

## Reliance Parties to Third-Party Opinion Letters in Commercial Real Estate Finance Transactions<sup>1</sup>

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An opinion letter in a commercial real estate finance transaction will generally be addressed to the opinion recipient, usually one or more lenders in the transaction. Except if expressly stated otherwise in the opinion letter, the only person entitled to rely on the opinion is the opinion recipient identified in the opinion letter, usually the addressee.<sup>2</sup> There is no need to state this limitation in the opinion letter, as the limitation is implicit in all opinions.<sup>3</sup>

Reliance on opinions letters is important for the opinion giver as reliance generally also means that a duty of care has been created between the opinion giver and the person who is relying on the opinion letter. In the words of the 1998 New York Mortgage Opinion Report:

‘Reliance’ on the opinion by a person other than the client usually means that the opinion giver has a professional duty of care to the persons who are permitted to rely on it and who reasonably do so. If the opinion is negligently given and results in damage to such persons, they may have a claim against the opinion giver.<sup>4</sup>

And in some jurisdictions, foreseeable reliance may give rise to a duty on the part of the opinion giver to third parties not expressly addressed in the opinion letter, such as when an opinion is given to the lead lender in a loan participation.<sup>5</sup>

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<sup>1</sup> This article is for informational purposes only and is not intended to be and should not be taken as legal advice. In addition, this article is the statement by the authors only and does not necessarily reflect the views of Richards, Layton & Finger, P.A., any of its other attorneys, or its clients, nor the views of Fishman Haygood L.L.P., any of its other attorneys, or its clients. Robert Krapf is a director and vice-president of Richards, Layton & Finger, P.A., in Wilmington, Delaware, and Scott Willis is a partner of Fishman Haygood L.L.P. in New Orleans, Louisiana.

<sup>2</sup> Committee on Legal Opinions in Real Estate Transactions, the American Bar Association Section of Real Property, Trust and Estate Law, Attorneys' Opinions Committee, the American College of Real Estate Lawyers & Opinions Committee, the American College of Mortgage Attorneys (the "Real Estate Opinion Committees"), *Real Estate Finance Opinion Report of 2012*, 47 REAL PROP. PROB. & TR. L. J. 213 (2012) (hereinafter the *2012 Report*) §0.3 at 227; A. FIELD & J. SMITH, 1 LEGAL OPINIONS IN BUSINESS TRANSACTIONS §8.5.1 at 177 (2014) (hereafter FIELD); R. THOMPSON, REAL ESTATE OPINION LETTER PRACTICE § 3.18 AT 112-114 (2009).

<sup>3</sup> Subcommittee on Mortgage Loan Opinions, Comm. on Real Property Law, the Ass'n of the Bar of the City of New York & Attorney Opinion Letters Comm., Real Property Law Section, New York State Bar Ass'n, *1998 Mortgage Loan Opinion Report*, 54 BUS. LAW. 119, 132 (1998) (hereinafter *1998 Mortgage Loan Opinion Report*).

<sup>4</sup> *1998 Mortgage Loan Opinion Report* at 171.

<sup>5</sup> THOMPSON REAL ESTATE OPINION LETTER PRACTICE § 3.18 AT 112.

In addition to the potential for reliance by unaddressed persons, the opinion recipient also often requests that the opinion giver permit future lenders and assignees to rely upon the opinion letter. Many opinion givers are reluctant to agree to this request because of various concerns, including that (i) successors and assigns may not understand applicable customary practice and therefore may not appreciate the assumptions and qualifications that limit the scope of the opinion letter; (ii) the opinion may be deemed reissued as of the date a future lender or assignee acquires its interest in the loan; (iii) claims may arise in multiple jurisdictions or under the laws of multiple jurisdictions because of the addition of these future reliance parties; or (iv) claims may be brought by "rogue" or "vulture" lenders or assignees that buy loans with a view to suing the opinion giver, among others.<sup>6</sup>

Some of this reluctance may be unwarranted. While a successor or assignee may not be familiar with customary practice, customary practice is still the standard that should apply to all opinions, and future recipients should have no greater rights than the original recipient.<sup>7</sup> Also, as to the concern about the opinion being deemed reissued, customary practice is clear that an opinion speaks only as to its date.<sup>8</sup> Nevertheless, out of caution an opinion giver may wish to make this specific in the opinion as discussed below.

Opinion practice varies considerably among opinion givers—some refuse to allow any future parties to rely on the opinion letter, some allow reliance but qualify it in different ways, and some permit reliance. When reliance is permitted subject to limitations, those limitations generally make clear that the new lender or assignee has no greater rights than the original addressee and has those rights only as of the original date of the opinion letter. The following is an example of such a provision:

Without our prior written consent, this Opinion Letter may not be used or relied upon by the Lender for any other purposes whatsoever or relied on by any other person, except that this Opinion Letter may from time to time be delivered by the Lender to an assignee for value of all right, title, and interest in and to the transaction documents, and such assignee may rely on this Opinion Letter as if it were addressed and had been delivered to it on the date hereof. Nothing in the preceding sentences, however, shall give any person entitled to rely upon this Opinion Letter any greater rights with respect to this Opinion Letter than those of the Lender as of the date hereof, or shall provide or imply any opinion being given

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<sup>6</sup> LEGAL OPINION STANDARDS COMM., BUS. LAW SECTION OF THE FLA. BAR & LEGAL OPINION COMM., REAL PROPERTY, PROBATE AND TRUST LAW SECTION OF THE FLA. BAR, THIRD-PARTY LEGAL OPINION CUSTOMARY PRACTICE IN FLORIDA (DECEMBER 3, 2011) (HEREINAFTER FLORIDA REPORT) §B at 19; Maryland State Bar Assn., Inc. & the Bar Assn. of Baltimore City, *Special Joint Committee on Lawyers' Opinions in Commercial Transactions*, 45 BUS. LAW. 705, 720 (1990). See also FIELD § 8.5.2 AT 178-179.

<sup>7</sup> 2012 Report, III at 220-1.

<sup>8</sup> 2012 Report, § 5.2 at 259.

with respect to an assignee that depends on the identity or characteristics of the named assignee or other circumstances than those of the original Opinion Letter.<sup>9</sup>

An opinion recipient might also request that recipient counsel or purchasers of loan participation interests be permitted to rely upon the opinion letter. Most commentators believe that such requests are inappropriate under customary practice and should be refused.<sup>10</sup>

Requests are sometimes made to include credit rating agencies (each more formally identified as a "nationally recognized statistical rating organization" or an "NRSRO") as addressees or persons expressly entitled to rely on the opinion letter. Rating agencies have confirmed they should be included as persons to whom the opinion letter may be furnished and by whom the opinion letter may be reviewed, but should not be included as addressees or reliance parties.<sup>11</sup> A request for inclusion of a rating agency as a reliance party (addressee or otherwise) is inappropriate and appears to be based on a misunderstanding of the NRSRO's requirements. Because reliance may indicate legal recourse against the opinion giver, reliance could imply that the rating agency is a party to the transaction, which is inconsistent with its role and function.<sup>12</sup> On the other hand, access to the opinion letter is important, and rating agencies should be added to the list of those to whom an opinion letter may be delivered and reviewed when the transaction is one in which a rating agency will be relevant. As the non-reliance/disclosure-only discussion has evolved recently, one solution in particular has emerged to address this. Many legal opinions now refer to allowing the posting of the opinion on a website maintained to fulfill certain of the requirements under SEC Rule 17g-5.<sup>13</sup> The Commercial Real Estate Finance Council has published a best practice proposing that all CMBS pooling and servicing agreements allow for the delivery of documents and materials such as legal opinions directly to the credit rating agencies, so long as such documentation is also posted on the 17g-5 website within a set timeframe.<sup>14</sup>

Finally, in addition to reliance parties, opinion recipients often request that the opinion be allowed to be delivered to, but not relied upon, by various parties. This would include not only

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<sup>9</sup> This sample reliance language is provided only as an example to illustrate the nature of the particular opinion. In practice, the specific language that opinion givers use can vary greatly.

<sup>10</sup> See *2012 Report* §5.1(c) at 258; Real Estate Opinion Committees, *Local Counsel Opinion Letters in Real Estate Finance Transactions: a Supplement to the Real Estate Finance Opinion Report of 2012*, 51 REAL PROP. PROB. & TR. L. J. 167 (2016) (hereinafter the *LoCo Report*) §0.3 at 181; see also FLORIDA REPORT §B at 19.

<sup>11</sup> See W. Dunn, & J. Forte, *Loan Closing Opinions and Rating Agencies: Disclosure Not Reliance*, CRE FINANCE WORLD 58 (2016). <https://crefc.wordpress.com/2016/01/10/loan-closing-legal-opinions-and-rating-agencies-disclosure-not-reliance/> (link last tested January 30, 2019); see also *LoCo Report* §0.3 at 181.

<sup>12</sup> *Id.*

<sup>13</sup> 17 CFR 240.17g-5. This is a rule on conflicts of interest promulgated under the Securities Exchange Act of 1934, adopted in November 2009 by the Securities and Exchange Commission (the SEC) under the Credit Rating Agency Reform Act of 2006.

<sup>14</sup> Accessed at [http://www.crefc.org/CREFC/Industry\\_Standards/CREFC\\_IRP/CREFC\\_IRP\\_7.1.aspx?WebsiteKey=148a29c3-4a5a-4a0d-98a7-70be1a37d5a7](http://www.crefc.org/CREFC/Industry_Standards/CREFC_IRP/CREFC_IRP_7.1.aspx?WebsiteKey=148a29c3-4a5a-4a0d-98a7-70be1a37d5a7) (link last tested January 30, 2019).

rating agencies but also courts and arbitrators in connection with the assertion of a defense as to which the opinion is relevant, as may be required by a court order or a governmental body, financial examiners and regulators, and similar entities who may need to verify an opinion was delivered as part of a transaction. Allowing access to opinions is important to the opinion recipient,<sup>15</sup> and as long as it is clear access does not entitle one to reliance there should be no concern to the opinion giver.

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<sup>15</sup> *LoCo Report* § 5.1 at 234-237.