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RE: ***Comparison of First American Title Insurance Company Eagle 9 Insurance Policy and Attorneys' UCC Opinion***

Dear Cliff:

The purpose of this letter is to consider and respond to the question of how First American's new Eagle 9 UCC Insurance Policy – Form 8100(500) compares to a standard (if such a concept exists) attorneys' opinion with respect to UCC perfection/filing.

Before delving into the issue at hand, I think it is worthy of note that First American's current venture into the field of Title Insurance for UCC (Security Interest) Filings reminds me of the early use of title insurance by lenders and attorneys in Massachusetts. It is only within the last twenty-five to thirty years that title insurance became the rule rather than the exception in Massachusetts. In the early 1970s, it was rare that title insurance was issued in connection with real estate acquisitions and/or financings. Historically, at least until the mid 1970s, attorneys would opine (certify) as to title. Today that certification has been virtually replaced, except for a statutory requirement on residential purchases, by title insurance. While the exception in the early 1970s, title insurance is now the rule, and it is the rare instance when it is not obtained. I make this comment, if not obvious on its face, to draw the analogy of title insurance acceptance in Massachusetts to the potential for the Eagle 9 policy throughout the United States. As we have discussed, it is my belief, based upon many years of representing borrowers and lenders in secured real estate transactions, that once the benefits of the Eagle 9 policy become known, especially in the securitized lending field (conduit loans, mortgage backed securities, and the like), it will become an integral part of lending checklists and should be in high demand. Moreover, while our perspective is principally from the real estate side, it would seem that the comparisons which we will be making would be even more applicable to the pure non-real estate collateralized transaction.

I feel compelled, at the outset, to make my point with respect to the Eagle 9 policy by starting with the caveat that this letter is not an opinion, is based upon our experience in issuing opinions when we have represented borrowers, or reviewing and negotiating opinions, when we have represented lenders and is generally based upon Massachusetts law, although, the UCC has been adopted in all jurisdictions and is, as its name suggests – "uniform". In addition to drawing upon our own experience, we have reviewed a number of form opinion letters, reviewed actual texts on opinion writing, consulted with New York counsel who regularly represents CMBS/conduit lenders, reviewed a standard form UCC-11 report which is furnished by many corporate search organizations such as Prentice Hall or Lexis, and reviewed the Eagle 9 UCC Insurance Policy – Form 8100(500) and the schedule pages for that policy, as furnished to us.

This analysis will focus on the comparison of the coverage afforded by the Eagle 9 policy and the assurances provided by those portions of an opinion rendered by counsel for a borrower and running in favor of a commercial or institutional lender that address the granting, enforceability, validity, perfection and priority of certain types of security interests in personal (i.e., non-real estate) property. Please note that this analysis will in no way conclude that the Eagle 9 Policy would or should replace the need for the due authority, validity and enforceability opinion, except insofar as that opinion relates to security interests and perfection of security interests. In connection with this review, we have considered and compared the structure and effect of legal opinions generally concerning security interests granted to lenders to the Eagle 9 policy. Also considered was our view of how the policy will be received in the lending community. Additionally, it should be noted that while the pending UCC Article 9 changes may clarify some of the vagaries in Article 9 which the policy might cover, that is balanced in the near term by the potential for confusion during the transition period, a valuable selling point for Eagle 9.

LEGAL OPINION

There is no "standard form" of legal opinion governing the granting, validity, and perfection of security interest in personal property. In fact, such opinions are usually a part of a more encompassing opinion relating to the validity, enforceability and due authority of Borrower with respect to a Loan of which a security interest is a part. Such opinions may combine real and personal property or cover only one or the other. Opinions used by borrower's counsel or requested by lender's counsel have generally evolved through past and present negotiations between various counsel to lenders, counsel to borrowers, and even counsel to rating agencies such as Moody's or Standard & Poors. Opinions are "built" over time and through experience and change from transaction to transaction. There are numerous variations in the form and

content of opinions from coast to coast.[1] These variations occur in the opinion sections themselves as well as the qualification, exception and assumption sections of the opinion. Assumptions, exceptions and qualifications in opinions are numerous. A careful reading of opinions could result in the conclusion that the assumptions, qualifications, and exceptions to opinions most often take up more of the opinion than the actual opinions themselves and usually limit those opinions extensively . It is our observation, based upon our review of opinions as lender's counsel and production of opinions as borrower's counsel, that it is the mission of a borrower's counsel to limit and qualify opinions so that they are extremely narrow in scope. Usually, the "effect" of the UCC portion of the legal opinion, in addition to generating legal fees to the borrower, is simply to state that, upon the filing of validly executed UCC financing statements with certain public offices (predicated on the assumption that the principal place of business of the borrower is in a certain location and that the collateral is located in a certain state), the filing would be effective in creating a security interest. As a result, to the extent that opinions do address the perfection of a security interest, such opinions may merely outline the requisite steps for a lender to take in order to perfect that interest in certain types of collateral within a named jurisdiction. Again, even that limited opinion will be subject to numerous assumptions, qualifications and exceptions. For the sake of understanding the references to qualifications, assumptions, and exceptions, sample qualification, assumption and exception sections from a typical opinion which we use are attached to this letter as Attachment No. 2.

In more infrequent situations, attorneys may be requested to opine as to the priority, as well as the perfection, of a security interest. This would actually be reminiscent of a time in many jurisdictions, like Massachusetts, when attorneys were required to give real estate title opinions instead of, or in addition to, providing title insurance. As previously mentioned, in all commercial transactions with which we are familiar, attorney's title opinions are almost nonexistent today as they have been replaced by title insurance . In fact, in all opinions which our firm issues, there is a specific disclaimer of any opinion on title and a reference to a title policy to be provided. It is also worthy of note that the ALTA 3.1 Zoning Endorsement is starting to replace, at least in part, attorney's opinions as to zoning compliance. The same could hold true for the Eagle 9 Policy.

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[1] It should be noted for the purposes of having a full discussion of this topic that the American College of Real Estate Lawyers (ACREL) in concert with the American Bar Association (ABA) in the early 1990's published a Legal Opinion Accord which appeared in the Third Party Legal Opinion Report prepared by the Committee on Legal Opinions, Section of Business Law © 1991 American Bar Association. This Accord set forth a form "Inclusive Real Estate Secured Transaction Opinion", portions of which relate to fixture filings. While, as a part of this undertaking for First American, we reviewed this form, it was our decision not to dwell on its contents for two reasons: (i) the opinions relating to U.C.C.'s in the Accord (See Attachment No. 1 to this letter) are not perceived by us to be different, to any great extent, from other forms of opinions encountered; and (ii) in the words of the authors of the sections of the Accord reviewed, "The ABA Legal Opinion Accord. . . have received some acceptance, but they have yet to become the nationwide standard that their authors had hoped." (This opinion may be ordered from the ABA or ACREL or found on the ACREL Website – www.acrel.org/)

It would be our assumption, and we would act accordingly, that if an opinion were requested for the priority of the security interest, that opinion would be conditioned upon effective filing of UCC-1's and would be based upon an assumption that a UCC Form 11 issued by a corporate search entity acting in a particular jurisdiction was accurate. So couched, the opinion may do little more than relate the necessity of filing and the outcome of the UCC-11 search. There would be strictly limited recourse to the issuing firm, as the opinion would be based upon a limited review or analysis by the borrower's counsel. The opinion would likewise take as one of its assumptions the payment and release of any existing security interest which, if not released, would remain as superior liens. By attaching the UCC Form 11 to the opinion, the opining attorney may also have shifted the burden for review and reliance on the UCC-11 to Lender's Counsel.

Most opinions as to enforceability, filing, perfection and priority are usually so qualified and contain so many exceptions that they are of limited value in the event of a UCC problem. Such qualifications and exceptions (refer to Attachment No. 2) include the application for bankruptcy, insolvency, receivership, creditor rights, and similar such creditor laws on the lender's enforcement rights, genuineness of signatures (where the opining firm does not witness the execution of the document), accuracy of UCC-11s, the application of certain state's laws, ownership of collateral, failure of consideration, authority of the lender to make the loan, and reliance on third party information furnished to the opining counsel. Many of these exceptions are affirmatively covered by the Eagle 9 Policy.

Opinions are customarily limited to the application of the law of the jurisdiction in which the borrower's counsel is licensed to practice. This may or may not be of concern in real estate mortgage transactions, but, notwithstanding the "uniform" nature of the UCC, could raise concerns in personal property financings which include receivables, products of collateral, securities, inventory, consignments or goods in transit as located in a number of jurisdictions. Additionally, where an opinion is limited to laws of the jurisdiction in which the borrower's counsel is licensed, such opinions often assume that such local law would be applicable, enforceable or interpreted similarly in other jurisdictions in which the collateral may be located. Such assumptions may or may not be valid, but they are customarily accepted. It might be totally impractical if not impossible to seek an opinion in every jurisdiction in which the collateral could be affected.

Implicit in all of the foregoing is the extensive cost involved in the review, negotiation and drafting of the UCC opinion which could be replaced by title insurance under the Eagle 9 policy.

An additional issue inherent to opinions is the natural adversarial nature, both in the negotiating of opinions and any claims made on them, between a borrower's and a lender's counsel. Add to that dynamic the pressure of a malpractice carrier, a deductible, the standard for

professional responsibility, usually "the prudent attorney in the community" standard, and you may have in an opinion which is limited in its utility and which certainly creates more of an adversarial environment than an indemnity policy like the Eagle 9.

UCC FORM 11

As referenced in the prior section, UCC Form 11s are readily available to and ordered by lender's or borrower's counsel in connection with efforts to ascertain the priority status of existing security interests as reported in the respective filing office. Little comfort is gained from a UCC-11 and the reporting company has little likelihood of liability as the actual search is conducted by public officials, not the reporting company. It would seem that a UCC-11, while a source for informational purposes, although often relied upon may have little value if information has been wrongly reported.

FIRST AMERICAN TITLE INSURANCE COMPANY EAGLE 9 UCC INSURANCE POLICY

The Eagle 9 Policy and its schedules generally provide a named insured and its successors and assigns indemnity, in a standard form of coverage, for losses incurred if a security interest in listed collateral given to a lender or owner under an insured UCC covered by the policy fails as a result of a number of insured risks.

The insured risks are essentially as follows:

(a) failure of the security interest to attach to or be created as to the collateral;

(b) failure of the security interest to be perfected;

(c) failure of the security interest to have priority or to exist with respect to:

  (i) other security interests in the same collateral;
  (ii) the lien of a lien creditor; or
  (iii) a party acquiring an interest in the collateral after the date of the policy;

(d) failure of the security interest as a result of fraud, forgery, undue influence, duress, incapacity, incompetency or impersonation;

(e) failure of an assignment of the security interest by its holder; and

(f) failure of the security interest due to certain proceedings under the bankruptcy code.

On its face, an Eagle 9 Policy far exceeds the scope of protection afforded under any attorney's opinion customarily provided. It is noteworthy, as with title insurance policies pertaining to real estate, that the Eagle 9 Policy provides for defense of an insured claim against the insured security interest and covers legal fees and expenses. The Eagle 9 Policy also extends to the former holder (assignor) of the security interest if there have been any warranties as to title and validity of the security interest upon assignment. The policy is, as with conventional title insurance, a policy of indemnification, and, again, while it does not provide for automatic payment upon the mere occurrence of a claim, it does provide for defense of that claim at the expense of the title insurance company and ultimate payment if that defense is not successful. The policy is a standardized form which, once a lender or a lender's counsel has familiarized itself with that form, provides consistent, assignable coverage by a company which has the assets to both defend and, in the event of a failure of title for insured causes, pay a loss.

One notable and certainly understandable exception to coverage under the Eagle 9 policy is for the failure of the debtor to have title to the collateral insured under the UCC. However, a legal opinion would never cover title either. Unlike a legal opinion, the standard language of the policy is consistent across jurisdictional lines for any insurance provided. The only variations in coverage would be the description of the insured security interest and UCC filing and the Schedule B exceptions, if any, to title. Of course there are no guarantees that counsel for an insured will not seek expanded, affirmative or additional coverage or that there might not be a dispute as to whether the claim was a covered risk, but hopefully these will not be frequent issues. The standard coverage provided by the UCC 9 policy covers attachment, perfection, and priority of a secured security interest, subject to the standard form limited qualifications and any accepted exceptions to title. The coverage is based upon the same due diligence which should be performed to issue a legal opinion, but without the exceptions, qualifications, and assumptions contained in such opinions. Ultimately, under the policy, First American acts as an indemnitor of the accuracy of that due diligence, unlike an opinion which "assumes" and relies on such accuracy. Additionally, one would assume, due to volume and control of business by the UCC insurer ("First American"), that due diligence will be accomplished as a part of the policy cost and more promptly than for a single order. We also assume that First American will have experienced counsel or staff addressing claims. These counsel or staff will, at the expense of the insurer, quickly address and resolve claims, and, as and if necessary, recommend to the title company the payment of claims. Since the insurer is in the business of insuring UCC risks, as opposed to opining counsel for whom payment of a claim might be construed as an admission of error, payment of an insured claim is the title company's business purpose and justifies the need for and value of the policy. Furthermore, in many if not all jurisdictions, title insurance companies are subject to insurance regulations, which act as an incentive for the company to promptly process, defend, and, if appropriate, pay claims. In most cases of which we are aware, attorneys' errors and omissions carriers usually defend claims on opinions, and in most cases the

accountability of an attorney for his or her opinion becomes adversarial, involving defense by a malpractice carrier and exposure to a deductible.

The Eagle 9 Policy will be issued based upon a set premium which, we have assumed, will include all of the necessary ingredients to determine and enable the issuance of such policy. Additionally, the policy due diligence might involve local counsel in the process of the issuance of such policy with compensation for such services. This could ameliorate the potential or perceived loss of fees for opinion issuing counsel. However, this might be an issue in states where the policy is considered property and casualty insurance and where agents for such insurance must be licensed. While there may be initial concern in the legal community because of a perceived risk of fee loss; speaking for ourselves and based on our discussions with other counsel providing similar services, most attorneys despise opinion writing and would gladly give up the fees to be relieved of the burden. Of course, there would still be the need for the general due enforceability and authority opinion. Additionally, it is worthy of note that an opining attorney is faced with a multi-faceted conflict when issuing an opinion, with the law firm wanting to be narrow in the scope of its opinion, the client wanting to close the loan for the most economical fee, the lender's counsel wanting to pass all risk for the subject matter of the opinion to borrower's counsel, regardless of the cost, and the lender wanting to keep its borrower reasonably happy while protecting itself. Under the Eagle 9 Policy, the title company, for a set fee, avoids this potential conflict. With the standardization of due diligence based upon which policies could be issued, there is the likelihood that lenders receiving such insurance will take comfort not only in the fact that their lien is insured, but that the title company's oversight and risk assumption will increase assurance of obtaining desired lien perfection. Additional impetus for the acceptance of the Eagle 9 Policy is also found in lender's counsel's desire not to involve itself in the review of the borrower's counsel's back-up for its opinion. Such review by lender's counsel could make it vulnerable to a claim that it approved the basis upon which the opinion had been rendered, which approval could be the basis for a defense by the opining firm against a claim. Finally, and perhaps most important of all, lenders can now avoid all of the varying assumptions, exceptions and qualifications presented by a legal opinion and instead get standardized, assignable coverage with standard limited and consistent exceptions.

An additional feature of the Eagle 9 Policy is the increase in the marketability of loans in the secondary or tertiary market through the standardization of coverage and the corporate indemnity. Inasmuch as the policy is a standard form, the due diligence portion of the review of loan packaging and sale would be simplified. All lenders using the Eagle 9 will be able to have, sell and receive the same secured lien in personal property as others, something which can not be said for lenders relying on varying opinions. They are also covered for warranties of title to the assigned security interest.

Conclusion

It is our conclusion that the First American Eagle 9 UCC Title Insurance policy offers numerous advantages over the customary legal opinions rendered in connection with secured loans. While we would like to say that lenders, lender's counsel, and borrower's counsel should and will be running to embrace the Eagle 9 Policy, we know that change, especially in the area of secured lending and legal representation comes slowly and often with some resistance. We do, however, sincerely believe that there should and will be a move toward the Eagle 9 Policy by secured lenders. The logical area to concentrate upon for this move would be with lenders selling loans rated by Rating Agencies. As the Eagle 9 finds its way into closing checklists for conduit loan lenders, it will surely become more universally recognized and adopted. We do not believe this change will come through attorneys, except in those cases where these attorneys take an active role in counseling their lender clients on how to improve their risk exposure and increase the marketability of their loans. Certainly attorneys should be educated with respect to the Eagle 9 Policy and its benefits and made allies and supporters of the coverages provided. One of the ways to inform these lenders, agencies and buyers of the benefits of Eagle 9 is through attorneys who have represented lenders and borrowers and who will recognize the advantages of Eagle 9 both in terms of the added security it offers lenders and the relief it offers to attorneys. However, it is ultimately the lenders, rating agencies and the purchasers of these loans in the secondary market who must be sold on its advantages and request it be provided. It is our sincere belief that sooner than later Eagle 9 will too become the standard not the exception.

We appreciate your asking us to assist you by providing this overview and hope that it will be of help to you in marketing the Eagle 9 Policy. Personally, I am very enthused by this product and would welcome the opportunity to work with First American in any further capacity in the marketing of the Eagle 9 Policy. If there is anything further which we can provide with respect to the foregoing, please feel free to contact us.

Very truly yours,

BERNKOPF, GOODMAN & BASEMAN LLP

By: _____
Gary P. Lilienthal

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