ESSAYS

COMPETITION IN THE LAND OF MICROBREWERIES: MANAGING MULTISTATE TRANSACTIONS IN THE UNITED STATES

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I. INTRODUCTION

I trust that I shall not be branded a traitor or a heretic for observing that the commercial law of the United States is untidy and indeterminate enough to unnerve many of my European counterparts. Indeed, as European lawyers soon learn in dealings with their American colleagues, the designation "U.S. commercial law" is something of a misnomer. Supposing a monolithic, more or less homogeneous U.S. law, a French colleague asks his counterpart in Illinois or New Jersey to clarify a rule of commercial law. The usual response, "it depends," may produce a bewildered stare on the questioner's face. But the laissez faire approach characteristic of American federalism, permitting states wide latitude in formulating rules of private law, makes *ça depend* the most appropriate answer.[1] The French colleague may be further perplexed to hear that our federalism principles permit the various states to reach different, even conflicting, legislative and judicial solutions to a problem. A state can even avoid reaching a solution altogether. Licensed to practice in a particular state,[2] a U.S. lawyer thinks routinely of a commercial rule as an Illinois rule, or a Florida rule, rather than a national rule. As if to underscore this last point, Professor Melvin Eisenberg has written lately that statements of U.S. national law rarely purport to state the law of any particular state in the federation.[3] Furthermore, notes Professor Eisenberg, the author of such statements cannot be taken to imply that the so-called national rule has been adopted in more than two or three states of the union.[4]

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1. Another popular answer is: "Well, there is a minority rule and a majority rule, and some states have no rule at all."

2. Each state administers its own bar examination, and from one state to another, sections of the exam may be identical or very different. A state's supervisory authority over lawyers in each state is vested in that state's supreme court, and disciplinary proceedings are usually conducted before the state supreme court. There is no separate bar examination for federal courts, and once admitted to practice in his chosen state, a lawyer may enroll by motion in federal court. The state bar examination covers both federal matters and the state's own municipal law. Although the American Bar Association enjoys considerable prestige and political influence, membership in it is purely optional for a practitioner. By contrast, state bar membership is obligatory upon anyone who wishes to practice law.

3. *See* Melvin A. Eisenberg, Why Is American Contract Law So Uniform?—National Law in the United States 10-11 (Feb. 26, 1996) (unpublished manuscript on file with author).

4. *See id.* at 9. "[C]itations [of so-called national rules] will typically be limited to cases from two or three states, and even when there are citations to more than two or three states, it is seldom if ever implied that the author of the statement warrants that every state has adopted the rule." *Id.* Eisenberg's concept of uniformity is elusive; I do not believe that he considers American law to display the uniformity of a European state with nationally effective civil and commercial codes. At any rate, U.S. lawyers do not conduct their practices as if U.S. law displayed such uniformity.

We Americans are perhaps not so far away from the confusion the *philosophe* Voltaire lamented in noting that pre-Revolutionary French law was apt to change whenever one changed his horse.[5] In a similar vein, Prof. Reinhard Zimmermann has suggested that American national law resembles nothing so much as the Digest-based *ius commune* of medieval Europe.[6] Assuming the accuracy of Zimmermann's comparison, however, we should add that most American lawyers, generally unimpressed by European legal history, would be mystified by Zimmermann's remark. Professor Eisenberg recently mused that U.S. national law most closely resembles international law or the *UNIDROIT Principles of Commercial Contracts* in the sense that rules of U.S. national law "purport to state the law, yet they do not purport to state the law of a jurisdiction."[7] But such tricky comparisons may baffle the French colleague for he knows that French law is the national law of a real jurisdiction and that international law, by contrast, is usually insusceptible of routine enforcement and less determinate than his own municipal law. However candid and well intentioned, scholarly analogies between U.S. law and other not-so-accessible legal regimes are apt to frustrate a hypothetical French colleague confident that both lawyers and clients are entitled to expect knowable rules effective in the place of a transaction.

Perhaps our nation of 250,000,000 people, many recent immigrants, makes inevitable the murkiness of our commercial law, or at least our tolerance for such murkiness. Depending upon the state in which a suit is filed or a transaction negotiated and concluded, inconsistent laws of two or more states may be implicated. Pouring from fifty different state court systems and hundreds of federal courts, a diverse and powerful case law flows and meanders, inundating our libraries, complicating lawyers' tasks, and eroding expectations of legal uniformity.

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5. "Et n'est-ce pas une chose absurde et affreuse que ce qui est vrai dans un village se trouve faux dans un autre? Par quelle étrange barbarie se peut-il que des compatriotes ne vivent pas sous la même loi? . . . Il en est ainsi de poste en poste dans le royaume; vous changez de jurisprudence en changeant de chevaux." ("Is it not an absurd and terrible thing that what is true in one village is false in another? What kind of barbarism is it that citizens must live under different laws? . . . When you travel in this kingdom you change legal systems as often as you change horses.") VII OEUVRES DE VOLTAIRE [WORKS OF VOLTAIRE], Dialogues 5 (1838).

6. *See* R. Zimmermann, *Civil Code and Civil Law—The "Europeanization" of Private Law Within the European Community and the Re-emergence of European Legal Science*, 1 COLUM. J. EUR. L. 63, 82-84 (1995). In this remark, Zimmermann seems to suggest that the United States has a common legal culture and grammar, though the rules of the legal community may vary widely. Unfortunately, lawyers cannot confidently advise clients based upon culture and grammar alone, but without this common core of experience U.S. lawyers could scarcely communicate at all.

7. Eisenberg, *supra* note 3, at 10-11.

Federalism during two centuries of American independence seems to have convinced us of the unattainability (and perhaps undesirability) of centralized regulation such as that characteristic of Westminster at the height of the British Empire. Then, Westminster boasted an elite cadre of high judges in the House of Lords. These judges, reinforced in their opinions by a strict doctrine of stare decisis, consulted regularly as they monitored and guided English jurisprudence and thus a great bulk of the law of the English-speaking world.[8] A decentralized U.S. law-making apparatus, by contrast, may today boast thousands of judges, most of whom do not know each other and would never consult about the current status of the law.

II. AMERICAN LAW BREWED IN MICROBREWERIES

Unlike our European counterparts, we are not heirs of a *ius commune*, that repository of fundamental ideas emanating from Roman and canon law and refined over centuries by medieval Romanists. Nor does our commercial law have a center of gravity or orientation that French and German lawyers would deem characteristic of the municipal law of their own systems. Skeptical of the power of legislative generalization,[9] Americans question the utility of national codes.[10] Though we once toyed with the idea of national codification, we long ago abandoned it, and we have little commitment to comprehensive national codes of substantive law.[11] Unlike the French codes, such legal documents have not constituted unifiers of our cultural and social identity. Compared with legal education in France, our legal education is not very standardized. From university to university, it is often unpredictable after the first year curriculum. The commercial community seems content to navigate among fifty states that in commercial matters boast about the distinctiveness and relative advantage of their laws over those of their sister states. Like microbreweries producing their own distinctive ales

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8. *See* JOHN P. DAWSON, ORACLES OF THE LAW 88-92 (1968) (discussing the growth and decline of British case law).

9. "General propositions do not decide concrete cases." Lochner v. New York, 198 U.S. 45, 76 (1905) (Holmes, J., dissenting). "*Ce scepticisme peut être résumé par la fameuse formule du juge Holmes tirée à la théorie platonicienne, selon laquelle les solutions générales ne résolvent pas les cas particuliers.*" (This legislative skepticism was capsulized in Justice Holmes's famous dictum, really a variant on Plato's theory of ideal forms, that general propositions did not resolve particular cases.) Herman, *supra* note *, at 716.

10. *See generally* Herman, *supra* note *.

11. *See* Herman, *supra* note *, at 715-18, 721-25. A notable exception to this statement is the U.C.C. enacted by each state with particularistic amendments and largely interpreted by each state's courts. *See infra* text accompanying notes 13-14.

and beers, the various state judiciaries, each with its own supreme court, construe enactments of their coordinate legislatures and produce case law effective in their respective states. But, by definition, these different case-products are at best only persuasive for neighboring states who chauvinistically vouch for their own domestic products. As in beer so in commercial law. Strength resides in diversity. *E pluribus unum.*[12]

When rules of two or more states have potential application in a lawsuit, the forum state may treat the rule of another nonforum state as foreign law and require that it be proven as a fact in the forum state litigation.[13] Though every state, including Louisiana, has enacted the Uniform Commercial Code (U.C.C. or Code),[14] such enactments occurred independently in each state legislature, not the United States Congress. The enactments occurred over several decades during which commercial perspectives on the most sensible commercial rules evolved. Each state's commercial code may have local variations; most such codes have extensive state annotations; and a state's jurisprudence interpreting the state's commercial code does not have to conform with that of other states. As commercial matters seldom attract attention from the United States Supreme Court, the only tribunal capable of harmonizing disparate rules, lawyers seem to have abandoned hope of having nationally received rules. Inconsistent results and rules are inconvenient, but they are constitutional.

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12. "From many, one" (ubiquitous motto on U.S. coinage).

13. *See* R. LEFLAR, L. MCDOUGAL III, R. FELIX, AMERICAN CONFLICTS LAW, § 130 (4th ed. 1986).

> According to the common law, the law of any state other than the forum was not law at all, but fact. If there were a case at trial in which the law of another state played a part, that law whether statutory or common had to be proved like any other fact in the case . . . . At common law no judicial notice was taken of the law of the other states. The standard method of proving the law of another state was by the testimony of witnesses skilled in that law, and that still remains a method of proof. When no presumption [as to the foreign law] was applicable, and there was nothing before the court as proof of the foreign law courts often cut the Gordian knot by applying the law of the forum without giving reasons for doing so, or by saying that the parties by bringing their suit at the forum had acquiesced in the application of the forum's law.

Id.

14. Louisiana has enacted virtually all titles of the Uniform Commercial Code except Article 2 (Sales) and Article 2A (Leases). However, ideas in Article 2 have influenced Louisiana's newly enacted sale articles. *See, e.g.*, C.P. Callens, Comment, *Louisiana Civil Law and the Uniform Commercial Code: Interpreting the New Louisiana Uniform Commercial Code—Inspired Sales Articles on Price*, 69 TUL. L. REV. 1649 (1995).

A. The Uniform Commercial Code Is Not Comprehensive

Even if the U.C.C. unified commercial law on a national plane, the Code's scope is not nearly as comprehensive as that of typical European codes. This conclusion is perhaps implicit in the fact that the U.C.C.'s scope is commercial and no more than commercial. Unlike a continental civil code with its general part and regulation of a wide array of civil matters, the U.C.C. provides no titles on obligations in general. As states other than Louisiana have no civil codes of a continental stamp, such regulation must be elaborated by the jurisprudence of each sovereign state. As a result, any so-called American law of obligations and contracts, regulating subjects such as formation, vices of consent, conditions and enforcement—is effective only within each state's borders. Indeed, the phrase "law of obligations" would likely have no fixed meaning among U.S. lawyers. Although the U.C.C. regulates sales of goods and (in some states) leases of equipment, the code does not affect immovable property, partnerships, corporations, mandate, guaranty, loan, mortgage or the other nominate contracts familiar to continental lawyers. Even bankruptcy law, which is federal law in principle, is roughly uniform from state to state, for well-established federal doctrine has authorized the federal courts to incorporate diverse state laws into bankruptcy matters, especially to fill gaps in federal law.[15]

B. Model Acts

To complicate matters, model acts regulate the organization and internal governance of partnerships and corporations. Because these acts are optionally enacted and episodically revised, there is on any given day and for any transaction no assurance that a particular state has enacted a particular model legislative act.[16] Even if the act is in force in a specific

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15. The same observation is true of securities laws which consist of a structure of more or less homogenous federal law laid over a heterogeneous patchwork of state laws. For a recent Supreme Court decision in which both strata of law are visible, see *Kamer v. Kemper Financial Services, Inc.*, 500 U.S. 90 (1991) (viewing the federal courts' role in securities law as interstitial and gap filling, the Supreme court declined to displace a particular state securities rule with a uniform rule abolishing a particular exception in federal derivative actions). For a consideration of Louisiana's blend of federal and state bankruptcy law, see *In the Matter of Zedda*, 103 F.3d 1195 (5th Cir. 1997).

16. On the development of model laws, see Herman, *supra* note *, at 725:

> Dans la mesure où le Congrès américain n'avait pas d'intérêt pratique à légiférer en droit privé, ces dispositions statutaires étaient laissées à l'appréciation des différents États qui pouvaient s'en inspirer comme loi modèle. La difficulté survint à ce propos. Alors que l'Ohio pouvait décider d'adopter un tel modèle législatif, la Pennsylvanie pouvait le rejeter de sorte

state, it is difficult to know if the most recent revision of the act is effective in that particular state. For example, Louisiana, because of its civil code regime and hybrid character, has enacted no model partnership law at all, but the influence of such a model law may be detected in the Civil Code, along with the influences of Quebec law, and other civilian systems. To Voltaire and his descendants, such national diversity would seem chaotic, but it must be remembered that a lawyer is effectively responsible only for his own state law, and many states think of their differing laws as emblematic of healthy competition. Poised to offer a complex legislative package to attract industries, or even citizens of certain ages, each state hawks its regulation of business, farming, gambling, etc., as the most enlightened (i.e., the most favorable).[17] Viewing the individual states as entrepreneurs (or what our politicians like to call independent laboratories of experimentation), one could conclude that the rationale for such diversity is inspired by an idea of survival of the fittest associated with Darwinian evolution.

III. NAVIGATING AMONG MICROBREWERIES

How do we commercial lawyers manage with this patchwork of rules and practices? To this question there are two answers, the first aesthetic and the second practical. First the aesthetic: Like a work of modern art, the great U.S. canvas in which thousands of rules figure will eventually disclose pattern and rhythm if the viewer stands far enough away from the image. This long perspective is perhaps a luxury of academics, who practice hypothetically everywhere, but only on

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> que le droit de ce dernier État restait jurisprudentiel car non affecté par ces règles nouvelles, alors que le droit du premier État devenait à la fois jurisprudentiel et statutaire. (Since the American Congress had no practical interest in legislating private law, these statutes were left to be written by the various states which could use the model law as a guide. The difficulty arose in that very regard. While Ohio could decide to adopt one model law, Pennsylvania could reject it. The result of that rejection is that the law of Pennsylvania would remain based on case law since the new rules did not affect it. Conversely, the law of Ohio became both statutory and case-based.)

Id.

17. With a zeal normally reserved for street vendors at a *marché aux puces* (flea market), lawyers and politicians commonly hawk their state's laws in one area or another. For example, a Tulane graduate on campus to interview students recently visited my class to lecture on the virtues of Delaware's corporate laws and its corporate bar. According to the speaker, Delaware's system is incomparably better than other state systems: efficiently operated, not very expensive for the users, Delaware's corporate system has the benefit of a very sophisticated business bench and bar who serve most of the major companies listed in Forbes Magazine and Fortune 500.

imaginary clients.[18] Unlike a university researcher, however, a lawyer works on his files at close range and with his eyes cast downward. Unaccountable for many commercial rules and practices effective outside a lawyer's state, he may lack the time or incentive to investigate them. At any moment the lawyer's focus of attention may be far from the scholar's long perspective. Their goals are different, for the scholar has no financial stake in the files nor any exposure for negligence if his advice has been wrong.

The balance of this Essay focuses on practical accommodations by commercial lawyers to reduce the anxiety produced by our unruly rules. In business matters, the United States has certain cultural extra-legal advantages over Europe: the nation is financially and linguistically unified. Unlike the continent, where transactions and lawsuits occur in an array of languages, American lawyers work almost invariably in the English language; some disagreements are alleviated by a more or less unified vocabulary, seasoned and tempered by the commonly taught doctrines of law schools, which claim not to teach students law rules but instead "how to think like a lawyer." Within the United States, prices are quoted in dollars, discount rates are national phenomena, inflation rates are low and reasonably constant, and nationally determinable interest rates appear daily in the Wall Street Journal. Our federalism also reminds us to keep in check our overly ambitious expectations of uniformity.

IV. A HYPOTHETICAL TRANSACTION

By reference to a hypothetical case let us indicate what else we do in a practical vein to reduce our anxiety about the disunity of U.S. commercial law. Assume that a consortium of European banks has made a loan commitment to a corporate borrower headquartered in the state of Delaware. With the loan the borrower plans to purchase a large manufacturing enterprise with installations, depots, and plants in several states including California and Tennessee. The structure of the purchase will be a credit sale with the borrower paying twenty percent of the price and the lenders furnishing the balance. The loan repayment will be secured by the borrower's mortgages on movable equipment, inventory, and immovable property in five states. The real estate of the target

18. This academic perspective may explain why Eisenberg argues that national law is uniform. But elsewhere he offers other reasons to support a scholarship premised on national rules: for he says that "work on local law hardly ever confers great scholarly prestige." Eisenberg, *supra* note 3, at 15 & n.19. Though generally accurate, this explanation is unhelpful for a client seeking concrete advice on the state law applicable to his transaction or litigation.

company is affected by numerous leases and other agreements that will remain fully effective after the loan has been funded and the purchaser company has acquired ownership of the target company. To reduce the issues arising from the array of state laws that might apply to the transaction, the mortgage lender will require a number of items. These items will also help the lender's attorneys structure the transaction to the lender's advantage: the lender's lawyers, who will be managing the transaction, can avoid learning and being confused by the potentially applicable law of several other states by drafting the loan documents to rule out certain possibilities in advance of any dispute. These documents will also shift to the purchaser's lawyers accountability for compliance with the laws of other states, and as we shall see, the purchaser's lawyers will also be responsible for knowing the laws of the lender's state.

A. State Law Selection

The loan agreement will designate a specific state law to be applied to any dispute between the parties. The borrower will also agree that the selected state law will govern interpretation of the document. The state law selected is likely the one where the lender consortium's lead bank has its U.S. headquarters. By means of the law selection clause, the lender's attorneys will compel the borrower, at its expense, to conform with the lender's state law, for the borrower must engage attorneys from the lender's state, acceptable to the lender, to negotiate and review the documents.

B. Forum Selection Clause

The parties' loan agreement will provide irrevocably the state jurisdiction for filing litigation in the event of a dispute under the loan agreement. As in Part IV.A *supra*, the lender's state is the likely choice of forum. By using this provision, the lender's attorneys can assure that any dispute will be litigated in a jurisdiction where they are licensed to practice and thus fully familiar with the law.

C. Summons, Service and Jurisdiction

The parties may stipulate the proper method of summons and service on the borrower so that, if it becomes a defendant, it cannot easily contest the forum's jurisdiction over the matter and the defendant itself.

D. Arbitration

If the parties desire, they may stipulate that any dispute between them shall be subject to binding arbitration, rather than litigation. In this last case they will designate the arbitration organization, e.g., American Arbitration Association, New York Chamber of Commerce, etc. The parties will also designate the events (e.g., deadlock, and notices after passage of so much time) that must occur as preconditions for lodging the dispute with an arbitral board or tribunal. Arbitration has the advantage of being less formal than litigation and arbitrators will likely reach a binding result more swiftly than a tribunal. The borrower may also think that arbitration will provide a fairer forum than the lender's state court because the arbitrators will not have to adhere so strictly to a particular state's law.

E. Chattel Security

Unlike the loan agreement, the mortgages in question will designate as applicable the law of the state where the collateral security is situated. For example, if the target company sells equipment in Tennessee and inventory in California, presumably the security agreements affecting these different goods will incorporate the laws of the states where they are located, along with forum selection clauses in the same states. Since all the security instruments would generally be based on specific titles of the U.C.C., there would probably be few differences among the California and Tennessee instruments, and the parties may deem neither state's law particularly advantageous or disadvantageous. Notably, if the borrower defaults under the loan agreement, the lender may initially file suit in the state stipulated in the loan agreement and invoke the laws of that state. At the conclusion of this action, foreclosure suits will be filed in the various states where collateral is located. As a rule, the law applicable to foreclosure and judicial sale of collateral will be the law of the state where the property is located rather than the law selected in the loan agreement.

F. Real Estate

Unlike the loan agreement, the real estate deeds and real estate mortgages will stipulate as applicable the law of the situs of the immovable property. According to prevalent U.S. doctrine, rights and duties respecting an immovable are subject to the sovereign authority of

the courts of the state where the property is situated.[19] Thus, for example, New Jersey property law, as elaborated by New Jersey courts, would regulate the ownership, disposition, and supervision of mortgaged real estate in New Jersey.

G. Title Insurance

The law of immovable property is highly variable in the United States, and in accordance with the principle of sovereignty mentioned above, the state of situs of the realty has power to dictate rights in the immovable property. But this principle of state sovereignty can make determination of a valid title chaotic. Before granting a mortgage and as a pre-condition to funding the loan, the lender, to minimize the effects of this chaos, will require title insurance. Purchased by the borrower, this is indemnity insurance, assuring that in case of a defect in the title rendering the mortgage partly unenforceable, the insurer must indemnify the mortgagee for any loss. Because no two states have identical regimes of property regulation, title insurers provide a sort of lowest common denominator or currency that facilitates negotiations among lenders and borrowers as well as vendors and purchasers. Thus, while a lender may not have confidence in an independent abstractor's title report from a distant state, a nationally recognized title insurer can standardize the criteria of title merchantability and calm a lender's concerns over the quality of its mortgage. No significant closing is advisable without title insurance, for this policy constitutes a title guarantee from a permanent, solvent organization, and for a single premium the insurance policy itself is valid for the life of the mortgage.

H. The Estoppel Letter

Before a title lawyer recommends to an insurer that it issue a title policy, he will require all of the preexisting documentation respecting the land to be mortgaged. This documentation would include surveys, servitudes, leases, and mortgages. In addition, lawyers will review all the leases affecting the property to assure that none is in default. They will also determine if the leases contain any options to purchase and rent escalations that the buyer must respect. In general, a purchaser and its lender wish assurance that they will not, after closing, unwittingly walk

19. *See* LEFLAR, *supra* note 13, § 165. "The title to land is, in theory at least, always controlled by the local law of the situs of the land . . . . The only state which by the action of its courts can change title of particular land is that of the situs." *Id*.

into a firestorm of complaints from tenants against the owner-landlord who has transferred the property. To block a tenant from complaining post-closing of a landlord's default under his lease, an estoppel letter will be required of the tenant. This letter requires each of the tenants to identify all the documents constituting the lease and to state specifically the rents due, if the lease in question is in full effect, whether there are any defaults, whether the lease has been amended, and whether the landlord-seller has complied fully with its lease obligations. Once delivered, this tenant declaration will bar the tenant from complaining of landlord defaults that have predated the closing. Essentially the estoppel letter resembles a marriage celebrant's familiar statement at a wedding that "if anyone knows why this marriage should not occur, speak now or forever hold your peace." Satisfactory compliance with this estoppel requirement will be a condition of the lender's funding and closing the loan.[20]

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20. A popular real estate text book provides the following form of tenant estoppel certificate and editorial comments:

CERTIFICATE

_____, 19___

_____
(Buyer's name and address)

The undersigned declares:

1. He is the tenant in possession of _____under a
(Describe leased premises)
lease, a complete and accurate copy of which, including all amendments, is attached.

2. The lease is in full force and effect.

3. As of the date of this certificate no breach exists on his part as tenant under the lease.

4. As of the date of this certificate no breach exists on the part of the landlord under the lease, so far as known to tenant.

5. No rent has been paid in advance except _____ the current installment for _____, 19___, and the undersigned has no claim against the landlord for any deposits and has no defense or offset to rent accruing after _____, 19___, under the lease or any other obligation.

He understands that you may purchase or acquire the leased premises, and that if you do so, your action will be in material reliance on this certificate.

(Signature of tenant)

_____
(Typed name of tenant)

(Acknowledgment)

COMMENT: The certificate prevents the tenant from contradicting the statements made in it during litigation arising under the lease. Evid.C. § 623. The underlying theory is that of equitable estoppel, and is limited to present or past facts, not future events. Berverdor, Inc. v. Salyer Farms (1950) 97 C.A.2d 459, 218 P.2d 138; see 4 Witkin, Summary of California Law 2869-2873 (7th ed., 1960).

I. Good Standing

If the borrower-purchaser is a corporation, the lender and the seller will want assurances that the borrower corporation has been duly formed, is in good standing in its state of incorporation, and is authorized to conduct business in all states where any of the newly purchased property is situated. The lender will also seek to verify that all the actions of the corporation have been specifically authorized by action of the respective boards or shareholders. In practically every state an agency will, for a fee, obtain current status information on the corporation and certify its good standing, or indicate why a good standing certificate cannot be issued for the corporation. If the corporation has entered any other state to do business, this authorization to do business in such other state can be determined. Separate agencies in each state will also verify that the equipment and inventory are free and unencumbered, and thus susceptible to a fully perfected senior security interest. It must be remembered, however, that all of these issues are to be verified on a statewide basis only, one state at a time. Hence, a multistate transaction will require a large number of certifications from different agencies as well as teams of attorneys who must assure conformity with state law.[21]

J. Statutory Compliance

If any of the real estate is subject to compliance with state and federal environmental laws, then the lender and buyer will require relevant certifications by state and federal agencies having jurisdiction over the property in question. Often these governmental agencies will not deal directly with the public. But a network of private agencies also specializes in contacting governmental agencies and evaluating environmental compliance by companies. As with many other aspects of the transaction, the lender, instead of making itself responsible for environmental laws in several states, will shift responsibility to the borrower's attorneys to have their respective state agencies certify environmental compliance of property. In this way, the lender generally

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GRANT S. NELSON & DALE A. WHITMAN, REAL ESTATE TRANSFER FINANCE AND DEVELOPMENT: CASES AND MATERIALS 131-32 (4th ed. 1992). Similar estoppel certificates are also normally required for other sorts of documentation, such as mortgages, licenses, franchises, service contracts, and any other document that will remain in effect and bind the purchaser after the transaction.

21. Though wedded in theory to ideals of efficiency and simplicity, lawyers seem to earn their livelihoods to an extent from the inefficiency and complexity produced by fifty different state systems which, like tariff barriers, increase transaction costs. Alas, these are costs of a federated system that respects state sovereignty in private law development.

assures that the borrower will be responsible for selecting reliable certification agencies.

K. Opinion of Counsel

Finally, the opinion letter. This is the heart of the closing exercise. Every closing is conditioned on delivery by attorneys of their opinion letter as to all phases of the transaction. For example, a lawyer in each state where a real estate deed and mortgage will be filed must opine on the enforceability and due execution of these instruments. This opinion will accompany the mortgage title policy. Likewise, for other instruments, any attorney representing a corporation must opine that his corporate client has been duly formed, is in good standing, and that all corporate actions have been fully authorized. Unless the attorney can escape giving these assurances, the attorney may also be required to opine on the genuineness of signatures and proper execution of the documents. In other words, by the end of the transaction, the lender will have succeeded in having the other parties' lawyers perform most of the work and take most of the responsibility for mistakes. Additionally the lender will assure that the other parties will pay virtually all the attorneys' fees for the transaction.

L. Practical Effects of Opinion Letter

First, the lawyer who delivers the letter will declare that he is responsible only for laws of his state of practice. In this way, no lawyer can impose upon the opinion giver more responsibility than his state bar permits. If the opinion giver does not honestly believe that a particular instrument is fully enforceable, he must state his reservations about the instrument. In that event he will often be compelled to suggest a redraft of the instrument to render it enforceable. If a dispute later arises in connection with a document, he will be unable to claim that he had mental reservations about it that his opinion letter neglected to mention. This neutralization-by-opinion may effectively prevent him from representing the client in litigation that questions the validity of the instruments covered in the letter. Like it or not, the lawyer has assumed responsibility for not trying to defeat the documents, even when later his own client earnestly desires to escape from them. Like a tenant's estoppel letter, the lawyer's opinion may prevent him from later taking a position inconsistent with his professional judgment at the time of the transaction.