public Accountants in preparing this proposal. It is anticipated that both organizations will either support or not oppose the proposal.

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EXHIBIT "C"
UPIA PROPOSED CHANGES SUMMARY

Principal & Income Act Revisions after Breakers meeting approval.

The following is a list of changes that have taken place in the proposed revisions to Chapter 738 F.S. since the Bill was originally approved at the meeting at the Breakers on August 3, 2011, as a result of discussions with members of the Tax Section.

Preamble:

Revisions were made to correct some omissions in the original preamble and to add clarifying language to take into account some of the proposed changes discussed below.

Section 1: s. 738.102 F.S. – Grammatical correction only

Section 4: s. 738.1041 F.S.

The purpose of the original bill was to smooth out investment performance. The definition of "Average Fair Market Value" has been revised to clarify that additions or distributions of principal during the periods used in the computation of the average do not affect the "smoothing" of investment performance. The original Bill did not provide any direction in this matter.

Section 6: s. 738.1041 F.S.

Provisions have been added clarifying that the methods used to determine unitrust payments are applicable to a unitrust expressly created by a governing instrument, unless the governing instrument provides otherwise.

Section 8: s. 738.201 F. S.

Language referring to the Internal Revenue Code has been revised and the phrase "comparable law of any state" was added to take into account the states that have not "piggy-backed" the federal estate tax , but have their own estate tax regime .

Current law of Florida does not provide for the payment of interest on pecuniary devises not in trust, but the governing instrument might do so. The modification deletes language creating confusion on this point.

Section 9: s. 738.202 F.S.

Language has been added clarifying the method of computing a beneficiary's share of trust income after disproportionate distributions have been made.

Section 13: s. 738.401 F. S.

F.S. s.738.401(3) was modified to clarify that it applies to estates as well as trusts, and to clarify the computation. .

F.S. s. 738.401(6) was modified to clarify the computation of the 3% cumulative income allocation in determining the 20% limitation for partial liquidations. 738.401(6) now applies to any non public company that is not an investment entity. The current statute did not adequately provide for the handling of a non public entity distributing money representing the proceeds from the sale of a portion of its business operations. .

F. S. s. 738.401(7) now applies only to "investment entities", and creates a look through approach as if the entity's investments were directly held by the trust and allocates first money received to income. For purposes of ease of administration the lookback is only for the prior two years. .

F.S. s. 738.401(8) was created from the prior F.S. s. 738.401(7)(e), and now applies to the entire section.

Section 25: s. 738.606 F. S.

Language referring to the Internal Revenue Code has been revised and the phrase “comparable law of any state” was added to take into account the states that have not “piggy-backed” the federal estate tax or have their own estate tax regime . **Section 32:** s. 738.705 F.S.

Clarifying language was added relating to the interaction of income tax allocations on distributions to income beneficiaries.

Section 33: s. 738.801 F.S.

The current statute applies to the obligations of life tenants and remaindermen where the property is not held in trust. It tries to handle this by referencing, s.s. 738.701 – 738.705, but those sections have many provisions applicable only to trusts, and use trust terms throughout, resulting in confusion when applied to a legal life estate. The modifications to s. 738.801 adopt the applicable provisions of 738.701-738.705 using appropriate terms. The current statute requires the use of the “official mortality tables” but does not say what they are; the modification also defines the use of “official mortality tables” by referring to tables published monthly by the federal government and widely available to the public.

Section 34: Changes to F.S. s.738.804 have been deleted as being unnecessary and confusing. Section 34 now includes the effective date provision (which will be January 1, 2013).

REAL PROPERTY, PROBATE & TRUST LAW SECTION
OF
THE FLORIDA BAR

MINUTES
OF THE
EXECUTIVE COMMITTEE
(OCTOBER 10-12, 2011, E-MAIL CONSIDERATION)

PROPOSAL. By an e-mail on Monday, October 10, 2011, Chair-Elect/General Standing Director William Fletcher Belcher notified the Executive Committee of the Real Property Probate and Trust Law Section of The Florida Bar of a request submitted by the Section's Florida Electronic Filing and Service Committee to file a comment in the Supreme Court of Florida, *In re: Amendments to the Florida Rules of Civil Procedure, Florida Rules of Judicial Administration, et. al.*, Case No. SC11-399: endorsing the concept of mandatory e-filing for all Florida attorneys and all Florida Courts, concluding that the schedule proposed by the FCTC is reasonable and should be adopted by the Supreme Court, and offers to assist the Supreme Court and The Florida Bar in implementation of such mandatory e-filing through the training and education of its members and other Florida attorneys with the following proposed comment:

> The Real Property, Probate and Trust Law Section of The Florida Bar ("RTTPL"), through its Chair, George J. Meyer, files this comment regarding the proposed rule 2.520 of the Florida Rules of Judicial Administration requiring, inter alia, mandatory e-filing by attorneys. Specifically, this comment pertains to the Supplemental Comment of the Florida Court Technology Commission (FCTC) filed in this proceeding on October 7, 2011. Authority for this comment is provided by orders of this court dated August 8 and 18, 2011.
>
> Real Property, Probate and Trust Law Section of The Florida Bar. RPPTL consists of nearly 10,000 members of The Florida Bar, most of whom are impacted in some manner by the civil divisions of trial courts and the appellate courts in Florida. RPPTL is governed by an Executive Council of over 250 members, which meets five times each year, and has established numerous general standing committees, one of which is the Florida Electronic Filing and Service Committee. That committee monitors the progress of electronic court filing in Florida, and provides assistance to the participating parties as necessary and possible. As part of RPPTL's core mission, over 16 continuing education seminars are provided each year. RPPTL has included updates regarding e-filing and related issues in several of its recent continuing education programs and its Executive Council meetings, and intends to be very active in educating its members regarding court e-filing as more information becomes available and the system becomes more efficient.
>
> Proposal by Florida Court Technology Commission. The FCTC has proposed that mandatory e-filing would become effective no later than March 1,

2013, for all civil divisions of trial courts and that e-filing in all appellate cases would become mandatory for all attorneys by October 1, 2012. (The FCTC also proposes mandatory e-filing in all criminal divisions no later than September 30, 2013.)

Position of RPPTL. RPPTL endorses the concept of mandatory e-filing for all Florida attorneys in all Florida courts. The schedule proposed by the FCTC is reasonable and should be adopted. RPPTL stands ready to assist the court and The Florida Bar regarding the implementation of mandatory e-filing for all Florida attorneys. Specifically, RPPTL is committed to increase its delivery of training and education of its members, and other Florida attorneys, regarding court e-filing and related issues on a schedule that will accommodate the court's adoption of the FCTC's proposal.

Michael J. Gelfand moved to amend to delete the last sentence and substitute "RPPTL support includes, as appropriate, incorporating e-filing materials in Section CLE offerings, coordinating with the Courts and the Clerks as those two train users including attorneys and their staff."

APPROVAL. Upon an e-mail vote by the Executive Committee concluding October 12, 2011, the Motion to Amend was defeated. The original Motion was approved unanimously. In his absence, Chair George J. Meyer delegated authority to sign the comment on behalf of the Section.

Dated ____ day of October, 2011

Respectfully Submitted,

Michael J . Gelfand
RPPTL Section Secretary

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REAL PROPERTY, PROBATE & TRUST LAW SECTION
OF
THE FLORIDA BAR

MINUTES
OF THE
EXECUTIVE COMMITTEE
(OCTOBER 19-20, 2011, E-MAIL CONSIDERATION)

PROPOSAL. By an e-mail on Wednesday, October 19, 2011, Chair George J. Meyer notified the Executive Committee of the Real Property Probate and Trust Law Section of The Florida Bar of a request submitted by the Section's Probate and Trust Law Division Chair, Michael Dribin on behalf of the Probate Law and Procedure Committee. Mr. Dribin moved to approve a Section position to amend F.S. Section 732.102, clarifying that the 2011 revisions to the statute did not provide that the share of the surviving spouse could be applied to the estates of persons dying prior to October 1, but whose probate proceedings were not commenced until after October 1, and that the request is within the Section's purview [*Sec. Note*: Bill Text, White Paper, and Legislative Position Request attached].

APPROVAL. Upon an e-mail vote by the Executive Committee concluding October 20, 2011, the Motion was approved unanimously, Ms. Rolando abstaining.

Dated ____ day of October, 2011

Respectfully Submitted,

Michael J . Gelfand
RPPTL Section Secretary

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A bill to be entitled

An act amending s. 731.102 clarifying effective date

Be It Enacted by the Legislature of the State of Florida:

Section 1. 732.102. Spouse's share of intestate estate.— The intestate share of the surviving spouse is:

(1) If there is no surviving descendant of the decedent, the entire intestate estate.

(2) If the decedent is survived by one or more descendants, all of whom are also descendants of the surviving spouse, and the surviving spouse has no other descendant, the entire intestate estate.

(3) If there are one or more surviving descendants of the decedent who are not descendants of the surviving spouse, one-half the intestate estate.

(4) If there are one or more surviving descendants of the decedent, all of whom are also descendants of the surviving spouse, and the surviving spouse has one or more descendants that are not descendants of the decedent, one-half of the intestate estate.

(5) This section shall apply only to estates of persons dying on or after October 1, 2011. For estates of persons dying prior to October 1, 2011, the law in effect at the time of the person's death shall apply.

Section 2. The amendment by this act to s. 732.102(5), Florida Statutes, is remedial and clarifying in nature.

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Real Property, Probate and Trust Law Section of The Florida Bar
White Paper on Proposed Amendment to 732.102 Clarifying Effective Date

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I.SUMMARY

The proposed legislation is intended to clarify the effective date of legislation which passed the 2011 legislative session changing the amount of the intestate share in certain circumstances for a surviving spouse.

II. CURRENT SITUATION

In 2011, the Florida Legislature amended Florida Statutes § 732.201 to increase the intestate share of the surviving spouse in certain circumstances. Section 14, ch. 2011-183, provides that "[e]xcept as otherwise expressly provided in this act, this act shall take effect upon becoming a law and shall apply to all proceedings pending before such date and all cases commenced on or after the effective date." Section 2, ch. 2011-183 provided for an effective date of October 1, 2011 for the changes to § 732.201. However, the language of Section 2 does not address the application of the amended statutes to estates pending or filed on or after October 1, 2011 for decedent's dying before October 1, 2011.

III. EFFECT OF PROPOSED CHANGES

The legislative proposal would make it clear that the 2011 legislative changes to § 732.102 apply only to the estates of persons dying on or after October 1, 2011 and that the prior laws apply to the estates of persons dying before that date.

IV. ANALYSIS

The changes made to Florida Statutes § 732.102 during the 2011 legislative session were only intended to apply to the estates of persons dying on or after October 1, 2011. This proposal will clarify the effective date and application of the 2011 changes.

VI. FISCAL IMPACT ON STATE AND LOCAL GOVERNMENT - None.

VII. FISCAL IMPACT ON PRIVATE SECTOR - None.

VIII. CONSTITUTIONAL ISSUES – None.

IX. OTHER INTERESTED PARTIES - None.

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LEGISLATIVE POSITION REQUEST FORM

GOVERNMENTAL AFFAIRS OFFICE

Date Form Received ____________

GENERAL INFORMATION

Submitted By	Probate Law and Procedure Committee of the Real Property Probate & Trust Law Section
Address	Tae Kelley Bronner, Chair, Tae Kelley Bronner, PL, 10006 Cross Creek Blvd., PMB #428 Tampa, FL 33647; Telephone: (813) 907-6643
Position Type	Probate Law and Procedure Committee, RPPTL Section, The Florida Bar

CONTACTS

Board & Legislation Committee Appearance	Tae Kelley Bronner, Tae Kelley Bronner, PL, 10006 Cross Creek Blvd., PMB #428 Tampa, FL 33647 Telephone: (813) 907-6643 Barry F. Spivey, Spivey and Fallon, 1515 Ringling Blvd., Suite 885, Sarasota, FL 34236 (941) 840-1991 William T. Hennessey, 777 South Flagler Drive, Suite 500 East, West Palm Beach, FL33401, (561) 650-0663 Peter M. Dunbar, Pennington, Moore, Wilkinson, Bell & Dunbar, P.O. Box 10095, Tallahassee, FL 32302-2095, (850) 222-3533 Martha J. Edenfield, Pennington, Moore, Wilkinson, Bell & Dunbar, P.O. Box 10095, Tallahassee, FL 32302-2095, (850) 222-3533
Appearances before Legislators	Same
Meetings with Legislators/staff	Same

PROPOSED ADVOCACY

All types of partisan advocacy or nonpartisan technical assistance should be presented to the Board of Governors via this request form. All proposed legislation that has *not* been filed as a bill or a proposed committee bill (PCB) should be attached to this request in legislative format - Standing Board Policy 9.20(c). Contact the Governmental Affairs office with questions.

If Applicable, List The Following

(Bill or PCB #) (Bill or PCB Sponsor)

Indicate Position **XX** Support Oppose Technical Assistance Other

Proposed Wording of Position for Official Publication Support amendment to F.S. § 732.102 clarifying the effective date and application of changes made during the 2011 legislative session to the amount of the intestate share of a surviving spouse

Reasons For Proposed Advocacy Changes made to Florida Statutes § 732.102 during the 2011 legislative session were only intended to apply to the estates of persons dying on or after October 1, 2011. The proposed amendment will clarify the effective date and application of the 2011 changes.

PRIOR POSITIONS TAKEN ON THIS ISSUE

Please indicate any prior Bar or section positions on this issue to include opposing positions. Contact the Governmental Affairs office if assistance is needed in completing this portion of the request form.

Most Recent Position

None

Others
(May attach list if more than one)

None

(Indicate Bar or Name Section) (Support or Oppose) (Date)

REFERRALS TO OTHER SECTIONS, COMMITTEES OR LEGAL ORGANIZATIONS

The Legislation Committee and Board of Governors do not typically consider requests for action on a legislative position in the absence of responses from all potentially affected Bar groups or legal organizations - Standing Board Policy 9.50(c). Please include all responses with this request form.

Referrals

1.
(Name of Group or Organization) (Support, Oppose or No Position)

2.
(Name of Group or Organization) (Support, Oppose or No Position)

3.
(Name of Group or Organization) (Support, Oppose or No Position)

Please submit completed Legislative Position Request Form, along with attachments, to the Governmental Affairs Office of The Florida Bar. Upon receipt, staff will further coordinate the scheduling for final Bar action of your request which usually involves separate appearances before the Legislation Committee and the Board of Governors unless otherwise advised. For information or assistance, please telephone (904) 561-5662 or 800-342-8060, extension 5662.

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REAL PROPERTY, PROBATE & TRUST LAW SECTION
OF
THE FLORIDA BAR

MINUTES
OF THE
EXECUTIVE COMMITTEE
(NOVEMBER 3-5, 2011, E-MAIL CONSIDERATION)

PROPOSAL. By an e-mail on Thursday, November 3, 2011, Chair George J. Meyer notified the Executive Committee of the Real Property Probate and Trust Law Section of The Florida Bar of a request submitted by the Section's Probate and Trust Law Division Chair, Michael Dribin on behalf of the Estate and Trust Tax Planning Committee. Mr. Dribin moved to approve a Section submission to the United States Internal Revenue Service responding to the IRS request for comments in IRS Notice 2011-82, Guidance on Electing Portability of Deceased Spousal Unused Exclusion Amount. The subject of "portability," relating to the availability of carrying over the unused portion of the estate tax exemption of the first spouse to die to be used in the estate of the second spouse. [*Sec. Note*: Proposed comment letter attached].

APPROVAL. Upon an e-mail vote by the Executive Committee concluding November5, 2011, the Motion was approved unanimously.

Dated ____ day of October, 2011

Respectfully Submitted,

Michael J . Gelfand
RPPTL Section Secretary

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November 4, 2011

CC:PA:LPD:PR (Notice 2011-82)
Room 5203
Internal Revenue Service
P.O. Box 7604
Ben Franklin Station
Washington, DC 20044

By email to: Notice.Comments@irscounsel.treas.gov

Re: IRS Notice 2011-82, Guidance on Electing Portability of Deceased Spousal Unused Exclusion Amount

To Whom It May Concern:

The Treasury Department recently issued IRS Notice 2011-82, requesting comments on certain specific issues for consideration in proposed regulations to be issued under Section 2010(c) of the Internal Revenue Code of 1986, as amended ("IRC"). We are pleased to submit these comments on behalf of the Tax Section and the Real Property Probate and Trust Law Section of The Florida Bar.

Although the members of The Florida Bar Tax Section and Real Property Probate and Trust Law Section who participated in preparing these comments may have clients who would be affected by the Proposed Regulations, no such member has been engaged by a client to make a government submission with respect to, or otherwise to influence the development or outcome of the specific subject matter of these comments.

Principal responsibility for these comments was exercised by David M. Silberstein, Esq., and Taso M. Milonas, Esq. These comments were reviewed by James Barrett, Esq., Lester Law, Esq.,and Elaine Bucher, Esq. Contact information is as follows:

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If you have questions regarding these comments, please contact Mr. Silberstein or Mr. Milonas.

The Florida Bar is the third largest organized state bar association in the United States. The Tax Section is comprised of more than 2,000 members and the Real Property Probate and Trust Law Section is comprised of more than 9,300 members. These materials were prepared by

the Comment Projects Subcommittees of both the Tax Section and the Real Property, Probate and Trust Law Section.

As always, we will be pleased to provide additional commentary as requested. If you have any questions, please do not hesitate to contact us.

THE TAX SECTION OF
THE FLORIDA BAR

By: ______________________________
Dominick R. Lioce, Esq., Chair

THE REAL PROPERTY, PROBATE
AND TRUST LAW SECTION OF THE
FLORIDA BAR

By: ______________________________
George J. Meyer, Esq., Chair

Enclosure

THE FLORIDA BAR

TAX SECTION
AND
REAL PROPERTY, PROBATE, AND TRUST LAW SECTION

COMMENTS TO IRS NOTICE 2011-82, GUIDANCE ON ELECTING PORTABILITY OF DECEASED SPOUSAL UNUSED EXCLUSION AMOUNT

To Whom It May Concern:

These comments are written on behalf of the Tax Section ("Tax Section") and the Real Property Probate and Trust Law Section ("RPPTL Section")of The Florida Bar, and are being submitted in response to the request of the Internal Revenue Service and Treasury Department (collectively referred to herein as "Treasury") in IRS Notice 2011-82 (the "Notice") for comments for consideration in issuing proposed regulations under Section 2010(c) of the Internal Revenue Code of 1986, as amended ("IRC"). IRC Section 2010(c) was amended by the Tax Relief, Unemployment Insurance Reauthorization, and Job Creation Act of 2010 (the "TRUICA").

We would like to acknowledge and thank the ABA Section of Real Property, Trust and Estate Law for its generosity in sharing a draft of its comments with us. We do not intend to repeat the ABA's positions and comments, but would like to acknowledge its thoroughness and request that the Treasury give thoughtful consideration to its positions and comments.

The Notice requested comments on the following five specific issues:

1. The determination in various circumstances of the deceased spousal unused exclusion amount (the "DSUEA") and the applicable exclusion amount;
2. The order in which exclusions are deemed to be used;
3. The effect of the last predeceasing spouse limitation described in IRC Section 2010(c)(4)(B)(i);
4. The scope of Treasury's right to examine a return of the first spouse to die without regard to any period of limitation in IRC Section 6501; and
5. Any additional issues that should be considered for inclusion in the proposed regulations.

We do not intend to address each of the foregoing issues, which we believe the ABA addressed thoroughly and at length in its comments. We would like to address the following issues: (i) the scope of Treasury's right to examine returns; (ii) the determination of "clawbacks"; (iii) what constitutes a timely filed return in certain circumstances; and (iv) the asymmetrical application of the portability election under current tax law.

1. Proposed Regulations should clarify the scope of the Treasury's right to examine a return of the first spouse to die without regard to any period of limitation in IRC Section 6501.

Under TRUICA, Treasury is authorized "to examine a return of the deceased spouse to

make determinations with respect to such amount [the DSEUA] for purposes of carrying out this subsection." The Proposed Regulations should specifically limit such review to estate and gift taxes, and state that such review does not apply to income taxes or generation skipping transfer taxes.

A second issue involves the difference in scope of such review under TRUICA and under other Gift and Estate Tax Returns. For example reviews of Gift Tax returns that have adequately disclosed items are limited to three (3) years, but use of a DSEUA by a surviving spouse could extend that period indefinitely. This can create record keeping issues for the surviving spouse and his or her professional advisors.

Prior to completing distribution of the surviving spouse's estate, all tax matters will need to be resolved. The Proposed Regulations should provide that the applicable periods of limitations will cease coincidently with the termination of those periods of limitation applicable to the surviving spouse.

2. Proposed Regulations should clarify that no clawback of the DSEUA will result in the imposition of Estate or Gift Tax.

It is recognized and should be noted that the issue of clawback or recapture is not unique to the portability analysis and could exist even where no portability issue is present. For example, the issue can arise anytime the applicable exclusion amount at the decedent's death is less than the amount the decedent previously allocated to a lifetime transfer. Portability does, however, have the potential to magnify or exacerbate the problem.

It is possible that the clawback or recapture of a DSEAU could occur in the event of a remarriage by and subsequent death of the surviving spouse or a future reduction in the basic exclusion amount that would apply to the surviving spouse. There are a number of other instances where a clawback or recapture could create an unintended result. The Proposed Regulations should provide that no such clawback of the DSEAU would result in the imposition of either gift or estate tax.

3. A Filing Trap for the Unwary.

A theme inherent in IRS Notice 2011-82 and the legislative history of TRUICA as it relates to IRC Section 2010(c)(5)(A) is simplification in planning for taxpayers and their advisors. The Notice states that the procedure for making the portability election should be "as straightforward and uncomplicated as possible." The reality is that application as described will likely create far more complexity, uncertainty and costs to taxpayers, their advisors and the Service. Currently, the great majority of decedent's estates do not require the preparation and filing of a federal estate tax return. The new rules would impose a *de facto* filing requirement on each and every decedent's estate or risk losing the portability benefit upon the death of the survivor. For example, assume A has a modest estate and dies in 2011 without filing an estate tax return. Years later, A's spouse B dies after winning $20 million in the lottery. Under this scenario, B's estate would be denied the benefits of portability. We believe the added cost and complexity to A's estate in the preparation and filing of a return when none was otherwise due, the cost and administrative burden put upon the Service to review each such return, and the potential claim for malpractice that now might lie against every practitioner dealing with an

otherwise simple, non-taxable estate situation militates against such a draconian application and instead suggests the need for a simpler and more practical approach.

This could include an optional "look-back" approach. Under this approach, a schedule could be attached to and made part of the surviving spouse's estate tax return verifying that the exclusion was unused at the death of the first spouse and is being allocated at the second death. This approach recognizes the reality that it is only upon the death of the survivor that all relevant facts (e.g., value of survivor's estate, current available exclusion) will be known. There is precedent in the estate and gift tax law for this type of approach in the common use of disclaimers and we believe such an approach would go a long way toward achieving the Service's stated goal of making the election as "straightforward and uncomplicated" as possible. It would relieve the vast majority of taxpayers of the undue cost and expense of filing of an estate tax return when one is otherwise not necessary, lessen the administrative burden on the Service in reviewing such returns, and eliminate the potential malpractice claim against an otherwise competent advisor not routinely advising taxable estate situations.

Another issue the Proposed Regulations should address is the determination of what constitutes a "timely" filed return (including extensions). Under current law, the time for filing begins if and only if the value of the gross estate plus taxable gifts of the first spouse's estate is at or above the minimum filing requirement. Conversely, for estates below the minimum, the clock never begins to run. The look-back approach suggested above would obviate this issue altogether. Another alternative would be to include a definition along the following lines: "In determining whether a decedent has timely filed a return (including extensions) for portability election purposes, the return must be filed if at all within nine months of the decedent's death, excluding extensions, *regardless* of the value of the decedent's gross estate." We believe this alternative is inferior to the look-back approach, but superior to the current proposal.

Finally, the Proposed Regulations should also permit extension of the filing requirements to permit late filings and reformation of improperly calculated DSEAU's. Treasury should revise the Forms 706 and 709 to include calculations of DSEAU.

4. Asymmetrical Application.

Symmetry is a characteristic or theme pervasive throughout current tax law. For example, where one party has income another typically has a corresponding and equal deduction. Symmetry is evident in estate and generation-skipping transfer ("GST") tax law in that the current GST amount equals the amount of the taxpayer's applicable exclusion amount for estate tax purposes. The portability election as enacted is asymmetrical in application and contradicts the long-standing notion of tax symmetry because it focuses only on the unused applicable exclusion remaining for estate but not GST tax purposes. While technically beyond the scope of the requested comments, this disconnect should be noted and addressed in account in future revisions of the law.

5. Summary Comments.

In summary, we believe that portability is beneficial to taxpayers, but it should not become a trap for the unwary. Taxpayers and their professional representatives should be able to rely on rules that are clear as to filing and election requirements. The Proposed Regulations

should strive to create more certainty in the application of these rules without imposing an undue administrative burden on the Service.

Taxpayers will be relying on the use of a DSEUA in executing pre- and post- nuptial agreements, making gifts, and planning their estates. They will need as much certainty as possible to make appropriate decisions and be able in accordance with applicable law. Taxpayers will rely on these rules in structuring their lives, and taxpayers need a system on which they can rely.

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