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## Opinion Letters in Commercial Real Estate

Best Practices to Minimize Risk When Crafting Third-Party Opinions on Loans and Acquisitions

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TUESDAY, OCTOBER 18, 2011

1pm Eastern | 12pm Central | 11am Mountain | 10am Pacific

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Today's faculty features:

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William B. Tate, II, Partner, Bryan Cave, Irvine, Calif.

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Opinion Letters  
in  
Commercial Real Estate Transactions

By

Gordon L. Gerson & William B. Tate II

BRYAN CAVE

# Introduction

- Purpose of Opinion Letters
- Opinion Letter Process
- Forms of Opinions
- Assumptions and Qualifications
- Cost/Benefit Analysis - Consequenc



# Opinion Letter Process

- Duties of the Opinion Giver
  - Special Counsel vs. Counsel
  - Scope of Review
  - Professional Competence
  - Duty not to Mislead

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# Opinion Letter Process (continued)

- Reliance Issues – Limitations
- Ethical Issues
- Conflict Letters



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# Forms of Opinions

- Organization, Authorization, Execution Opinions
- Enforceability Opinions
- No Violations of Organizational Documents or Agreements
- No Litigation or Material Claims
- Usury
- Security Documents – Recordable Form and Filing Issues
- Non-Consolidation Opinions

# Organization, Authorization, Execution Opinions

- Form of Organization Opinion
  - If Borrower is an entity –
    - [Based solely on the Good Standing Certificate(s), copies of which are attached hereto as Exhibit \_\_\_], Borrower is a [type of entity], duly organized, validly existing and in good standing under the laws of \_\_\_\_\_ [, and is qualified to transact business as a foreign [name of entity] in [Mortgaged Property jurisdiction].]
  - If Borrower is a trust –
    - [Borrower is a [name of the type of trust] validly existing under the laws of [jurisdiction] [, and is qualified to transact business as a foreign entity in [Mortgaged Property jurisdiction].]
  - If Borrower is an individual –
    - Borrower is an [individual] resident in the State of \_\_\_\_\_.

# Organization, Authorization, Execution Opinions (continued)

- Form of Authorization and Execution Opinions
  - Borrower has the [corporate/partnership/trust] authority to execute, deliver and perform its obligations under the Loan Documents.
  - The execution and delivery of the Loan Documents [and the Subordination Agreement] by or on behalf of Borrower, and the consummation by Borrower of the transactions contemplated thereby, and the performance by Borrower of its obligations thereunder, have been duly and validly authorized by all necessary [corporate/partnership/trust] action by or on behalf of Borrower.
  - Each of the Loan Documents has been duly executed and delivered by Borrower, and the individual(s) executing the Loan Documents on behalf of Borrower have the authority and legal capacity to do so.

# Enforceability Opinion

- Each of the Loan Documents has been duly executed and delivered by Borrower, and the individual(s) executing the Loan Documents on behalf of Borrower have the authority and legal capacity to do so. Each of the Loan Documents constitutes the valid and legally binding obligation of Borrower, enforceable against Borrower in accordance with its terms, subject to the following qualifications:
  - (i) the effect of applicable bankruptcy, insolvency, fraudulent transfer, reorganization, moratorium and other similar laws affecting the rights of creditors generally;
  - (ii) the effect of the exercise of judicial discretion in accordance with general principles of equity (whether applied by a court of law or of equity); and
  - (iii) certain remedies, waivers, and other provisions of the Loan Documents may not be enforceable, but, subject to the qualifications set forth in the foregoing subparagraphs (i) and (ii), such unenforceability will not preclude (a) the enforcement of the obligation of Borrower to pay the principal, interest[, late charges, if any,] and prepayment premium, if any, as provided in the Note and (b) the foreclosure of the Security Instrument upon the event of a material breach.

# No Violations of Organizational Documents or Agreements

- The execution and delivery of, and the performance of the obligations under, the Loan Documents, will not violate the Organizational Documents of Borrower.
- Based solely upon (a) our knowledge and (b) the Borrower's Certificate, the execution and delivery of the Loan Documents will not (i) cause Borrower to be in violation of, or constitute a material default under the provisions of any agreement to which Borrower is a party or by which Borrower is bound, (ii) conflict with, or result in the breach of, any court judgment, decree or order of any governmental body to which Borrower is subject, and (iii) result in the creation or imposition of any lien, charge or encumbrance of any nature whatsoever upon any of the property or assets of Borrower, except as specifically contemplated by the Loan Documents.

# No Litigation or Material Claims

- Based solely upon (a) our knowledge and (b) the Borrower's Certificate, there is no litigation or other claim pending before any court or administrative or other governmental body or threatened against Borrower, the Mortgaged Property, or any other properties of Borrower, Guarantor or Key Principal [, except as identified on Exhibit “ ”]
  - Note risk of disclosing in a non-privileged writing any threatened litigation.



# Usury

- The interest rate set forth in the Note will not violate any applicable usury laws of the State of \_\_\_\_\_



# Security Documents – Recordable Form and Filing Issues

- The Mortgage is in proper form for recording and, subject to the need for the filing of the Fixture Financing Statement with the \_\_\_\_\_ of the County of \_\_\_\_\_, State of \_\_\_\_\_, will perfect the Lender's security interest in all real property and fixtures described in the Mortgage.
- The Uniform Commercial Code as adopted in the Property Jurisdiction states that the Uniform Commercial Code as adopted in the State of Borrower's Organization governs the method of perfection of the secured party's security interest in personal property to the extent that the security interest in such personal property can be perfected by filing a financing statement pursuant to the Uniform Commercial Code as in effect in the State of Borrower's Organization.

# Non-Consolidation Opinions

- Non Consolidation Opinion.
  - What is it?
    - A non-consolidation opinion letter is a separate opinion letter (in addition to organization, authorization, and enforceability). It requires a comprehensive, and generally complex, analysis of why entities affiliated with the borrower and guarantor, and the respective entities which are manager or general partners of each, would not be substantively consolidated by a bankruptcy court (or motion of debtor or one or more creditors) in the event of a voluntary or involuntary bankruptcy action by borrower, guarantor, or any of their respective affiliates.
  - Who requires it?
    - Most CMBS loans over \$20mm
    - Freddie Mac loans over \$25mm
    - Other

# Assumptions and Qualifications

## Assumptions

- Documents Reviewed
- Reliance upon Certificates of Borrower or Guarantor
- Commonly Accepted Assumptions



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# Assumptions and Qualifications

(continued)

## Qualifications

- ABA Model
- Silverado et al (California)
- Opinion Letter Policies
- Transaction Specific Qualifications



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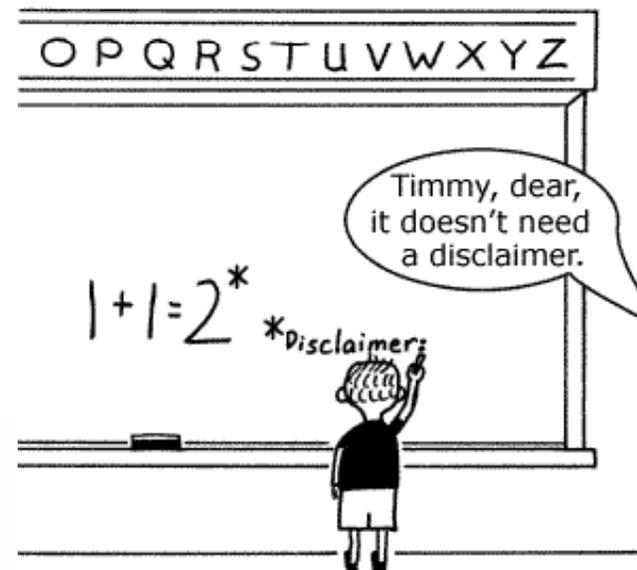
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# Assumptions and Qualifications

(continued)

- Special Issues
  - Knowledge
  - Substantive Realization
  - Remedies
  - Specific Case Law

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# Cost/Benefit Analysis of Consequences

- Borrower
- Legal Counsel
- Specific Examples

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Children,  
let's settle this  
like adults.



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