

# No Need for a Usury Exception to an Enforceability or No Violation of Law Opinion in Wisconsin

This past summer witnessed the issuance of the Real Estate Finance Opinion Report of 2012, which provides valuable insights into the preparation of third party opinion letters in financing transactions secured by real property. This new report represents the joint efforts of a drafting committee consisting of members of three separate legal organizations: (i) the American Bar Association Section of Real Property, Trust and Estate Law's Committee on Legal Opinions in Real Estate Transactions, (ii) the American College of Real Estate Lawyers' Attorneys' Opinions Committee, and (iii) the American College of Mortgage Attorneys' Opinion Committee. During a discussion panel at the recent annual conference of the American College of Mortgage Attorneys' Opinion Committee, one of the panel members, Jeff Lem of Miller Thomson LLP, cleverly coined a nickname for the new report arising from its joint authorship—the "Tri-Org Report"—in honor of the TriBar Opinion Committee's valuable work on real estate opinions.

Among the many issues discussed in the Tri-Org Report, one that may catch some readers by surprise is the suggestion that the standard enforceability and no violations of laws opinions may unknowingly also constitute a usury opinion. Generally, the standard enforceability opinion simply states that the mortgage and other specific loan documents addressed by the opinion are enforceable in accordance with their terms. Reinhart's standard enforceability opinion, for example, reads as follows: "The Loan Documents to which Borrower is a party are the legal, valid and binding obligations of Borrower enforceable against it in accordance with their terms." Similar issues may arise with the typical opinion stating the mortgage and other specified loan documents do not violate any applicable laws. Reinhart's version of that opinion reads: "The execution and delivery of, and performance by Borrower of its obligations under the Loan Documents does not, as to payment obligations only, result in a violation of any applicable law, statute, or regulation of the State of Wisconsin which is known by us to be applicable to the Borrower."

Given the breadth of the typical enforceability and no violation of law opinions, the Tri-Org Report suggests that attorneys granting one or both of these opinions may also be unknowingly opining that the interest rates set forth in the loan documents are not usurious. In the "Illustrative Language of Real Estate Finance Opinion Letter" incorporated into the Tri-Org Report, the authors have crafted an

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express exception which could be added to a requested opinion letter where the issuer does not want to offer an opinion as to whether the interest charged under the applicable mortgage and loan documents is usurious. The Tri-Org Report's suggested exception language reads as follows: "No opinion is expressed by this Opinion Letter with respect to usury or whether any amounts might constitute unenforceable penalties."

As we noted in a [prior e-alert](#), however, Wisconsin attorneys should not have any trouble giving an implicit or even an explicit usury opinion in a commercial loan. The governing statute on usury in Wisconsin is Wisconsin Statutes section 135.05. Section 138.05(8)(c) eliminates the concept of usury for any commercial loan or forbearance entered into after November 1, 1981. Assuming the transaction involves a commercial loan (as opposed to a loan primarily for personal, family or household purposes), Wisconsin local counsel seemingly should be able to provide some form of usury opinion or, at the very least, not have any need to insert the suggested usury exception set forth in the Tri-Org Report.

If you have questions about this e-alert, please contact your Reinhart attorney or any member of the Reinhart Real Estate Opinion Team.

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