THIRD-PARTY LEGAL OPINIONS: AN
INTRODUCTION TO
"CUSTOMARY PRACTICE"

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INTRODUCTION

A request to provide a legal opinion to a non-client third party has become routine and is now a part of many attorneys' practice. Providing these “third-party” legal opinions is a troubling, and relatively new, aspect of the practice of law. The opining lawyer must consider a number of issues to ensure that the opinion given is accurate and, in doing so, that the opining lawyer limits risk that he or she will become financially liable for some defect in the transaction. In essence, third-party legal opinions have the effect of injecting lawyers into the transaction. This occurs when the party requiring the opinion insists that

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2. It should be noted that attorneys are fundamentally sensitive when injecting themselves as part of a transaction for several reasons. First of all, ethical considerations have always dictated that attorneys should not benefit from a client's transaction because it may influence the attorney's performance. See Model Code of Prof'l Responsibility D.R. 5-103 and 5-104 (1983). Although a third-party legal opinion does not earn an attorney any compensation beyond hourly fees or a flat rate for writing the opinion, it can put the attorney in a position where his or her best interests are in conflict with those of his or her client because the lawyer may be pressured to give an opinion that he or she would rather not give “but for” the fear of souring a deal. Bermant, C533 ALI-ABA at 1349-50. To compound the matter, it has been asserted by some that attorneys are increasingly at risk of being held accountable for a client's misrepresentations in giving a legal opinion, regardless of how clearly the attorney states certain limitations, qualifications and exceptions (i.e., disclaimers). John C. Quale & Brian D. Weimer, Legal Opinions In Corporate Transactions Affected By FCC Regulation: An Economic Approach, 1192 PLI/Corp 745, 756 (2000). As stated in one article: “Delivering overly expansive legal opinions should be of particular concern to lawyers in light of recent case law suggesting that legal opinion practice can expose a lawyer to serious risk of liability.” Quale & Weimer, 1192 PLI/Corp at 753. Finally, it should be noted that third-party legal opinions are not necessarily the best means to ensure the matters upon which an opinion is given, nor is it necessarily appropriate for an attorney to give certain opinions which are sometimes required. “Lawyers should not act as insurers or guarantors of corporate transactions; to ask lawyers to do so unnecessarily
the opinion mimic the representations and warranties in the transaction agreement—in effect, guaranteeing the accuracy and completeness of an aspect of the business deal as a substitute or supplement to the opinion recipient’s own due diligence. It also occurs when the opinion recipient refuses to accept common qualifications to the opinions. In both cases, the attorney giving the opinion is placed in a position of accepting increased liability exposure so that the client’s transaction will close, or rejecting increased liability exposure at the risk of jeopardizing the client’s transaction. Some in our firm remain convinced that, by their very nature, third-party legal opinions are offensive. However, they are unavoidable in modern commercial practice and we must find the most appropriate approach to deal with this difficult area.

As discussed below, the format of third-party legal opinions has changed dramatically over the last decade, which indicates that this is an area of law that attorneys worry about. This has certainly been an area of continuing concern for our law firm and, after much deliberation and analysis, our firm has adopted the new “customary practice” form of legal opinion for use when opining on transactions and transactional documents.

For many years, our firm adopted portions or all of the Accord\(^3\) when giving legal opinions. Additionally, our firm believed it was necessary to make certain assumptions with respect to, and to carve out certain limitations, qualifications and exceptions from, many opinions. Thus, many of our firm’s legal opinions (like many other firms) contained multiple pages of text to address assumptions, limitations, qualifications and exceptions with regard to the one page of actual opinions being given! By doing so, we were trying to be thorough, accurate and follow guidance provided by various bar associations, commission reports, scholarly writings by various authorities on the subject and examples of opinions that we had received from other firms. In developing such a “standard” form of legal opinion, our firm’s legal opinion committee obtained the highest level of comfort possible in striving to ensure that our third-party legal opinions were accurate and our firm’s potential financial liability for the opinions given was minimal. Despite that level of comfort, there is always (and probably always will be) a certain level of discomfort when giving a third-party legal opinion because of the inherent risk associated with opining on various matters to a third party.

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\(^3\) See infra discussion regarding “The Accord.”
This article is intended to provide practitioners with what our firm believes is the current state of third-party legal opinion practice. In doing so, we will review the purpose and history of third-party legal opinions, and then we will present the recent development of the “customary practice” form of legal opinions. Finally, we will explain the reasons for our firm’s adoption of the customary practice principles for our opinions. In doing so, we are not holding ourselves out as more knowledgeable than any other attorneys or firms that are engaged in transactional practice; rather, we are merely sharing the results of the research which led our firm to this significant change of direction in its third-party legal opinion practice. If any practitioners find the information contained in this article to be useful in their own practice, then we believe our time in writing this article was well spent.

PURPOSE OF OPINIONS

It is only in the last forty years or so that attorneys have been asked to give an opinion to persons other than their own clients.\(^4\) Such an opinion is generally known as a “third-party legal opinion” and it is often given in business transactions such as transactions between (i) sellers and purchasers of a business or (ii) borrowers and lenders. In a typical third-party legal opinion scenario, the purchaser or lender requires a lawyer or law firm for the seller or borrower to provide an opinion as to certain characteristics of its client and as to certain aspects of the transaction as a condition to closing. Specifically, the attorney representing the seller or borrower must generally opine certain things about the client’s existence, capacity and authority, and that the transaction documents will be enforceable against the seller or borrower and not violate other agreements to which the seller or borrower may be bound. Thus, third-party legal opinion practice developed to the point where attorneys who are “almost never a signatory to the agreement calling for the opinion” nevertheless become a party to the transaction based solely on their opinion with regard to their client’s conduct or authority as set forth in the transaction documents.\(^5\)

The role, scope and purpose of a third-party legal opinion has been summarized as follows:

One of the frequently stated purposes of such an opinion is to disable the opining lawyer from attacking the validity of the transaction. If the lawyer said the agreement is enforceable in the Third Party Legal Opinion delivered at closing, the lawyer’s effectiveness in later attacking the agreement would

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5. Id. at 1339-42.
be severely compromised, and the client of such lawyer, disadvantaged. . . . Another stated purpose is to satisfy the recipient that the lawyer has done due diligence and assured him/herself that all is right with the client. . . . A third purpose would be to provide a second look at the legal and factual intricacies of the transaction, backstopping the advice of the lawyer for the recipient. . . . It has generally been agreed that an impermissible purpose of a Third Party Legal Opinion is to seek a deep pocket (the lawyer's) if things don't work out as expected. . . . For example, it is generally considered bad form, if not reprehensible, for a lender to require the borrower's lawyer to render an opinion that a usurious transaction is not usurious on pain of not making the loan. The oft repeated "Your lawyer screwed up another deal" can often have an adverse effect on the relationship between a financially strapped client and its [soon to be erstwhile] lawyer. . . . Another facet of Third Party Legal Opinions that offends many is the idea that the party with economic leverage will use such power to wrest unreasonable or unnecessary opinions from the lawyer for the oppressed. . . . This has led to the theorem that no lawyer should ask for an opinion that the lawyer would not give. Its corollary is also true, although often not as religiously advocated; no lawyer should give an opinion the lawyer would not accept.6

As attorneys became increasingly required to provide third-party legal opinions in transactions involving their clients, the opinions seemed to grow from simply "the opinion" to the much more convoluted "the opinion subject to a number of limitations, qualifications and exceptions." A good example of this concept is shown by the following excerpt from George W. Bermant:

In its first manifestation in the Third Party Legal Opinions, the Remedies Opinion,7 generally consisted of the simple statement that the "[Agreement] has been duly and validly authorized, executed and delivered, constitutes the binding agreement of the Company enforceable against it in accordance with its terms." . . . As lawyers began to think about

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6. Id. at 1348-50.

7. The third-party legal opinions which generally result in the greatest amount of negotiation between attorneys (because it results in the most worry for the opinion giver) are those which go to the heart of the transaction in question because they can ultimately lead to financial liability for the attorney. These opinions are commonly known as the "remedies opinions." Perhaps the most common form of a "remedies opinion" is provided in this excerpt from Bermant with regard to the underlying transactional documents constituting "the binding agreement of the Company enforceable against it in accordance with its terms." In addition to this basic form of a "remedies opinion," there are an unlimited number of offshoots that arise, all of which can be like land mines to the unsuspecting attorney who doesn't think through the issues which must be analyzed prior to giving such an opinion.
that opinion, they concluded that bankruptcy and other insolvency laws prevented the enforcement of the agreement “in accordance with its terms” and possibly, at all. Therefore, such lawyers started to insert in their Third Party Legal Opinions an exclusion for the effect of such laws. The consequence of such exclusion was to remove from all consideration how the agreement being opined on would fare if bankruptcy intervened. . . . Next, careful lawyers started to worry about whether the effect of a Remedies Opinion meant that the provisions of the agreement could be specifically enforced against their clients. Since specific performance is an equitable remedy subject to all sorts of judicial discretion, they started to abjure specific performance as a necessarily available remedy. . . . That started them to consider other equitable remedy problems, such as availability of any remedy at all for an immaterial breach, restrictions on remedies because of inequitable behavior of the party seeking to enforce the agreement, restrictions because the court finds the agreement unconscionable or one of adhesion, etc. This led to the expansion of the specific performance qualification to one of the effect of equitable limitations on enforcement. . . . The lawyer asking for the opinion had a difficult time disagreeing with the particulars raised by the lawyer asked to give the Remedies Opinion, although much haggling took place.8

The “haggling” which occurred between opinion giver and opinion recipient is perhaps best understood by briefly examining the historical development of third-party legal opinion practice.

PRE-ACCORD

Prior to the 1970’s, third-party legal opinion practice was described as “more a matter of lore than of learned analysis”9 and “as much folklore as analysis.”10 As described by one author: “In those days the scope and wording of third-party opinions were determined in relative isolation as a result of bilateral negotiation in particular transactions. There was little relevant secondary opinion literature. Lawyers giving or receiving opinions in commercial transactions, even those doing so more or less regularly, had few guideposts as to customary practice beyond their own experiences . . . .”11

One of the first widely recognized articles which attempted to organize third-party legal opinion thought was James Fuld's 1973 article entitled *Legal Opinions in Business Transactions—An Attempt to Bring Some Order Out of Some Chaos*.\(^1\) In commenting on the lack of third-party legal opinion guidance existing at that time, Fuld stated that he could "find hardly any cases considering the substance and form of legal opinions; there is virtually no printed word on the subject in the law books or articles; so far as I know, neither the law schools nor the institutes for practising lawyers consider the subject; and, unlike the accountants, the lawyers do not have any generally accepted principles covering opinions."\(^1\) Fuld's article has been described as "the seminal work on the subject" in terms of trying to help lawyers involved in transactions to understand third-party legal opinions.\(^1\) Unfortunately, Fuld's article raised a lot of questions in the legal opinion community but did not provide any definitive answers.\(^1\)

The difficulty for attorneys writing third-party legal opinions was (and is) to ensure that the opinion giver and the opinion recipient and its counsel understand the opinion to mean the same thing. This remaining difficulty regarding the coverage and interpretation of legal opinion language has been summarized as follows: "[E]ven when dealing with the same time-honored opinion language, the opinion giver and the opinion recipient . . . may not have a common understanding of either what is intended by the opinion expressed . . . or what further legal or factual issues, if any, might be implicitly addressed by the language used."\(^1\) Such "misunderstandings" between opinion givers and opinion recipients tend to occur "over the meaning of terms, the extent and coverage of the opinion sought and given, and other basic

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\(^1\) Bermant, C533 ALI-ABA at 1350.

\(^1\) James J. Fuld, *Legal Opinions in Business Transactions—An Attempt to Bring Some Order Out of Some Chaos*, 28 BUS. LAW. 915 (1973). The reference to "generally accepted principles" between accountants and lawyers refers to principles developed and adopted in the mid-1970's to provide an understanding of how lawyers should respond to audit inquiries from accountants. Specifically, the Committee on Audit Inquiry Responses, Section of Business Law, American Bar Association produced a booklet entitled "Auditor's Letter Handbook" in December 1976 to "provide a convenient and useful reference resource for inside and outside counsel in dealing with the auditor's need for corroboration of information furnished by management concerning litigation, claims and assessments." COMMITTEE ON AUDIT INQUIRY RESPONSES, AUDITOR'S LETTER HANDBOOK, 2 (1976 & Supp. 1998).

\(^1\) Bermant, C533 ALI-ABA at 1350.

\(^1\) Glazer, BUS. L. TODAY, Nov.-Dec. 1999, at 32. "Not much in the way of published materials was available, and what was . . . raised — by design — more questions than it answered." *Id.*

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aspects of these third-party opinions.” As noted by one author: “Although the words of the opinion on agreements and instruments are fixed, their meanings are surprisingly unsettled. The standard phraseology, replete with fuzzy nouns and slippery adverbs, is susceptible to a broad range of interpretations.”

As a result of the questions raised by Fuld’s article, and due to the continuing misunderstandings between opinion givers and opinion recipients and their counsel, bar associations throughout the country began to discuss and opine on certain third-party legal opinion language in an attempt to standardize certain meanings—at least within their individual bar associations. Consequently, a number of written reports were circulated among the bar associations in an attempt to define the legal opinion practice.

Perhaps the best-known work of any bar association on this topic was the landmark report issued by the TriBar Opinion Committee, which consisted of three New York bar associations. The TriBar Opinion Committee’s 1979 publication became known as “The TriBar Report.” As one would expect, The TriBar Report was tailored to reflect local customs and “had a New York focus.” Similarly, other written reports by various bar associations throughout the country also reflected their own local customs and interpretations. Thus, by the late 1980’s, the practicing bar was flooded with “too many” sources of guidance when it came to the topic of third-party legal opinions. As stated by one author, “chaos continued because there existed no authoritative pronouncement, just briefs and position papers.” As a result of these numerous and conflicting writings on the topic of third-party legal opinions, an attempt was made to forge “a national consensus on legal-opinion issues,” and the resulting product in 1991 became known as the “Accord.”

19. HOLDERNESS & WUNNICKE, LEGAL OPINION LETTERS FORMBOOK at 197. Specifically, the three New York Bar Associations were (i) the New York County Lawyer's Association, (ii) The Association of the Bar of the City of New York, and (iii) the New York State Bar Association.
22. Id.
THE ACCORD

In 1989, the Business Law Section of the American Bar Association appointed a small group of attorneys to organize and write a national third-party legal opinion pronouncement in an attempt to resolve the “chaos” which existed in the legal profession on the topic of third-party legal opinions. The original “planning group” began by appointing six reporters to draft discussion papers on specific topics and issues that arose in the preparation of a third-party legal opinion. After formalizing the discussion papers into an approved format, the next step was to select approximately eighty lawyers representing a broad spectrum of practice and geographical area to constitute a newly created committee known as the ABA Business Law Section Standing Committee on Legal Opinions (the “Committee”). Ultimately, the Committee met in Silverado, California from May 31 to June 3, 1989 to discuss the various position papers and hammer out a national consensus on legal-opinion issues.

After the Committee met in Silverado, a series of proposals were made to form the basis of an accord which would be sanctioned by the ABA with regard to third-party legal opinions. The Committee then appointed a task force (the “Task Force”) which prepared a draft Accord for consideration by the Committee at its May 4, 1990 meeting in Chicago, Illinois. After further negotiation and refinement, the Committee presented the Accord for endorsement and approval by the Council of the Business Law Section (the “Council”) at its August 11, 1991 meeting in Atlanta, Georgia. At that meeting, in addition to approving the Accord, “the Council granted to the Committee continuing authority and jurisdiction to add to, modify, supplement, amend and interpret the [Accord] from time to time as the Committee deems necessary or appropriate.” Thus, for the first time, a national organization presented lawyers with uniform standards for drafting third-party legal opinions.

The Foreword to the Accord describes the concept of the Accord as follows:

The various bar association reports ... have not been as useful as the bar might have wished, because of uncertainty as to whether lawyers could rely on their conclusions as univer-

26. Id. at 1351.
27. Id. at 1351-52.
28. Id. at 1352; Glazer, BUS. L. TODAY, Nov.-Dec. 1999 at 33.
30. Id.
31. Committee on Legal Opinions, 47 BUS. LAW. at 172.
32. Id.
sally authoritative. Apparently for that reason, some lawyers have taken more conservative positions (i.e., setting forth in their opinion letters elaborations on themes that some reports state and some lawyers believe are inherent or included by implication in the opinion) than those set forth in the report issued in their respective jurisdictions. The organizing theme of the Accord is that, when it is adopted in the opinion letter, it governs the opinion and the opinion recipient's acceptance of the opinion letter in this form operates as conclusive evidence of acceptance by the opinion recipient of that role for the Accord. Thus, the Accord will govern those opinions that expressly adopt it. The Accord does not purport, in all respects, to reflect current opinion practice, nor does it purport to govern opinion practice with respect to opinions that do not expressly adopt it.\textsuperscript{33}

As explicitly stated in its Foreword, the Accord did not create a universal template for attorneys to rely upon when giving a legal opinion or deciphering someone else's legal opinion. Rather, it "is an endeavor to meet the reasonable needs of the opinion giver and the opinion recipient by providing a framework that is both sensible and fair. It has no official sanction and its use is voluntary."\textsuperscript{34} Essentially, the Accord provided a "consensual approach" to third-party legal opinions, whereby an opinion giver and an opinion recipient could adopt "a contractual mechanism for bringing themselves into accord on the meaning of standard opinion language and the work required to support it."\textsuperscript{35} Specifically, the Accord provided "a detailed set of rules that defined for those who chose to adopt them how an opinion letter should be interpreted, the laws it should be understood to cover, the factual investigation the opinion giver was expected to conduct and the meaning of several standard opinion clauses."\textsuperscript{36}

As stated by Donald W. Glazer, "the Accord had a profound effect on opinion practice. Its intense definitional focus sharpened and deepened the understanding of standard opinion language."\textsuperscript{37} Glazer further commented that in "spelling out all the assumptions and exceptions that opinion letters ordinarily leave unstated, the Accord highlighted how much the meaning of standard opinion language depends on what is implicit as well as what is explicit."\textsuperscript{38} Said another way: "When the opinion giver adopts the Accord, and the opinion recipient accepts the legal opinion with a statement of that adoption set

\begin{itemize}
\item \textsuperscript{33} Id. at 170.
\item \textsuperscript{34} Id. at 171.
\item \textsuperscript{35} Glazer, Bus. L. Today, Nov.-Dec. 1999 at 33.
\item \textsuperscript{36} Id.
\item \textsuperscript{37} Id. at 34.
\item \textsuperscript{38} Id.
\end{itemize}
forth in it, the opinion giver and the recipient have agreed on the procedures supporting, and the meaning and effect of, the particular legal opinion.” 39 Adopting the Accord in such a manner allowed for a clearer understanding of the legal principles underlying the opinion.

Unfortunately, the Accord was not a cure for all third-party legal opinion issues and it “never caught on” in many legal circles, thus defeating the enthusiasm exhibited by some when the Accord was adopted. 40 Due to the voluntary nature of the Accord, the misunderstandings between opinion giver and opinion recipient were not resolved unless they adopted the Accord or agreed on the meaning of the language used in the third-party legal opinion. Hence, opinion givers would often adopt portions of the Accord and then reject or modify other portions of the Accord when drafting their legal opinions. 41 Also, it is clear from our practice that counsel to opinion recipients felt the Accord favored opinion givers and, as a result, such counsel objected more often than not to its unfettered use. In other cases, counsel for one or more of the parties was unfamiliar with the Accord and would seek to coerce elimination of standard qualifications on the eve of the closing, thereby jeopardizing the opinion giver’s client from obtaining critical financing or a favorable business sale. Consequently, the Accord became only a partial solution to the third-party legal opinion misunderstandings between attorneys because it only solved the issues which the opinion giver and the opinion recipient could agree on by referencing the Accord. When rejecting the Accord, whether entirely or by adopting only certain portions of the Accord, attorneys would continue to draft their own opinion language to define the scope of their opinion or they would supplement the Accord by adding their own definitions (i.e., for such things as “knowledge”). In doing so, the issues which arose prior to the Accord continued and, to a certain extent, became even worse as attorneys would adopt portions of the Ac-

40. Glazer, BUS. L. TODAY, Nov.-Dec. 1999 at 34. After the Accord was introduced, Steven O. Weise pronounced: “The [Accord] reflects a concerted effort by dedicated members of the ABA, drawn from all over the country, to rationalize the opinion giving process that has been a central part of transactional practice for corporate lawyers for many decades. If broadly accepted, the Committee believes the . . . Accord will benefit lawyers, clients and the legal profession.” Weise, 774 PLI/CorP at 367 (emphasis added).
41. For example, our most common practice when giving Accord-style opinions was to adopt only Section 12 (“Bankruptcy and Insolvency Exception”), Section 13 (“Equitable Principles Exception”) and Section 14 (“Other Common Qualifications”) of the Accord. To show that our opinion was limited to only those sections of the Accord, our firm generally stated something to the effect of: “Our opinion is governed by and shall be interpreted in accordance with the Accord solely for the purpose of incorporating the qualifications, exceptions and limitations to which reference is made above, but not otherwise.”
cord and then draft around it when writing their third-party legal opinions.

Ultimately, as we saw in our practice, the number of limitations, qualifications and exceptions in third-party legal opinions continued to grow, thus making it increasingly difficult for an opinion giver and opinion recipient to understand the third-party legal opinions in the same way. It is our belief that the Accord was flawed insofar as it tended to make lawyers focus on the limitations, qualifications and exceptions that they might need to limit their own risk, rather than focusing on the actual opinions given for the benefit of their clients. In other words, the Accord unintentionally created the wrong philosophical approach to writing legal opinions. Moreover, whether or not lawyers adopted the Accord in their third-party legal opinions, the focus increasingly shifted to delineating and expanding upon the limitations, qualifications and exceptions to the opinions rather than the opinions themselves.42

1998: A WATERSHED YEAR

By the mid-to-late 1990's, various organizations began to realize that the Accord did not solve the misunderstandings and difficulties inherent in drafting a third-party legal opinion. Because many firms did not adopt the Accord (or only adopted part of the Accord) in their legal opinions, and because recipients became more and more hesitant to accept the Accord, “opinion letters often became longer and negotiations . . . more difficult. The added complexity, however, rarely made opinion givers feel more comfortable. Opinion preparers recognized all too well the impossibility of stating everything and worried that the more they stated, the more difficult it would be to claim that something unstated was intended to apply anyway.”43 Thus, although the Accord “was the product of some remarkably innovative thinking on legal opinion issues,” it did not gain “the general acceptance that its framers hoped for it.”44

Consequently, the TriBar Opinion Committee issued a new report in 1998 which became known as “TriBar II.”45 As stated in the intro-

42. See infra discussion regarding “Continuing Legal Opinion Dilemmas” with regard to the philosophical differences between the Accord and the customary practice approaches to third-party legal opinions.
duction to TriBar II: "This Report is generally consistent with TriBar's prior reports, it reexamines and replaces TriBar's first report (the '1979 Report'), the two addenda to it and the Committee's Special Report on the Remedies Opinion." The introduction further states that the revision "considers the nearly two decades of court decisions, legal opinion literature, changes in corporate law and practice, and developments in legal opinion practice since the 1979 Report." Obviously, the issuance of the Accord and its failure to solve third-party legal opinion issues was one of the "developments in legal opinion practice" which the TriBar Opinion Committee attempted to address in TriBar II.

At the same time, the American Law Institute restated its Restatement of the Law Governing Lawyers (the "Restatement (Third)") which included a discussion of third-party legal opinions.48 Arthur Norman Field, author of Legal Opinions and the Restatement, the Law Governing Lawyers, noted: "The strength of the ALI process is that . . . some of [the ALI's] members will know how [the law] should work."49 In the development of the Restatement, "Members offer detailed advice on drafts and that advice is taken seriously by the Reporters. That occurred here and the result is a good one. The Reporters of the Restatement have developed a sensitivity for the role of legal opinions."50 Field further noted that "The Restatement is generally compatible with the bar reports . . . [and therefore], TriBar II and the Restatement will reinforce one another in describing customary practice in giving legal opinions."51 Specifically, Section 95 of the Restatement (Third) is dedicated to legal opinion issues.52 It should be especially noted that the Reporters of Restatement (Third) provided "that custom and practice permit abbreviated opinions that do not set forth all the assumptions and limitations on which they are based or the scope of the diligence that the lawyer has performed to render them."53 Also, in suggesting where judges could seek guidance in trying to interpret the meanings inherent in a third-party legal opinion, "the Reporters in a note characterized the ABA Legal Opinion Princi-

46. Id. at 592-93.
47. Id.
49. Field, 609 PLI/LIT at 117.
50. Id.
51. Id.
53. Glazer, BUS. L. TODAY, NOV.-DEC. 1999 at 34.
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ple and the TriBar Committee’s Third-Party ‘Closing’ Opinions as the two ‘leading’ bar-association reports.”

Finally, in 1998, the ABA Business Law Section Standing Committee on Legal Opinions also admitted that “the Accord has not gained the national acceptance the Committee had hoped.” As a result, the Committee approved and released a document known as the Legal Opinion Principles (the “Principles”) in order “to provide further guidance regarding the application of customary practice to third-party ‘closing’ opinions that do not adopt the Accord.” It was hoped that “these Principles will prove useful both to lawyers and their clients and to courts that from time to time are called upon to address legal opinion issues.” The Principles contain fifteen simple statements addressing categories of third-party legal opinions described as (i) general, (ii) law, (iii) facts and (iv) date. Donald W. Glazer, author of It's Time to Streamline Opinion Letters: The Chair of the BLS Committee Speaks Out, determined that with such simplicity, the Principles “serve as a bridge between the Restatement’s description of applicable legal standards and the extended discussion of legal-opinion practice in the various bar-association reports.” In further discussion of the Principles’ simplicity, Glazer stated that “[i]n less than two pages, the Principles provide in simple and straightforward language guidance regarding the application of selected aspects of custom and practice (the Principles use the term ‘customary practice’) to third-party closing opinions that do not adopt the Accord.” Under the Principles, “many limitations, qualifications and assumptions are understood to be applicable even when not stated expressly.” That being said, Glazer commented that “[t]he Principles are premised on the concept that customary practice, both as to law and fact, reflects the realities of what can reasonably be expected under the circumstances in which third-party opinions normally are rendered.”

Collectively, these three 1998 reports “provide a comprehensive and internally consistent description of legal opinion practice as it exists today. As such, they constitute the best sources currently available on legal-opinion issues.” To paraphrase Glazer, the three 1998

54. Id. at 34-36.
56. Committee on Legal Opinions, 53 Bus. Law. at 831.
57. Id.
58. Id. at 832-33.
60. Id.
61. Id.
62. Id.
63. Id. at 34.
reports represent a moment in time for third-party legal opinion practice when the stars seemed to have come into alignment, thereby indicating "a new age dawning."64 In describing the three 1998 reports, Glazer asserts that together they

create a unique opportunity for modifying traditional legal opinion practice without making the wholesale changes required by the Accord. Historically, lawyers have been concerned about the paucity of case law and the resulting uncertainty in the standards that judges might apply to legal opinions. The Restatement should dispel that concern, making clear that the rendering of a legal opinion is to be judged by customary standards of the profession. Those lawyers who previously have felt compelled to try to spell everything out in their opinions (recognizing all too well the futility of that task) now have a basis for relying instead on customary practice as described in published sources, such as the Legal Opinion Principles and [TriBar II].65

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Out of the pre-Accord "chaos" and subsequent failure of the Accord has sprung the three 1998 reports described above. If the customary practice approach to legal opinions will ultimately be successful, it will require that lawyers accept it as the proper approach to deal with this difficult area of practicing law. We believe that it is the proper approach for our firm and attorneys in general. We also believe there will develop a fundamental consensus that third-party legal opinions are and should be guided by what has generally been referred to as "customary practice." As noted later in this article, customary practice legal opinions are certainly not so well defined as to be problem free; rather, there are still gray areas with which lawyers must contend. However, we believe that customary practice legal opinions provide broad advantages over Accord opinions or opinions which adopt the Accord only in part. They also are clearly preferable to the accepted state of chaos and highly qualified opinions which existed prior to the Accord. Because of the content contained in those three 1998 reports and the persuasiveness of Donald W. Glazer in his article advocating the streamlining of legal opinions, our firm has decided to adopt a new "customary practice" form of legal opinion as further described below.

When our firm's legal opinion committee began to examine whether to adopt a new customary practice format for legal opinions

64. Id. at 34, 37.
65. Id. at 37.
rather than continuing to rely upon the Accord form of legal opinions, it thoroughly reviewed the Principles, the Restatement (Third), the TriBar II Report, Donald W. Glazer's article and several other articles or form books which address third-party legal opinions. After reviewing these materials, the committee developed a “Comparison Chart” to show the differences between a typical Accord opinion and the assumptions inherent in a customary practice opinion.\(^6\) By developing the Comparison Chart, the committee was able to itemize and evaluate the language we traditionally used when drafting an Accord opinion and compare it to the assumptions which would automatically underlie any customary practice legal opinion. For example, in a typical Accord opinion, the committee would reference Sections 12 and 13 of the Accord to carve out the bankruptcy and equitable principles exceptions from its opinion, whereas these exceptions are automatically presumed when giving a customary practice opinion.\(^7\) On the other hand, the Comparison Chart also shows that some language typically used in the Accord opinions may still need to be used in a customary practice opinion,\(^8\) depending on the type of opinions being provided and other relevant considerations.

After evaluating the items which could be assumed in a customary practice legal opinion, our legal opinion committee then examined the limitations, qualifications and exceptions historically used by the firm when drafting its Accord form of opinion to determine whether or not such limitations, qualifications and exceptions would continue to be needed when giving a customary practice legal opinion.\(^9\) In reviewing the “Limitations, Qualifications and Exceptions Chart” developed by our committee, you will notice that a customary practice legal opinion may still need to contain any number of “carve-outs” in order to ensure a meeting of the minds between the opinion giver and the opinion recipient. Perhaps the easiest example of this is shown with the topic of security interests. Specifically, our firm (like most others) does not believe it is appropriate to give (or to ask for) an opinion on the priority of a secured party’s security interest in collateral which is the subject of the loan documents which underlie the legal opinion. Thus, any opinion on security interests must be carefully drafted to avoid any implication that a priority opinion is being given, or an exception from that opinion must be stated.

Based on the information contained in the Comparison Chart and the Limitations, Qualifications and Exceptions Chart, our firm then

\(^{6}\) See Appendix I.
\(^{7}\) See Appendix I and the topic “Bankruptcy and Equitable Principles.”
\(^{8}\) See Appendix I and the topic “Law.”
\(^{9}\) See Appendix II.
developed a template for what has become our customary practice form of third-party legal opinion.\textsuperscript{70} As you can see (see Appendix III), our form is fairly consistent with the “Illustrative Opinion Letter” formats provided in the TriBar II Report.\textsuperscript{71} Generally speaking, the customary practice legal opinion format contains only the following provisions: (i) introductory paragraph to define the parties and the reason for the opinion, (ii) a reference to the documents and/or review performed by the attorney, (iii) the actual opinion(s), (iv) a statement indicating which laws were considered when giving the opinion, and (v) statements of any limitations, qualifications, exceptions or assumptions as necessary (if any) for the specific opinions being given. Thus, a typical customary practice third-party legal opinion can now be written in a few pages whereas our previous Accord-style legal opinions generally required many more pages, plus several more pages of exhibits for purposes of incorporating sections of the Accord.

One of the items our firm considered when developing a template for our customary practice form of third-party legal opinions was the issue of whether or not we needed to make any reference to the fact that the opinion should be interpreted through the lens of what is assumed to be “customary practice” as described above. In debating this issue, we considered whether to include a reference such as this: “For purposes of this opinion, we are relying upon ‘customary practice’ as described in: (i) Third Party ‘Closing’ Opinions, A Report of the TriBar Opinion Committee (1998) (‘TriBar II’); (ii) the American Law Institute’s Restatement (Third) of the Law Governing Lawyers (1998); and (iii) Legal Opinion Principles (1998) drafted by the Committee on Legal Opinions of the ABA Business Law Section.” By including such a statement, we thought that any dispute which may arise over one of our opinions would at least have a reference to direct a judge or arbitrator with regard to what is implied in a customary practice form of a third-party legal opinion. This kind of statement would have been consistent with our references to the Accord in our prior form of legal opinions. However, our firm ultimately decided that no reference was

\textsuperscript{70} See Appendix III.

\textsuperscript{71} TriBar Opinion Committee, 53 Bus. Law. at 667-74. One change you will note in our form is that we did not adopt the language set forth in the Illustrative Opinion Letter of TriBar II with regard to bankruptcy, insolvency and other similar laws. Specifically, some of the Illustrative Opinion Letters of the TriBar II Report state: “Our opinions above are subject to bankruptcy, insolvency and other similar laws affecting the rights and remedies of creditors generally and general principles of equity.” Id. at 668, 672. Section 3.3 of the TriBar II Report states that although bankruptcy and insolvency are “uniformly accepted qualifications,” they “are understood to be applicable to the remedies opinion even if they are not expressly stated.” In considering TriBar’s guidance that the bankruptcy and equitable remedies limitations are “understood . . . even if they are not expressly stated,” we did not understand why they would then include such language in their Illustrative Opinion Letter forms.
necessary and, in reaching this conclusion, our rationale was twofold. First, to include such a reference would potentially open new doors for negotiation when the opinion recipient begins to question what is contained in all of those reports, which specific sections of those reports we're relying upon, etc. Such a scenario would put us right back where we were with our Accord-style opinions, which we determined was unacceptable. Secondly, we believe that because case law interpreting legal opinions is very limited, a judge or arbitrator would almost certainly accept guidance from the Restatement (Third). In that event, the Restatement (Third) will direct the judge or arbitrator to look toward the TriBar II Report and the Principles for guidance. Thus, our committee considered, but rejected, making any specific reference to “customary practice” in our legal opinions and we believe this is consistent with how a customary practice form of legal opinion is meant to be written.

Overall, there is no clearly defined and concise treatise or accord which can be cited to ascertain what is meant by “customary practice” legal opinions. However, the three 1998 reports cited above collectively provide what attorneys can assume to be “customary practice” when they find themselves in the role of an opinion giver or an opinion recipient. Based on our firm's research as set forth in Appendix I and Appendix II, we believe that customary practice is sufficiently defined to adopt a much more streamlined form of legal opinion rather than a bulkier Accord-style opinion replete with limitations, qualifications, exceptions, assumptions, etc. However, in spite of any comfort we have in providing this new form of customary practice legal opinion, there are certainly some continuing dilemmas attorneys must address each time they give an opinion.

CONTINUING LEGAL OPINION DILEMMAS

Ongoing dilemmas in third-party legal opinions will continue even after, or maybe in some cases because of, the decision to follow the customary practice approach. This is best illustrated on a macro level by looking at the major philosophical difference between the Accord and customary practice approaches. The Accord was a voluntary approach that was almost statutory in its detail and framework. By contrast, customary practice relies on the fundamental concept that all lawyers and parties to a transaction know or understand certain things with regard to (or as a backdrop to) third-party legal opinions. When viewed at this macro level, the change from the Accord, on the one hand, to customary practice, on the other, is rather revolutionary.

Even for those attorneys who never used the Accord, they most likely have relied on a substantial number of assumptions, qualifications, limitations and exceptions in their opinions. The departure from that approach to the customary practice approach is equally great.

However, once an attorney has chosen the customary practice approach, the true difficulty is at the more micro level. As our Comparison Chart (Appendix I) and Limitations, Qualifications and Exceptions Chart (Appendix II) illustrate, there will remain difficult questions to be resolved even under the customary practice approach. If anything, these judgments will be more difficult because customary practice takes the attorney into subjective areas of “custom” and “practice” and away from the objective security of an Accord-style or otherwise heavily qualified opinion.

On a positive note, customary practice should focus the attorneys and parties more intently on each opinion considered (and ultimately given) to determine if any further explanation, as opposed to qualification, is needed. This was also the intent of the Accord, but that experiment had the opposite effect, as evidenced by negotiations which often took place between an opinion giver and opinion recipient with regard to the assumptions, qualifications, limitations and exceptions that were set forth in an opinion rather than the opinions themselves. Customary practice will focus the discussion on the actual opinions and what may be necessary to clarify or explain the opinions (which may be accomplished by qualification, etc., but only if necessary to make sure the recipient understands what is, and what is not, being opined), rather than on the assumptions, qualifications, limitations and exceptions, which is often the case where customary practice is not used. In other words, it will be much more likely that the parties will focus on opinions if they don't have to read pages and pages of assumptions, qualifications, limitations and exceptions to get to the opinions.

Even though it is impossible in an article such as this to speculate as to all the issues which may arise as customary practice evolves, we thought some examples may be helpful to illustrate some unique considerations. As noted above, customary practice is intended to include certain assumptions as to fact and law. In our view, some of the most difficult questions which will remain deal with assumptions relating to law. For purposes of illustration, assume that the following two examples contain these facts: Company A (“Borrower”) is going to borrow a substantial amount of money from Bank B (“Lender”). Borrower is represented by Opinion Giver, and Lender is represented by its outside counsel. The transactional documents being signed by and between Borrower and Bank consist of a Credit Agreement, Promissory
Note, Deed of Trust and a UCC Financing Statement (collectively, the "Loan Documents").

Example 1: Borrower, Bank, Opinion Giver and Bank's counsel are all located in the State of Nebraska. In giving a customary practice legal opinion, we believe that Opinion Giver can assume that the Bank and its counsel are familiar with the laws of the State of Nebraska and, as such, the Opinion Giver can assume (as customary practice) that the Bank and its counsel are aware that Nebraska has some specific laws that may govern certain provisions of the Loan Documents such as (i) that attorney fees are most likely not recoverable in the State of Nebraska, (ii) that credit agreements must be in writing in the State of Nebraska in order to be enforceable, except to the extent that an oral agreement has been effected or a course of dealing has occurred modifying such written provisions, and (iii) that collection of deficiency judgments require strict adherence to certain procedural requirements.

Example 2: Borrower, Bank and Opinion Giver are all located in the State of Nebraska. Bank is a national association whose legal counsel is located and licensed to practice only in the State of Minnesota. Because legal counsel to Bank may not be familiar with the laws of the State of Nebraska, Opinion Giver may consider the need to specifically state qualifications to its legal opinion with regard to the laws described in (i)-(iii) in Example 1. In other words, it would be customary practice for Nebraska attorneys to understand these laws and assume them to be true in a loan transaction as described in Example 1; however, can we assume that the Bank's Minnesota attorney necessarily understands such laws as "customary practice" in the State of Nebraska? It could be argued that it is fair to assume that the Bank and its counsel should be deemed to understand Nebraska law because they have chosen to handle the transaction without Nebraska counsel. On the other hand, it may be more fair to assume only that they know laws of general applicability (i.e., federal bankruptcy laws) as opposed to unique Nebraska laws.

Based on the two examples set forth above, it is easy to see that what is "customary" is and will be a fluid concept depending upon the opinions being given and the parties involved. The TriBar II Report suggests that as long as it is reasonably arguable for the opinion giver to believe that something about the law or the transaction is customary (i.e., known, understood, assumed) when giving a legal opinion, then the opinion giver has no need to specifically address such customary items. Said another way, the opinion giver should assume that if he or she could not reasonably argue that the opinion recipient would know (or should know) of the custom or law in the locale the opinion is
being given, then the opinion giver should specifically explain such item(s) by a qualification, limitation, exception or otherwise.

Unfortunately, there are no hard and fast rules as to what an opinion giver and an opinion recipient should understand as being “customary practice” on any given transaction; however, TriBar II seems to suggest that an attorney can be guided by common sense in thinking through what an opinion recipient could be deemed to understand when reading the opinion giver’s opinion. A good rule of thumb would be to ask yourself this question: “Are there any unique laws or aspects to this transaction, relating to a particular opinion being given, that I think it would be inappropriate to assume that I know if I were the opinion recipient or the recipient’s counsel?” In Example 2 above, we believe a Nebraska attorney may want to address certain aspects of Nebraska law to an out-of-state attorney because, if the roles were reversed, we would probably want to be alerted to similar laws if we represented a Nebraska lender and the borrower resided in Minnesota.

Another good rule of thumb when considering whether or not certain limitations, qualifications or exceptions may be necessary in a customary practice form of a third-party legal opinion would be to ask yourself this question: “Does the limitation, qualification or exception go to the fundamental element of the opinion being given?” By evaluating potential limitations, qualifications and exceptions in this manner, we believe the opinion giver will ultimately choose to decrease the number of such limitations, qualifications or exceptions and instead provide a more streamlined opinion. The reason for our belief is grounded in the Limitations, Qualifications and Exceptions Chart because if a person reviews each opinion while keeping in mind each topic listed in the Chart, we believe very few of the topics will be applicable to any given opinion (i.e., the exception does not go to the fundamental element of the opinion requested).

This entire discussion must also be viewed with the recognition that current legal practice is often “multi-jurisdictional.” Increasingly, attorneys are involved with clients and transactions in multiple states and sometimes in foreign countries. This article is not intended to and is not capable of addressing all issues which may arise because of this new legal certainty, such as ethics, licensure, etc. The truth remains, however, that it is becoming more prevalent for the facts underlying Example 2 above, rather than Example 1, to be the norm when giving a third-party legal opinion. That particular backdrop, maybe more than any other single issue, will be an immense challenge to the concept of customary practice legal opinions. In other words, whose “custom” and whose “practice” under those circumstances?
One thing for certain, however, is that the number of hypothetical scenarios which one could consider when trying to determine what "customary practice" means is unlimited, and therefore an opinion giver must always be vigilant in analyzing the specific facts and laws which are encompassed in the transaction for which the third-party opinion is being given. In our firm, we intend to go through the formal exercise of reviewing the Limitations, Qualifications and Exceptions Chart each time we consider an opinion, just to ensure that we analyze a number of issues which may be relevant to the opinion under consideration when viewed in the context of the particular transaction documents. Undoubtedly, we will continue to expand the Chart as unique circumstances are encountered in future opinions. By doing so, we hope to always analyze opinions with the broadest base of necessary (or potentially important) considerations which get to the core of each opinion given.

CONCLUSION: ADOPTING CUSTOMARY PRACTICE

Based on the foregoing discussion and the remaining uncertainties, one may question why our law firm would choose to adopt customary practice as its new standard form of legal opinion. As noted, the decision process was not easy and it took our firm's legal opinion committee months to complete its analysis and to reach the conclusion that the customary practice approach was the best one for our firm. Although it would be impossible to summarize all of the matters considered, there were several fundamental considerations which drove our firm's decision. First, the Accord approach to opinions was never widely accepted. Accordingly, our continued use of the Accord would either need to be modified or would be a continuing struggle. Second, the other apparent alternative would be to rely on significant assumptions, limitations, qualifications and exceptions in all of our opinions. Our firm decided that this was simply a return to the "chaos" that had existed with legal opinions prior to the Accord. Specifically, we concluded that no listing of assumptions, qualifications, limitations and exceptions would ever be satisfactory or complete, and would fundamentally lead to continued growth of the numbers of those items in our opinions, thereby resulting in increased complexity in our opinions. This would in turn lead to an escalation of disputes over opinions, and ultimately a complete loss of efficiency in completing

73. See Appendix IV. The Legal Opinion Committee Checklist/Report is used by our committee each time we issue a third-party legal opinion to ensure that we are consistent in our reviews prior to giving an opinion. The Checklist/Report is updated to include new items each time we encounter a unique situation which we may want to add to our Checklist/Report of due diligence items to review.
transactions. The ultimate losers in the future would have been our clients, which we obviously wanted to avoid. Finally, because many transactions are multi-jurisdictional, we believed it was necessary to adopt the “state of the art” opinion practice to keep us current with national trends.

In addition to the above referenced fundamental considerations which guided our decision, we also believe that, conceptually, customary practice is the proper approach. It is founded on sound principles which are inherent in every aspect of a lawyer’s practice. Each attorney spends his or her day dealing with projects for which there is an assumption that the attorney on the other side of the matter has a certain set of knowledge and understanding. This is an entirely fair assumption considering the ethical constraints with which we all must live; specifically, that we should be competent to perform legal services in any matter we accept from a client. Customary practice legal opinions are no different. We have a right to assume that all lawyers who are involved in sophisticated transactions have a sophisticated level of knowledge and understanding.74

The fundamental dilemma that all attorneys must face before adopting customary practice is whether they can live with the concepts (i.e., principles) that form the basis of customary practice. Any attorney or firm adopting this approach must be willing to give up the security blanket of the significantly qualified opinion, because customary practice is largely an all or nothing approach. Our firm strongly believes that you cannot go part way to customary practice. Once you begin relying on “custom” and “practice,” the continued inclusion or expansion of broad-based or generic (rather than specific and targeted) assumptions, qualifications, limitations and exceptions will put the opinion giver at more, rather than less, risk.

Only time will tell whether our decision was the right one for our firm or would be the right one for any other lawyers. Only with time will it become obvious if the relevant parties, primarily judges and arbitrators, will accept and enforce the concepts and principles which underlie the customary practice approach. Accordingly, our choice is not without risk; however, we believe it is based on sound principles and is the proper decision for our practice and our clients.

74. Both the ABA Model Rules and the ABA Model Code require that an attorney be “competent” prior to taking on any work for a client.
**APPENDIX I**
**COMPARISON CHART**

<table>
<thead>
<tr>
<th>Topic</th>
<th>Koley Jessen's Typical Accord Opinion Language</th>
<th>&quot;Customary Practice&quot; Equivalent/Assumptions</th>
</tr>
</thead>
<tbody>
<tr>
<td>Assumptions</td>
<td>We have assumed the genuineness of all signatures, the legal competence and capacity of all natural persons, the</td>
<td>Section 2.3 of the TriBar II Report states that these items are &quot;customarily assumed as a matter of course.&quot;</td>
</tr>
<tr>
<td></td>
<td>authenticity of all documents submitted to us as originals, the conformity to original documents of all copies</td>
<td>Principle III.D also supports this.</td>
</tr>
<tr>
<td></td>
<td>submitted to us, and the authenticity of the originals of such copies.</td>
<td></td>
</tr>
<tr>
<td></td>
<td>We have assumed the valid authorization, execution, and delivery of the</td>
<td>Section 2.3 of the TriBar II Report states that &quot;... in giving a remedies opinion, the opinion preparers will</td>
</tr>
<tr>
<td></td>
<td>Opinion Documents by all parties other than Borrower and that all parties other than Borrower have been duly</td>
<td>usually assume that the agreement is</td>
</tr>
<tr>
<td></td>
<td>organized and are validly existing and in good standing under their respective jurisdictions of incorporation</td>
<td>binding on the other parties to it. As a matter of customary practice, assumptions of general application need</td>
</tr>
<tr>
<td></td>
<td>or organization. We have assumed that all parties other than Borrower have all requisite corporate or other</td>
<td>not be stated in opinion letters.&quot; Principle III.D also supports this.</td>
</tr>
<tr>
<td></td>
<td>organizational power to perform their respective obligations and that each Opinion Document is a valid and</td>
<td></td>
</tr>
<tr>
<td></td>
<td>binding obligation of each such other party to each Opinion Document.</td>
<td></td>
</tr>
<tr>
<td>Bankruptcy and</td>
<td>Each of the &quot;Bankruptcy and Insolvency Exception,&quot; the &quot;Equitable Principles Exception&quot; and the &quot;Other Common</td>
<td>In accordance with Section 3.3 of the TriBar II Report: &quot;Two uniformly accepted qualifications to the remedies</td>
</tr>
<tr>
<td>Equitable Principles</td>
<td>Qualifications,&quot; as those terms are set forth and defined in §§ 12, 13 and 14, respectively, of the Legal</td>
<td>opinion are the bankruptcy exception and the equitable principles limitation. When stated, they often follow</td>
</tr>
<tr>
<td></td>
<td>Opinion Accord of the Business Law Section of the American Bar Association (1991) (the &quot;Accord&quot;), which sections</td>
<td>immediately after the affirmative statement of the remedies opinion and are typically phrased substantially as</td>
</tr>
<tr>
<td></td>
<td>are attached hereto as Schedule &quot;I&quot; are hereby incorporated herein as though fully set forth at length. Our</td>
<td>follows: &quot;. . . except as may be limited by bankruptcy, insolvency or other similar laws affecting the rights</td>
</tr>
<tr>
<td></td>
<td>opinion is governed by and shall be interpreted in accordance with the Accord solely for the purpose of</td>
<td>and remedies of creditors generally and general principles of equity.</td>
</tr>
<tr>
<td></td>
<td>incorporating the qualifications, exceptions and limitations to which reference is made above, but not</td>
<td>. . . [T]hese qualifications are sometimes stated as being generally applicable to all opinions. . . . These</td>
</tr>
<tr>
<td>Basis of Opinion</td>
<td>otherwise.</td>
<td>qualifications are understood to be applicable to the remedies opinion even if they are not expressly stated.</td>
</tr>
<tr>
<td></td>
<td></td>
<td>NOTE: A specific qualification or exception may need to be given with regard to state-specific bankruptcy</td>
</tr>
<tr>
<td></td>
<td></td>
<td>laws depending upon the location of the parties.</td>
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</tbody>
</table>

A statement to the effect of: "For purposes of this Opinion, we have reviewed such documents and made such other investigation as we have deemed appropriate."

AND/OR

Our review included, without limitation, the following documents (the "Opinion Documents"): 
Section 1.5 of the TriBar II Report states that "a mere listing in an opinion letter of documents examined is not sufficient to give notice to the recipient that the opinion giver reviewed only the list of documents (rather than the documents required by customary practice)." Thus, if we want to limit our opinions as relying on only certain documents, we would need to specifically state that our opinion is based entirely on such reliance, otherwise it is assumed that we have done other due diligence in accordance with customary practice.

Section 2.5.1 of the TriBar II Report states: "In establishing the factual bases for their opinions, opinion preparers customarily rely on officers' certificates. Many lawyers mention reliance on such certificates in the opinion letter, often using language such as that set forth in the illustrative Opinion Letters. Because nearly every opinion letter relies on certificates, that reliance should be understood, whether or not stated." Principle III.C also supports this.

Also of relevance to these types of assumptions is Section 2.6 of the TriBar II Report which states, in part: "[O]pinion givers sometimes include in their opinion letters a statement along the following lines: As to certain matters of fact material to the opinions expressed herein we have relied on representations made in the Agreement and certificates of public officials and officers of the Company [and others]. We have not independently established the facts so relied on." However, Section 2.6 goes on to state: "Any such statement should be regarded as included solely as a matter of emphasis since that reliance is customary without any express statement." Principles III.B and III.C also support this.

In accordance with Section 2.6.1 of the TriBar II Report: "Many lawyers include the phrase 'to our knowledge' (or some variant of it) in the 'no breach or default' and 'no litigation' opinions . . . and sometimes in other opinions as well. Those who include the phrase do so to make clear that the opinion should not be read literally but rather in the context of customary practice. By doing so, they do not limit the customary diligence lawyers undertake to support the opinion, and the meaning of the opinion is the same whether or not the phrase is used. The obligation of the opinion preparers to exercise customary diligence in establishing the factual basis for an opinion is implicit in every opinion letter. An opinion giver can limit or disclaim that obligation by including in the opinion letter an express statement describing the factual investigation it conducted on a particular point and making clear that no other investigation was conducted. Often, this is done simply by adding the phrase 'without investigation'. Inclusion of the phrase 'to our knowledge' in an opinion does not by itself (i) label the factual material involved as unreliable . . . (ii) a state a limitation on the investigation required by customary diligence." Principles III.A and III.B also support this.
We neither express nor imply any opinion as to laws other than current federal laws (the Delaware General Corporation Law) and the current laws of the State of Nebraska, and our opinion is in all respects subject to and may be limited by future legislation as well as future case law. We assume no responsibility to advise you of any matters after the date hereof. To the extent any opinion herein involves the analysis or application of the laws of any other State, we expressly assume there are no differences between that State's law and the internal law of the State of Nebraska.

In addition to our standard qualifications and exceptions to our opinions, we also explicitly state that "we express no opinion as to . . . (i.e., perfection, priority, enforceability of any provision in the Opinion Documents regarding the payment of attorneys' fees, etc.)."

This opinion constitutes a legal opinion and is not a guaranty or warranty as to any legal or factual matter or as to the performance of any obligation.

Certain of the remedial provisions of the Agreement may be further limited or rendered unenforceable by applicable law, but in our opinion such law does not make the remedies afforded by the Agreement inadequate for the practical realization of the principal benefits intended to be provided.

Currently we carve out certain remedies opinions as set forth throughout this chart.

In accordance with Section 1.9(a) of the TriBar II Report, we could state something to the effect of: "The opinions expressed herein are limited to the federal law of the United States (the Delaware General Corporation Law) and the law of the State of Nebraska." Principle II.A also supports this. Furthermore, Principle IV specifically states that the opinion "speaks as of its date" and the "opinion giver has no obligation to update an opinion letter for subsequent events or legal developments."

We will need to continue to specifically state the things about our opinion which are outside of "customary practice" in order to ensure that the recipient is not reading more into our opinion than is meant. See "Limitations, Qualifications and Exceptions Chart" for examples of language which we may continue to use in certain opinions. Principle I.C also supports this. Principal I.D encompasses this provision as customary in all legal opinions.

Section 3.4.1 of the TriBar II Report states: "Despite its inherent ambiguity, the 'practical realization' language quoted above has been encrusted with tradition and become an aspect of customary practice. The Committee believes that its continued use should be confined to its historical context of lease and secured financing transactions."

Some exceptions to remedies opinions are automatically assumed as set forth above; however, we will always need to consider what kind of opinion is required with regard to the specific type of transaction and then determine whether specific exceptions should be stated. See "Limitations, Qualifications and Exceptions Chart" for examples of language which we may continue to use in certain opinions.
APPENDIX II
LIMITATIONS, QUALIFICATIONS AND EXCEPTIONS CHART

In accordance with Section 1.9(i) of the TriBar II Report: "An exception is often phrased to indicate that no opinion is given as to a particular provision in the agreement or specific aspect of the matter covered, rather than to provide a negative opinion on that provision or aspect. An opinion is said to be 'qualified' if it contains an exception that is not customary in opinions of that type, thereby putting the opinion recipient on notice as to uncertainties and limitations. Thus, a remedies opinion that excludes coverage of an indemnification provision in a supply contract is a qualified opinion, but a remedies opinion containing a 'bankruptcy exception' (which is standard for remedies opinions) is not. . . . General unspecified 'public policy' exceptions are not used because they make the entire opinion unacceptably vague, requiring the opinion recipient to guess at the opinion giver's source of concern."

Thus, when giving legal opinions, the firm's Legal Opinion Committee must determine which exceptions the firm will need to continue incorporating in its legal opinions. In accordance with Section 1.9(i) of the TriBar II Report, the Committee must determine which exceptions are "not customary in opinions of that type" in order to determine when we need to explicitly state such exceptions in a "customary practice" legal opinion. This chart is meant to aid the Committee in determining when a specific exception must be listed in future legal opinions by allowing the Committee to see examples of exceptions which the Firm has used in the past when giving Accord-style legal opinions. Since the various legal opinion resources do not provide any clear-cut guidance on whether these exceptions are customarily assumed in legal opinions, the Committee must decide whether each needs to be specifically stated in future opinions or if it wants to assume that certain of these exceptions are customarily not assumed.

In accordance with Section 3.5.3 of the TriBar II Report: "The Committee believes that, as to the many areas where custom is unclear, the opinion recipient should request opinions on the matters it wishes to have covered. The Committee also believes that it would ordinarily be counterproductive for opinion givers to try to identify in opinion letters each area that is not covered. First, the list of exclusions will never be complete, yet any list may suggest that it is complete. Second, lists of exclusions in opinion letters are likely to provide a new area for negotiations that will impede rather than facilitate the opinion process." Thus, the firm's Legal Opinion Committee should be wary of listing too many exceptions in a "customary practice" legal opinion for fear of suggesting that the exceptions listed are the only ones relied upon - which would place us in the same position as our former Accord-style opinions.

As discussed by the Committee, "customary practice" will vary depending upon the location of the parties involved in the transaction. Thus, when all of the parties can be deemed as knowledgeable with regard to Nebraska law, many of the limitations, qualifications and exceptions listed can be assumed as known by all parties since it would be "customary" for all parties to be aware of those things. On the other hand, when all of the parties are not deemed to be familiar with Nebraska law, then the limitations, qualifications and exceptions need to be carefully scrutinized to determine whether or not they need to be addressed in the opinion. For purposes of aiding the committee, an "**" has been added at the beginning of each Topic name to indicate areas that the Committee agreed could be deemed "customary" when giving an opinion where all parties are located in Nebraska. In all other cases, a specific determination will need to be made depending upon the underlying transaction and transactional documents.
<table>
<thead>
<tr>
<th>Topic</th>
<th>Language Used in Past “Accord” Opinions Which is Not Assumed as Part of a “Customary Practice” Opinion</th>
<th>Times When This Language May Continue to be Necessary</th>
</tr>
</thead>
<tbody>
<tr>
<td>*Arbitration/Prepayment</td>
<td>The opinions in this letter do not include any opinion as to the enforceability of (i) any agreement to arbitrate disputes, and (ii) any agreement requiring additional payment upon prepayment.</td>
<td>(i) Anytime an arbitration provision is contained in the Opinion Documents. Section 3.6.1 of the TriBar II Report specifically states: “If opinion preparers are unable to conclude that the arbitration provision will be given effect in all respects, they should include in the opinion letter an exception to the remedies opinion.”</td>
</tr>
<tr>
<td>*Attorneys’ Fees</td>
<td>We neither express nor imply an opinion as to the enforceability of any provision in any Opinion Document that provides for the payment of attorneys’ fees by Borrowers.</td>
<td>In certain loan opinions.</td>
</tr>
<tr>
<td>*Deficiency</td>
<td>Limitations imposed by Nebraska law may preclude, limit or otherwise affect a secured creditor’s right to enforce collection of, or collect, any deficiency, including any deficiency remaining after a foreclosure sale or the conclusion of any action to enforce an obligation, if there has not been compliance with the procedural requirements of state law.</td>
<td>All opinions containing such provisions unless the Committee determines that this exception should be deemed as assumed customary in an opinion.</td>
</tr>
<tr>
<td>Fraudulent Transfer</td>
<td>We express no opinion as to the effect of any fraudulent transfer laws on any of the obligations of Borrower under any of the Opinion Documents</td>
<td>In certain loan opinions.</td>
</tr>
<tr>
<td>Miscellaneous</td>
<td>We express no opinion as to the enforceability of any particular provision of any of the Opinion Documents relating to waivers of defenses, rights to trial by jury, advance confessions of judgment, jurisdiction or venue, waivers of provisions which may not be waived under applicable law, choice of law, the grant of powers of attorney, exculpation clauses, indemnity clauses, clauses violating of public policy or to the extent they require indemnification for a party’s own negligence, clauses relating to releases or waivers of unmatured claims or rights, payment of attorneys fees incurred in litigation, interest on overdue interest, default rates of interest or late charges on overdue or defaulted obligations to the extent they would constitute a penalty, or waivers of other rights or benefits conferred by applicable law.</td>
<td>These items are generally encompassed in Section 14 of the Accord. These exceptions were not specifically addressed by the TriBar II Report as being assumed as customary (contra the bankruptcy and equitable principles exceptions, which were addressed). Thus, all or some of these may need to be listed in future opinions unless the Committee determines that these exceptions should be deemed “customary” in an opinion.</td>
</tr>
<tr>
<td>Other Agreements</td>
<td>Example: “We advise that the Shareholders' Agreement dated October 1, 2001 entered into by Company A, Inc. (the “Shareholders’ Agreement”) in connection with its investment in shares of preferred stock in Company B, Inc. (the “Company B Stock”) contains a prohibition against pledge of such shares unless all the parties consent. The pledge pursuant to the Security Agreement shall be subject to the terms of the Shareholders’ Agreement.”</td>
<td>As necessary.</td>
</tr>
</tbody>
</table>
Ownership
We have not made any investigation or examination of, nor do we express any opinion as to, title to or ownership of any property, real or personal.

We express no opinion with respect to Borrower’s ownership interest in or to the Collateral and we have assumed that Borrower has or will have sufficient rights in the Collateral to grant security interests in the Collateral.

We express no opinion with respect to Sublessee’s, Lessee’s or Lessor’s respective ownership interest in or to the collateral subject to the Deed of Trust and the Lease Agreement and we have assumed that Sublessee has or will have sufficient rights therein to grant a mortgage and security interest therein.

Practical Realization
Certain of the remedial provisions of the Agreement may be further limited or rendered unenforceable by applicable law, but in our opinion such law does not make the remedies afforded by the Agreement inadequate for the practical realization of the principal benefits intended to be provided.

*Qualification
We have assumed that [the other party] is duly qualified to conduct business in the State of Nebraska.

Securities Laws
We advise that the disposition by the Lenders of any Collateral that constitutes a “security” as defined in the Securities Act of 1933, as amended, and any applicable state securities laws (collectively, the “Securities Laws”) must be in compliance with the Securities Laws. We express no opinion as to whether any particular disposition would be in such compliance.

Security Interest
We neither express nor imply any opinion as to the creation, perfection, priority or continuation of any security interest in or lien against any property, real or personal.

Taxes
We express no opinion as to the federal or state income tax consequences relating to or arising out of the matters contemplated in the Transaction Documents.

*UCC Impact
Enforceability of the Opinion Documents may be limited or otherwise affected by limitations on the right of a creditor to exercise rights and remedies under loan documents for any defaults by the debtor under the Nebraska Uniform Commercial Code (“UCC”) or other applicable law.

*Writing Requirement
Under certain circumstances, the requirements that the provisions of the Opinion Documents may be modified or waived only in writing or only in a specific instance may be enforceable under the laws of the State of Nebraska or to the extent that an oral agreement has been effected or a course of dealing has occurred modifying such provisions. Additionally, all credit agreements must be in writing to be enforceable under Nebraska law pursuant to Neb. Rev. Stat. § 45-1,113 (Reissue 1998.)

In certain loan opinions or in certain circumstances when a security interest is granted.

In certain loan opinions or in certain circumstances when a security interest is granted.

In certain loan opinions or in certain circumstances when a security interest is granted.

In accordance with Section 3.4.1 of the TriBar II Report, this language should be used in opinions which cover leases or secured financing transactions. Additionally, this language could be used in lieu of listing a number of limitations, qualifications and exceptions if the committee determines that such a “practical realization” statement will still render the opinions given to be valid without itemizing specific limitations, qualifications and exceptions.

As necessary.

As necessary.

In certain loan opinions or in certain circumstances when a security interest is granted.

In certain loan opinions.

In certain loan opinions or in certain circumstances when a security interest is granted.

Loan opinions.
Ladies and Gentlemen:

We have acted as counsel to 

[corporation/LLC/Partnership/Other] ("[Purchaser or Borrower]"), in connection with the negotiation, execution and delivery of the __________________ Agreement, dated as of __________________, 20___ (the "Agreement"), by and among [Purchaser or Borrower], and __________________. This letter (the "Opinion") is furnished to you pursuant to Section ________ of the Agreement. Capitalized terms used in this Opinion and not otherwise defined shall have the meanings ascribed to such terms in the Agreement.

For purposes of this Opinion, we have reviewed such documents and made such other investigation as we have deemed appropriate. [Our review included, without limitation, the following documents (the "Opinion Documents"):

1. __________________________
2. __________________________

As to certain matters of fact material to the opinions expressed in this Opinion, we have relied on the representations made in the Agreement and certificates of public officials and officers of the Company [and others]. We have not independently established the facts so relied on.

Based upon the foregoing and subject to the other paragraphs of this Opinion, we express the following opinions:

1. __________________________
2. __________________________
3. __________________________
4. __________________________
The opinions expressed in this Opinion are based solely upon and limited to the federal law of the United States [,the Delaware General Corporation Law] and the law of the State of Nebraska.

[Insert limitations, qualifications, exceptions and assumptions as necessary.]

This Opinion is rendered solely to you in connection with the Agreement. You may not rely upon this Opinion for any other purpose. Without our prior written consent, this Opinion may not be furnished to or relied upon by any other person or entity for any purpose.

Sincerely,

KOLEY JESSEN P.C.
A Limited Liability Organization
APPENDIX IV
LEGAL OPINION COMMITTEE CHECKLIST/REPORT

1. Name of Client: ________________________________

2. File Number: ________________________________

3. Type of Opinion: ______________________________

4. Date Reviewed: ________________________________

5. Audit Letter File Reviewed (if necessary in giving “no litigation” opinion).
   □ Yes   □ No   □ N/A

6. Draft of Opinion Reviewed:
   □ Yes   □ No

7. Opinion Letter is on firm’s letterhead; not an individual lawyer’s letterhead:
   □ Yes   □ No

8. Opinion Letter is signed on behalf of the firm; not with an individual name:
   □ Yes   □ No

9. Opinion Committee met with requesting attorney to discuss opinion(s).
   □ Yes   □ No

10. Limitations, Qualifications and Exceptions Chart reviewed for determination of application to this Opinion:
    □ Yes   □ No

11. Opinion Approved:
    □ Yes   □ No

______________________________ Date ____________
Chairman, Legal Opinion Committee