NEW MEXICO STATEMENT OF POLICY REGARDING LAWYERS' OPINION LETTERS IN MORTGAGE LOAN TRANSACTIONS

1. Preface

This 2003 New Mexico Statement of Policy Regarding Lawyers' Opinion Letters in Mortgage Loan Transactions as revised in 2008 to reflect amendments to the New Mexico Deed of Trust Act (this "Statement") is presented by the Real Property, Probate and Trust Law Section (the "Section") of the State Bar of New Mexico. It was prepared by the Section's Opinion Letters Task Force (the "Task Force") as a state-specific supplement to the *Legal Opinion Accord* (the "Accord") published in 1991 by the Section of Business Law of the American Bar Association and the *Report on Adaptation of the Legal Opinion Accord* (the "Report") published in 1994 by the Joint Drafting Committee of the Section of Real Property, Probate and Trust Law of the American Bar Association and the American College of Real Estate Lawyers ("ACREL"). This Statement and accompanying opinion letter reflect New Mexico law as of January 1, 2003, as revised in 2008 to reflect amendments to the New Mexico Deed of Trust Act, and do not take into account changes in New Mexico law thereafter.

Since 1985, Bar Associations in many states have published commentaries and guidelines on the evolving subject of opinion letters in mortgage loan transactions. These state-level products are a necessary adjunct to an underlying, nationwide effort to achieve the greatest possible degree of national uniformity, which has as its foundation "The Third-Party Legal Opinion Report of the Section of Business Law", 47 The Business Lawyer 167 (1991). That publication includes a Foreword, the Accord itself, Commentary and Guidelines. The Accord will be the focus of this Statement; however, because the Accord expressly excludes certain legal opinion issues respecting liens on real property (see ' 19(h) of the Accord), this Statement will consider the Accord as supplemented by the Report.

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Of the many State Bar opinion practice reports, one of the very best is the ***1995 Texas Supplement Regarding Lawyer's Opinion Letters in Mortgage Loan Transactions*** (the "Texas Supplement"), published by the State Bar of Texas Committee on Lawyers' Opinion Letters in Mortgage Loan Transactions. Much of this Statement is distilled or otherwise derived from the Texas Supplement, and the Task Force expresses gratitude to our colleagues in Texas for their excellent work.

The Task Force is pleased to contribute a New Mexico perspective on this subject. This Statement presents the consensus of the members of this Task Force. This Statement, although approved by the Section, has not been adopted or approved by the State Bar of New Mexico itself. **As emphasized in the Accord itself, this Statement does not replace careful, transaction-specific legal work as the basis for a third-party opinion.**

2. Recommendation: Adoption of the Accord and the Report

As supplemented by the Report, the Accord offers lawyers an opportunity to prepare an opinion letter for a mortgage loan transaction with a nationally uniform format, thus contributing in a significant way to efficiency and economy in the many mortgage loan transactions where lawyers' opinion letters are required. In addition, the Task Force believes that by incorporating the substance of the Accord and the Report, an Opinion Giver (the term used in the Accord for the opining lawyer) has a ready source for at least the basic elements of an opinion letter for a mortgage loan transaction which will be mutually acceptable in format to both the Opinion Giver and the Opinion Recipient (the term used in the Accord for the mortgagee). The Task Force, therefore, recommends that lawyers in New Mexico adopt and incorporate the substance of the Accord and the Report into their opinion letters in mortgage loan transactions. In addition, although the Foreword, Commentary, Illustrative Opinion Letter and Guidelines (the complete title of the final item being "Certain Guidelines for the Negotiation and Preparation of Third-Party

Legal Opinions") accompanying the Accord are not officially incorporated as part of the Accord itself, the Task Force recommends that lawyers in New Mexico review those accompanying materials. ***The Task Force incorporated in the Opinion all of the Accord and Report opinions, assumptions and qualifications we thought were appropriate, but the Opinion does not incorporate the Accord or Report themselves by reference as a result.***

3. Sample Opinion; Definitions; Incorporated Provisions

3.1. Sample Opinion

Attached as Appendix 1 to this Statement is a sample form opinion (the "Opinion"). The Texas Supplement included a long form opinion, analogous to the Opinion attached hereto, and a very brief short form opinion that incorporated by reference substantial portions of the long form opinion. The Task Force determined, despite the appeal of the brevity of the Texas short form opinion, that there is not any growing acceptance from lenders of short form opinions. As a result, adoption of a short form opinion would not provide any practical benefit to practitioners in New Mexico at this time.

3.2. Definitions

Capitalized terms used in the Opinion are defined in the Opinion. The Task Force has adopted certain defined terms and definitions which differ from those given in the Accord and Report, including the following:

"Borrower": the party identified as the "Borrower" in the opinion letter. This term will usually have the same meaning as "Client" as that term is used in the Accord and Report: "the party or parties to the Transaction (including predecessor entities where relevant) for which the Opinion Giver provides legal representation." However, the Task Force chose to use the term "Borrower" because at times an Opinion Giver represents Guarantors as well as the Borrower, or represents the Lender. Where the Opinion Giver represents Guarantors as well as the Borrower, it is helpful to

differentiate between them, because the Lender might appropriately request most, but not all, of the standard opinions for both the Borrower and the Guarantors.

"Deed of Trust": an identified document granting a lien on real property interests to secure identified obligations in connection with the mortgage loan transaction, and granting a Trustee a power of sale after default pursuant to the New Mexico Deed of Trust Act, NMSA 1978, ' ' 48-10-1 *et seq.*

"Mortgage": an identified document granting a lien on real property interests to secure identified obligations in connection with the mortgage loan transaction, and not purporting to grant a power of sale pursuant to the New Mexico Deed of Trust Act.

3.3. Incorporated Provisions

One goal of the Accord and the Report, and one of their greatest achievements, was the compilation of lists of standard legal assurances that Opinion Recipients normally expect and that Opinion Givers can normally provide, together with lists of standard assumptions, qualifications, limitations and exclusions normally required to protect Opinion Givers from unintended interpretations and uses of their opinions. These lists can be incorporated, by reference to the Accord and Report, in a mutually acceptable, concise standard opinion letter form. At least in theory, with such a form established in advance, the lawyers in a transaction should be able to avoid unnecessary and unproductive negotiations, saving time and money and freeing them to concentrate on other aspects of the transaction. The Opinion includes all of the provisions which the Task Force felt were appropriate to incorporate from the Accord and Report.

4. Recommendation of a Generic Qualification And Assurance

4.1. <u>General Recommendation</u>

The Accord and the Report recommend (and the Task Force agrees) that a so-called "Generic Qualification" should be added to opinion letters in mortgage loan transactions (i.e., any opinion involving real property Collateral).

The "Generic Qualification," as recommended in Paragraphs 11 and 11A of the Report, is as follows:

> "Certain provisions contained in the Transaction Documents may not be enforceable."

This statement is so broad that it leaves the reader to wonder whether the Opinion Giver is offering any enforceability opinion at all, and therefore, to the best of our knowledge, all published state and national reports agree that some type of Assurance must follow the Generic Qualification (see Report Paragraph 11A); however, the various reports have reached diverse conclusions as to the appropriate form of Assurance that is to be given.

4.2. <u>The Form of Assurance Recommended by This Statement</u>

The following form of Generic Qualification and Assurance is included in the Opinion:

> Certain remedies, waivers and other provisions of the Transaction Documents may not be enforceable; nevertheless, subject to the assumptions and qualifications expressed elsewhere in this Opinion Letter, such unenforceability will not render the Transaction Documents invalid as a whole or preclude: (a) the judicial enforcement of the obligation of Borrower [and Guarantor] to repay the principal, together with interest thereon (to the extent not deemed a penalty) as provided in the Note (subject to

> 48-10-17 in the event of non-judicial foreclosure, if applicable) and further subject to non-recourse provisions in the Transaction Documents, if applicable; (b) the acceleration of the obligation of Borrower [and Guarantor] to repay such principal, together with such interest, upon a material default by Borrower in the payment of such principal or interest or upon a material default in any other material provision of the Transaction Documents; (c) the foreclosure, in accordance with applicable Law, of the lien on and security interest in the Collateral created by the Transaction Documents upon maturity or upon the acceleration pursuant to (b) above; [and (d) the non-judicial foreclosure (*i.e.*, pursuant to the power of sale as specified in the Deed of Trust), in accordance with applicable Law and the Transaction Documents, of the lien on and security interest in the Collateral created by the Security Documents upon maturity or upon an acceleration described in subparagraph (b) above.] (Footnotes omitted).

This recommended form of Assurance has its basis in the form recommended by the American College of Real Estate Lawyers Statement of Policy (the "ACREL SOP"), which is discussed in Paragraph 11A of the Report. Those readers who compare this recommended form of Assurance with the ACREL SOP, however, will note the following changes:

(a) With regard to the first Assurance subparagraph (*i.e.*, the assurance that the Opinion Recipient can sue on the debt), the Report states: "In states where anti-deficiency laws, one-form-of-action rules and similar provisions limit enforcement solely to foreclosure on security, an exception to the ACREL SOP form clause [(a)] must be made." Report, Paragraph 11, page 596. NMSA 1978, ' 48-10-17 establishes a six (6) year period for recovery of a deficiency when a secured party elects to pursue non-judicial foreclosure through a power of sale in a deed of trust except that no deficiency may be recovered in cases where (a) recovery of a deficiency is prohibited by the terms of the deed of trust or (b) the deed of trust secures a residential loan made to a low-

income household. NMSA 1978, ' 48-10-17 (D), (E). Under § 48-10-17 (G)(2), a "residential loan" means a loan the primary purpose of which is the purchase or finance of a permanent dwelling located in New Mexico and which is primarily secured by a deed of trust encumbering the dwelling and related trust real estate; and under § 48-10-17 (G)(1), the term "low-income household" means a household in which the current annual income is at or below eighty percent of the area median income adjusted for family size as determined by the United States department of housing and urban development and calculated pursuant to the United States department of housing and urban development part 5 guidelines. Accordingly, where a deed of trust is employed, New Mexico opinions should include the exception for this statute in subparagraph (a).

(b) As discussed in Paragraph 11A of the Report in the subsection entitled "Broadening the ACREL SOP Form of Assurance," Report, Paragraph 11, pages 598-600, the ACREL SOP form of Assurance includes an assurance as to the acceleration of the debt, but only for a default in an installment payment. The Task Force has concluded that an assurance should also be given as to an acceleration of the debt for "a material default of any other material provision of the Transaction Documents [*i.e.*, other than an installment payment]." Accordingly, the form of Assurance recommended by this New Mexico Supplement includes the additional phrase in subsection (b). This seems to be the approach taken by the most recent American Bar Association work on the subject.

(c) As discussed in Paragraph 11A of the Report, in the subsection entitled "American College of Real Estate Lawyers Statement of Policy" (Report, Paragraph 11, page 596), the ACREL SOP form of Assurance assures that some form of foreclosure is available but does not guarantee any specific foreclosure remedy. As applied to New Mexico foreclosure remedies, then, the ACREL SOP form of Assurance would not include a specific assurance as to availability of a non-judicial foreclosure procedure under a power-of-sale provision in a Deed of Trust. In fact, the Report

expressly cautions in this regard as follows: "If the Opinion Recipient desires assurance that a specific form of foreclosure provided in a Loan Document is available, that specific assurance must be provided in addition to the assurances following the generic qualification." Report, Paragraph 11, page 596. Both mortgages and deeds of trust are employed in New Mexico, with the mortgage form being far more common. The Committee assumes that Opinion Recipients of an Opinion Letter involving a New Mexico deed of trust will wish to receive an assurance with regard to the non-judicial foreclosure remedy; therefore, subsections (c) and (d) of the form of Assurance recommended by this New Mexico Supplement include both judicial and non-judicial foreclosure. Subsection (d) should be deleted for transactions secured by a mortgage, but an Opinion Giver should generally be willing to give both of these assurances where a deed of trust is used, assuming the instrument complies with the requirements of applicable Law, including the strict requirements of the New Mexico Deed of Trust Act.

4.3. <u>Interpretations of the Recommended Assurance</u>

Some ambiguity remains as a result of the reference to "material provision" in subparagraph (b) of the recommended Assurance, but the term "material" is a term which is frequently used in legal practice (in contrast to the terms "practical realization" and "principal benefits", which are used in some other standard forms of Assurance); and this Task Force has concluded, as did the Joint Drafting Committee in the Report, that any uncertainty has been limited to an acceptable level by restricting the Opinion Giver's inquiry as to which provisions may be material to a determination of whether, after the breach of any such provision, the indebtedness could be accelerated. In other words, unlike the phrase "practical realization of benefits [or principal benefits]," it is clear that the portion of the Opinion in which the term "material" is used gives an assurance *only* as to the acceleration of the debt (and not, for example, as to the Borrower's purported waiver of its right to require a jury trial). In addition, to ameliorate the uncertainty further, this Statement adopts the Report interpretations of the recommended Assurance. Specifically, the Report lists assurances which should be deemed

included by implication in the recommended Assurance, and assurances which should not be deemed included. See Report Paragraph 11, page 597-599. This Task Force concurs with the Joint Drafting Committee of the Report that (subject to the "General Qualifications," express exclusions in the Accord, and any other qualifications which the Opinion Giver may include in the Opinion Letter), the recommended form of Assurance should be interpreted to provide assurance of the enforceability of various provisions which are often included in Transaction Documents, such as (1) the right to accelerate regardless of any reinstatement law; (2) the right to receive all of the payments provided for in the Transaction Documents, whether characterized as interest, participation interests, fees or otherwise; and (3) the ability to sue for a deficiency or to sue on the debt without foreclosing any lien.

Additionally, the Task Force notes that New Mexico law recognizes a landlord's interest in leases and rents as assets that can be conveyed separately from the landlord's title to the underlying property. See NMSA 1978, ' ' 47-1-1, 47-1-22. Leases and rents of real property are specifically excluded from the coverage of Article 9 of the UCC (NMSA 1978, ' 55-9-109(d)(11),) so they are dealt with as a hybrid species of "real personal property." *See Resolution Trust Corp. v. Binford*, 114 N.M. 560, 844 P.2d 810 (1992). The point at which a mortgagee/assignee is entitled to collect rents has not been uniformly determined among the jurisdictions addressing the issue. 1 G. Nelson & D. Whitman, *Real Estate Finance Law* ' 4.35, at 245 (3d ed. 1993). The New Mexico courts have not resolved this question. When leases and rents are specifically assigned or mortgaged to the lender in conjunction with a mortgage of the underlying leased property, the Task Force believes New Mexico courts would permit a separate, pre-foreclosure collection of rents in accordance with the terms of the assignment. See Restatement (Third) of the Law of Property: Mortgages, ' ' 4.1, 4.2 (1997); *see also* J. Forrester, "*A Uniform and More Rational Approach to Rents as Security for the Mortgage Loan*," 46 Rutgers L. Rev. 349 (Fall 1993). New Mexico law does not require a separate foreclosure on leases or rents appurtenant to the mortgagor's property; rather, upon

foreclosure they are deemed transferred together with the landlord's title to the leased property and rents are payable solely to the property transferee after notice to the tenant. *Fletcher v. Bryan,* 76 N.M. 221, 413 P.2d 885 (1966).

Finally, the recommended form of Assurance should be interpreted to provide assurance of the enforceability of a Lender's right to accelerate for a violation of a provision that restricts sale, leasing, encumbrance or other alienation of property interests, *e.g.*, a "due-on sale" provisions, subject to Qualification 11 in the Opinion.

Of course, these interpretations may not be appropriate in every case. As stated in the Report, "if the law of a particular state limits or restricts the specific assurances stated or implied in the opinion, the Opinion Giver should specifically mention such limitation or restriction in the Opinion Letter, as additional qualifications or exclusions for the transaction." Report, Paragraph 11, page 597.

As to assurances which should not be deemed included, this Task Force concurs with the Joint Drafting Committee of the Report that the recommended form of Assurance does *not* provide implied opinions as to many provisions which are often included in Transaction Documents such as those pertaining to the appointment of a receiver or the right to collect assigned leases or rents, other non-foreclosure remedies or procedures, prepayment fees, the rights or protections of a mortgagee in possession, or the ability to add the cost of cure of a debtor's default to the secured indebtedness. See the Report, Paragraph 11, pages 596 and following. Although not specifically stated in the Report, the Task Force believes that in New Mexico a waiver of jury trial should logically be added to the list of "other benefits" which are not included in the recommended form of Assurance. In these and all other cases where enforceability may be less certain, the Recipient must specifically request the Opinion Giver's opinion on enforceability (Report, Paragraph 11, page 596) and should expect such a request to require additional delay and expense, whether or not the requested opinion can ultimately be given. There is currently no New Mexico case law on many of the

issues raised by the ever-evolving language, devices and procedures employed by mortgage lenders. Therefore, a New Mexico Opinion Giver may deem it inappropriate to give an enforceability opinion on such issues, or may express a "reasoned" opinion, *i.e.*, one which is explicitly phrased as a review and analysis of the New Mexico and foreign-state law which the opinion giver believes would be analyzed by a New Mexico court attempting to resolve the issue; the conclusion of such a "reasoned" opinion is generally phrased as "in my opinion, it is more likely than not . . .". Such an opinion is, at best, an educated guess; but opinion givers approach these opinions with caution nonetheless because they are generally based on a broader spectrum of "Law" than that otherwise addressed by a typical mortgage loan opinion (*e.g.*, the Opinion), opening up new issues of the opinion-giver's competence and standard of care. *See* Article 6 of this Statement for examples of potential additional assurances and Article 10 of this Statement for a discussion of *First National Bank v. Diane*, 102 N.M. 548, 698 P.2d 5 (Ct. App. 1985) regarding a possible duty to warn of the consequences of being mistaken in an opinion on an untested legal theory.

5. Potential Additional Qualifications

The Accord, the Report and this Statement do not preclude the Opinion Giver from adding additional qualifications to those described above in this Statement. Although the Task Force believes that the attached Opinion includes all the qualifications typically necessary, certain others may be needed as discussed in Section 4.3 above. In addition, the Task Force added certain New Mexico-specific qualifications. *See* qualification 4(n) and 7 through 23 of the Opinion.

The Task Force considered and rejected the following New Mexico-specific qualification:

> The Deed of Trust Act, ' '48-10-1 *et. seq.* became effective in 1987. We are aware of no reported decision of any court

construing or interpreting any provisions of the Deed of Trust Act.

The Task Force reasoned that the lack of case law would be most meaningful in the context of an evaluation of the constitutionality of the Deed of Trust Act. The Accord provides that the constitutionality or validity of a relevant statute is not to be considered in issue unless a reported decision in the opining jurisdiction has specifically addressed but not resolved, or has established, its unconstitutionality or invalidity. Accord ' 4(1). No such decision has ever been reported (to our knowledge), so New Mexico Opinion Givers should feel free to assume the constitutionality of the Deed of Trust Act. In the absence of any issue of the Act's constitutionality, the Task Force concluded that no qualification on the lack of case law interpreting it was needed.

6. Potential Additional Assurances or Analysis

The Accord, the Report and this Statement do not preclude the Opinion Recipient from requesting assurances or analyses in addition to the assurances discussed above. Although the Task Force does not believe that any additional assurances should be necessary when the Opinion Recipient is represented by New Mexico counsel or is otherwise familiar with New Mexico law, and the Transaction Documents have been tailored to the requirements of New Mexico law, the Task Force recognizes that additional assurances may be appropriate if specific circumstances warrant them.

6.1. Potential Addition to Opinion Paragraph 3 of the Opinion Letter

As an example, the following additional opinion may be included in the Opinion Letter if the Opinion Recipient requires it and the Opinion Giver is willing and able to provide it. (By including only one example, the Task Force is not suggesting that an Opinion Recipient's request for other assurances would be inappropriate).

The signatures for the Borrower [and the Guarantor] on the Transaction Documents [and the Guaranty] [or specify particular documents] are all genuine, i.e., we are not relying upon Section 4(e) of the Accord and Assumption number 9 below with regard to these signatures for the Borrower [and the Guarantor].[1]

6.2. Potential Additional Opinions

It is common for lawyers to be asked to provide factually-based opinions on the property that is collateral for the mortgage loan, such as zoning, subdivision or environmental compliance. The Task Force, along with most commentators, believes it is inadvisable to opine on such matters. *See, e.g.*, R. Thompson, *Real Estate Opinion Letter Practice* ' 8.3 (1993), 1 M. John Sterba, *Drafting Legal Opinion Letters*, ' 5.17 (2d ed. 1992).

The Task Force also considers it inappropriate to opine that the loan documents contain "all remedies customary in New Mexico" or any similar assurance. The experience of the members of the Task Force is that the forms of documents utilized in New Mexico vary so widely that there is no generally accepted set of remedies in New Mexico.

7. Usury

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[1]This potential additional assurance is presented in light of ' 4(e) of the Accord (included as Assumption number 9 in the Opinion), which permits the Opinion Giver to assume, among other things, that all signatures on documents reviewed by the Opinion Giver are genuine. Because of an Opinion Giver's narrow expertise and limited role in most transactions, the Task Force believes the additional assurance set out above should only be requested and given when the Opinion Giver actually witnesses the signature of the specified documents by persons known to the Opinion Giver. In this regard the Task Force disagrees with certain other writers on the subject, who have taken the position that an Opinion Giver should not assume the genuineness of signatures of the Borrower or Guarantor.

Unlike many other states, New Mexico has no general usury law. Prior to its repeal in 1991, ' 56-8-11.1 provided that any rate of interest may be imposed provided that such rate is agreed to in writing by the parties. Since its repeal, ' 56-8-11.1 has not been replaced with any other general usury law. The Task Force is unaware of any common law usury. As a result, subject to narrow exceptions discussed below, there is no limitation on the maximum rate of interest imposed on mortgage loans by New Mexico law.

The New Mexico Mortgage Loan Company and Loan Broker Act (the "Loan Broker Act"), NMSA 1978, ' ' 58-21-1 *et seq.*, imposes certain registration requirements on persons engaging in residential mortgage lending business in New Mexico. Case law indicates that out-of state mortgage brokers are not subject to the Loan Broker Act if they have not engaged in significant New Mexico activities constituting "transacting business in this State." *V.P. Clarence Co. v. Colgate,* 115 N.M. 471, 853 P.2d 722 (1993). Also, ' 58-21-6 exempts from the Loan Broker Act any person doing business in New Mexico who has as one of its principal purposes the brokering, making or originating of loans secured by real estate mortgages and who does not place or sell more than 10% of such loans to persons other than "institutional investors." The Loan Broker Act defines "institutional investors" to include:

> a. banks, trust companies, savings and loan associations, credit unions, consumer finance companies, insurance companies and real estate investment trusts as defined in 26 U.S.C. ' 856;
>
> b. Federal National Mortgage Association, the Government National Mortgage Association, the Federal Home Loan Mortgage Corporation, the New Mexico Mortgage Finance Authority and any other entity which is an instrumentality of or sponsored by the federal government or the State of New Mexico,

and any successors to any of the foregoing or of the State of New Mexico; and

c. any other person who in the twelve months immediately preceding any such transaction has acquired real estate mortgage loans in an aggregate principal amount equal to at least $25,000,000.

This exemption, however, is not available to lenders who make certain high-interest loans made on a borrower's principal residence, *i.e.*, loans with an annual percentage rate computed in accordance with federal truth-in-lending laws exceeding twice the highest reported yield during the preceding four weeks from the date the loan disclosure statement is signed, as reported by the federal reserve system for the United States treasury securities calculated at thirty-year constant maturity. NMSA 1978, ' 58-21-6(H).

Any lender which is not exempt from the Loan Broker Act is limited in the interest rates and other charges that can be imposed on borrowers. Such a lender is prohibited from charging prepaid interest in the nature of points, and in charging brokers' fees in excess of 6% of the principal amount of the loan. NMSA 1978, ' ' 58-21-18(B) - 19(C).

Additionally, New Mexico statutes contain a provision regarding the interest rate that may be charged on an interim construction loan:

> In addition to the maximum interest or discount which a lender is permitted to charge by law the lender may charge, take, reserve or receive a premium or points in an amount up to but not exceeding three percent of the face amount of the loan on interim construction loans. . . . For purposes of this section, an interim construction loan means a loan secured by a first mortgage and used by the borrower primarily for financing the construction of buildings, structures or

improvements on or to the real property on which the first mortgage has been taken.

NMSA 1978, ' 56-8-9(D). This statute was enacted in 1957 when New Mexico had a maximum allowable rate of interest. At that time, ' 56-8-9(D) allowed an increase in the lender's permitted charges on interim construction loans. Since the usury limit was lifted, however, there has been no case law construing the continuing effect, if any, of ' 56-8-9(D). Nevertheless, arguments have been raised that it now has the effect of limiting points that may be charged on an interim construction loan. The Task Force believes that repeal of all general usury limitations in New Mexico and the phrase in ' 56-8-9(D) "in addition to the maximum interest . . . permitted . . . by law" may render the statute ineffective. In addition, ' 56-8-9(E) further provides that a lender may charge points or a premium on any loan secured by real property provided the points or premium together with the interest or discount charged do not exceed the maximum permitted by law. Since New Mexico no longer recognizes a maximum interest rate, ' 56-8-9(E) further supports the argument that ' 56-8-9(D) no longer is effective.

If the Loan were an "interim construction loan" within the meaning of ' 56-8-9(D), and the fees charged by the Lender in connection with the Loan were deemed a "premium or points" within ' 56-8-9(D) and exceed 3% of the face amount of a Loan, the Lender would be subject to the penalty and forfeiture provisions of the State statutes, including (I) a criminal misdemeanor penalty carrying a fine of not less than $25 nor more than $100, ' 56-8-14, and (ii) the civil penalty and forfeiture provisions of ' 56-8-13, providing (x) that the taking, receiving, reserving or charging of a rate of interest greater than allowed by applicable law, when knowingly done, is to be deemed a forfeiture of the entire amount of such interest which the evidence of debt carries with it, or which has been agreed to be paid thereon; and (y) that, in case the greater rate of interest has been paid, the person by whom it has been paid, or his legal

representatives, may recover back by civil action twice the amount of the interest thus paid from the person, corporation or association taking or receiving the same.

Finally, NMSA 1978, ' 30-43-3 provides that the extension of credit in excess of an annual rate of 45%, along with the reasonable belief by the borrower at the time of the loan that the creditor used, or had a reputation for using, extortionate means in collection, creates a prima facie evidence of the criminal act of loan sharking. Since this criminal statute is not implicated in loans at rates of 45% per year or less, which is well above any normal commercial financing rates, the New Mexico Loan Sharking Act should not be applicable to commercial mortgage lending.

8. Choice of Law

With a deep bow of gratitude to the State Bar of Texas Committee on Lawyers' Opinion Letters in Mortgage Loan Transactions, the Task Force reproduces the following substantial portion of the Texas Supplement's discussion on Choice of Law:

> *Acknowledging that the following summary should not be considered to be a substitute for the full text of Sections 10(b), (c) and (d) of the Accord (with subsections (b) and (c) having themselves been explained and qualified by Paragraphs 8 and 9 of the Report), the Committee sets out below a summary of such choice-of-law provisions in the Accord and the Report:*
>
> *(a) With regard to the Opinion Giver's opinion as to the existence and good standing of the Borrower (i.e., incorporated into the Remedies Opinion, as explained in [Section 3.3 (a) of this New Mexico Statement]), the laws of the Client's [jurisdiction of] organization are deemed to apply to such opinion [Accord, ' 10(c)]. For example, if the Client is a Delaware corporation, then the laws of the State of Delaware are deemed to be applicable to the implied opinion*

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that the Client is in existence and in good standing in the State of Delaware; accordingly, if the Opinion Giver is not licensed in the State of Delaware, he or she may wish to obtain a supporting opinion from a Delaware lawyer with regard to the Client's existence and good standing status in that State.

(b) With regard to the Opinion Giver's opinion as to the substantive *aspects of the Transaction Documents (i.e., not the choice-of-law provisions, if any, in such Transaction Documents), the law of the jurisdiction whose laws are being addressed by the Opinion Giver in the Opinion (normally being the laws of the state of the Opinion Giver) shall be deemed to govern the Transaction Documents [Accord ' 10(b) and Report ' 8]. For example, even if the Transaction Documents specify the laws of the State of New York as being applicable to the Transaction, if the Opinion Letter includes a Remedies Opinion without a specific reference to the laws of the State of New York, then as to that Remedies Opinion by the [New Mexico] Opinion Giver, the laws of the State of [New Mexico] are deemed to apply to the Remedies Opinion.*

(c) With regard to the choice-of-law provisions, if any, in the Transaction Documents, if and to the extent that the choice-of-law provisions designate the law of the jurisdiction being addressed by the Opinion Giver in the Opinion (which the Accord defines as the "Opining Jurisdiction"), the Opinion is deemed to include an opinion that such choice-of-law provisions will be given effect under the choice-of-law rules of the Opining Jurisdiction [Accord ' 10(d)(l)], except to the extent that the application of such choice-of-law rules would be "contrary to a fundamental public policy of the Law of an Other Jurisdiction" (defined below) [Report ' 9]. For example, if the Transaction Documents specify the laws of the State of [New Mexico] as being applicable to the Transaction, then the Remedies Opinion is deemed to

include an opinion that such choice-of-law provision will be given effect by a federal or state court in the State of [New Mexico] -- unless such court determines that its application of the choice-of-law provision would be contrary to a fundamental public policy of the laws of another state which had a significant relationship to the Transaction.

(d) If and to the extent that the choice-of-law provisions designate the law of a jurisdiction other than the Opining Jurisdiction (which the Accord defines as an "Other Jurisdiction"), the Opinion is not deemed to include an opinion as to what law governs the Transaction. For example, if the Transaction Documents specify the laws of the State of Colorado, then the [New Mexico] Opinion Giver is not deemed to be rendering any opinion on the validity of that choice-of-law provision (i.e., unless the Opinion Letter includes an express choice-of-law opinion).

. . .

The first point, pertaining to the law governing the Borrower itself, arises because the Remedies Opinion necessarily implies that a contract has been formed. Accord, Section 10 (a)(I). This then subsumes the conclusions that the Borrower exists, and that it has properly authorized and executed the transaction documents. New Mexico, like other states, defers to the law of the Borrower's jurisdiction of organization for these matters. *See, e.g.*, NMSA 1978, ' ' 53-8-64(A), 53-17-1 (foreign corporations), and 53-19-47 (foreign limited liability companies). Therefore, the Remedies Opinion addresses the law of the Borrower's jurisdiction of organization "as part of the law of the Opining Jurisdiction to the extent the law of the jurisdiction of organization governs the [Client's] organizational status, good standing and authorization of the Transaction Document and any other . . . similar requirements with respect to its execution" unless an assumption or reliance on another counsel's opinion is specifically stated. Although not explicitly stated in the Accord, the Task Force assumes this implication could be avoided by a specific disclaimer as well. It is most reassuring for the lender, as well as

most prudent for the opining lawyer, to have a separate opinion provided to the Lender on these issues from a lawyer licensed in the appropriate jurisdiction.

The remaining choice of law issue is the choice of substantive law to govern the validity and interpretation of the Transaction Documents. Of course, the New Mexico Uniform Commercial Code generally recognizes the enforceability of contractual choice of law provisions provided that the state whose law is chosen has some reasonable relationship with the transaction. NMSA 1978, ' 55-1-105(1). Such contractual choice of law provisions do not apply, however, to perfection, the effect of perfection or nonperfection and the priority of a security interest. NMSA 1978, ' ' 55-1-105(2), 55-9-301 through 55-9-307. The UCC itself would not be applicable to real estate transactions or general commercial agreements except insofar as they also involve negotiable instruments or Article 9 security interests.

Outside the UCC arena, New Mexico's case law on choice of substantive law in contract disputes is limited and somewhat confused. *Reagan v. McGee Drilling Corp.*, 123 N.M. 68, 933 P.2d 867 (Ct. App. 1997), discussed the traditional choice of law analysis, which was that contract validity issues are determined under the local law of the place of contracting. This has been applied as the law of New Mexico. *Satterwhite v. Stolz*, 79 N.M. 320, 321, 442 P.2d 810, 811 (Ct. App. 1968). However, the *Reagan* opinion also expressed a strong preference for the more modern approach of the Restatement (Second) of Conflict of Laws, and summarized it as follows: "the law to be applied may be chosen by the parties and otherwise is determined by an interest analysis. Restatement (Second) of Conflict of Laws, ' ' 186-188 (1971)." As the *Reagan* court stated, that more modern approach had never been adopted in New Mexico. *See also State Farm Mut. Auto. Ins. Co. v. Ballard,* 132 N.M. 696, 54 P.3d 537 (2002); *but see* dicta in *Burge v. Mid-Continent Casualty Co.,* 123 N.M. 1, 933 P.2d 210 (1996). Therefore, some New Mexico attorneys require that an additional document be signed in the state whose laws have been chosen to govern the loan documents

acknowledging that the signing of such document is the last act necessary to consummate the transaction. For loan transactions evidenced by documents containing contractual choices of the laws of multiple states, consider *SBKC Service Corp. v. 1111 Prospect Partners, L.P.,* 105 F.3d 578 (10th Cir. 1997) (construing Kansas and California law).

9. Standards For Assurances Regarding The Borrower

With regard to opinions in the Opinion Letter regarding no breaches or violations of another agreement (' 15 of the Accord), no violation of law (' 16 of the Accord) and legal proceedings (' 17 of the Accord), the Accord occasionally incorporates the term "Actual Knowledge," which is defined in ' 6-A of the Accord as follows: "the conscious awareness of facts or other information by the Primary Lawyer (defined in ' 6-B of the Accord) or the Primary Lawyer Group (also defined in ' 6-B of the Accord)." The concept of "Actual Knowledge", as well as other standards regarding these assurances regarding the Opinion Giver's client, are applied in ' ' 15-17 of the Accord, as supplemented by Paragraphs 14 and 15 of the Report, to limit the respective opinions described in those Sections/Paragraphs as follows:

9.1. <u>No Breaches or Violations (' 15)</u>

In determining whether the specific terms of, and performance of agreements in, the Transaction Documents would cause a breach of or default under an Other Agreement or violate the express terms of a Constituent Document or a Court Order, the Opinion Giver need only take into account information furnished to him or her by others (see Section 3 of the Accord) and "other facts of which the Opinion Giver has Actual Knowledge."

9.2. <u>No Violations of Law (' 16)</u>

In giving the opinion that the execution and delivery by the Borrower of, and performance by the Borrower of its *payment* obligations [the limitation to *payment* obligations is effected by

Paragraph 15 of the Report] in, the Transaction Documents neither is prohibited by, nor subjects the Borrower to a fine, penalty or other similar sanction, the Opinion Giver need only determine whether any such prohibition would occur under or any such fine, penalty or similar sanction would arise from a statute or regulation of the Opining Jurisdiction that a lawyer in the Opining Jurisdiction "exercising customary professional diligence" would reasonably recognize as being directly applicable to the Borrower, the Transaction, or both. An Opinion Recipient's request for an opinion concerning compliance with a specific law is appropriate only if the Opinion Giver can ascertain compliance without making factual or other assumptions that effectively render the opinion meaningless.

9.3 Legal Proceedings (' 17)

In giving a confirmation regarding the existence of legal proceedings that are pending or threatened against the Borrower, an Opinion Giver relies only upon information provided by others (*see* ' 3 of Accord) and a review of the Opinion Giver's litigation docket, which the Task Force would define as the Opinion Giver's own internal records listing legal proceedings being given substantive attention by the Opinion Giver's organization. The Opinion Giver need not review court or other public records or undertake any broader review of its own files.

10. Privity/Reliance

The legal issue of whether an Opinion Recipient has a cause of action against an Opinion Giver for a negligently rendered Opinion is not directly addressed in the Accord, although ' 7 of the Accord, quoted below, may indirectly relate to this issue:

> ' 7 Reliance by Opinion Recipient. The Opinion Recipient may rely upon the Opinion, without taking steps to verify the conclusions reached, with respect to the specific legal issues that the Opinion Letter affirmatively addresses. The Opinion Recipient may not rely on the Opinion or the Opinion Giver for any legal or other analysis beyond that set

> forth in the Opinion Letter, such as the broader guidance and counsel that the Opinion Giver might provide to the Borrower.

The Report includes the following commentary clarifying that Section:

> Accord ' 7 is not intended to alter the Law of any Opining Jurisdiction with regard either to the standard of care expected of an attorney or to the extent of third-party liability, i.e., the liability of an attorney to a party who is not the attorney's client. For example, the Accord is not to be read as inconsistent with any prerequisite of the Law of the Opining Jurisdiction that requires the Opinion Recipient to demonstrate its reliance upon the Opinion Letter as a prerequisite to prevailing in a cause of action based on an erroneous Opinion contained in the Opinion Letter.

Report, Paragraph 6, page 581.

To prevail on a claim of legal malpractice in New Mexico, a plaintiff must prove three elements: (1) employment of the defendant attorney; (2) the defendant attorney's negligence; and, (3) the negligence caused and proximately caused the loss to the plaintiff. *Hyden v. Law Firm of McCormick, Forbes, Caraway & Tabor*, 115 N.M. 159, 162-63, 848 P.2d 1086, 1089-90 (Ct. App. 1993); *George v. Caton* , 93 N.M. 370, 373, 600 P.2d 822, 825 (Ct. App. 1979).

The first *Hyden* element, an attorney-client relationship, is one of contract, but the contract may be express or implied. *Holland v. Lawless*, 95 N.M. 490, 494, 623 P.2d 1004, 1008 (Ct. App. 1981). A formal arrangement or attorney fee is not necessary, but there must be some professional relationship creating a duty on the part of the attorney. *Id.* at 496, 623 P.2d at 1010 (citing *George*, 93 N.M. at 375, 600 P.2d at 827). For example, the *Holland* court found no duty where the attorney and plaintiff were on opposite sides of a real estate transaction. *Id.*

In *Leyba v. Whitley*, 120 N.M. 768, 907 P.2d 172 (1995), the court relaxed the privity rule, holding that "it seems logical to treat an intended (not incidental) third-party beneficiary as though in privity of contract and accord such a beneficiary traditional remedies in the enforcement of promises and common-law duties in his or her own right and not simply in the enforcement of the promisee's right." *Id.* at 773, 907 P.2d at 177. The plaintiffs in *Leyba* claimed that a lawyer owed a duty to an intended statutory beneficiary in a wrongful death action, even though the lawyer's client was the statutory trustee who brought the action, rather than the beneficiary of the action. *Id.* at 776, 907 P.2d at 180. The court allowed the plaintiff's claim to proceed, but subject to an adversarial exception. *Id.* The exception is such that "when an adversarial relationship develops between the client and the third party ... the attorney's duty to the third party should end." *Id.* at 778, 907 P.2d at 182.

To establish the second element, the lawyer's negligence, the plaintiff must show that "his or her attorney failed to use the skill, prudence, and diligence of an attorney of ordinary skill and capacity that is similarly situated." *Hyden*, 115 N.M. at 163, 848 P.2d at 1090; *First National Bank v. Diane, Inc.*, 102 N.M. 548, 553, 698 P.2d 5, 10 (Ct. App. 1985). The testimony of another attorney is usually necessary to establish the applicable standards of practice. *Rodriguez v. Horton*, 95 N.M. 356, 358, 622 P.2d 261, 263 (Ct. App. 1980). For example, in *Collins ex rel. Collins v. Perrine*, 108 N.M. 714, 778 P.2d 912 (Ct. App. 1989), the plaintiff satisfied the second element by showing that his Albuquerque attorney did not meet the standard of attorneys practicing in Albuquerque during a similar time period. *Id.* at 717, 778 P.2d at 915. "A lawyer is not liable, however, for an error in judgment if he acts in good faith and in an honest belief that his advice and acts are well founded and in the best interests of his clients." *George*, 93 N.M. at 376, 600 P.2d at 828. But "[i]f the law on the subject is well and clearly defined and has existed and been published long enough to justify the belief that it was known to the profession, a lawyer who disregards the rule or is ignorant of it renders him[self] liable for losses caused by such negligence or want of skill." *Id.* at 377, 600 P.2d at 829.

In *First National Bank v. Diane*, the New Mexico Court of Appeals held that under the facts of that case expert testimony of failure by an attorney to warn of the consequences of being mistaken in an opinion on an untested legal theory was sufficient evidence of attorney malpractice. 102 N.M. at 552-53, 698 P.2d at 9-10.

New Mexico continues to recognize separate claims of attorney malpractice and negligent misrepresentation by attorneys. Although a third party beneficiary must show some professional relationship with the defendant lawyer to succeed in a malpractice suit, New Mexico does not require any privity of contract for a successful claim of negligent misrepresentation. *See Holland v. Lawless*, 95 N.M. at 496-97, 623 P.2d at 1010-11; Restatement (Second) of Torts ' 552 (1977). To maintain such a claim, the Plaintiff must show:

> "(1) One who, in the course of his business, profession or employment, or in any other transaction in which he has a pecuniary interest, supplies false information for the guidance of others in their business transactions, is subject to liability for pecuniary loss caused to them by their justifiable reliance upon the information, if he fails to exercise reasonable care or competence in obtaining or communicating the information.
>
> ....
>
> The rule...subjects the negligent supplier of misinformation to liability only to those persons for whose benefit and guidance it is supplied.
>
> [I]t is not necessary that the maker should have any particular person in mind as the intended, or even the probable, recipient of the information. In other words, it is not required that the person who is to become the plaintiff be identified or known to [those persons for whose benefit and guidance the misinformation] is supplied. It is enough that the maker of the representation intends it to reach and

> influence either a particular person or persons, known to him, or a group or class of persons, distinct from the much larger class who might reasonably be expected sooner or later to have access to the information and foreseeably to take some action in reliance upon it. It is enough likewise, that the maker of the representation knows that his recipient intends to transmit the information to a similar person, persons or group. It is sufficient, in other words, insofar as the plaintiff's identity is concerned, that the maker supplies the information for repetition to a certain group or class of persons and that the plaintiff proves to be one of them, even though the maker never had heard of him by name when the information was given."

Holland, 95 N.M. at 496-497, 623 P.2d at 1010-1011 (quoting Restatement (Second) of Torts ' 552 & cmt. h).

In *Valdez v. Gonzales*, 50 N.M. 281, 176 P.2d 173 (1946), the court was invited to extend liability for damage to a third party beneficiary, a candidate for public office, who was damaged by negligent printing and delivering of false instructions to precinct election judges. The court denied relief on the ground the plaintiff was unable to show privity, a necessary element in a case of negligent misrepresentation:

> "Liability for negligence if adjudged in this case will extend to many callings other than an auditor's. Lawyers who certify their opinion as to the validity of municipal or corporate bonds, with knowledge that the opinion will be brought to the notice of the public, will become liable to the investors, if they have overlooked a statute or a decision, to the same extent as if the controversy were one between client and adviser."

Id. at 287, 176 P.2d at 176-77 (quoting Chief Justice Cardozo in *Ultramares Corp v. Touche*, 174 N.E. 441, 445 (N.Y. 1931)).

The *Valdez* rule, however, was greatly relaxed in *Stotlar v. Hester*, 92 N.M. 26, 582 P.2d 403 (Ct. App. 1978). In *Stotlar*, the

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court adopted Restatement (Second) of Torts ' 522 (1977), and applied the Restatement to a case of alleged negligent misrepresentation by an appraiser in a real estate transaction. *Id.* at 28-29, 582 P.2d at 405-06.

11. Assumptions

Section 4 of the Accord sets forth sixteen assumptions that are included by implication in any Opinion Letter which adopts the Accord. (*See* Section 3.3(b) of this Statement). Section 4 of the Report adds two additional assumptions applicable to Opinions in mortgage loan transactions. For additional commentary, *see* && 4.1 to 4.6 of the Accord. Although New Mexico lawyers may have other favorite assumptions which are not expressly listed in the Accord or the Report, this Task Force concludes that, absent special considerations, the recommended assumptions should be included in a New Mexico opinion letter, and no additional assumptions are necessary in an Opinion Letter which incorporates the substance of the Accord and the Report, subject to the following

(a) The Task Force did not include one of the two assumptions suggested in Section 4 of the Report. The Task Force excluded the following assumption:

> The Security Documents have been or will be duly recorded and/or filed in all places necessary (*if* and to the extent necessary) to create the lien as provided therein.

The Task force concluded that no filing or recording is required in New Mexico to *create* (as opposed to *perfect*) any lien for which an opinion is given in the Opinion Letter. Any opinion as to perfection of a lien is expressly excluded in Qualification 1(h)(iv) of the Opinion Letter.

(b) The Task Force further added five non-New Mexico specific assumptions in the Opinion Letter:

(i) Section 4.3 of the Accord indicates that the following three assumptions are subsumed within Assumption 3 ("Each party to the Transaction (other than the Borrower) has satisfied those legal requirements that are applicable to it to the extent necessary to make the Transaction Documents enforceable against it"):

1) All parties to the Transaction other than the Borrower have legal existence.

2) The Transaction and the Transaction Documents have been duly authorized by all necessary corporate or other action on the part of all parties other than the Client, and the Transaction Documents have been duly executed and delivered by, and are valid as to, binding upon and enforceable against, all such other parties.

3) Persons acting on behalf of parties to the Transaction other than the Borrower, including agents and fiduciaries, were duly authorized to act in that capacity.

The Task Force concluded that those three assumptions should be included in the Opinion Letter as Assumptions 4, 5 and 6. The Task Force elected to create an Opinion Letter that includes the relevant opinion letter provisions from the Accord, rather than simply incorporating it by reference. Although the subsuming of those three assumptions into Assumption 3 would have been clear if the entire Accord were incorporated by reference in the Opinion Letter, the Task Force determined that those three assumptions should be inserted in the Opinion Letter for purposes of clarity.

(ii) The Task Force added Assumption 7:

Adequate consideration exists for the Transaction.

The Task Force concluded that consideration is required to form binding contracts, and that neither the Accord nor the Report adequately addresses the requirement of consideration.

(iii) The Task Force added Assumption 22:

> To the extent that any license, franchise, lease, agreement, or other contract constituting Collateral requires by its terms the consent of another party for its assignment or the creation of an encumbrance, such consent has been obtained.

The Task Force members sometimes use this assumption and did not see where in the Accord or report such assumption was adequately addressed.

(c) The Task Force also added one additional New Mexico-specific assumption as Assumption 23:

> The real property (the "**Real Property**") described in the Deed of Trust constitutes and qualifies as "trust real estate" within the meaning of ' 48-10-3H of the New Mexico Deed of Trust Act, §§ 48-10-1 *et seq.* ("Deed of Trust Act"). Any of the "trust real estate" which is the subject of a recorded subdivision plat is described for purposes of a legal description in the Deed of Trust, "by the use of lot, block, tract or parcel as shown on such recorded subdivision plat." ' 48-10-5B. The named trustee is qualified under ' 48-10-6. The Deed of Trust secures the performance of a "contract" as defined in ' 48-10-3B. The Transaction does not constitute a residential loan made to a low-income household within the meaning of §§48-10-17E and G. The Transaction Documents correctly state the names and mailing addresses of Lender, Borrower and, in the case of the Deed of Trust, the trustee under the Deed of Trust.

This assumption is specific to certain requirements under the New Mexico Deed of Trust Act, ' ' 48-10-1 *et seq.*, compliance with which may affect the enforceability of the non-judicial foreclosure sale remedy under such Act. In a given transaction, the lender may require that the Opinion Giver satisfy himself or herself as to certain or all of the matters assumed.

(d) The Task Force added the final sentence of Assumption 14:

> The Transaction Documents accurately reflect all of the intended agreements between the parties.

The Task Force deemed such addition necessary in light of the adoption of contextual interpretation of contracts in New Mexico. *See Mark V, Inc. v. Mellekas*, 114 N.M. 778, 845 P.2d 1232 (1993).

(e) The Task Force debated, but finally did not include, the following assumption:

> None of the Collateral is, or will become, located on an Indian Reservation or in "Indian Country" as defined in *Buzzard v. Oklahoma Tax Comm'n*, 992 F.2d 1073 (10th Cir. 1993) and the cases cited therein.

Real estate practice in New Mexico frequently presents issues involving Indian reservations and "Indian Country." The Task Force concluded that the issues involving such Indian law matters fall outside the scope of this Statement. As a result, use of the Opinion Letter is predicated on an assumption that neither the collateral or any interest therein nor any party to the Transaction gives rise to application of any Indian law. To the extent any Indian legal issues may be involved in the Transaction, special attention must be given to such issues, which may result in additional assumptions and exclusions.