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Recent Development

***347 HAWAII 2000 REPORT REGARDING LAWYERS' OPINION LETTERS IN
MORTGAGE LOAN
TRANSACTIONS**

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I. Preface

This Hawaii's 2000 Report Regarding Lawyers' Opinion Letters in Mortgage Loan Transactions [FN1] ("Hawaii's 2000 Report") is presented by the Opinion Committee ("Committee") [FN2] of the Real Property and Financial Services Section ("Section") of the Hawaii's State Bar Association, as an addendum to the Accord and the Report which are described below. The Hawaii's 2000 Report follows - and supersedes - a prior product of a similar committee (chaired by Raymond S. Iwamoto) of the Section: Borrower's Counsel's Opinions to Lenders ("1987 Article"). [FN3]

The 1987 Article articulated principles and standards used by Hawaii's practitioners in giving and accepting legal opinions in Mortgage Loan Transactions. The 1987 Article is consistent with more detailed work later performed by committees representing national associations of lawyers. In 1991, the Section of Business Law of the American Bar Association published the Third-Party Legal Opinion Report, Including the Legal Opinion Accord, of the Section of Business Law, American Bar Association. [FN4] That publication includes a Foreword [FN5], a Legal Opinion Accord ("Accord") [FN6] with Commentary *348 ("Commentary"), [FN7] an Illustrative Opinion Letter [FN8] and Certain Guidelines for the Negotiation and Preparation of Third- Party Legal Opinions ("Guidelines"). [FN9] Because the Accord expressly excludes certain legal opinion issues involving liens on real property, [FN10] the Accord was supplemented and adapted to Mortgage Loan Transactions in 1994 by a 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 in the Report on Adaptation of the Legal Opinion Accord of the Section of Business Law of the American Bar Association for Real Estate Secured Transactions. [FN11] In 1998, the Committee on Legal Opinions of the American Bar Association's Section of Business Law stated principles, which provide guidance for all opinion letters, including those that do not reference the Accord. [FN12]

The Hawaii's 2000 Report: (i) utilizes the work that has been done since the 1987 Article to make recommendations regarding a form of opinion letter; (ii) endorses the Principles as an accurate statement of Hawaii's practice; (iii) addresses certain Hawaii's specific issues; and (iv) rearticulates important Hawaii's practice standards for opinion letters. [FN13]

The Hawaii's 2000 Report represents the consensus of the members of this Committee; however, it does not necessarily reflect the views of any particular member of the Committee. This Hawaii's 2000 Report has been approved by the Section, but it has not been adopted or approved by the Hawaii's State Bar Association. Neither the Section nor this Committee promise that the Hawaii's 2000 Report is free from error when published; therefore, readers are urged to verify all analysis contained herein.

***349 II. Recommendation and Endorsement**

The Committee recommends that lawyers in Hawaii's - by express reference - adopt and incorporate

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the Accord and the Report into their opinion letters in Mortgage Loan Transactions. In addition, although the Foreword, Commentary, Illustrative Opinion Letter and Guidelines accompanying the Accord are not officially a part of the Accord itself, the Committee recommends that lawyers in Hawai'i consult those accompanying materials as a reference and practice aid. 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, contributing to efficiency and cost effectiveness in the opinion process. The Committee also believes that by incorporating the Accord and the Report, an Opinion Giver (the term used in the Accord for the opining lawyer) has the basics of an opinion letter for a Mortgage Loan Transaction that will be mutually acceptable in format to both the Opinion Giver and the Opinion Recipient (the term used in the Accord for the mortgagee). Further, the Committee believes that Hawai'i practice generally conforms to the principles and standards reflected in the Accord and the Report. Finally, the Committee believes that the Accord and the Report reflect an appropriate balance - for many transactions - of the costs and benefits of addressing particular issues through third party opinion letters.

The Committee also endorses the Principles [FN14] as an accurate statement of selected aspects of customary Hawai'i practice for all opinion letters including those that do not reference the Accord or the Report.

III. Sample Opinion Letter

Attached as Appendix 1 is a sample opinion letter ("sample Opinion Letter") based on the Accord, the Report, and this Hawai'i 2000 Report. The sample Opinion Letter also contains commentary to assist members of the Hawai'i Bar in increasing their familiarity with the Accord and the Report and to illustrate how Hawai'i practice conforms to the principles in the Accord and the Report. [FN15]

***350** The sample Opinion Letter incorporates by reference the Accord and the Report. This means that numerous definitions, opinions, assumptions, qualifications, limitations and exclusions are incorporated into the sample Opinion Letter, without expressly setting out such items. This "short form" approach eliminates unnecessary negotiations regarding the precise wording of the basic provisions of the opinion letter and allows for a concise opinion letter. These goals, and the resulting cost savings to clients, are a central purpose of the Accord and the Report.

One disadvantage of the "short form" approach is that it requires the Opinion Giver and the Opinion Recipient to be familiar with the detailed work reflected in the Accord and the Report. The Committee nonetheless believes that the advantages of the "short form" approach outweigh the disadvantages. In addition, the 1999 publication of the Inclusive Real Estate Secured Transaction Opinion Report, [FN16] that includes an annotated "long form" Accord/Report opinion letter, can dramatically facilitate the process of becoming familiar with the Accord and the Report. The sample "long form" opinion letter of the Inclusive Real Estate Secured Transaction Opinion Report includes within its text the definitions, assumptions, qualifications, limitations, and exclusions, that are implied in an Accord/Report "short form" opinion letter. The Committee commends the Inclusive Real Estate Secured Transaction Opinion Report to Hawai'i lawyers as a valuable aid in drafting opinion letters and in becoming familiar with the Accord and the Report.

IV. Hawai'i Issues

Appendix 2 contains a discussion of Hawai'i law on several issues that frequently arise in commercial Mortgage Loan Transactions. After summarizing Hawai'i law on a particular issue, the Committee provides a comment on how the issue should be handled in the Opinion Letter process. The analysis in Appendix 2 is current as of November 1, 2000. Opinion Givers are cautioned to update their analysis through the date of their Opinion Letters.

***351 V. Generic Qualification and Assurance**

Like the Report, the Committee believes it is appropriate and consistent with Hawai'i practice to incorporate into Opinion Letters in Mortgage Loan Transactions a Generic Qualification with Assurance stating generally that certain provisions in the loan documents may not be enforceable but providing assurance regarding the enforceability of key provisions in the loan documents. [FN17] This limits the broad assurance regarding enforceability which is otherwise given in an Accord/Report Opinion. [FN18] The Report, while endorsing a Generic Qualification with Assurance, takes no position regarding the preferred language of such term. [FN19] The Committee endorses the following language for a Generic Qualification and Assurance:

In addition to the General Qualifications [an Accord-defined term], the Opinion set forth in [the] paragraph [stating that the Loan Documents are enforceable] is subject to the further qualification that certain provisions of the Loan Documents may not be enforceable; nevertheless, such unenforceability will not render the Loan Documents invalid as a whole or preclude:

- (i) the judicial enforcement of the obligation of the Client to repay the principal, together with interest thereon (to the extent not deemed a penalty) [FN20] as provided in the Note,
- (ii) the acceleration of the obligation of the Client to repay such principal, together with such interest, upon a material default by the Client in the payment of such principal or interest or upon a material default in any other material provision of the Loan Documents, and
- (iii) the foreclosure in accordance with applicable law of the lien on and security interest in the Collateral created by the security documents upon maturity or upon the acceleration pursuant to (ii) above.

This language is adopted from language proposed by the American College of Real Estate Lawyers and modifications proposed by the Report. [FN21] It is appropriate in the Committee's view because: (i) loan documents often contain provisions of questionable enforceability under Hawai'i law; (ii) these provisions are not otherwise identified as unenforceable in either the Accord *352 or the Report; (iii) Opinion Recipients are often aware that certain provisions in their loan documents are of doubtful enforceability, but nonetheless want to take advantage of any benefit such provisions will provide; and (iv) it is often not cost effective to provide a detailed list of such items. Generally, what is important to the Opinion Recipient is assurance that the key provisions of the Loan Documents are enforceable, and that assurance is provided. However, where the Opinion Recipient is not represented by local counsel, the Opinion Recipient may have questions about the enforceability of certain provisions which are important to the transaction at issue, but which are not addressed if the Generic Qualification with Assurance is used. It may be appropriate for the Opinion Recipient to ask for opinions or assurances regarding specific provisions, but the additional cost of such opinions should be first expressly addressed among the Opinion Recipient, the Opinion Giver, and the Client. The Committee hopes that the information contained in Appendix 2 will facilitate this process.

To clarify the meaning of the Generic Qualification with Assurance, the Committee provides the following examples of matters included and not included within the Assurance. These examples are for illustration purposes only, and are not intended to be an exclusive list. Inclusion within the Assurance does not affect the limitations imposed in the Accord by the following Accord-defined items: the Bankruptcy and Insolvency Exception; the Equitable Principles Limitation, the Other Common Qualifications; and other express Accord exclusions.

A. Assurances Included In the Assurance.

The Generic Qualification with Assurance does include assurances that provisions in loan documents containing the following are enforceable:

- (a) The right to accelerate regardless of a state reinstatement law. [FN22]
- (b) The right to receive contingent interest, participation interest, rate adjustments, negative

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amortization, and compounded interest to the extent provided in the [t]ransaction [d]ocuments. [FN23]

(c) The ability to seek full recovery for any deficiency after foreclosure or to sue on the debt without having foreclosed. [FN24]

(d) The ability to enforce a right in rents to the extent such enforcement would be considered a foreclosure or to the extent that acceleration and foreclosure *353 would be available if a borrower interfered with a lender's exercise of rights under an assignment of rents. [FN25]

(e) The right to accelerate for a violation of a provision that restricts sale, financing, leasing, or ownership interests (the 'due-on' provisions), [but] it provides no assurance that a clause prohibiting the creation of a junior lien can be specifically enforced to avoid the lien. [FN26]

B. Assurances Not Included in the Assurance.

1. Excluded Assurances Identified in the Report.

The Generic Qualification with Assurance does not include assurances that provisions in loan documents containing the following are enforceable:

- (a) [The right] to appointment of a receiver or the right to collect assigned leases or rents. [FN27]
- (b) Nonforeclosure remedies or procedures, such as those pertaining to an assignment of rents, except to the extent enforcement of a right in rents would be considered a foreclosure or to the extent that acceleration and foreclosure would be available if a borrower interfered with a lender's exercise of rights under an assignment of rents. [FN28]
- (c) Specific enforcement of a prohibition against creating a junior lien to avoid the lien. [FN29]
- (d) Prepayment fees. [FN30]
- (e) A collateral or absolute assignment of rents (except as included within the concept of foreclosure of rents as Collateral). [FN31]
- (f) A determination of the rights or protections of a mortgagee in possession. [FN32]
- *354 (g) The ability to add the cost of cure of a debtor's default to the secured indebtedness. [FN33]

2. Excluded Assurances Identified in this Hawai'i 2000 Report.

In addition to those matters identified in the Report, the Committee concludes that the Generic Qualification with Assurance does not include assurances that provisions in loan documents containing the following are enforceable:

- (a) A waiver of jury trial. [FN34]
- (b) A prohibition against oral modification or waivers. [FN35]
- (c) Dragnet or anaconda clauses which purport to make the Collateral security for future or past advances from the lender to the debtor, unless the Mortgage specifically refers to particular advances, or unless such advances relate to the same transaction or series of transactions as the principle debt for which the Mortgage is given. [FN36]

VI. Potential Additional Qualifications

The Committee's review of Hawai'i law in Appendix 2 has identified one additional qualification that should be included where residential real property is the Collateral. As explained in Appendix 2, Item 9, it is appropriate to include the following additional qualification language in a Hawai'i Opinion Letter:

The list of Other Common Qualifications identified in the Accord and the Report is supplemented by the addition of the following: 'where the Collateral is residential real property, limit or affect the enforceability of provisions that provide for the application of insurance proceeds to reduce indebtedness, or that provide for an increased rate of interest on the occurrence of a casualty affecting the Collateral.'

VII. Additional Opinions

The Accord, the Report, and this Hawai'i 2000 Report all contemplate that in certain situations it will be appropriate for an Opinion Recipient to request ***355** opinions beyond those provided in the sample Opinion Letter and for an Opinion Giver to provide such opinions. Likewise, there may be transactions where it is not appropriate to provide all the opinions in the sample Opinion Letter. The Committee believes that application of the "Golden Rule" and a careful balancing of the costs and benefits of additional opinions provides guidance regarding when opinions should be given.

The Golden Rule (adapted to the present situation) provides:

It is inappropriate to request an opinion that the Opinion Recipient's counsel, possessing the requisite expertise (and therefore competence respecting the legal issue), would not render if it were the Opinion Giver. [FN37]

The cost of additional opinions should be balanced against the benefits of these opinions and such matters should be openly addressed among the Client, the Opinion Giver and the Opinion Recipient. Unlike some states, Hawai'i often does not have statutes or clear case law which address certain issues on which Opinion Recipients may request opinions. Thus, opinions which might be readily given in other states may be quite costly in Hawai'i. For example, opinions regarding enforcement of choice of law provisions in loan documents (except to the extent they are covered by the mandatory choice of law provisions of the Hawai'i Uniform Commercial Code) are based on a few Hawai'i decisions and on analysis of other authority. [FN38] Similarly, opinions regarding security interests in property that is not covered by the Hawai'i Uniform Commercial Code and which is not real property are based on scant and ancient law. Such opinions are difficult to give and very costly.

The Committee makes the following recommendations:

Opinion Recommendation/Rationale

Title to Personal Property Should not be given. Primarily a factual matter.

Title to Real Property Should not be given. By custom this is addressed through a title insurance policy, and attorneys in Hawai'i do not search title.

Priority of Security Interest in Real Property Should not be given. By custom this is addressed through a title insurance policy, and attorneys in Hawai'i do not search title.

***356** Compliance of a property with zoning, environmental laws, shoreline management laws, and building codes Should not be given. Involves factual issues not within the expertise of attorneys and is more properly given by architects, engineers and other professionals. Often involves costly due diligence. An attorney may opine, if requested, on the legal meaning of certain statutes or ordinances.

All required licenses and approvals necessary to the operation of the property have been obtained Should not be given. This opinion involves numerous factual issues which the Opinion Giver typically has no way of investigating.

Transfer is not a fraudulent conveyance Rarely, if ever, appropriate to give. Requires a fact-based evaluation of client solvency. The preferred approach is for the Opinion Recipient to obtain the facts directly from the Client together with any necessary legal advice from its own counsel. [FN39]

Bankruptcy of parent or subsidiary will not result in a consolidation of parent and

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subsidiaryRarely, if ever, appropriate to give. Requires a fact-based evaluation of the adequacy of capitalization. The preferred approach is for the Opinion Recipient to obtain the facts directly from the Client together with any necessary legal advice from its own counsel. [FN40]

***357** Creation and Priority of Security Interest in Collateral which is not real property and which is not covered by the UCCGenerally not given. Often very costly. Should be given only in unusual circumstances.

Creation, Attachment and Perfection of Security Interests in UCC Personal PropertyGenerally not given. May be very costly depending on the type of collateral, since such opinions are not part of the regular practice of most Hawai'i practitioners. Should be given only when cost is justified. [FN41] No opinion regarding title is expressed in such opinions. Hawai'i opinions are often limited to collateral in which a security interest is perfected by filing.

Priority of Security Interest in UCC Personal Property Generally not given. May be costly depending on the type of collateral, since such opinions are not part of the regular practice of most Hawai'i practitioners. Should be given only when cost is justified. No opinion regarding title is expressed in such opinions. Hawai'i opinions are often limited to collateral in which a security interest is perfected by filing. The Opinion Giver should be permitted to rely on chattel lien reports prepared by others. [FN42]

***358** Law chosen in document (other than Hawai'i law) will be followed by Hawai'i courts.Rarely given and extremely costly. Should be given only when the cost of the opinion is justified. When given, it is a reasoned opinion, citing relevant authority and relying on specific assumptions. [FN43]

No Litigation ConfirmationRarely given. Generally, this is a factual matter which can be addressed by a Client representation in the loan documents. [FN44]

***359** VIII. Conclusion

The Committee hopes that this Hawai'i 2000 Report streamlines the Opinion negotiating process, clarifies Hawai'i Opinion Letter practice, and makes the process of giving opinions more accessible to Hawai'i practitioners.

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[FN1]. Transactions, or those portions of transactions, involving a security interest in real property.

[FN2]. Chair: Jon M.H. Pang, Esq.; Co-Reporters: Trevor A. Brown, Esq. and Danton S. Wong, Esq.; Members: Gail O. Ayabe, Esq., Wesley Y.S. Chang, Esq., Deborah J.M. Chun, Esq., Daniel Devaney IV, Esq., Nancy N. Grekin, Esq., Michelle C. Imata, Esq., Raymond S. Iwamoto, Esq., Diane S. Kishimoto, Esq., and William W.L. Yuen, Esq. The members of the Committee do not feel that the title of "Reporter" does justice to the work of Trevor A. Brown, Esq. and Danton S. Wong, Esq. Their compilation of the products and comments contributed by the Committee involved a tremendous amount of effort and analysis. The Committee members extend their appreciation to Danton and Trevor for undertaking the primary drafting of this product.

[FN3]. See Ad hoc Committee, Real Property and Financial Services Section, Hawai'i State Bar Association, Borrower's Counsel's Opinions to Lenders, 20 Haw. Bar J. 129 (1987).

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[FN4]. See Committee on Legal Opinions, Section of Business Law, American Bar Association, Third-Party Legal Opinion Report, Including the Legal Opinion Accord, of the Section of Business Law, American Bar Association, 47 Bus. Law. 167 (1991); reprinted in 29 Real Prop. Prob. & Tr. J. 487 (1994).

[FN5]. See *id.* at 169.

[FN6]. See *id.* at 173.

[FN7]. See *id.* at 173.

[FN8]. See *id.* at 221.

[FN9]. See *id.* at 224.

[FN10]. See *supra* note 4, at 215, § 19(h).

[FN11]. See Subcommittee on Adaptation of the Legal Opinion Accord of the American Bar Association Section of Business Law, Committee on Legal Opinions in Real Estate Transactions, Section of Real Property, Probate and Trust Law, American Bar Association; and the American College of Real Estate Lawyers Attorneys' Opinions Committee, Report on Adaptation of the Legal Opinion Accord of the Section of Business Law of the American Bar Association for Real Estate Secured Transactions, 29 Real Prop. Prob. & Tr. J. 569 (1994) [hereinafter "Report"].

[FN12]. See Committee on Legal Opinions, Section of Business Law, American Bar Association, Legal Opinion Principles, 53 Bus. Law. 831 (1998) [hereinafter "Principles"].

[FN13]. Other state bar associations have undertaken similar opinion projects in light of the national work reflected in the Accord and the Report. Particularly helpful to the Committee have been the approach and format of: Committee on Lawyers' Opinion Letters in Mortgage Loan Transactions, State Bar of Texas, 1996 Texas Supplement Regarding Lawyers' Opinion Letters in Mortgage Loan Transactions (1996).

[FN14]. See Principles, *supra* note 12.

[FN15]. This Hawai'i 2000 Report focuses on the Accord and the Report which provide for Opinion Givers to expressly incorporate by reference certain standards and terms in their opinion letters. See Committee on Legal Opinions, *supra* note 4, at § 22; Report, *supra* note 11, at ¶ 20. Other recent work by national and local bar associations articulate practice standards and guidelines for opinion letters whether or not such opinion letters make reference to the associations' work. See, e.g., Principles, *supra* note 12, at 831; TriBar Opinion Committee, Third-Party "Closing" Opinions, 53 Bus. Law. 591 (1998) [hereinafter "Closing Opinions"]. The Hawai'i 2000 Report provides selected commentary on Hawai'i opinion letter principles and practices, and endorses the Principles as applicable to all opinion letters. The Hawai'i 2000 Report does not attempt a comprehensive statement of Hawai'i opinion letter practice for non-Accord opinions. Cf. Closing Opinions, 53 Bus. Law. at 592.

[FN16]. See Subcommittee on Creation of an Inclusive Opinion, Committee on Legal Opinions in Real Estate Transactions, Section of Real Property, Probate, and Trust Law, American Bar Association; and the American College of Real Estate Lawyers Attorneys' Opinions Committee., Inclusive Real Estate Secured Transaction Opinion Report (1999) [hereinafter "Inclusive Opinion Report"], available at <http://www.acrel.org/public/whatsnew.pdf>. (with notes); [http:// www.abanet.org/](http://www.abanet.org/)

rppt/inclusive-art.pdf. (without notes); and http://ctr.umkc.edu/dept/dirt/files/incl_rep.pdf. (without notes).

[FN17]. See Report, *supra* note 11, at ¶11.

[FN18]. See *id.*

[FN19]. See *id.* at ¶11A (discussing language alternatives).

[FN20]. Opinion Recipients may wish to have this parenthetical limited to increases in the interest rate triggered by certain events, e.g., default. This avoids any implication that the Opinion Giver thinks that the base interest rate is itself a penalty. The Committee considers this request reasonable. If there is concern that the base interest rate is a penalty, that concern can be addressed and, if necessary, an express qualification can be made in the Opinion Letter.

[FN21]. See Report, *supra* note 11, at ¶11A.

[FN22]. *Id.* at 597.

[FN23]. *Id.*

[FN24]. *Id.*

[FN25]. *Id.*; cf. *infra* Appendix 2, Item 3.

[FN26]. Report, *supra* note 11, at 599. This Hawai'i 2000 Report focuses on commercial mortgage loans. However, where the Collateral is residential real property containing less than five dwelling units, Opinion Givers are cautioned to review the Garn Act, 42 U.S.C. § 1701j-3 (2000), which provides that due- on-sale clauses are not enforceable under certain circumstances. 42 U.S.C. § 1701j-3(d) (2000).

[FN27]. *Id.* at 596. See also *infra* Appendix 2, Items 3 and 8.

[FN28]. See also *infra* Appendix 2, Item 3.

[FN29]. Report, *supra* note 11 at 599.

[FN30]. *Id.*

[FN31]. *Id.* See also *infra* Appendix 2, Item 3.

[FN32]. Report, *supra* note 11 at 596.

[FN33]. *Id.*; cf. *infra* Appendix 2, Item 1.

[FN34]. See *infra* Appendix 2, Item 2.

[FN35]. See *infra* Appendix 2, Item 4.

[FN36]. See *infra* Appendix 2, Item 1.

[FN37]. See Committee on Legal Opinions, *supra* note 4, at 226, 1.B.(1).

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[FN38]. See *infra* Appendix 2, Item 5.

[FN39]. But see TriBar Opinion Committee, *Opinions in the Bankruptcy Context: Rating Agency, Structured Financing, and Chapter 11 Transactions* (hereinafter "Opinions in the Bankruptcy Context"), 46 Bus. Law. 717, 727- 29 (1991) (discussing when fraudulent transfer opinion may be appropriate).

[FN40]. But see *id.* at 725-27 (discussing when a no substantive consolidation opinion may be appropriate).

[FN41]. For an excellent discussion of such opinions, see TriBar Opinion Committee, *UCC Security Interest Opinions*, 49 Bus. Law. 362 (1993), supplemented by TriBar Opinion Committee, *An Addendum for Protected Purchasers- U.C.C. Security Interest Opinions*, 54 Bus. Law. 1261 (1999).

[FN42]. For an excellent discussion of such opinions see *id.*

[FN43]. See *infra* Appendix 3, Item 1, for a form of opinion.

A reasoned (or "explained") opinion is typically rendered when, in the view of the opinion giver, the opinion's conclusions should not be stated apart from its underlying reasoning (for example, when the opinion giver reaches a conclusion despite the existence of possibly contradictory authority). By setting forth the reasoning behind the opinion, the opinion giver spells out, for evaluation by the opinion recipient and its counsel, such matters as a lack of judicial authority, the presence of divided authority or contrary but outdated authority. The conclusions expressed in a 'reasoned opinion are sometimes limited by the phrase 'while the matter is not free from doubt or some similar phrase. However, at other times the opinion, although containing reasoning, will not be limited in this way because the opinion giver has concluded that the opinion as 'reasoned needs no further characterization.

Closing Opinions, *supra* note 15, at 607. Reasoned opinions typically conclude with a statement "[b]ased on the foregoing, it is our opinion that a Hawai'i court would [or should] conclude. . . ." In Hawai'i, the Committee believes the use of the word "would" has indicated a higher degree of certainty than use of the word "should." Some credit rating agencies, such as Standard & Poor's, have also taken this view. *Opinions in the Bankruptcy Context*, *supra* note 39, at 733. However, practitioners in other geographic areas do not view "would" and "should" as conveying a different degree of certainty. Closing Opinions, *supra* note 15, at n.37. On a forward-going basis, so that there is no misunderstanding with out-of-state counsel, the Committee recommends that Hawai'i Opinion Givers expressly qualify both a "would" or "should" opinion, where the Opinion Giver thinks that some explanation beyond the reasoning set out is needed. The use of a reasoned opinion implicitly communicates uncertainties and limitations to a recipient. This can also be done with a "clean" opinion that is expressly qualified, e.g., by using the phrase "while the matter is not free from doubt." *Opinions in the Bankruptcy Context*, *supra* note 39, at 734-36. A "clean" opinion states a conclusion without reference to the legal authority on which it is based. Committee on Legal Opinions, *supra* note 4, at 229, II.C. Even an unqualified clean opinion is not a guarantee that a court will reach a particular result, but a statement of the Opinion Giver's professional judgment. *Opinions in the Bankruptcy Context*, *supra* note 37, at 734-36; Principles, *supra* note 10, at 832, II.D.

[FN44]. See *infra* Appendix 3, Item 2, for a form of confirmation.

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