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# Common Qualifications to a Remedies Opinion in U.S. Commercial Loan Transactions



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*As a condition to the closing of many types of business transactions, one or more of the parties may be required to provide written opinion letters of counsel for the benefit of other parties to the transaction. These opinions are often referred to as “third-party” opinions because the opinion giver renders them to a party or parties other than the opinion giver’s own client. These opinions may cover a range of issues, including, among others, the entity status and power of, the due authorization, execution and delivery of the transaction documents by, and the enforceability of those documents against, the opinion giver’s own client in the transaction. Oftentimes the discussions regarding the scope of these opinions and the extent to which they will be qualified are time-consuming, and the resulting costs, borne by the client whose counsel is asked to render the opinions, increase substantially as negotiations proceed. This article, focusing on third-party opinions rendered in the context of U.S. commercial loan*

*transactions, considers a number of qualifications that for various reasons, in the experience of the authors, opinion givers commonly include and opinion recipients and their counsel commonly accept. The authors believe that the identification of commonly used and accepted qualifications in the U.S. commercial loan market can help to streamline the opinion process in many transactions.*

## **INTRODUCTION**

Set forth below are qualifications that, in the authors' experience, are commonly taken by opinion givers, and also commonly accepted by banks and other institutional lenders, in third-party legal opinion letters addressing the enforceability of financing agreements in the U.S. domestic loan context.<sup>2</sup> In describing these qualifications, this article does not purport to reflect a statistical analysis of opinion practice or to analyze the need for or desirability of these qualifications under specific circumstances. Rather, it attempts to identify selected common qualifications, offer reasons for their being taken, and set forth common formulations for expressing them. The list of qualifications is neither exclusive nor suggestive of those that should be taken or accepted.<sup>3</sup>

Sometimes a qualification is included in a legal opinion to highlight a legal issue that could affect the enforceability of provisions of the covered agreement. Sometimes a qualification is necessary for an opinion to be correct; at other times, it clarifies how the opinion should be interpreted.<sup>4</sup>

In many cases, however, factors other than a perceived necessity for the qualification may account for the opinion giver's taking the qualification, such as: a decision that engaging in the requisite research to resolve a legal issue is not justified on a cost-benefit or other basis; the unwillingness of the lawyer to make a determination that he or she views as factual (for example, whether a waiver is conspicuous or knowing, or whether liquidated damages are reasonable); the fact that the qualification is among those listed in one or more bar or other association reports; personal preference of the opining lawyer or law firm opinion committee policy; or an unwillingness on the part of one or more parties to modify the transaction structure or documentation to eliminate the need for the qualification.

Furthermore, as transactions become more complex and close more quickly, time constraints often make it difficult for an opinion giver to complete the legal research—or even to undertake the legal analysis—needed to narrow or eliminate qualifications upon which the opinion giver commonly relies. Cost-benefit considerations are another important reason that

many of these qualifications have become common in the U.S. commercial loan context. In the process of preparing and negotiating legal opinions, opinion givers and recipients, to some extent, undertake a cost-benefit analysis to determine whether the cost of doing research, or undertaking careful legal analysis regarding a given set of legal issues, is justified by the benefit of receiving an opinion covering those issues.

Part of the explanation for the willingness on the part of recipients ...

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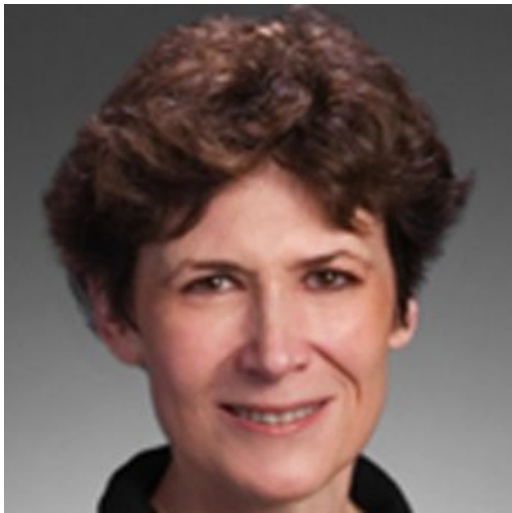
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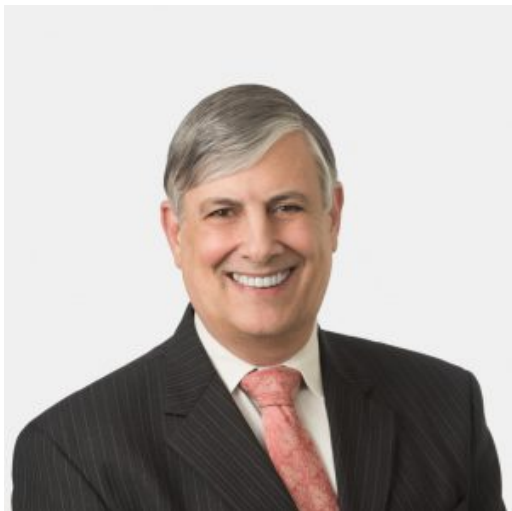
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