

**2004 REPORT ON LAWYERS OPINIONS IN
OREGON REAL ESTATE TRANSACTIONS
BY THE REAL ESTATE AND LAND USE SECTION
OF THE OREGON STATE BAR,
STANDING COMMITTEE ON OPINION LETTERS¹**

INTRODUCTION

Since the publication of *Lawyers' Opinions in Oregon Real Estate Transactions, 1996 Supplement* (the "1996 Report") which supplemented the earlier published *Lawyers' Opinions in Oregon Real Estate Transactions* (the "1992 Report"), the Real Estate and Land Use Section of the Oregon State Bar Committee on Opinion Letters (the "Committee") has monitored national Opinion Letter practice. Generally, Oregon Opinion Givers have been successful in giving and Opinion Recipients have been willing to accept the form Opinion Letter attached to the 1996 Report. Based on recent developments, the Committee has reviewed the 1996 Report along with its suggested form of Opinion and prepared a new suggested form of Opinion Letter (the "2004 Oregon Model Opinion"). These introductory comments are to provide background for the suggested changes in the form Opinion Letter. Except as noted in the 2004 Oregon Model Opinion, these comments are not meant to supersede the Commentary contained in either the 1992 or the 1996 Report. "Opinion Givers" (Borrower's Counsel) and "Opinion Recipients" (Lender and Lender's Counsel) should continue to refer to these Commentaries as well as the footnotes to the 2004 Oregon Model Opinion for guidance in giving or receiving Opinion Letters.

BACKGROUND

The 1996 Report was written after the publication of the *Third-Party Legal Opinion Report Including the Legal Opinion Accord of the Section of Business Law of the American Bar Association*,² (the "Accord") and the *Report on Adaptation of*

¹ The following actively participated in the preparation of these materials: Don G. Carter, Valerie Fisher, Jonathon L. Goodling, C. Scott Howard, Dustin R. Klinger, Mark A. Manulik, Lois J. Portnoy, Stanley M. Samuels, and David P. Weiner, Chair and Editor.

² 47 BUS LAW 167 (1991) reprinted in 29 REAL PROP PROB & TR J 487 (1994).

the Legal Opinion Accord of the Section of Business Law of the American Bar Association for Real Estate Secured Transactions of the Section of the Real Property, Probate and Trust Law of the American Bar Association and the American College of Real Estate Lawyers,³ (the “ABA-ACREL Report”). In 1999, the Joint Committee that produced the ABA-ACREL Report published the *Inclusive Opinion Report* and a model *Inclusive Real Estate Secured Transaction Opinion*⁴ (the “Inclusive Opinion”). A copy of the Inclusive Opinion is attached hereto as Addendum A. The Inclusive Opinion was promulgated as an easy to understand model opinion for real estate secured loan transactions without the necessity to either be familiar with or refer back to the Accord. The Committee has not adopted the Inclusive Opinion, however, it provided guidance in formulating the 2004 Oregon Model Opinion.

In 2001, the Section of Business Law of the American Bar Association, Committee of Legal Opinions published *Guidelines for the Preparation of Closing Opinions* (the “Business Law Guidelines”).⁵ The Business Law Guidelines were meant to replace the guidelines originally published as a part of the Accord. In January 2003, the Joint Committee that produced the ABA-ACREL Report adopted *Real Estate Opinion Letter Guidelines*⁶ (the “Real Estate Guidelines”). A copy of the Real Estate Guidelines is attached hereto as Addendum B. The Real Estate Guidelines, with necessary revisions and refinements, accepted and adopted the Business Law Guidelines and addressed “several important subjects of particular relevance and significance to real estate secured loans.”⁷ The Real Estate Guidelines “are intended to fill that void with a single, integrated set of opinion Guidelines, reflecting the current state of customary real estate opinion letter practice.”⁸ The Committee generally supports the principles set forth in the Real Estate Guidelines as appropriate for Oregon Opinion Letter practice.

³ 29 REAL PROP. PROB. & TR. J. 569 (1994).

⁴ <http://www.abanet.org/rppt/cmtes/rp/i5>.

⁵ 57 BUS LAW 875 (2002).

⁶ 38 REAL PROP PROB & TR J 241 (2003).

⁷ *Id* at 242.

⁸ *Id* at 242.

2004 OPINION LETTER PROJECT

In addition to reviewing the Inclusive Opinion and the Real Estate Guidelines, the Committee reviewed a form of Enforceability Opinion promulgated by the American College of Real Estate Lawyers (“ACREL”) as well as other state bar Opinion letter projects.⁹ It is the goal of the Committee to make the 2004 Oregon Model Opinion both convenient for use by Opinion Givers and Recipients and also to insure that it conforms to national Opinion Letter practice. While the Committee acknowledges the comments in the Real Estate Guidelines concerning the Enforceability Opinion and the use of the so-called “laundry list” of exclusions, the Committee determined that it is preferable to modify the Oregon suggested form of Enforceability Opinion while still retaining a “laundry list” of exclusions. The Committee confirms the reasons for the use of the “laundry list” as documented in the 1994 Report and the 1996 Report.¹⁰

The 2004 Oregon Model Opinion sets forth the Committee’s suggested changes to the form Opinion Letter published as a part of the 1996 Report. Explanations of the suggested changes are set forth as footnotes within the 2004 Oregon Model Opinion. A complete copy of the 2004 Oregon Model Opinion is set forth as Addendum C. For the use of Opinion Givers and Recipients, other commonly requested opinions are set forth and discussed in Appendix 1, and a separate section dealing with personal property opinions is set forth in Appendix 2.

As with all forms, careful review must be given by both the Opinion Giver and the Opinion Recipient to ensure that the inclusion of each provision is appropriate to the transaction.

⁹ A general discussion of the various forms of the Enforceability Opinion can be found in Report on Adaptation of the Legal Opinion Accord of the Section of Business Law of the Association for American Bar Association for Real Estate Secured Transactions of the Section of Real Property, Probate and Trust, American Bar Association and American College of Real Estate Lawyers, 29 REAL PROP PROB & TR J 569 (1994) and in Section 4.0 of the Real Estate Guidelines.

¹⁰ See 1992 Report at pages 17–19 and the 1996 Report at page S-9.

ADOPTION

Following the recommendation of the Committee, the Executive Committee of the Real Estate and Land Use Section of the Oregon State Bar has adopted this Report and the 2004 Oregon Model Opinion for use in Oregon secured real estate transactions.

2004 OREGON MODEL OPINION
(with changes)

[Date]

[Addressee and address]

Re: \$ _____ Loan to _____ (the "Loan")

Ladies and Gentlemen:

INTRODUCTION¹¹

We have acted as Oregon counsel to _____ ("Borrower") in connection with that certain Loan Agreement ("Loan Agreement") dated _____, ____, between _____ ("Lender") and Borrower.

We have also acted as Oregon counsel to _____ ("Guarantor").

[Alternate clause: We are not Borrower's [or Guarantor's] general counsel, we have not previously represented Borrower [or Guarantor], and we have made no investigation of Borrower's [or Guarantor's] legal affairs except as expressly set forth in this letter.]

[Alternate clause: Although we represent Borrower [or Guarantor] from time to time in connection with specific transactions, we are not general counsel to Borrower [or Guarantor], and we did not participate in the formation or organization of Borrower.]

¹¹ This portion of the Opinion sets forth the relationship between the Opinion Giver and the Borrower and, if a part of the transaction, a Guarantor. The inclusion of a Guarantor recognizes the current state of commercial real estate secured transactions wherein a limited liability type entity is typically the Borrower and one or more principals of the Borrower are required to guaranty the entire principal balance of the Loan or some portion thereof (i.e. the non-recourse carveouts).

In this capacity, Borrower [and Guarantor] [has] [have] requested that we deliver to you our opinion as to certain matters relating to the Loan. This opinion is delivered to you pursuant to Section ___ of the Loan Agreement.

DOCUMENTS REVIEWED¹²

In rendering our opinion, we have examined originals~~[[drafts]]~~, copies identified to our satisfaction as true copies of the originals ~~[[drafts]]~~, or copies certified to us as being execution copies ~~[[or drafts]]~~ of the following documents, provided to us under cover of a letter dated _____ from _____:

1. The Loan Agreement dated as of _____ executed by Borrower and Lender~~[where necessary];~~

2. Promissory Note ~~[(“note”) to be]~~ (“Note”) dated as of _____ executed by Borrower ~~[as maker]~~ and payable to the order of Lender in the sum of \$ _____ ~~[, [draft] dated _____];~~

3. Deed of Trust (“Trust Deed”) ~~[to be]~~ dated as of _____ executed by Borrower as grantor, in favor of Lender as beneficiary, securing the Note, ~~[[draft] dated _____];~~ encumbering certain property including real property located at _____ (the “Real Property”);

~~[4. Assignment of Rents and Leases (“Lease Assignment”) dated as of _____ executed by Borrower, as Assignor, for the benefit to Lender, as Assignee;]~~

~~[5. Security Agreement (“Security Agreement”) ~~[to be]~~ dated as of _____ executed by Borrower, as debtor, and naming Lender as secured party~~], [draft] dated _____];~~~~

~~[5. UCC-1 Financing Statement (“Financing Statement”) to be executed by Borrower in favor of Lender, [draft];~~

~~6. UCC-1A Financing Statement (“Fixture Filing”) to be executed by Borrower in favor of Lender, [draft];~~

¹² This section of the opinion letter contains an illustrative list. The actual Loan Documents with their correct titles should be included.

~~7. Assignment of Rents and Leases (“Lease Assignment”) to be executed by Borrower as assignor to Lender as assignee, [draft] dated _____;~~

~~8. Guaranty (“Guaranty”) to be executed by _____ (“Guarantor”)]~~

~~[6. Guaranty (“Guaranty”) dated as of _____ executed by Guarantor as Guarantor in favor of Lender[, [draft] dated _____;];]~~

~~[7. Hazardous Material Indemnification Agreement (“Hazardous Material Indemnification Agreement”) dated as of _____ executed by Borrower and Guarantor in favor of Lender;]~~

~~8. UCC Financing Statement (“Financing Statement”) naming Borrower as debtor and Lender as secured party.¹³~~

The documents listed ~~[in Items]~~ as 1 through 8 above are collectively referred to herein as the “Loan Documents.” All property described in any of the Loan Documents in respect of which provision is made by the Loan Documents for a lien or security interest is referred to herein as the “Collateral”.

In addition to the Loan Documents, we ~~also~~ have ~~[also]~~ been furnished with and have examined the following:

~~[: (i) certificates of officers and representatives of Borrower; (ii) certificates of public officials; and (iii) other documents and instruments described in these certificates.~~

~~The certificates of Borrower and public officials upon which we have relied are described as follows: [List specifically the certificates relied upon.]~~

~~1. A Certificate of Borrower’s [President,][appropriate party] dated _____, _____ [a copy of which is attached hereto and by this reference incorporated herein];¹⁴~~

¹³ The Inclusive Opinion deletes the UCC Financing Statement as a “Loan Document” because there are no covenants or agreements of the Borrower contained therein. Therefore, there is nothing to “enforce”. The Inclusive Opinion refers to the UCC Financing Statement as a “Security Document” with the Opinion Giver acknowledging the review thereof. Notwithstanding the foregoing, the Committee chose to continue to list the UCC Financing Statement as a Loan Document thereby including it within the Enforceability Opinion. The Committee acknowledges that there is nothing in the UCC Financing Statement to enforce.

¹⁴ The decision of whether to deliver a copy of the Borrower Certificate is reserved to the Opinion Giver. There is no strong argument either in favor or against such delivery. Some Opinion

2. A Certificate issued by the State of Oregon, Office of the Secretary of State, Corporation Division, with respect to Borrower,¹⁵ dated _____, a copy of which is attached hereto and by this reference incorporated herein.¹⁶
~~[.]~~

~~[Copies of these certificates are enclosed.]~~

3. Other documents and instruments described in these Certificates.

RELIANCE WITHOUT INVESTIGATION¹⁷

We disclaim any responsibility for any changes that may have occurred with respect to the status of Borrower (or Guarantor) from and after the respective dates of the ~~[certificates]~~ Certificates mentioned above. We also assume that the ~~[certificates]~~ Certificates and the public records upon which they are based are accurate and complete.

~~[SCOPE OF INVESTIGATION]~~

~~As to questions of fact material to this opinion, we have relied upon statements or certificates of Borrower]~~

Except to the extent the information constitutes a statement, directly or in practical effect, of any legal conclusion at issue,¹⁸ we have relied without investigation or analysis upon the information contained in representations by the Borrower (or Guarantor) in the Loan Documents and in the Certificate of Borrower

Recipients may derive comfort from having the Certificate delivered. On the other hand, some Opinion Recipients do not want to have the Borrower's Certificate in their file. Opinion Givers should carefully review the suggested form of Certificate attached to the 2004 Model Opinion. See also Footnotes 16 and 53 infra.

¹⁵ If the Guarantor is an entity, the same Certificate should be obtained for the entity. Even when the Guarantor is an individual, a separate Guarantor's Certificate may also be necessary depending on the facts of the subject transaction.

¹⁶ The Certificate from the Secretary of State showing the status of the Borrower should always be attached to the Opinion.

¹⁷ The changes in this Section substantively conform to Section 1.5 of the Inclusive Opinion.

¹⁸ The Committee debated the nature of the representations made in the Certificate and whether they were factual or legal conclusions. In conforming this language to the Inclusive Opinion, the Opinion Recipient should obtain comfort that the Opinion Giver is making independent legal conclusions.

(or Guarantor) and public officials. We have made no independent investigation [of] with regard to such matters or with regard to the warranties and representations made by Borrower (or Guarantor) in the Loan Documents or of any related matters. Except as specifically identified herein, we have not been retained or engaged to perform, and we have not performed, any independent review or investigation of (1) any agreement or instrument to which Borrower (or Guarantor) may be a party or by which Borrower (or Guarantor) or any property owned by Borrower (or Guarantor) may be bound, or (2) any order of any governmental or public body or authority to which Borrower (or Guarantor) may be subject.

ASSUMPTIONS

This opinion letter assumes:

(i) that Lender has satisfied all necessary legal requirements applicable to it and that Lender has all necessary corporate authority to enter into the Loan Documents and consummate the Loan;

(ii) the legal capacity of all natural persons to enter into and perform their respective obligations under the Loan Documents;

(iii) the authenticity and completeness of all documents submitted to us for review, that each such document that is a copy conforms to an authentic original, and that all signatures on each such document are genuine;

[(iv) that Borrower (or Guarantor) is duly organized and validly existing as a _____ under the laws of the State of _____, and ~~is in good standing under such laws;~~ ~~[Alternative Assumption]] has taken all action required to authorize Borrower (or Guarantor) to enter into and execute the Loan Documents and perform all obligations of Borrower (or Guarantor) under the Loan Documents;]¹⁹~~

(v) the due execution and delivery of the Loan Documents;²⁰

¹⁹ This is an alternative assumption to be used only if the Opinion Giver is serving as local counsel.

²⁰ Many Opinion Recipients will not allow the Opinion Giver to include this assumption. If omitted, the Opinion Giver must either be physically present when the Borrower signs the Loan

(vi) the vesting of fee title²¹ to the Real Property in Borrower at the time the Loan Documents are executed and recorded or filed and that Borrower has good and sufficient rights in and title to the Collateral;

(vii) the accuracy and sufficiency of the description of the ~~[real and personal property]~~ Collateral²² to provide notice to third parties of the liens and security interests ~~[provided in]~~ created by the Loan Documents and to create an effective contractual obligation under the laws of the State of Oregon;

(viii) that the trustee named in the Trust Deed is validly existing, and has full power and authority to act as trustee;

(ix) the due recording of the Deed of Trust ~~[and the Lease Assignment]~~ in the Official Records of _____ County, Oregon;

(x) the proper filing²³ and indexing of the ~~[a UCC-1]~~ Financing Statement or the Security Agreement in the Office of the Secretary of State of Oregon²⁴ ~~[and the proper filing and indexing of a UCC [-1A] Financing Statement or the Security Agreement in the Official Records of _____ County, Oregon,]~~²⁵ so as to give constructive notice of the security interests described therein;

(xi) the funding of the Loan to Borrower;

(xii) that Lender has negotiated the Loan transaction and will exercise its rights and remedies under the Loan Documents and applicable law in good faith, with fair dealing and in a commercially reasonable manner;

Documents and delivers them to the closing escrow or in some other manner insure that the Borrower has in fact signed the Loan Documents.

²¹ If the Loan is secured by other than fee title (i.e. a leasehold) then the appropriate property interest should be inserted in lieu of fee title. See also Footnote 33 infra.

²² The inclusion of this assumption as it relates to personal property is not necessary if the personal property is described as a recognized category pursuant to UCC Revised Article 9 (e.g. “equipment”, “inventory”, or in appropriate cases “all assets”).

²³ This assumption is not necessary if a perfection opinion as set forth in Appendix 2 is being given as that opinion includes this assumption.

²⁴ Assuming Borrower is an entity organized under Oregon law or an individual residing in Oregon.

²⁵ This provision should only be used if a separate UCC Financing Statement is being recorded in the real estate records.

(xiii) that Lender has no notice of any defense against the enforcement of the Loan Documents;

(xiv) that there has not been any mutual mistake of fact or misunderstanding, fraud, duress, or undue influence with respect to the Loan Documents;

(xv) that Oregon law (without regard to Oregon law regarding conflicts of law) will apply to the interpretation, validity, and enforceability of the Loan Documents;

(xvi) that all statutes, judicial and administrative decisions, and rules and regulations of governmental agencies, constituting the law of the State of Oregon are generally available (i.e., in terms of access and distribution following publication or other release) to lawyers practicing in the State of Oregon, and are in a format that makes legal research reasonably feasible;

(xvii) that the constitutionality or validity of a relevant statute, rule, regulation or agency action is not in issue unless a reported decision in the State of Oregon has specifically addressed but not resolved, or has established, its unconstitutionality or invalidity;

(xviii) that Borrower (and Guarantor) will obtain all permits and governmental approvals required in the future, and take all actions similarly required, relevant to subsequent consummation of the Loan or performance of the Loan Documents;²⁶ and

(xix) that 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, or qualify the terms of the Loan Documents.

²⁶ Assumptions (xvi) through (xix) are taken from Section 3.1 of the Inclusive Opinion. An Opinion Giver should carefully review all assumptions to make sure they are applicable to the transaction.

OPINIONS

Subject to the qualifications stated herein, we are of the opinion that:

1. Borrower is a ~~[corporation]~~ limited liability company [or other applicable entity] ~~[duly incorporated [or other appropriate formality] and]~~ validly existing under the laws of the state of Oregon.²⁷

2. ~~[Borrower has all requisite corporate []]~~All actions or approvals by Borrower, and its [members (or managers or other applicable [entity] authority to (i) own [, lease,] [operate] the property and (ii) undertake and perform the obligations of] necessary parties] to bind Borrower under the Loan Documents have been taken or obtained.²⁸

²⁷ The changes in this Opinion have been made to reflect current Opinion Letter practice. Opinion Recipients require Opinions that address the Borrower's current legal status as an entity that is capable of entering and performing the Loan. Opinions given are as of the date of the Opinion Letter. The concept of being duly formed (including "duly incorporated or duly organized") has been eliminated as being unnecessary. As a normal part of the Opinion Giver's due diligence, a certified copy (if the Opinion Giver did not form the entity) of the Borrower's filed organization documents should be obtained from the Secretary of State in addition to a currently dated Certificate of Existence. Under Oregon law, the Secretary of State's filing of the Borrower's Articles of Incorporation or Articles of Organization is conclusive proof that the entity has satisfied all conditions precedent to formation except in a proceeding by the state to cancel or revoke the formation or to involuntarily dissolve the entity (see, for example, ORS 60.051(2) for private corporation or ORS 63.051(2) for limited liability companies). If, however, the Borrower is a limited partnership, the Opinion Giver cannot rely on a similar statute as ORS 70.070(4) provides that the Secretary of State's duty to file a limited partnership certificate is ministerial and ORS 70.110 provides that the filed certificate is only notice that the entity is a limited partnership and the persons designated are general partners. As a result, in the case of a limited partnership, the Opinion Giver must undertake sufficient due diligence and obtain necessary Certificates from the principals of the limited partnership in order to give this Opinion.

If the Borrower is a private corporation or a limited liability company, a Certificate of Existence issued by the Secretary of State may be, subject to any qualification set forth in the Certificate, relied on as conclusive evidence that the entity is in existence or is authorized to transact business in Oregon. (See ORS 60.027 for domestic or foreign private corporations or ORS 63.027 for domestic or foreign limited liability companies).

²⁸ This new Opinion is included to conform to the Inclusive Opinion. This Opinion relating to Borrower's actions or approvals is given to provide the Opinion Recipient with comfort that the Loan is authorized. As a part of the Opinion Giver's due diligence, the entity's organizational documents must be examined to determine what actions must be taken to authorize the Loan. After such a review, an appropriate meeting must be held or an appropriate action must be executed authorizing the Loan. A copy of the minutes or action is then normally attached to

3. Borrower has all requisite [insert applicable entity] authority to undertake and perform the obligations of Borrower under the Loan Documents.²⁹

4. ~~[3.]~~ The Loan Documents are the legal, valid, and binding obligations of Borrower [and Guarantor, as applicable,] and are enforceable against Borrower [and Guarantor, as applicable,] in accordance with their terms, except that the foregoing may be limited by ~~[(a)]~~ bankruptcy, insolvency, reorganization, fraudulent transfer,³⁰ civil forfeiture,³¹ moratorium~~[,]~~ or similar laws~~[,] or (b)]~~ relating to or limiting the rights of creditors generally,³² or by equitable principles (regardless of whether such enforcement is considered in a proceeding in equity or at law) ~~[relating to or limiting the rights of creditors generally.]~~. The use of the term “enforceable” does not imply any opinion on the availability of equitable remedies other than the foreclosure of the liens created by the Loan Documents in accordance with Oregon law.³³

the Borrower’s Certificate (see the Borrower’s Certificate attached to this Opinion). This Opinion should be eliminated if the Opinion Giver is local counsel and assumption (iv) has been included.

²⁹ The second opinion in the 1996 Report has been revised to eliminate the phrase “own [lease], [operate] the property”. The Committee determined that the inclusion of this language did not add to the opinion and potentially conflicted with assumption (xviii).

³⁰ See Section 4.6 of the Real Estate Guidelines.

³¹ See ORS 475.485.

³² This phrase was moved from its prior location so as to better define which laws were being addressed.

³³ This portion of the Generic Qualification was included in the Opinion Letter in the 1996 Report as a part of the next following paragraph. The Committee determined to retain this qualification, but to move it from the Generic Qualification so that the revised Generic Qualification will more closely follow the Inclusive Opinion.

If the Opinion Giver is asked to opine on the enforceability of a lease, such as a ground lease being mortgaged or a master lease given by the Borrower as credit enhancement on a project, the Opinion Giver should consider whether additional limitations on the opinion are warranted. For example, the Opinion Giver should express no opinion on lease provisions such as those authorizing multiple suits for recovery of rent, providing for recovery of rent without mitigation of damages, or authorizing recovery of rent without reasonably discounting future rent to present value. The Opinion Giver should also question whether, pursuant to ORS 86.770, a master lease executed by the Borrower will be extinguished by foreclosure of the trust deed.

The Opinion Giver may be asked to render an opinion on a “loan” that is structured as a sale/leaseback. The Opinion Giver should consider whether the transaction is a true lease or a

³⁴ In giving this opinion number [3] 4, we advise you that [~~:(i) the use of the term “enforceable” shall not imply any opinion as to the availability of equitable remedies other than the foreclosure of the liens created by the Loan Documents; and (ii)~~] an Oregon court may not³⁵ [~~strictly~~] enforce certain provisions contained in the Loan Documents or allow acceleration of the maturity of the indebtedness if it concludes that such enforcement or acceleration would be unreasonable under the then existing circumstances; [~~however,~~] nevertheless, subject to the other qualifications and limitations [~~expressed elsewhere~~] set forth in this opinion [~~or incorporated~~], upon a material breach by [~~reference into this opinion, enforcement or acceleration against~~] Borrower [~~or Guarantor~~]³⁶ [~~would be available if an event~~

loan and whether the lease may be an “equitable mortgage,” which may require foreclosure rather than enforcement of lease remedies. The Opinion Giver should carefully consider the possibility of “recharacterization” of the transaction by a court if it is challenged by the Borrower when the “lessor” attempts to enforce its remedies.

³⁴ The Generic Qualification and Generic Assurance as set forth in this paragraph have been revised to generally conform with current Opinion Letter practice as generally described in the Inclusive Opinion. The Committee also retained “the material breach of a material provision” qualification which led to the conclusion to retain the “laundry list” of exclusions. A discussion of the rationale for this decision can be found in Footnote 32 to the Inclusive Opinion. The inclusion of a laundry list differs from the recommendations contained in Section 4.0 of the Real Estate Guidelines.

³⁵ The Committee determined that the previous inclusion of the word “strictly” did not serve the Opinion Recipient and could expose the Opinion Giver to unintended liability.

³⁶ Special consideration must be taken by the Opinion Giver if an Enforceability Opinion is requested on a guaranty. Affiliated corporate entities are frequently requested to guarantee corporate loans. If the guaranty is given without adequate consideration, the guarantor or creditors of the guarantor may challenge enforceability of the guaranty based on concepts of “consideration” or “fraudulent transfer.” This issue is one of the reasons for excluding fraudulent transfers in the first paragraph of the Generic Qualification and for the inclusion of assumption (xxii). On this issue generally, see David Murdoch, Linda Sartin & Robert Zadek, *Leveraged Buyouts and Fraudulent Transfers: Life After Gleneagles*, 43 BUS LAW 1 (1987), and Kirby, McGuinness & Kandel, *Fraudulent Conveyance Concerns in Leveraged Buyout Lending*, 43 BUS LAW 27 (1987).

The Equal Credit Opportunity Act (Pub L No 93-495, Title V, 88 Stat 1521 (1974)) applies not only to consumer debt, but also to commercial loans. The Opinion Giver should be cautious about opining on the enforceability of a guaranty given by a spouse of a Borrower who is not a co-applicant. 15 USC §§1691a-f, and regulations and interpretations promulgated pursuant thereto.

Lenders occasionally ask an individual Borrower to guarantee his or her own debt. One purpose of such guaranties is to ask the Borrower to waive defenses that are not waivable by the maker

~~of default occurs as a result of a material breach by Borrower [or Guarantor] of a material provision contained in the Loan Documents.]~~ of a material provision of the Loan Documents, there will be available to Lender (i) the judicial enforcement of the obligation of the Borrower [and Guarantor, as applicable] to repay the principal together with interest thereon (to the extent not deemed a penalty)³⁷ to the extent provided in the Note; (ii) acceleration of the obligation of Borrower [and Guarantor, as applicable] to repay such principal, together with interest; and (iii) the foreclosure of the liens created by the Loan Documents upon maturity or upon acceleration pursuant to clause (ii) above.

Although (i) the following list is not a complete recitation of matters as to which no opinion is expressed; and (ii) this list is not intended to supersede or diminish other limitations set forth or incorporated by reference in the opinion, we wish to specifically emphasize and advise you that we express no opinion as to the enforceability of:

- (a) provisions of the Loan Documents which grant rights of self-help, rights of setoff, or the right to possession of the real or personal property or collection of rental or other income without (i) appointment of a receiver or acquisition of the Real Property through foreclosure or other means, (ii) complying with the procedural requirements for appointment of a receiver, ~~[or the rights, procedural requirements for, or]~~ and (iii) complying with the limitations applicable to the rights and powers of a receiver at law or in equity;
- (b) provisions purporting to establish evidentiary standards;
- (c) provisions relating to the waiver of rights, remedies, and defenses,³⁸

of a note under the Uniform Commercial Code, but are waivable by a guarantor. It is not clear whether guaranties of a person's own debt or that of a person's "alter ego" are enforceable in Oregon.

³⁷ This language was included to conform the Generic Assurance to that suggested by ACREL and the ABA-ACREL Report.

³⁸ Oregon law on the validity of these waivers is not well developed, but the controlling principle is set forth in *Turney v. J.H. Tillman Co.*, 112 Or 122, 132, 228 P 933 (1924):

“[A] person may waive by agreement the benefit of a statutory provision. But there is an exception to this general rule in the case of a statutory provision whose waiver would violate public policy expressed therein, or where rights of third parties which the statute was intended to protect are involved.”

(d) to the extent such amounts exceed actual damages, provisions that permit Lender to collect a late charge, increased interest rate after default or maturity, or a prepayment premium;³⁹

(e) any reservation of the right to pursue inconsistent or cumulative remedies;

(f) any “due on sale” clause to the extent that enforcement is not mandated by applicable federal law and that the security for the ~~{loan}~~ Loan would not be impaired;⁴⁰

(g) any “due on encumbrance” clause in any circumstance in which the security for the ~~{loan}~~ Loan would not be impaired;

(h) the effect of any “one-action” or “anti-deficiency” provisions contained in applicable trust deed statutes, including any statutory restrictions on deficiency judgments after foreclosure, including, without limitation, the provisions of ORS 86.770;⁴¹

(i) provisions for payment or reimbursement of costs and expenses or indemnification for claims, losses, or liabilities (including, without limitation, attorney fees) in excess of statutory limits or an amount determined to be reasonable by any court or other tribunal, and any provision for attorney fees other than to the prevailing party;

³⁹ In addition to the citations in the 1992 Report, see also *Kesterson v. Juhl*, 157 Or App 544, 970 P2d 681 (1998).

⁴⁰ In addition to the citations in the 1992 Report, see also *Carey v. Lincoln Loan Co.*, 165 Or App 657, 998 P2d 724 (2000); and note that the Oregon Supreme Court declined to review *United Savings Bank Mutual v. Barnette*, 72 Or App 46, 52, 695 P2d 73, *rev. denied*, 299 Or 203 (1985).

⁴¹ The 1997 Oregon Legislature amended ORS 86.770 by eliminating references to actions on guarantees following a judicial or nonjudicial foreclosure. Nothing in these amendments, however, changed the prohibition on bringing an action on the debt following such a foreclosure. As before the 1997 amendments, pursuant to ORS 86.770(2), no action on a guaranty may be brought while a nonjudicial foreclosure is pending or following a nonjudicial foreclosure.

- (j) provisions pertaining to jurisdiction, venue, or choice of law;⁴²
- (k) provisions purporting to appoint Lender or the trustee as attorney-in-fact for Borrower;
- (l) limitations on the liability of Lender or the trustee named in the Deed of Trust, or for their indemnification for their own negligence or misconduct;
- (m) provisions that purport to establish or maintain priority of [the lien;] a lien or security interest created by the Loan Documents;
- (n) provisions for charging interest on interest;
- (o) provisions purporting to impose continued liability following foreclosure, such as environmental or building code indemnity provisions;⁴³
- (p) provisions in conflict with statutory provisions which permit Borrower to reinstate a trust deed during a nonjudicial proceeding; [and]
- (q) provisions purporting to allow Lender to determine the method or order of sale of property in a foreclosure action; and

~~[4. [OPTIONAL PARAGRAPH] We have no current actual knowledge of any pending or threatened lawsuits or claims against Borrower or the property (except as set forth herein or in the Loan Documents).]~~

- (r) severability clauses of the Loan Documents.

~~[Whenever the phrase “our actual knowledge” or any variation thereof is used in this opinion, the subject modified by such phrase is limited to matters within the present actual knowledge of _____ and _____, the lawyer(s) in this firm actively engaged in the representation of Borrower, shall mean only the conscious awareness of facts or other information by such lawyer(s), and shall not include any knowledge that may be imputed to such individual(s) by constructive notice or other means or imply that any inquiry has been undertaken by such individual(s) with respect to any of such matters except to the extent that facts and circumstances presented to such individual(s) would compel a prudent~~

⁴² In addition to the citations in the 1992 Report, see also *Machado-Miller v. Mersereau & Shannon, LLP*, 180 Or App 586, 592–593, 43 P3d 1207 (2002). If a choice of law opinion is given (See Appendix 1, opinion G), this assumption should be modified accordingly.

⁴³ See also the discussion at Footnote 41 supra. It is not clear whether any liability secured by a trust deed can continue after foreclosure in light of ORS 86.770.

lawyer to make further inquiry when presented with the same facts and circumstances.]

LIMITATIONS

None of the opinions herein expressed include any implied opinion⁴⁴ and the opinions are specifically subject to and qualified by the following:

1. Regardless of the states in which members of this firm are licensed to practice, our opinion is limited to the laws of Oregon and to applicable federal laws.

~~[2. This opinion is to be interpreted in accordance with Lawyers' Opinions in Oregon Real Estate Loan Transactions and the 1996 Supplement to Lawyers' Opinions in Oregon Real Estate Secured Transactions prepared by the Real Estate and Land Use Section of the Oregon State Bar Committee on Opinion Letters.]⁴⁵~~

2. This opinion is provided to you as a legal opinion only, and not as a guaranty or warranty of the matters discussed herein. Our opinion is limited to the matters expressly stated herein, and no other opinions may be implied or inferred.

3. Without limiting any other disclaimers or limitations contained in this opinion, we express no opinion as to any matter whatsoever relating to:

- (a) the value of the collateral;
- (b) the adequacy of the consideration for the Loan [or Guaranty];
- (c) the accuracy or completeness of any financial, accounting, or statistical information furnished to Lender [or Guarantor];
- (d) the accuracy or completeness of any representations made by Borrower [or Guarantor] to Lender;
- (e) the financial status of Borrower [or Guarantor];

⁴⁴ See Section 1.5.a of the Real Estate Guidelines.

⁴⁵ The suggested form Opinion attached to the 1996 Report contained a Limitation incorporating by reference the 1992 and 1996 Reports. Many Opinion Recipients, especially those out of state, objected to this reference. The Committee determined that the inclusion of the reference to the Report did not serve a useful purpose as in any Opinion Letter litigation, the contents thereof would be viewed as the appropriate standard of care for an Opinion Giver.

(f) the ability of Borrower [or Guarantor] to meet [its] [their] obligations under the Loan Documents;

(g) the state of the title to the ~~[real property]~~ Real Property and personal property or the attachment, perfection, or priority of any liens thereon or security interest therein;⁴⁶

(h) the adequacy or accuracy of descriptions of real or personal property;

(i) compliance with securities, pension and employee benefit laws and regulations (e.g. ERISA), zoning, land use, building, health and safety, or environmental rules, regulations, laws, ordinances, or directives;⁴⁷

(j) compliance with fiduciary duty requirements, antitrust and unfair competition laws and regulations, tax laws and regulations;⁴⁸ or

(k) whether the Lender is doing business in the state of Oregon.⁴⁹

[4. Whenever the phrase “knowledge”, “our actual knowledge” or any variation thereof is used in this opinion, the subject modified by such phrase is limited to matters within the present actual knowledge of _____ and _____, the lawyer(s) in this firm actively engaged in the representation of Borrower, shall mean only the conscious awareness of facts or other information by such lawyer(s), and shall not include any knowledge that may be imputed to such individual(s) by constructive notice or other means or imply that any inquiry has been undertaken by such individual(s) with respect to any of such matters except to the extent that facts and circumstances presented to such individual(s) would compel a prudent lawyer to make further inquiry when presented with the same facts and circumstances.]⁵⁰

⁴⁶ See Sections 4.0.c and 4.0.d of the Real Estate Guidelines.

⁴⁷ See Section 4.3.a of the Real Estate Guidelines.

⁴⁸ See Section 3.2 of the Inclusive Opinion.

⁴⁹ See Section 4.1.a of the Real Estate Guidelines for a discussion of the reasons Borrower’s counsel is generally not in a position to opine as to the necessity of Lender’s qualification to do business in the state where the Collateral is located.

⁵⁰ This provision was taken from the 1996 form of Opinion Letter. See also Section 3.4.a of the Real Estate Guidelines. This Limitation should only be included when an opinion based on the Opinion Giver’s knowledge is included.

5. This opinion is rendered at the request of Borrower as a requirement for closing. This opinion does not establish any attorney-client relationship between this firm and any addressee. Nothing contained in this opinion shall be deemed to constitute a waiver of the attorney-client privilege between this firm and Borrower ~~[except as to the matters specifically set forth herein.]~~[or Guarantor].

This opinion is rendered as of the date set forth above, and we disclaim any obligation to advise you of any changes in the circumstances, laws, or events that may occur after this date or to otherwise update this opinion.

This opinion has been rendered to you in connection with the transaction described herein solely for your information and is not to be quoted in whole or in part or otherwise referred to, used, delivered to, or relied upon by any person or entity other than you, your legal counsel, and ~~[your successors and assigns]~~ the successive holders of the Loan.⁵¹

Very truly yours,

[Firm name, not individual]

⁵¹ This change was made to more clearly reflect actual practice. In addition, if others (i.e. participating lenders or rating agencies) are to receive a copy of the opinion, they should be included in this paragraph. See also Section 1.7 of the Real Estate Guidelines.