March 30, 2004[†]

REPORT OF THE LEGAL OPINION COMMITTEE OF THE BUSINESS LAW SECTION OF THE NORTH CAROLINA BAR ASSOCIATION

THIRD-PARTY LEGAL OPINIONS IN BUSINESS TRANSACTIONS, SECOND EDITION

Co-Chair
John R. Miller
Charlotte, NC

Co-Chair
William B. Gwyn, Jr.
Raleigh, NC

Committee Members

A. Mark Adcock
Charlotte, NC

Diana S. Allen
Raleigh, NC

David Line Batty
Charlotte, NC

Charles L. Cain
High Point, NC

Mark T. Cain
Charlotte, NC

Christopher B. Capel
Raleigh, NC

T. Hal Clarke, Jr.
Charlotte, NC

William A. Davis, II
Winston-Salem, NC

Kenneth M. Greene
Greensboro, NC

Alfred L. Purrington, III
Raleigh, NC

Richard K. Schell
Charlotte, NC

Melanie Samson Tuttle
Greensboro, NC

[†] This version includes certain technical corrections added August 16, 2004.

TABLE OF CONTENTS

Page

REPORT OF THE LEGAL OPINION COMMITTEE OF THE BUSINESS LAW SECTION OF THE NORTH CAROLINA BAR ASSOCIATION

THIRD-PARTY LEGAL OPINIONS IN BUSINESS TRANSACTIONS, SECOND EDITION

I. INTRODUCTION

A. Background

This Report on Third-Party Legal Opinions in Business Transactions, Second Edition (the "Report") was prepared by the Legal Opinion Committee (the "Committee") of the Business Law Section of the North Carolina Bar Association.

The Business Law Section originally formed the Committee in late 1994. The Committee was composed of North Carolina lawyers with considerable experience in business transactions and in rendering and receiving legal opinions. Their practices included representation of borrowers, lenders, issuers, acquirors, sellers and others engaged in various types of business transactions. Members of the Committee consulted with lenders and their counsel, borrowers and their counsel, and others involved or interested in the legal opinion process. The Committee issued its initial Report on Third-Party Legal Opinions in Business Transactions in January 1999 (the "1999 Report"). The 1999 Report reflected the Committee's attempt to achieve a balance between the sometimes-conflicting interests of parties to a transaction such as lenders and borrowers and acquirors and sellers and their attorneys. In connection with the 1999 Report, the Committee considered in depth the Third-Party Legal Opinion Report, including the ABA ACCORD (the "ACCORD"), issued in 1991 by the Section of Business Law of the American Bar Association.[1] Charles L. Cain chaired the original Committee.

In 2002, the Business Law Section reconstituted the Committee and requested that the Committee reexamine the 1999 Report, update it and expand it as appropriate to serve the practicing bar in North Carolina. At approximately the same time, the Uniform Commercial Code Committee of the Business Law Section (the "UCC Committee") undertook the task of creating an illustrative form of legal opinion for Uniform Commercial Code ("UCC") secured transactions. In addition, the TriBar Opinion Committee was working on a special report on

---

[1] While a useful tool, the ACCORD is not typically incorporated into opinions rendered in North Carolina practice nor, insofar as the Committee has determined, throughout the rest of the country. Accordingly, the Committee determined that simply endorsing the practice of adopting the ACCORD in North Carolina legal opinions would not be productive. The problems with the ACCORD include its length, complexity, and its approach of incorporating by reference an independent set of opinion principles, which, once incorporated, govern interpretation of the opinion. The Committee concluded it was unlikely to influence North Carolina opinion practice to the extent necessary to achieve widespread usage of the ACCORD.

UCC security interest opinions under Revised Article 9 (the "Special TriBar Report"). This report was released on July 25, 2003 and published at 58 BUS. LAW. 1453 (2003).

In August 2002, the UCC Committee referred a draft of the illustrative form of UCC Opinion to the Committee for its consideration. In evaluating that draft, the Committee considered the revised American Bar Association Legal Opinion Guidelines[2] and various drafts of the Special TriBar Report. In many instances, the Committee determined that the revised Guidelines and the Special TriBar Report accurately set forth the appropriate standard of conduct for legal opinion practice in North Carolina. The ABA Guidelines are attached to this Report as an appendix and are reprinted herein by permission of the American Bar Association. The Committee endorses them in principle as providing helpful guidance regarding the application of customary practice to third-party legal opinions that will prove useful both to lawyers and their clients.

The 1999 Report set forth recommended North Carolina opinion practices and procedures in the specific substantive areas covered. Where considered appropriate, the Committee offered commentary on opinions and practices it believed should be encouraged or discouraged. The Report carries forward the approach of the 1999 Report and adds to the scope of the 1999 Report discussions on ethics, opinions of inside counsel and opinions with regard to secured transactions under Article 9 of the Uniform Commercial Code.

The Business Section Council approved and endorsed this Report in March 2004. The Report reflects the views of the Committee. It does not necessarily reflect the views of any law firm, institution or individual practitioner, including individual members of the Committee. The Report has not been submitted for consideration or approval by the Board of Governors of the North Carolina Bar Association or the State Bar of North Carolina. The Illustrative Form of UCC Opinion was presented to the Bar during a video CLE on November 19, 2002 and also at the 2003 UNC School of Law Banking Institute.

B. Purpose of Report

The purpose of the Report is three-fold: (1) to assist North Carolina lawyers engaged in business law practice, including those who do not regularly render or receive opinions; (2) to develop a common understanding about what standard substantive opinions mean and what legal or factual issues might be involved; and (3) to achieve a degree of standardization and consistency in opinion practice, thereby reducing the time and expense devoted by all involved. The Committee hopes the Report will lead to a more efficient and effective process of opinion

---

[2] In connection with the ACCORD, the ABA Legal Opinion Committee promulgated *Certain Guidelines for the Negotiation and Preparation of Third-Party Legal Opinions*. The goal of the ABA Guidelines is to help the parties reach a fair and equitable result -- a professional opinion that is within the competence of the opinion giver and that satisfies the reasonable needs of the opinion recipient. Overriding responsibilities of each party are to negotiate the terms of the opinion as early as practicable in the transaction, to be governed by a sense of ethical behavior and professionalism, and to ask of the other no more than it would be willing to provide (conversely, neither party should refuse to give opinions within its competence and expertise). In 2002, the ABA published revised Guidelines, renamed "*Legal Opinion Guidelines*," together with the Legal Opinion Principles adopted by the ABA in 1998 ("ABA Guidelines").

rendering and receiving, with benefits for lawyers who deliver opinions, their clients who bear the cost of the opinions, and the lenders, acquirors and sellers and others who receive the opinions.

The Report's coverage includes: common assumptions underlying opinions, knowledge qualification, the opinion giver's scope of inquiry, the format of the opinion letter, and substantive opinions on company status, company power and authorization, authorization and issuance of stock, remedies, no breach or default, no violation of law, no governmental approvals or consent, secured transactions and no litigation confirmation. In each section the Report sets forth the specific substantive opinions that the Committee believes represent appropriate North Carolina practice and procedure consistent with relevant principles of professional responsibility. Following is commentary on what those opinions mean and what they do not mean, and discussion of relevant qualifications, exceptions and alternative approaches where appropriate. Further, the Report suggests general due diligence procedures to provide the necessary legal and factual basis for each opinion. It should be noted, however, that the due diligence appropriate for a particular opinion will depend upon various factors, including the circumstances of the transaction, the role of counsel in the transaction and the relationship of the opinion giver to the client. Accordingly, the extent of due diligence appropriate to the situation may be greater or less than that outlined in the Report for a specific opinion.

This Second Edition also includes a discussion of the ethical considerations bearing upon opinion practice in North Carolina (Introduction, part C) and adds new material discussing opinions of inside counsel (Section 2.10). As a consequence of the increasing number of limited liability companies doing business in North Carolina, the treatment of limited liability companies in the Second Edition has also been expanded significantly.

Finally, the Report contains two illustrative forms of opinion, cross-referenced to the text of the Report to assist the opinion giver in preparing the opinion letter. The first is an Illustrative Form of Opinion for business transactions generally, and the second is an Illustrative Form of UCC Opinion for secured transactions under Article 9 of the UCC.

The Report is intended for use in typical business transactions such as loans, financings, mergers and acquisitions. This Report also addresses issues unique to secured transactions (e.g., perfection of liens). It does not address real property transactions (e.g., real property title issues). Real property opinion issues are discussed by the *Report of the Opinion Letter Subcommittee of the Commercial Law Committee of the Real Property Section of the North Carolina Bar Association*, issued in May 1993 (the "*Real Property Committee Report*").

The Committee recognizes that not all business or secured transactions fit neatly into the standardized approaches endorsed by the Report. There will be circumstances where unique aspects of the transaction require a negotiated opinion. But the Committee's hope is that as a result of the Report the parties' time and efforts can be devoted to those unique aspects of the transaction, and that it will not be necessary in each transaction to readdress the more routine and standardized aspects of opinions.

In summary, the Report is intended to be used by North Carolina practitioners as a tool and reference source. It is intended to help bring uniformity, consistency and professionalism to the

rendering of transactional legal opinions in North Carolina. By doing so, the Committee believes that the lawyers who render the opinions, those who receive the opinions, and their clients will benefit.

C. Ethical Issues Involved in the Rendering of Opinion Letters

The starting point for considering a lawyer's ethical obligations in rendering a legal opinion to a third party in a business transaction is Rule 2.3(a) of the North Carolina Revised Rules of Professional Conduct (the "Rules"). That Rule expressly authorizes a lawyer to "undertake an evaluation of a matter affecting a client for the use of someone other than the client" if the lawyer "reasonably believes that making the evaluation is compatible with other aspects of the lawyer's relationship with the client" and the client requests the evaluation or consents after consultation. The Rule applies to a third-party legal opinion, which falls within the broader term "report of an evaluation" found in the Rule.[3]

The compatibility and consent requirements of Rule 2.3 ordinarily pose no problems for a lawyer delivering a closing opinion. Delivery of the opinion is just one part of the lawyer's larger role when representing a client in a business transaction. The opinion letter is required for the client to achieve its objective of completing the transaction, as are the lawyer's functions of advising the client and negotiating and drafting the requisite transaction documents. In delivering the third-party legal opinion, the lawyer is doing what he or she was retained to do. The client may have requested that the opinion be delivered or, in the more usual case, the client's consent is apparent from the circumstances surrounding the transaction. In particular, the definitive agreement for the transaction, whether it be a loan, financing, merger or sale of assets, for example, will typically make the delivery of the opinion letter a condition to closing. The lawyer should, however, consider consulting with the client to ensure that the client understands the scope and purpose of the opinion letter and expressly or implicitly consents to its delivery.[4]

Rendering a legal opinion in a business transaction implicates additional ethical obligations on the part of the opining lawyer. They include:

- The lawyer must be competent to render the opinion.
- The lawyer must preserve the confidentiality of client information.
- The lawyer's conduct must conform to the requirements of the law and must be characterized by independent judgment and truthfulness.

---

[3] *See* Rule 2.3(b) and Comment [1] to Rule 2.3.

[4] Rule 2.3(b) of the American Bar Association's Model Rules of Professional Conduct, as revised (2003), expressly requires a lawyer to obtain the client's informed consent before providing an opinion that "is likely to affect the client's interests materially and adversely."

Lawyers whose opinions will be filed as exhibits to registration statements filed with the Securities and Exchange Commission must also be concerned with their obligations under the Sarbanes-Oxley Act of 2002.

The failure to comply with an obligation or prohibition imposed by the Rules may be a basis for invoking the disciplinary process of the North Carolina State Bar. The Rules are designed to provide guidance to lawyers; they are not designed to be a basis for civil liability. That being said, because the Rules do establish standards of conduct by lawyers, a violation of a Rule may be evidence of a breach of an applicable standard of conduct.

Competence

Rule 1.1 prohibits a lawyer from handling a matter that the lawyer knows or should know he or she is not competent to handle unless the lawyer associates with a lawyer who is competent to handle the matter. "Competent representation requires the legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation."[5] Competence, therefore, requires both substantive knowledge of the law and an understanding of the factual issues involved in rendering the requested opinion.

A lawyer should opine only as to those matters within his or her legal knowledge and competence. The lawyer must determine what legal matters the opinion will address and then assess his or her own competence with respect to those matters. In a closing opinion, those matters may be diverse and highly specialized, including, for example, the evaluation of corporate organization and authorization, UCC security interests, securities law compliance, pending litigation, patent rights, and tax matters, and may be governed by the laws of another state or jurisdiction.[6] If the lawyer lacks the legal competence to render the required opinion, then he or she must associate another lawyer who is competent to render the opinion. The necessary competence may be supplied by several lawyers within a single law firm. In some cases, the lawyer may need to associate special or local counsel outside of his or her firm. In any event, the lawyer must reasonably believe that the lawyer he or she associates is competent to give the requested opinion.

When associating another lawyer in connection with delivering an opinion, the lawyer should take care to assure that the associated lawyer understands the transaction and the issues – both legal and factual – involved. If the lawyer rendering the primary opinion relies on the opinions of other lawyers, this fact should be disclosed in the primary opinion.

To satisfy the ethical obligation of competence, a lawyer rendering a closing opinion must investigate and review the relevant facts and law underlying each specific opinion. This duty includes identifying, gathering and reviewing all facts and legal documents that support the opinion. This Report suggests various procedures and inquiries the lawyer may undertake to

---

[5] Rule 1.1.

[6] As a matter of customary practice, the effect of certain laws and regulations, such as securities, tax and insolvency laws, are considered to be excluded from closing opinions unless addressed expressly. *See* ABA Principles § II. D.

complete the diligence required for the various substantive opinions found in typical transaction closing opinions. These procedures and inquiries are not meant to be definitive, as the extent of due diligence appropriate for a particular opinion depends upon various factors, including the circumstances of the transaction, the opining lawyer's relationship with the client and the lawyer's role in the transaction.

Confidentiality

Rule 1.6 prohibits a lawyer from revealing information acquired during the professional relationship with a client unless the client gives informed consent, the disclosure is impliedly authorized to carry out the representation or the disclosure is otherwise permitted under the Rule. Closing opinions almost invariably reveal and use information acquired during the professional relationship with the client. The client's consent to the delivery of the opinion required under Rule 2.3 generally suffices to permit disclosure of client information in the opinion. Lawyers, however, should consider discussing the opinion in reasonable depth with the client to insure that the client understands its scope and purpose and consents to the disclosures required by the opinion.

Closing opinions normally benefit clients and seldom involve the disclosure of information that clients would rather withhold or the expression of opinions that would work to the clients' disadvantage. It is possible, though, for the opining lawyer to be aware of or to discover a legal problem that the client would prefer to keep confidential. This situation embodies the ethical tension that exists between the lawyer's duty to preserve the confidentiality of client information under Rule 1.6 and the lawyer's ethical obligation to communicate honestly with the third-party recipient of the opinion.[7]

When confronted with this situation, the lawyer may attempt to negotiate with the opinion recipient to exclude the opinion in question. If the opinion is not of great concern, the recipient may agree to forgo it. In some cases the client may decide that the cost of disclosing the information is outweighed by the benefits of closing the transaction and agree to disclosure. The lawyer should discuss the matter with the client in sufficient detail so as to enable the client to make an informed decision whether or not to authorize disclosure of the confidential information. If the opinion cannot be excluded by agreement with the recipient and the client does not consent to disclosure, the information must be kept confidential and the lawyer may not render the opinion in question.[8] Maintaining confidentiality by declining to render the opinion is consistent with the consent and compatibility requirements of Rule 2.3 and ordinarily does not breach an obligation to the opinion recipient. A lawyer may not, however, attempt to hide the

---

[7] *See* Comment [3] to Rule 2.3 (recognizing the lawyer's responsibilities to third parties and the duty to disseminate findings); *see also* Restatement of Law Governing Lawyers § 51, Comment *e* (noting that a lawyer rendering an opinion to a third party owes a duty of care to the third party).

[8] *See* Committee on Legal Opinions, *Guidelines for the Preparation of Closing Opinions* § 2.4, 57 BUS. LAW. 875, 877-78 (2002)(providing that where "an opinion would require disclosure of information that the lawyers preparing the opinion are aware the client would wish to keep confidential, the implications should be discussed with the client and the opinion should not be rendered unless the client consents to the disclosure").

problem by relying on a standard exception. Doing so improperly misleads the recipient with respect to the matters covered by the opinion.

Conduct

A lawyer may not counsel or assist a client in conduct that the lawyer knows is criminal or fraudulent[9] or knowingly make a false statement of law or material fact to a third person in the course of representing a client.[10] If the lawyer learns that the client is engaged in wrongdoing, the lawyer may not assist or facilitate that behavior. That includes delivering a closing opinion, even one that is technically correct.

A lawyer may also not provide the exact form of opinion requested if the opinion is not accurate. Although the opinion giver is generally permitted to rely on the certificate of the client or another person as to factual matters and to state a qualification that the opinion is based solely on that certificate, the lawyer may not do so if he or she knows the certificate is false, inaccurate or misleading. The lawyer must evaluate the reasonableness of the various certificates he or she is receiving and may not rely upon certificates or other factual assertions he or she knows are false or unreliable.

The opining lawyer should consider all material aspects of his or her relationship with the client that might impair the independence of his or her judgment. If the lawyer cannot render an objective opinion, the lawyer should decline from rendering the opinion.

Sarbanes-Oxley Act of 2002

Lawyers who prepare opinions that are filed with the Securities and Exchange Commission as exhibits to their client's registration statements must be aware that they are "appearing and practicing" before the SEC and are subject to the SEC's standards of professional conduct.[11] Pursuant to section 307 of the Sarbanes-Oxley Act of 2002[12] the SEC adopted rules obligating lawyers who appear and practice before it in the representation of an issuer of securities and who become aware of evidence of a material violation by the issuer or any of its directors, officers, employees or agents of an applicable federal or state securities law, a material breach of fiduciary duty arising under federal or state law or a similar material violation of any federal or state law to report promptly such evidence to the issuer's chief legal officer or to both the issuer's chief legal officer and chief executive officer.[13] The rule makes plain that the issuer as

---

[9] Rule 1.2(d).

[10] Rule 4.1.

[11] These opinions are required by Item 601 of Regulation S-K, 17 CFR Part 229, and generally relate to the legality of the securities being registered and tax matters.

[12] 15 U.S.C. § 7245.

[13] 17 CFR Part 205. "Evidence of a material violation means credible evidence, based upon which it would be unreasonable, under the circumstances, for a prudent and competent attorney not to conclude that it is reasonably likely that a material violation has occurred, is ongoing, or is about to occur." 17 CFR § 205.2(e). Under this objective test,

an organization is the lawyer's client to whom the lawyer owes his or her professional and ethical duties and not the issuer's officers, directors or employees.[14]

A lawyer who has reported evidence of a material violation need take no further action if he or she reasonably believes that the chief legal officer or the chief executive officer of the issuer has provided an appropriate response within a reasonable time.[15] If the lawyer is not satisfied with the response or does not get an appropriate response within a reasonable time, the lawyer must report the evidence of a material violation to the audit committee of the issuer's board of directors, to another committee of the board comprised solely of independent directors if the issuer does not have an audit committee or to the full board of directors.[16]

The SEC rules do not presently provide any further duties on the part of a reporting lawyer once he or she reports evidence of a material violation to the issuer's audit committee, alternative independent committee or full board of directors. The SEC is considering amending the rules to add so-called "noisy withdrawal" provisions. In the meantime, North Carolina lawyers should be aware that the Revised Rules of Professional Conduct may require a lawyer to withdraw from

---

to be "reasonably likely," a material violation must be more than a mere possibility but it need not be "more likely than not." SEC Release No. 33-8185 (January 29, 2003).

[14] 17 CFR § 205.3(a). Rule 1.13(a) of the North Carolina Revised Rules of Professional Conduct provides that "[a] lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents." Rule 1.13 addresses the actions a lawyer should take if he or she knows that a person associated with the client-organization, including its officers and employees, is engaged or is intending to engage in conduct in a matter related to the representation that violates a legal obligation owed the organization or is a violation of law that may be reasonably imputed to the organization and cause it substantial injury. One of the enumerated actions is to refer the matter to higher authority in the organization. *See* Rule 1.13(b)(3). "Review by the chief executive officer or by the board of directors may be required when the matter is of importance commensurate with their authority." Comment [3] to Rule 1.13.

[15] 17 CFR § 205.3(b). A response is appropriate if the reporting lawyer reasonably believes, based on the response, that no material violation has occurred, is ongoing or is about to occur or that the issuer has adopted appropriate remedial measures, including sanctions to stop any ongoing material violations, to prevent a material violation from occurring or to remedy a violation that has occurred and to minimize the likelihood of reoccurrence. Alternatively, a response is appropriate if the reporting lawyer reasonably believes that the issuer, with the consent of its board of directors, a committee of independent directors or a qualified legal compliance committee, has retained or directed an attorney to review the reported evidence of a material violation and either has substantially implemented any remedial recommendations made by the attorney after reasonable investigation and evaluation, or has been advised that the attorney may, consistent with his or her professional obligations, assert a colorable defense on behalf of the issuer in any proceeding relating to the reported evidence of a material violation. 17 CFR § 205.2(b).

[16] 17 CFR § 205.3(b)(3). The SEC rules provide an alternative reporting procedure for lawyers retained or employed by an issuer that has established a qualified legal compliance committee, as defined in section 205.2(k). If such a lawyer appearing and practicing before the SEC in the representation of the issuer becomes aware of evidence of a material violation, he or she may report the evidence to the qualified legal compliance committee and thereupon satisfies his or her obligation to report and is not required to assess the issuer's response to the reported evidence. *See* 17 CFR § 205.3(c).

representation and possibly to disclose information relating to the representation to avoid being deemed to have assisted the client's crime or fraud.[17]

The SEC rules do not create a private right of action against a lawyer or law firm for failure to comply with their provisions. A lawyer appearing and practicing before the SEC who violates any provision of the rules will be subject, however, to the SEC's disciplinary authority and may be subject to discipline for the same conduct in the jurisdiction where the lawyer is admitted or practices. The lawyer may also be subject to the civil penalties and remedies for violation of the federal securities laws in an action brought by the SEC.[18]

---

[17] *See, e.g.*, Rules 1.2(d), 1.6, 1.13(c), 1.16, and 4.1; Comment [3] to Rule 4.1. Rule 1.13(c) provides that a lawyer who unsuccessfully tries to prevent or address the acts of a person associated with his or her client-organization, including its officers and employees, that violate a legal obligation to the organization or that constitute a violation of law that might be imputed to the organization and likely cause it substantial injury in a matter related to the representation may resign the representation in accordance with Rule 1.16. Comment [3] to Rule 4.1 explains that it is sometimes necessary for a lawyer to withdraw from a representation to avoid assisting a client's crime or fraud and "to give notice of the fact of withdrawal and to disaffirm an opinion . . . ." The lawyer may be required by law to disclose information relating to the representation and such disclosure is permitted by Rule 1.6(b).

[18] 17 CFR § 205.6.

II. OPINION REPORT

SECTION 1. GLOSSARY OF TERMS

§ 1.0 Terms. The following is a listing of terms and abbreviations used in this Report:

"ACCORD": Committee on Legal Opinions, *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 at* GLAZER, Appendix Two.

"ABA Guidelines": Committee on Legal Opinions, *Guidelines for the Preparation of Closing Opinions*, 57 BUS. LAW. 875 (2002).

"ABA Principles": Committee on Legal Opinions, *Legal Opinion Principles*, 57 BUS. LAW. 882 (2002).

"Agreement": The Transaction Document setting forth the principal terms of the Transaction and identified as the "Agreement" in the opinion.

"BCA" or "Business Corporation Act": The North Carolina Business Corporation Act, N.C. Gen. Stat. §§ 55-1-01 to -17-05.

"Certificate of Existence": A certificate obtained from the North Carolina Secretary of State pursuant to N.C. Gen. Stat. § 55-1-28 as to a corporation or N.C. Gen. Stat. § 57C-1-28 as to a limited liability company.

"Company": The entity, either a corporation or a limited liability company, as to which the opinion is being given.

"GLAZER": D. GLAZER, S. FITZGIBBON & S. WEISE, GLAZER AND FITZGIBBON ON LEGAL OPINIONS (2d ed. 2001 & Supp. 2003).

"LLC Act": The North Carolina Limited Liability Company Act, N.C. Gen. Stat. §§ 57C-1-01 to -10-07.

"Other Agreements": *See* § 11.0.

"ROBINSON": RUSSELL M. ROBINSON II, ROBINSON ON NORTH CAROLINA CORPORATION LAW (7th ed. 2002).

"Rules": The North Carolina Revised Rules of Professional Conduct (2003).

"Special TriBar Report": TriBar Opinion Committee, *Special Report by the TriBar Opinion Committee: U.C.C. Security Interest Opinions -- Revised Article 9*, 58 BUS. LAW. 1453 (2003).

"Transaction": The transaction to which the Company is a party and to which the opinion relates.

"Transaction Documents": The Agreement and any other documents ancillary thereto identified in the opinion.

"TriBar Report": *Third-Party "Closing" Opinions*, 53 BUS. LAW. 591 (1998).

SECTION 2. OPINION LETTER FORMAT AND RELATED MATTERS

§ 2.0 Format Generally. Although transactional opinion letters are a product of customary practice, no format for third-party legal opinions has authoritative recognition.[19] Some of the features of opinion format, however, have become so customary that they may be regarded as generally accepted in the legal profession. First, opinions are customarily presented in the form of a letter from the opining lawyer (or opining law firm) addressed to the opinion recipient, under the letterhead of the opining lawyer or firm and over the signature of the opining lawyer or firm. Almost invariably, the opinion letter will have the following components, usually in the following order:

a. Date of the opinion letter. (*See* § 2.1)

b. Name and address of opinion recipient. (*See* § 2.2)

c. Salutation. ("Ladies and Gentlemen" has become a typical salutation in opinion letters addressed to organizations.)

d. A paragraph identifying the transaction to which the opinion letter relates, why the opinion letter is being delivered, and the relationship of the opining lawyer or law firm to the client as to which the opinions are given. (*See* §§ 2.3 and 2.4)

e. Definitions of terms used in the opinion letter. (*See* § 2.5)

f. The scope of the inquiries made by the opining lawyer or law firm, and the documents relied upon in giving the opinions. (*See* §§ 3.0 and 3.1)

g. The underlying assumptions for the opinion, except to the extent the opining lawyer or law firm deems them implicit. (*See* § 4)

h. Any general limitations and qualifications with respect to the opinions expressed in the opinion letter. (*See*, *e.g.*, § 5)

i. Identification of the substantive law addressed by the opinion letter. (*See* §§ 2.6 and 2.7)

j. Language introducing the operative opinions (*e.g.*, "it is our opinion that:"). (*See* § 2.8)

k. The operative opinions, in the form of separately enumerated paragraphs. (*See*, *e.g.*, §§ 6 - 13)

---

[19] *See generally* GLAZER § 2.1.

l. Either with each of the relevant operative opinions, or after all of the operative opinions, specific limitations and qualifications relating to specific opinions. (*See*, *e.g.*, §§ 6 - 13)

m. Statements limiting reliance upon or use of the opinion letter, and disclaiming any obligation to update the opinion letter. (*See* §§ 2.1 and 2.2)

n. A closing phrase (such as "Very truly yours") and the signature of the opining lawyer or law firm. (*See* § 2.9)

See Part III of this Report for an illustrative form of opinion letter that uses the language suggested in this Report.

§ 2.1 Date. It is generally understood that an opinion letter "speaks" as of its date, and that the advice contained in the operative opinions is limited to the facts and the law existing on that date. The date of the opinion letter is usually specified in the agreement that calls for it to be delivered, which is usually the date of the closing of the transaction contemplated by that agreement. This is all relatively straightforward, but there are several issues that can arise regarding the date of an opinion letter:

a. Does the opinion giver have any duty to call the opinion recipient's attention to laws that have been enacted but have not yet become effective, if they will alter the opinions expressed when they become effective? Commentators who have addressed this issue, including the Commentary to the ACCORD, take the position that the opinion giver has such a duty.[20]

b. How should the opinion giver deal with relevant facts the continued accuracy of which cannot be ascertained, or cannot be ascertained without considerable effort, at the time the opinion letter is delivered? An obvious example is the fact of company existence; it is customary to rely upon a certificate that is dated prior to the date of the opinion letter, and it may be difficult or even impossible to obtain written (or even oral) confirmation of its continued accuracy up to the time the opinion letter is delivered. The obvious answer in this case is expressly to state reliance upon a certificate dated a specified date. (*See* § 6.0, Due Diligence ¶ b.) In other cases, neither the problem nor the solution may be so obvious; the opinion giver should be alert to other facts relied upon that may change prior to delivery of the opinion, and deal with the potential change either by updating the investigations or expressing an appropriate limitation in the opinion letter.

c. Does the opinion giver have any duty to update the opinion after it is delivered for changes in law or facts? For opinions covered by the ACCORD, there is no such duty insofar as changes in law are concerned.[21] The Committee concurs with this

---

[20] *See* GLAZER § 2.2.1 n. 2 and authorities cited; ACCORD Commentary § 9.3.

[21] ACCORD § 9.

view, and believes that this should be implicit, making it unnecessary to so state in the opinion letter. Changes in the underlying facts upon which an opinion is based, or changes in the application of existing law to the facts then at hand, present a variety of different circumstances that may bear upon the opinion giver's responsibility: If the opinion giver was negligent in not ascertaining the true facts, or the opinion giver's reliance upon certain facts was unwarranted, the opinion giver's duty to update may arise out of a need to mitigate any loss to the opinion recipient due to its continued reliance on the opinion. But what if matters that could not have been reasonably ascertained by the opinion giver at the time of delivery of the opinion later come to the opinion giver's attention, and there was no fraud on the part of the opinion giver's client in withholding those facts? The Committee believes that there is no continuing duty to investigate the facts underlying an opinion previously delivered, and that consequently there is no continuing duty to update the opinion even if a change in those facts subsequently comes to the opinion giver's attention. This should be implicit, but it is acceptable for the opinion giver to include the following statement in the opinion letter:

> **Our opinions expressed herein are as of the date hereof, and we undertake no obligation to advise you of any changes in applicable law or any other matters that may come to our attention after the date hereof that may affect our opinions expressed herein.**

§ 2.2 Addressee. It is generally understood that the addressee of an opinion letter is entitled to rely upon the opinions expressed therein. Consequently, it is important from the standpoint of the opinion giver that the addressees be specifically named -- if not individually, at least by a description of a group whose members can be ascertained (such as "the Underwriters named in Schedule 1 to the Underwriting Agreement").

Ordinarily, it is understood that only the addressee may rely upon the opinion letter and only for the purpose of the transaction in connection with which it is delivered.[22] The ACCORD provides that these limitations on reliance and use apply implicitly to opinion letters subject to the ACCORD and need not be expressly stated.[23] Given the extensive body of case law concerning who may rely upon opinions and reports of professionals in other fields, especially accountants, the Committee recommends that opinion letters that are not governed by the ACCORD include an express statement limiting reliance and use of the opinion letter, such as the following:

> **This opinion letter is delivered solely for your benefit in connection with the Transaction and may not be used or relied upon by any other person or for any other purpose without our prior written consent in each instance.**

---

[22] *See* GLAZER § 2.3.

[23] ACCORD § 20.

Occasionally, the opinion recipient (such as the lead lender advancing funds in a syndicated loan in which the syndicate members have not yet been identified) will request that an exception to this disclaimer be made to permit reliance by participants in the loan. Such an exception, if agreed to, could be expressed as follows:

> **except that it may be relied upon by any successor or permitted assignee of [the Lender] succeeding to the rights of [the Lender] under the [Credit Agreement] to the same extent as though this opinion letter were addressed to such successor or permitted assignee.**

§ 2.3 Identification of Transaction and Request for Opinion Letter. The opening paragraph of the opinion letter will normally identify the transaction to which it relates and state why the opinion letter is being given. This has the purpose and effect of putting the opinion letter in its proper context, and is also an opportunity to define various terms that will be used throughout the opinion letter. The following is an example of such language:

> **We have acted as counsel to _____ (the "Company") in connection with the transaction (the "Transaction") contemplated by the _____ Agreement dated _____ (the "Agreement") between the Company and _____ (the "[Other Party]"). This opinion letter is delivered pursuant to Section _____ of the Agreement.**

The statement as to why the opinion letter is being delivered serves two other purposes in addition to providing a context for the opinion letter:

a. From the opinion recipient's standpoint, it evidences that the opinion giver's client has requested that the opinion be given (in the foregoing example, by undertaking in the specified section of the Agreement to have it delivered).[24]

b. From the opinion giver's standpoint, it evidences the client's consent to giving the opinion, and any disclosure of client confidences that giving the opinion entails. Delivery of the opinion letter should be made only after the opinion giver has satisfied the relevant ethical obligation to the Client to obtain its permission to do so. Consent may be inferred from the Transaction Documents or otherwise apparent from the circumstances surrounding the Transaction. If the Transaction Documents do not specifically refer to the delivery of the opinion letter, but such delivery is necessary to close the Transaction or otherwise effect the client's wishes, the following language (with the client's consent, of course) could be substituted:

---

[24] In one case, the court determined that opining counsel had no duty of care to the opinion recipient because the client had not requested the lawyer to render the opinion. *United Bank of Kuwait v. Enventure Energy Enhanced Oil Recovery Associates-Charco Redondo Butane*, 755 F. Supp. 1195 (S.D.N.Y. 1989). *See also* GLAZER § 2.5.4 and authorities cited.

This opinion letter is delivered in connection with such transactions with the consent of the Company.

§ 2.4 Identification of Lawyer's Role and Relationship with Client. The first sentence of the statement at the beginning of the opinion letter set forth in § 2.3 above recites that the opinion giver has **"acted as counsel to _____ (the "Company") in connection with the transactions . . ."** and thus identifies the opinion giver as the client's counsel -- and not as counsel to the opinion recipient. Sometimes the opinion giver might refer to itself as "special counsel" or "local North Carolina counsel." It is questionable whether such adjectives in any way limit the responsibilities of the opinion giver in providing the opinions,[25] but there may be situations where additional description of the opinion giver's role provides additional context to the opinion letter, such as where several opinions are rendered in a transaction by various counsel in different jurisdictions or as to specific opinion matters.

There appears to be no consensus as to whether it is necessary or appropriate for the opinion giver to disclose in the opinion letter any relationships between the opinion giver (or members of the opinion giver's law firm) and the client, other than the attorney-client relationship.[26] For example, a member of the opinion giver's law firm may be a member of the client's Board of Directors, or have a significant financial interest in the client or even, through the client, in the transaction to which the opinion letter relates. The Committee takes no position on this issue, but suggests that the opinion giver consider such disclosure whenever it may appear that the existence of such relationship may be considered material by the opinion recipient.

§ 2.5 Definitions. It is useful to define terms that are used throughout the opinion letter, and this is typically done through parenthetical references as the defined terms first appear in the text. In many cases, an efficient way to define terms is to incorporate the definitions used in one or more of the Transaction Documents to which the opinion letter relates. The following statement, appearing in the first paragraph of the opinion letter, is an example of this method:

All capitalized terms used herein and not otherwise defined herein shall have the same meanings as are ascribed to them in the Agreement.

The opinion giver should take care, of course, that the defined terms are clearly defined. One common pitfall is to define "Transaction Documents" as "the Agreement and all other documents delivered in connection with the Agreement," and then providing a remedies opinion as to "the Transaction Documents;" controversy could later arise as to precisely which documents were "delivered in connection with the Agreement" and therefore covered by the remedies opinion.

§ 2.6 Opining Jurisdiction. Even if a legal opinion is given by a North Carolina lawyer or law firm to a North Carolina recipient as to a North Carolina client regarding a North Carolina transaction, it is important that the opinion letter expressly state the laws that are

---

[25] *See* GLAZER § 2.5.2.

[26] *See* GLAZER § 2.5.5; ABA Guidelines, § 2.3.

covered by the opinion. For North Carolina lawyers, it is customary to opine as to matters governed both by North Carolina law and by the federal laws of the United States, although sometimes in an opinion of local counsel only the opinion giver's State law is requested to be covered. The following is an example of such a statement:

> **The opinions set forth herein are limited to matters governed by the laws of the State of North Carolina [and the federal laws of the United States], and no opinion is expressed herein as to the laws of any other jurisdiction.**[27]

If a remedies opinion is provided as to a contract that by its terms is governed by the laws of a jurisdiction other than North Carolina, the foregoing limitation, without more, is problematical: either (a) the remedies opinion is a nullity (if North Carolina law does not apply to the contract, then the opinion giver has said nothing about its enforceability), or (b) the opinion recipient should be entitled to assume that this limitation does not apply to the remedies opinion, or (c) the remedies opinion should be construed to apply to the choice of law provision of the contract were such provision examined by the North Carolina courts. The solution is to add appropriate language that, for purposes of the opinion letter, ignores the choice of law provision and assumes that, notwithstanding such provision, North Carolina law would apply. See § 10.3.a of this Report for suggested language. If the opinion recipient also requests specific opinion coverage of the enforceability, before the North Carolina courts, of the choice of law provision (and the opinion giver considers it to be appropriate under the circumstances to give such opinion), suggested language is set forth in § 10.3.b below. The opinion recipient might also be persuaded that, if the opinion giver can opine that the contract would be enforceable under North Carolina law even if the choice of law provision were disregarded, there is no need for assurance that the choice of law provision would be honored by the North Carolina courts.

The implications of opinions by North Carolina lawyers as to the laws of other jurisdictions are beyond the scope of this Report, but the Committee notes that it is customary and accepted practice for North Carolina corporate lawyers who represent Delaware companies to provide opinions as to basic matters governed by the Delaware corporation and limited liability company law.[28] It is also customary and accepted practice for lawyers to provide surveys of the laws of all 50 states as to various matters, such as state securities or "blue sky" laws.

§ 2.7 Effect of Certain Laws. The opinion giver should consider excluding the effect of certain laws from the opinion letter as follows:

> **We express no opinion concerning any matter respecting or affected by any laws other than laws that a lawyer in North Carolina exercising customary**

---

[27] The Committee considers that "the laws of the State of North Carolina" refers only to the statutes, the judicial and administrative decisions, and the rules and regulations of the legislature and the governmental agencies of the State of North Carolina and do not include the acts, ordinances, administrative decisions, or rules or regulations of counties, towns, municipalities or other political subdivisions or judicial decisions regarding any such acts, ordinances, administrative decisions, or rules or regulations. *See* § 12.0.b of this Report; *see also* ABA Principles, § II.

[28] *See* § 6.0.g of this Report.

professional diligence would reasonably recognize as being directly applicable to the Company, the Transaction or both.

COMMENTARY

The approach taken in this clause is different from that taken in the ACCORD. An opinion letter which incorporates the ACCORD, unless it specifically provides otherwise, will not address any of eighteen substantive areas of law, including federal securities laws and regulations, federal and state antitrust and unfair competition laws and regulations and matters of local law. ACCORD § 19. The Committee does not regard the approach of the ACCORD in this regard as consistent with customary opinion practice in North Carolina and, therefore, has opted for a more general exclusion of the effect of laws that, in the exercise of customary professional diligence, would not normally be considered in transactions such as those contemplated by the Agreement. Unlike the ACCORD approach, this places the burden upon the opinion giver either to conclude that a particular law would not normally be considered in connection with the Transaction or to enumerate such excluded law in the opinion. Attorneys giving opinions under this approach may wish to use § 19 of the ACCORD as a checklist in examining this issue.

Under the ABA Principles, this clause would be considered to be implicit as a matter of customary practice. *See* ABA Principles, § II.B. The ABA Principles further provide that some laws (such as securities, tax and insolvency laws) are understood as a matter of customary practice to be covered only when an opinion refers to them expressly, even when they are generally recognized as being directly applicable to the Company or the Transaction. *Id.* § II.D.

The principal substantive opinion clauses affected by this limitation are the remedies opinion and the no violation of law opinion. *See*, respectively, §§ 10 and 12 of this Report.

§ 2.8 Lead-in to Operative Opinions. The operative opinions in an opinion letter are customarily presented as separately enumerated paragraphs, with a "lead-in" indicating that they are the opinions of the opinion giver. The "lead-in" customarily refers to the qualifications and limitations contained in the opinion letter, both before and after the operative opinions. The following is a typical "lead-in":

Based upon and subject to the foregoing and the further assumptions, limitations and qualifications hereinafter expressed, it is our opinion that:

§ 2.9 Signature. When the opinion giver is a law firm, the opinion recipient normally expects that the opinions expressed in the opinion letter are those of the law firm, not just a particular lawyer in the firm. Accordingly, it is expected that the opinion letter be signed on behalf of the firm by someone duly authorized to do so.

It is customary for the opinion letter either to be signed with the full name of the firm, manually written by an authorized person, or to be signed under the typed name of the firm by an authorized person in his or her own name on behalf of the firm, or in some other manner indicating that the person is signing on behalf of the firm.

Whether someone other than a partner in a law firm that is a partnership may bind the firm by signing an opinion letter is a matter of both actual and apparent authority. Clearly a partner has

apparent authority; an associate or other non-partner employee may or may not have apparent authority to sign opinion letters. Even if a non-partner has actual authority to sign opinion letters, it may be expedient to arrange to have the opinion letter signed by a partner, in order to avoid any last-minute questioning of authority by the opinion recipient.

§ 2.10 Opinions of Inside Counsel. Closing opinions are often rendered by inside counsel. Opinions of inside counsel are particularly appropriate where inside counsel can be expected to have greater knowledge of particular matters than outside counsel. Opinions by inside counsel can make the opinion process more efficient and economical for the client.

In delivering an opinion, inside counsel has the same general duty of care to the opinion recipient as outside counsel.[29] Inside counsel can limit or disclaim the customary diligence obligation, on the same basis as outside counsel. Inside counsel can also rely on certificates of officers of the company with regard to factual matters to the same extent as outside counsel.

The duty of care is personal to the inside counsel, with potential personal liability for violation. Indemnification may be available to the inside counsel under the Company's charter, bylaws or personal agreement, and coverage may be available under directors' and officers' liability insurance or legal malpractice insurance. Other lawyers in the Company's in-house legal department are not vicariously liable for violations of the duty of care by the opinion giver.[30]

As with outside counsel, inside counsel has the duty to seek out others who might have knowledge needed to support particular opinions. While inside counsel is responsible for the knowledge of other lawyers in his or her department who participated in the preparation of the opinion, the inside counsel is not responsible generally for information known to others in the Company.

The format of an inside counsel opinion is substantially the same as for outside counsel. The inside counsel opinion is typically addressed directly to the opinion recipient. Alternatively, the inside counsel could address the opinion to the Company's outside counsel, who would then rely on the inside counsel opinion in delivering the primary opinion to the opinion recipient. Opinion letters should be signed in the name of the inside counsel, with company position usually included. Illustrative forms of opinion of inside counsel have been published by the TriBar Committee.[31]

---

[29] ABA Committee on Legal Opinions, *Closing Opinions of Inside Counsel*, 58 BUS. LAW. 1127 (2003).

[30] *Id*. at 1128.

[31] TriBar Report, Appendices A-2 and B-2.

SECTION 3. SCOPE OF INQUIRY, RELIANCE

§ 3.0 Standard Formulation of Statement of Scope of Inquiry. The following is a standard formulation of the statement of scope of inquiry:

> **We have reviewed such documents and considered such matters of law and fact as we, in our professional judgment, have deemed appropriate to render the opinions contained herein.**

COMMENTARY

In the statement of the scope of inquiry, the opinion giver outlines what has been done, in general terms, to render the opinion. Some opinion givers follow the practice of reciting the documents reviewed and other procedures followed, such as the following:

> **We have reviewed a copy of the articles of incorporation [articles of organization] of the Company as certified by the North Carolina Secretary of State dated _____ (the "Articles of Incorporation") ["Articles of Organization"], the bylaws [operating agreement] of the Company, the minute book of the Company, certified copies of resolutions of the board of directors [members or managers] of the Company and such other documents and have considered such matters of law and fact, in each case, as we, in our professional judgment, have deemed appropriate to render the opinions contained herein.**

This is the approach followed in the Illustrative Form of UCC Opinion.

The general statement set forth above is a more straightforward approach. Notwithstanding this, in certain instances, particularly where counsel may be acting as local counsel on a large transaction with little or no input into the documents and little if any contact with the Company, it is appropriate to limit the scope of inquiry, *e.g.,* "We have reviewed only the following documents and made no other investigation or inquiry in connection with our opinions rendered herein."[32]

§ 3.1 Standard Formulation of Statement of Reliance. The following is a standard formulation of the statement of reliance on information provided by others:

> **With respect to certain facts, we have considered it appropriate to rely upon certificates or other comparable documents of public officials and officers or other appropriate representatives of the Company, without investigation or analysis of any underlying data contained therein.**

---

[32] ACCORD § 2.

COMMENTARY

It is appropriate to rely on certificates of others where such a certificate addresses the facts in question and the opinion giver reasonably believes (in a manner consistent with the Scope of Inquiry discussed above) the provider of the information is an appropriate source. It is not appropriate to rely on a certificate if it contains a statement which constitutes, directly or in practical effect, a legal conclusion at issue, unless the information is provided in a legal opinion of other counsel and that reliance is stated in the opinion letter, or is set forth in a public official's document. Reliance should not be based on information provided by the opinion recipient or on representations contained in a Transaction Document, unless such reliance is specifically stated in the opinion letter.[33]

[33] ACCORD § 3.

SECTION 4. ASSUMPTIONS UNDERLYING THE OPINION

Assumptions underlying the opinion can be implicit or made explicit. It should not be necessary to recite assumptions that are generally accepted in practice. This includes factual assumptions that are made in the examination of documents in preparation for giving the opinions, assumptions with respect to facts that are too difficult or time-consuming to verify and general law-related matters.[34]

§ 4.0 Assumptions Deemed Implicit. Under various reports published by committees of the North Carolina Bar Association and the American Bar Association, certain assumptions, qualifications, limitations and exceptions are considered implicit in opinion letters. Although the Committee has expressly set forth certain assumptions, qualifications, limitations and exceptions herein, it is not intending to limit or omit any others set forth in the various reports or otherwise deemed standard practice by lawyers in North Carolina.

It is not necessary to state the implicit assumptions underlying the opinion or that there are implicit assumptions.[35] Set forth below is a list of assumptions the Committee deems to be generally accepted in practice and thus are implicit, and need not be explicitly stated, in the opinion letter. This list is not intended to be exhaustive.[36]

a. Each document (other than a Transaction Document) submitted for review is accurate and complete, each such document submitted as an original is authentic and each such document submitted as a copy conforms to an authentic original.

b. All signatures on such documents are genuine.

c. Each certificate or other document issued by a public authority is accurate, complete and authentic, and all official public records (including their proper indexing and filing) are accurate and complete.

d. All natural persons acting on behalf of the Company have sufficient legal capacity to take all such actions as may be required of them as representatives of the Company.

---

[34] *See* TriBar Report at 615. Similarly, the ABA Principles provide that some factual assumptions ordinarily do not need to be stated expressly; these are assumptions of general application that apply regardless of the type of transaction or the nature of the parties. ABA Principles, § III(D).

[35] If the opinion giver desires to call attention to the fact that there are implicit assumptions, the opinion giver may consider including the following language:

> "We call your attention to the fact that as a matter of customary practice, certain assumptions underlying opinions are understood to be implicit."

[36] *See generally* GLAZER § 4.3.3; ACCORD § 4; and TriBar Report § 2.3.

e. The Company holds the requisite title and rights to any property involved in the Transaction.

f. The execution and delivery of each document by, or on behalf of [other party] has been duly authorized, each such document has been duly executed and delivered and each such document is valid, binding and enforceable against [other party].

g. [Other party] has complied with all legal requirements pertaining to its status as such status relates to its rights to enforce the Transaction Documents against the Company.

h. There has not been any mutual mistake of fact or misunderstanding, fraud, duress or undue influence in connection with the Transaction.

i. The conduct of the parties to the Transaction has complied with any requirement of good faith, fair dealing and conscionability.

j. [Other party] and any agent acting for it in connection with the Transaction have acted in good faith and without notice of any defense against enforcement of rights created by, or adverse claim to any property or security interest transferred or created as part of, the Transaction.

k. There are no agreements or understandings among the parties, written or oral, and there is no usage of trade or course of prior dealing among the parties that would, in either case, define, supplement or qualify the terms of the Transaction Documents.

l. Other Agreements and Court Orders will be enforced as written.

m. The Company will not in the future take any discretionary action (including a decision not to act) permitted under the Transaction Documents that would result in a violation of law or constitute a breach of default under any Other Agreement or Court Order.

n. The Company will obtain all permits and governmental approvals required in the future, and take all actions similarly required, relevant to subsequent consummation of the Transaction or performance of the Transaction Documents.[37]

§ 4.1 Other Assumptions - Stated. Specific assumptions that go beyond or modify assumptions that are generally accepted in practice or otherwise deemed implicit should be explicitly set out in the opinion. Stated assumptions generally should be reserved for matters that

[37] This implicit assumption and the one preceding it in the list are forward-looking and relate to post-closing obligations; as such, they would have only limited application in closing opinions, such as in an opinion that performance by the Company of its obligations under a Transaction Document will not violate applicable provisions of statutory laws or regulations. *See* § 12.0 of this Report (Commentary ¶ f); GLAZER § 13. 2.3.

are (a) not of general application, (b) contravened, (c) require explanation or clarification, or (d) might give rise to a misunderstanding if not expressly addressed. If the opinion giver knows that any of the assumptions that would otherwise be implicit are untrue, then the opinion giver should not rely on such assumptions and should consider an appropriate disclaimer in the opinion letter.

The formulation for specific stated assumptions would be as follows:

We have relied, without investigation, on the following assumptions:

[*insert specific assumptions*]

SECTION 5. KNOWLEDGE QUALIFICATION

§ 5.0 Standard Formulation. The following is a standard formulation of the knowledge qualification:

> **The phrases "to our knowledge" and "known to us" mean the conscious awareness by lawyers in the primary lawyer group of factual matters such lawyers recognize as being relevant to the opinion or confirmation so qualified. Where any opinion or confirmation is qualified by the phrase "to our knowledge" or "known to us," the lawyers in the primary lawyer group are without knowledge, or conscious awareness, that the opinion or confirmation is untrue. "Primary lawyer group" means any lawyer in this firm (i) who signs this opinion letter, (ii) who is actively involved in negotiating or documenting the transaction or (iii) solely as to information relevant to a particular opinion or factual confirmation issue, who is primarily responsible for providing the response concerning the particular opinion or issue**.

a. *Purpose of Qualification*. The knowledge qualification expressly limits the extent to which information known to or possessed by the opinion giver or other personnel in the firm is imputed to the opinion giver. The knowledge qualification permits the opinion giver to keep the scope of inquiry required within reasonable bounds. The second sentence of this qualification is intended to clarify the meaning of the phrase "to our knowledge" in response to the decision of the Fourth Circuit Court of Appeals in *Hitachi Credit America Corp. v. Signet Bank.*[38]

b. *Scope of Knowledge Qualification*. The standard formulation adopts the concepts of "conscious awareness" and "primary lawyer group" as the basis for the qualification. By limiting the scope of the knowledge qualification to the "primary lawyer group," no additional inquiry should be required beyond the members of that group unless the opinion giver is requested, and undertakes, to conduct an inquiry of other lawyers in the opinion giver's firm. By incorporating

---

[38] *See* 166 F.3d 614, 622 (4th Cir. 1999). In *Hitachi*, Signet assigned a portion of an existing loan to Hitachi. *See id.* at 622. Because Hitachi's willingness to purchase the assignment depended on the existence of an underlying lease agreement involving the borrower, Hitachi requested, and Signet provided, a representation that "[t]o the best knowledge of the Assignor . . . [the underlying lease] . . . is in full force and effect." *Id.* Ultimately, the underlying lease did not exist and Hitachi sued Signet, *inter alia*, for a breach of contract on the grounds that Signet breached its representation regarding the lease. *See id.* at 623. In concluding that Signet had breached its representation to Hitachi, the court reasoned that a plain language reading of Signet's representation led to a determination that Signet had represented that it had actual knowledge that the underlying lease was in full force and effect. *See id.* at 623-25. Moreover, the court declined to consider parol evidence in the form of merger and acquisition and banking treatises indicating that the "knowledge" qualification to Signet's representation meant that Signet lacked actual knowledge that the lease was not in full force and effect. *See id.* at 625. The court noted that Signet could have drafted the representation to say "[t]he Assignor is without knowledge" had it intended to qualify its representation in that manner. *See id.*

the knowledge qualification into the opinion letter, it should not be necessary for the opinion giver to undertake an investigation of all other lawyers in the firm, or to review all the firm's files. The opinion is limited to matters that are within the "conscious awareness" of the persons (or person) who fall within the definition of "primary lawyer group."[39]

An alternative approach is to limit the scope of the qualification to officers' certificates or interviews with officers of the Company. This approach may be insufficient, however, as it may overlook information that may be readily available within the opinion giver's firm. On the other hand, requiring an inquiry of all attorneys in the firm is over-reaching, especially for larger firms. The difficulty and cost of fully informing other lawyers in the firm on the background of the Transaction and the opinion, so that they can meaningfully divulge relevant facts to the opining attorney, could be high despite communications devices such as firm-wide e-mail.

The better approach is to limit the knowledge qualification to the primary lawyer or primary lawyer group handling the opinion and the Transaction. This approach is consistent with the ACCORD, which includes in the group of lawyers whose knowledge is relevant those actively involved in negotiating and preparing the transaction documents, those preparing the opinion letter and those who are primarily responsible for providing a response on a particular opinion issue. ACCORD Commentary ¶6.2(iii).

c. *Terminology*. The phrase "to our knowledge" is recommended over the other common phrases such as "to the best of our knowledge," "insofar as is known to us" or "nothing has come to our attention." The use of the phrase "to our knowledge" is less cumbersome, and promotes consistency among opinions. Moreover, the Committee believes that all these phrases should be construed to have the same meaning.

[39] "The 'conscious awareness' concept recognizes that what is 'known' at one time may not be in the mind or may be forgotten altogether at another time." ACCORD § 6.2(iv).

SECTION 6. THE COMPANY STATUS OPINION

§ 6.0 The Operative Opinion. The following is a standard formulation of the company status opinion for a corporation:

> **The Company is a corporation in existence under the laws of the State of North Carolina.**

The standard formulation of a comparable opinion for a limited liability company is as follows:

> **The Company is a limited liability company in existence under the laws of the State of North Carolina.**

COMMENTARY

a. *General Effect of the Opinion*. As described more fully below, the company status opinion is comprised of two parts: the Company is a corporation (or limited liability company), and the Company is in existence.

b. *Opinion that the Company "Is a Corporation" or "Is a Limited Liability Company."* An opinion that a company "is a corporation under the laws of the State of North Carolina" means that it has complied with the requirements for incorporation under the applicable incorporation statute, as in effect at the time of incorporation, and that the company has not subsequently ceased to exist, for example through merger or dissolution. The requirements for incorporation in North Carolina are set forth in N.C. Gen. Stat. § 55-2-03 (Incorporation), N.C. Gen. Stat. § 55-2-02 (Articles of Incorporation) and N.C. Gen. Stat. §§ 55-1-20 through 55-1-23 (Filing requirements, etc.).

There are no substantive distinctions among the opinion phrases that a company "is a corporation," "is incorporated" or "is duly incorporated"[40] and, although the formulation of the opinion set forth above uses the phrase "is a corporation," the Committee expresses no preference among these phrases.

An opinion that a company "is a limited liability company under the laws of the State of North Carolina" means that it has complied with the requirements for formation under the applicable formation statute, as in effect at the time of formation, and that the company has not subsequently ceased to exist, for example through merger or dissolution. The requirements for formation of a limited liability company in North Carolina are set forth in N.C. Gen. Stat. § 57C-2-20 (Formation), N.C. Gen. Stat. § 57C-2-21 (Articles of Organization), and N.C. Gen. Stat. §§ 57C-1-20 through 57C-1-22 (Filing requirements, etc.). N.C. Gen. Stat. § 57C-2-20 provides that persons may "form a limited liability company by delivering executed articles of organization to the Secretary of State" and a Certificate of Existence for a limited liability company provides that a limited liability

[40] *See* GLAZER §§ 6.6 and 7.2.

company is "duly formed."[41] The Committee believes that there are no substantive distinctions among the opinion phrases that a company "is a limited liability company," or that a limited liability company was "duly formed" and, thus, these phrases have the same meanings.

As described below, an opinion that a company "is a corporation" or "is a limited liability company" includes or implies an opinion that the company also is "in existence." Also as described below, an opinion that a company "is a corporation" or "is a limited liability company" does not include or imply an opinion that the company also is "duly organized."

c. *Opinion that the Company "Is in Existence."* An opinion that a corporation "is in existence under the laws of the State of North Carolina" means that the company continues to be a corporation, that it has not been dissolved, that its articles of incorporation have not been revoked or suspended, that it has not been merged into another corporation in a transaction in which it was not the survivor, and that, in the case of a corporation whose term of duration is limited, the term of the corporation has not expired.[42]

An opinion that a limited liability company "is in existence under the laws of the State of North Carolina" means that the company continues to be a limited liability company, that it has not been administratively dissolved, that articles of dissolution have not been filed, that its articles of organization have not been revoked or suspended, that it has not been merged into another limited liability company in a transaction in which it was not the survivor, and that, in the case of a limited liability company whose term of duration is limited, the term of the limited liability company has not expired.[43]

The "in existence" opinion is included in or implied by an opinion that the company "is a corporation" or "is a limited liability company" or similar phrases described above. Likewise, an opinion that a company is "in existence" includes an opinion that the company "is a corporation" or "is a limited liability company." However, an opinion that a corporation "has been or was duly incorporated," or that a limited liability company "has been or was duly formed" does not include or imply that the company is "in existence."

There are no substantive distinctions among the opinion phrases that a company "is in existence" or "is existing" or "is validly existing." The Committee, however, prefers the phrase "is in existence" because N.C. Gen. Stat. § 55-1-28(c) and N.C. Gen. Stat. § 57C-1-28(c) provide that a Certificate of Existence "may be relied upon as conclusive evidence that the...[company] is in existence." (emphasis added)

---

[41] *See* N.C. Gen. Stat. § 57C-1-28.

[42] *See* N.C. Gen. Stat. § 55-1-28.

[43] *See* N.C. Gen. Stat. § 57C-1-28.

An opinion that a company "is in existence" does not mean that the company is "in good standing."[44] Also, an existence opinion does not address whether the company has paid applicable taxes. Further, an existence opinion only addresses the status of the corporation under the Business Corporation Act or the status of a limited liability company under the LLC Act and does not address the company's status for tax, regulatory, or other purposes. For example, the opinion does not address whether the corporation has observed "corporate formalities" since its incorporation or whether the "corporate veil" would be recognized or pierced.

d. *Opinion that the Company "Is Duly Organized."* An opinion that a corporation "is duly organized" is not included in the standard formulation of the corporate status opinion. Where the corporation was not recently formed, or the corporate records as to organization are incomplete, it often is not cost-effective for the opinion recipient to seek a duly organized opinion. Therefore, such an opinion should not routinely be requested under these circumstances unless the opinion giver participated in the organization of the corporation. An opinion that a corporation "is duly organized" under the laws of North Carolina means that the company has, after incorporation, complied with the statutory requirements for organization set forth in N.C. Gen. Stat. § 55-2-05 (Organization of corporation) or any applicable predecessor statute in effect at the time of organization. For a corporation to be duly organized under N.C. Gen. Stat. § 55-2-05, an organizational meeting must be held, directors must be elected (unless they are named in the articles of incorporation), bylaws must be adopted, and officers must be appointed.[45] Accordingly, a "duly organized" opinion is more expansive than an opinion that the company "is a corporation," and an "is a corporation" opinion does not include an opinion that the corporation is "duly organized." A duly organized opinion does include and imply an opinion that the "company has been or was incorporated," since organization of the corporation can occur only after incorporation, *see* N.C. Gen. Stat. § 55-2-05, but it does not include an opinion that a company "is a corporation" or "is in existence."

An opinion that a limited liability company "is duly organized under the laws of the State of North Carolina" means that the company has complied with the statutory requirements for organization set forth in N.C. Gen. Stat. § 57C-2-20(c) ("Organization of a limited liability company requires one or more initial members . . ."). Prior to July 21, 2000, however, the LLC Act did not contain a provision that was a counterpart to Section 55-2-05 of the Business Corporation Act (Organization of corporation). Thus it is not possible to opine that a limited liability company formed before July 21, 2000 is duly organized. For limited liability companies formed after July 21, 2000, a "duly organized" opinion is more expansive than an opinion that the company "is a limited liability company," and an

---

[44] Good standing is discussed in § 6.0.e of this Report.

[45] Although N.C. Gen. Stat. § 55-2-05 does not explicitly require the issuance of stock as part of the organization of a corporation, "duly organized" also customarily implies that the corporation has issued some amount of capital stock and has one or more shareholders. "[Organization] usually requires adoption of bylaws, the appointment of officers and agents, *the raising of equity capital by the issuance of shares to the participants in the venture*, and the election of directors." N.C. Gen. Stat. § 55-2-05 official comment (emphasis added).

"is a limited liability company" opinion does not include an opinion that the company is "duly organized." A duly organized opinion does not include an opinion that a company "is a limited liability company" or "is in existence."

e. *Good Standing Generally*. The statement that a company "is in good standing under the laws of the State of North Carolina" has no definitive meaning under North Carolina law or under customary opinion practice in North Carolina. The good standing certificate previously issued by the North Carolina Secretary of State was discontinued with the enactment of the new Business Corporation Act in 1990, and was replaced with a Certificate of Existence.[46] Accordingly, the Committee has not included the phrase "in good standing" in the company status opinion. If the opinion giver nevertheless renders an opinion to the effect that the company is in good standing, the opinion giver should consider qualifying or defining the phrase "in good standing" in the opinion letter. The Committee recommends the following language, which may be set forth in the same paragraph as the good standing opinion or in a portion of the opinion letter that addresses various qualifications, limitations and assumptions:

> **In rendering our opinion that the Company is "in good standing" we have relied solely upon a Certificate of Existence regarding the Company from the North Carolina Secretary of State dated _____.**

It is inappropriate for an opinion recipient to request a good standing opinion without allowing the opinion giver to qualify or define "good standing" in the opinion letter, as described above or in some other reasonable manner.[47]

f. *Tax Good Standing*. Upon written authorization and request by a corporation, the North Carolina Department of Revenue will issue what is commonly referred to as a "tax good standing letter." Such a letter will certify that the corporation has filed all state franchise and income tax returns and has paid the taxes shown due on those returns, and that there are no outstanding franchise and income tax assessments. Such letters are frequently obtained as part of the closing documentation for financing, acquisition and other transactions. The use of a tax good standing letter may be helpful in qualifying or defining the meaning of "good standing" in an opinion letter or giving assurances to an opinion recipient as to good standing in lieu of a good standing opinion.

g. *Delaware Companies*. It has become commonplace for lawyers not admitted to practice in Delaware to be asked to opine on routine matters of Delaware corporation and limited liability company law, such as the company status of a Delaware company. The Committee approves of this practice, so long as the opinion giver has sufficient

---

[46] *See* N.C. Gen. Stat. § 55-1-28. A North Carolina Certificate of Existence does not use the phrase "in good standing." In contrast, a comparable certificate from the Delaware Secretary of State does use such phrase. For a limited liability company, *see* N.C. Gen. Stat. § 57C-1-28.

[47] *See* GLAZER §§ 6.6 and 7.2.

knowledge of Delaware corporation and limited liability company law, as applicable. The opinion giver has the responsibility to determine whether he or she is capable of rendering a particular Delaware law opinion, on a case by case basis. The due diligence involved in giving a Delaware company status opinion and other matters of Delaware law are beyond the scope of this Report.

DUE DILIGENCE

a. *Opinion that "the Company Is a Corporation [Limited Liability Company];" Certificate of Existence.* A Certificate of Existence may be obtained for a corporation under N.C. Gen. Stat. § 55-1-28, which provides that the Certificate "may be relied upon as conclusive evidence that the...corporation is in existence." N.C. Gen. Stat. § 55-1-28(c). Further, such a Certificate sets forth that the corporation "is duly incorporated under the law of this State, the date of its incorporation, and the period of duration if less than perpetual." N.C. Gen. Stat. § 55-1-28(b)(2). Thus, an opinion that a company "is a corporation," "is incorporated" or "is duly incorporated" may be given solely in reliance on a Certificate of Existence as of the date of the Certificate.[48] Reliance may be made on the Certificate regardless of when the corporation was formed or the applicable statute under which it was incorporated, and without a review of the corporate records, because the Certificate contains a certification by the Secretary of State that the company is "duly incorporated"[49] and the Certificate is "conclusive evidence" as to corporate existence. N.C. Gen. Stat. § 55-1-28. A Certificate of Existence should be examined carefully to ensure there are no qualifications stated therein.

A Certificate of Existence may be obtained for a limited liability company under N.C. Gen. Stat. § 57C-1-28, which provides that the Certificate "may be relied upon as conclusive evidence that the . . . limited liability company is in existence." N.C. Gen. Stat. § 57C-1-28(c). The Certificate sets forth that the company "is duly formed under the law of the State, the date of its formation, and the period of its duration." N.C. Gen. Stat. § 57C-1-28(b)(2). Therefore, an opinion that a company "is a limited liability company" and "is formed" may be given solely in reliance on a Certificate of Existence as of the date of the Certificate.

---

[48] This approach is also consistent with the ACCORD which permits reliance by the opinion giver on a "Public Authority Document" without investigation and without a statement of reliance in the opinion letter. ACCORD § 3.

[49] Some commentators have suggested that an opinion that a company "is duly incorporated" may be more expansive than an opinion that the company "is a corporation" or "is incorporated." Under that view, an opinion that a company "is duly incorporated" would mean, among other things, that the opinion giver has not relied solely on a Certificate of Existence and "has reviewed the corporate records and made a professional judgment that any defects identified during the course of that review would not prevent a court from recognizing the entity as a corporation." GLAZER § 6.3. However, because of the conclusive effect of a Certificate of Existence and the language in a Certificate of Existence that a corporation "is duly incorporated," *see* N.C. Gen. Stat. § 55-1-28, an opinion that a corporation "is duly incorporated" should not be interpreted under North Carolina law to be more expansive than an opinion that a company "is a corporation" or "is incorporated," and the opinion giver should be able to render a "duly incorporated" opinion in reliance solely upon a Certificate of Existence.

b. *Statement of Reliance on Certificate of Existence.* An opinion recipient outside of North Carolina might erroneously assume that the opinion giver has reviewed company records in rendering an opinion that a company "is a corporation," "is incorporated," or "is duly incorporated," or "is a limited liability company," "is formed," or "is duly formed." Accordingly, if the opinion giver is rendering a company status opinion, and the opinion recipient is outside of North Carolina, the opinion giver may wish to consider stating the opinion giver's reliance solely on a Certificate of Existence in the opinion letter. If reliance is to be stated, the Committee recommends the following language, which may be set forth in the same paragraph as the opinion or in a portion of the opinion letter that addresses various qualifications, limitations and assumptions:

> **In rendering our opinion that the Company "is a corporation" ["is a limited liability company"] and "is in existence," we have relied solely upon a Certificate of Existence regarding the Company from the North Carolina Secretary of State dated _____.**

Even if the opinion recipient is in North Carolina, the opinion giver may wish to use this language to notify the recipient that the opinion as to company status is given as of the date of the Certificate of Existence. The use of such language means that the opinion does not address any period after the date of the Certificate. In the absence of a reference to the date of a Certificate, the opinion speaks as of the date of the opinion letter.

c. *Other Relevant Statutes.* In addition to the statutes regarding Certificates of Existence, other statutes should be noted. N.C. Gen. Stat. § 55-2-03(b) provides as follows:

> The Secretary of State's filing of the articles of incorporation is conclusive proof that the incorporators satisfied all conditions precedent to incorporation except in a proceeding by the State to cancel or revoke the incorporation or involuntarily dissolve the corporation.

The comparable statute for a limited liability company is N.C. Gen. Stat. § 57C-2-20.

N.C. Gen. Stat. § 55-1-27 provides in part as follows:

> A certificate attached to a copy of a document filed by the Secretary of State, bearing the Secretary of State's signature (which may be in facsimile) and the seal of office and certifying that the copy is a true copy of the document, is conclusive evidence that the original document is on file with the Secretary of State.

The comparable statute for a limited liability company is N.C. Gen. Stat. § 57C-1-27.

Thus, a certified copy from the Secretary of State's office of a company's articles of incorporation is conclusive proof that a company "has been or was incorporated," but it does not address whether the company is currently in existence, *i.e.*, that the company "is incorporated."

d. *Alternative Due Diligence*. If the opinion giver does not rely solely on a Certificate of Existence in rendering the opinion, the following are the due diligence steps the opinion giver generally should consider undertaking in order to render an opinion that a company "is a corporation" (or "is incorporated" or "is duly incorporated") or "is a limited liability company" (or "is formed" or "is duly formed"):

- Obtain a certified copy of the corporation's current articles of incorporation from the Secretary of State, and examine the Secretary of State's certification to ensure there are no irregularities therein. For a limited liability company, obtain articles of organization filed under N.C. Gen. Stat. § 57C-2-20.

- Examine the certified articles of incorporation of the corporation to confirm compliance with N.C. Gen. Stat. § 55-2-02 (Articles of Incorporation) and N.C. Gen. Stat. §§ 55-1-20 through 55-1-23 (Filing requirements), or any applicable predecessor statutes in effect at the time of incorporation. For a limited liability company, examine the certified articles of organization to confirm compliance with N.C. Gen. Stat. § 57C-2-20 (Formation), N.C. Gen. Stat. § 57C-2-21 (Articles of Organization) and N.C. Gen. Stat. §§57C-1-20 through 57C-1-22 (Filing requirements, etc.).

- Examine the certified articles of incorporation of the corporation to ensure that no term of duration is stated or that any stated term has not expired. For a limited liability company, examine the certified articles of organization to ensure that any stated latest date of dissolution has not passed.

- Obtain a Certificate of Existence for the corporation (or limited liability company) from the Secretary of State and examine it to ensure there are no qualifications stated therein.

The opinion giver is not required to examine the minutes of the Company in order to render an opinion that the Company is a corporation or limited liability company and is in existence.

e. *Other Steps*. Even if the opinion giver is relying on a Certificate of Existence in rendering a company status opinion, the opinion giver might be required to obtain and examine certified articles of incorporation for a corporation or certified articles of organization for a limited liability company in connection with rendering a corporate or limited liability company power opinion described below. If so, the Committee believes that the examination of the articles should be conducted with a view also toward identifying any patent deficiencies regarding company status; however, this should not be construed to mean that the due diligence described in paragraph d. above is required where reliance is made solely on a Certificate of Existence in rendering the company status opinion.

f. *Opinion that "the Company Is in Existence."* An opinion that a company "is in existence" may be given solely in reliance on a Certificate of Existence from the Secretary of State as of the date of the Certificate.[50] Because a Certificate of Existence is "conclusive evidence" that the corporation or limited liability company is in existence, no further due diligence investigation is necessary.[51] It is inappropriate for an opinion recipient to request that an opinion giver refrain from including in the opinion a statement to the effect that an "in existence" opinion has been rendered in reliance on a Certificate of Existence dated a certain date, as described above, although it would not be inappropriate for an opinion recipient to request that the Certificate be obtained as close as practicable to the closing date of the Transaction to which the opinion letter relates.[52]

g. *Opinion that "the Company Is Duly Organized."* The opinion giver should generally consider undertaking the following due diligence investigation in order to render an opinion that the company is "duly organized":

- Obtain a Certificate of Existence for the corporation or limited liability company from the Secretary of State, to confirm incorporation of a corporation or formation of a limited liability company.[53]

- Examine the corporation's minute book to confirm that corporate action was taken to organize the corporation in compliance with N.C. Gen. Stat. § 55-2-05 or any applicable predecessor statute in effect at the time of organization. For a limited liability company formed after July 21, 2000, examine the limited liability company's operating agreement or company records to confirm that action was taken to organize the limited liability company in compliance with N.C. Gen. Stat. § 57C-2-20(c).[54]

h. *Good Standing.* Because the phrase "in good standing" does not have any definitive meaning in North Carolina, as described above, the due diligence investigation necessary to render a good standing opinion cannot be established. If the opinion giver renders a good standing opinion that is qualified or defined as described above, the related due diligence investigation should be conducted to address the meaning of "good standing" as so qualified or defined.

---

[50] *See* text accompanying footnote 46.

[51] N.C. Gen. Stat. § 55-1-28. For a limited liability company Certificate of Existence, *see* N.C. Gen. Stat. § 57C-1-28.

[52] *See* subsection b above.

[53] *See* N.C. Gen. Stat. § 55-1-28.

[54] No organization opinion can be given for a limited liability company formed before July 21, 2000. *See* § 6.0 of this Report (Commentary ¶ d).

SECTION 7. THE FOREIGN AUTHORIZATION OPINION

§ 7.0 Foreign Authorization to Transact Business in North Carolina. The following is a standard formulation of such opinion:

> **The Company is authorized to transact business in the State of North Carolina.**

COMMENTARY

a. *General Effect of the Opinion*. An opinion that a corporation or limited liability company "is authorized to transact business in the State of North Carolina" means that it has complied with the requirements under the laws of North Carolina for a foreign corporation or limited liability company to transact business in North Carolina. Such requirements are set forth in N.C. Gen. Stat. §§ 55-15-01 through 55-15-05 for a corporation, and in N.C. Gen. Stat. §§ 57C-7-01 through 57C-7-05 for a limited liability company. Because "qualified to do business in North Carolina" has no established meaning under North Carolina law, the opinion should instead use the language "authorized to transact business in North Carolina." The Committee believes that a foreign authorization opinion should not normally be requested. See "Due Diligence" below.

b. *North Carolina Company Authorization or Qualification to Do Business in Other Jurisdictions*. Where a company's properties and business activities extend beyond North Carolina, the Committee concurs with the ABA Guidelines that it generally is inappropriate for an opinion recipient to request a comprehensive foreign authorization or qualification opinion from the opinion giver such as the following: "The Company is qualified to do business as a foreign corporation [limited liability company] in all jurisdictions where its properties or business activities require qualification."[55] As an alternative, the parties may wish to consider having the opinion giver render an opinion that the North Carolina company is authorized or qualified to do business in particular jurisdictions. However, because it is acceptable for an opinion giver to rely on a certificate confirming qualification from officials in such jurisdictions, as described below, the Committee believes that an opinion regarding foreign authorization or qualification does not provide any additional benefit to the opinion recipient over the certificate as to authorization or qualification. Accordingly, the Committee concurs with the ABA Guidelines that a certificate as to authorization or qualification in a foreign jurisdiction from the appropriate public official should suffice and an opinion should not normally be requested.[56]

---

[55] *See* ABA Guidelines § 4.1. *See also* GLAZER § 7.1.

[56] *See* ABA Guidelines § 4.1.

c. *Opinion that a North Carolina Company Is in Good Standing in Other Jurisdictions*. The term "good standing" has no generally accepted meaning in all jurisdictions. Therefore, it is inappropriate for an opinion recipient to request an opinion on good standing in a foreign jurisdiction unless the opinion giver is allowed to rely on a good standing certificate or comparable certificate from the particular jurisdiction or unless there is a well-established meaning of good standing in the particular jurisdiction. If the opinion giver renders an opinion to the effect that a North Carolina company is in good standing in a foreign jurisdiction, the opinion giver should consider qualifying or defining "in good standing" in the manner described above. If the opinion giver renders such a good standing opinion in reliance on a certificate from the particular jurisdiction, the Committee believes that a good standing opinion does not provide any additional benefit to the opinion recipient over the certificate. Accordingly, the Committee concurs with the ABA Guidelines that a certificate should suffice and an opinion should not normally be requested.[57]

DUE DILIGENCE

a. *Authorized to Transact Business in North Carolina.* A Certificate of Authorization for a foreign corporation may be obtained from the North Carolina Secretary of State under N.C. Gen. Stat. § 55-1-28, which provides that the Certificate "may be relied upon as conclusive evidence that the . . . foreign corporation . . . is authorized to transact business in this State." A Certificate of Authorization for a foreign limited liability company may be obtained from the North Carolina Secretary of State under N.C. Gen. Stat. § 57C-1-28, which provides that the Certificate "may be relied upon as conclusive evidence that the . . . foreign limited liability company . . . is authorized to transact business in this State." Thus, an opinion that a foreign company is authorized to transact business in North Carolina may be given solely in reliance on a Certificate of Authorization as of the date of the Certificate. Reliance on the Certificate may be made regardless of when the foreign company was authorized to transact business in North Carolina or the applicable statute under which it was authorized, and without a review of the company records. A Certificate of Authorization should be examined to ensure there are no qualifications stated therein. The opinion giver may rely upon a Certificate of Authorization without a statement as to reliance in the opinion letter.[58] However, the opinion giver may wish to consider stating reliance on a Certificate dated as of a particular date.[59] It is inappropriate for an opinion recipient to request an authorized to transact business opinion without allowing the opinion giver to make such a statement of reliance.

In light of such reliance by the opinion giver on a Certificate of Authorization, the Committee believes that an opinion regarding authorization to transact business in North Carolina does not provide any additional benefit to the opinion recipient over the

---

[57] *See* ABA Guidelines § 4.1.

[58] *See supra* note 48.

[59] *See* § 6.0 of this Report (Due Diligence, ¶ b).

Certificate of Authorization. Accordingly, the Committee concurs with the ABA Guidelines that a Certificate of Authorization should suffice and an opinion should not normally be requested.[60]

b. *Foreign Qualification*. Because the Committee believes that it generally is inappropriate to request a comprehensive foreign authorization or qualification opinion, as described above, the due diligence investigation for such an opinion is not addressed. If the opinion giver renders a foreign authorization or qualification opinion with respect to a particular jurisdiction, the opinion giver may do so solely in reliance on a certificate as to authorization or qualification from the appropriate official in such jurisdiction.[61] Further, the opinion giver may so rely without a statement as to reliance in the opinion letter.[62] However, the opinion giver may wish to consider stating reliance on a certificate dated as of a particular date.[63] It is inappropriate for an opinion recipient to request a foreign authorization or qualification opinion without allowing the opinion giver to make such a statement of reliance.

---

[60] *See* ABA Guidelines § 4.1.

[61] In various jurisdictions, the qualification concept may be characterized as "qualified to do business," "authorized to transact business," or other similar phrases. Accordingly, the opinion giver should consider conforming the opinion letter language to the language in the certificate.

[62] *See supra* note 48.

[63] *See* § 6.0 of this Report (Due Diligence, ¶ b).

SECTION 8. THE COMPANY POWER AND AUTHORIZATION OPINIONS

§ 8.0 The Operative Company Power Opinion. The following is a standard formulation of the company power opinion:

> **The Company has the corporate [limited liability company] power to execute, deliver and perform its obligations under the Transaction Documents**.[64]

COMMENTARY

a. *General Effect of the Opinion*. An opinion that the Company has the corporate power to execute, deliver and perform the Transaction Documents means that the Company's performance of those activities is not *ultra vires* under the Company's articles of incorporation or bylaws and applicable corporation laws. An opinion that the Company has the limited liability company power to execute, deliver and perform the Transaction Documents means that the Company's performance of those activities is not ultra vires under the Company's articles of organization or operating agreement and applicable limited liability company laws. The opinion is limited to the Company and to its "corporate power" or "limited liability company power," as opposed to "power and authority" or "full power and authority," which might imply broader authority. The

---

[64] This opinion clause is sometimes expanded to cover the power of the Company to operate its business. The following language is customary for this opinion:

> **The Company has the corporate [limited liability company] power to operate its business as currently conducted.**

In such case, it is advisable to recite the specific business of the Company being conducted and to rely upon an officer's certificate:

> **For purposes of this opinion, we have assumed that the business presently conducted by the Company consists of _____ and activities directly related thereto, as set forth in an officer's certificate rendered to us in connection with this opinion.**

This opinion is limited to the Company and its current activities and does not include reference to authority to own its property since the authority of the Company to operate should encompass the authority to own its assets. This opinion does not address whether the Company operates its business in a lawful manner. Inasmuch as modern North Carolina business corporations and limited liability companies are permitted to engage in any lawful activity, the Committee considers an opinion that the Company has the corporate or limited liability company power to operate its business as currently conducted to be of little value and, accordingly, such opinion should not be requested, absent special circumstances. Special purpose corporations or limited liability companies and corporations or limited liability companies in regulated industries might warrant an opinion of this type. Appropriate due diligence for this opinion might include (i) examination of the minute book, shareholders' agreements, a limited liability company's operating agreement, and similar documents to determine that there is no prohibition or restriction on the business conducted; (ii) examination of applicable statutes and regulations dealing with a specialized or professional company or a company operating in a regulated industry; and (iii) obtaining an officer's certificate describing the Company's current business activities.

inclusion of the term "authority" in this opinion traditionally has been considered to mean the same thing as power. The Committee suggests using only "corporate power" or, for a limited liability company, "limited liability company power" to avoid the implication that the additional language expands the scope of the opinion.

b. *Limitation of Opinion*. This opinion speaks solely to the legal capacity and power under applicable corporation law and the Company's articles of incorporation and bylaws, or applicable limited liability company law and the Company's articles of organization and operating agreement. This opinion deals with the Company's capacity to take action, not matters such as statutory provisions that subject the Company to fines or penalties, liability of directors for taking action or the necessity to obtain specific licenses or permits.

DUE DILIGENCE

The opinion giver should generally consider examining:

For a corporation:

- The Company's certified articles of incorporation;[65]
- Certificate of Existence;[66]
- Bylaws, certified by the corporate secretary;[67]
- Business corporation laws governing corporate powers; and [68]
- The Transaction Documents.

For a limited liability company:

- The Company's certified articles of organization;[69]
- Certificate of Existence;[70]
- Operating Agreement;

---

[65] *See* N.C. Gen. Stat. § 55-2-02.

[66] *See* N.C. Gen. Stat. § 55-1-28.

[67] *See* N.C. Gen. Stat. § 55-2-06.

[68] *See* N.C. Gen. Stat. § 55-3-02.

[69] *See* N.C. Gen. Stat. § 57C-2-21.

[70] *See* N.C. Gen. Stat. § 57C-1-28.

- Limited liability company laws governing limited liability company powers;[71] and
- The Transaction Documents.

Where appropriate the opinion giver also should review applicable statutes dealing with a specialized or professional company, or a company operating in a regulated industry.

§ 8.1 The Operative Authorization, Execution and Delivery Opinion. The following is a standard formulation of the opinion regarding authorization of the Transaction and execution and delivery of the Transaction Documents:

> **The Company has authorized the execution, delivery and performance of the Transaction Documents by all necessary corporate [limited liability company] action and has duly executed and delivered the Transaction Documents.**

COMMENTARY

a. *General Effect of Opinion*. This opinion means that persons having authority to bind the Company have signed the Transaction Documents and delivered them in a manner to make them binding. For a corporation, this opinion refers to the action taken by the Board of Directors and, if necessary, the shareholders of the Company to authorize the Transaction.

For a limited liability company, this opinion refers to the action taken by those parties authorized by the LLC Act, the articles of organization, or the operating agreement of the Company to authorize the Transaction. Limited liability companies are flexible entities, and the articles of organization and operating agreement may grant one or more of the members, managers, directors, or executives authority to authorize transactions.

Unless the articles of organization provide otherwise, all members by virtue of their status as members are managers of a limited liability company, together with any other persons that may be designated as managers in, or in accordance with, the articles of organization or written operating agreement.[72] If the articles of organization provide that all members are not managers by virtue of their status as members, then those persons designated as managers in, or in accordance with, the articles of organization or written operating agreement are managers.[73] Further, except as otherwise provided in the articles

---

[71] *See* N.C. Gen. Stat. § 57C-2-02.

[72] *See* N.C. Gen. Stat. § 57C-3-20(a).

[73] *See id.*

of organization or written operating agreement, management of the affairs of the limited liability company is vested in the managers.[74]

The LLC Act permits limited liability companies to have directors and executives. For any limited liability company whose management is vested in persons other than its managers pursuant to N.C. Gen. Stat. § 57C-3-20(b), "Director" means any person other than a manager who is vested with the authority to manage the limited liability company's affairs,[75] and "Executive" means any person who is vested with authority to participate in the management of the limited liability company's affairs under the direction of its managers or directors.[76]

N.C. Gen. Stat. § 57C-3-22(f) of the LLC Act provides that except to the extent otherwise provided in the articles of organization or written operating agreement, each director and executive is afforded the rights set forth in N.C. Gen. Stat. § 57C-3-22 (Duties of managers) for a manager when the director or executive exercises authority in the management of a limited liability company's affairs that otherwise would be vested in the managers pursuant to N.C. Gen. Stat. § 57C-3-20(b).

Thus it is necessary to review the articles of organization and operating agreement to determine whether one or more of the limited liability company's members, managers, directors, or executives has authority to authorize the Transaction. In addition, the opinion giver can rely on the certificate of any manager of the limited liability company, as N.C. Gen. Stat. § 57C-3-25(b) provides that the limited liability company operating agreement and records of the actions of the limited liability company's members, managers, directors, or executives may be authenticated by any manager of the limited liability company, and any person dealing with a limited liability company may rely conclusively upon the certificate or written statement of a manager authenticating its documents and records except to the extent the person has actual knowledge that the certificate or written statement is false.

b. *Limitation of Opinion*. This opinion does not speak to the enforceability of the documents but it can be, and frequently is, combined with the remedies opinion.[77]

DUE DILIGENCE

The opinion giver should generally consider examining:

For a corporation:

---

[74] *See* N.C. Gen. Stat. § 57C-3-20(b).

[75] *See* N.C. Gen. Stat. § 57C-1-03(5a).

[76] *See* N.C. Gen. Stat. § 57C-1-03(6b).

[77] *See* § 10 of this Report.

- The Company's certified articles of incorporation;[78]
- Bylaws, certified by the corporate secretary;[79]
- Certified copy of shareholder, director or committee resolutions or minutes of their meetings verifying authorization of the Transaction and the execution of the Transaction Documents;
- The executed Transaction Documents, together with evidence of delivery;
- Incumbency certificate (showing that those persons acting on behalf of the Company have been properly empowered); and
- Minute book, shareholders' agreements, voting trusts and similar documents.

For a limited liability company:

- The Company's certified articles of organization;[80]
- Operating agreement, certified by a manager;
- Certified copy of resolutions or minutes of meetings verifying authorization of the Transaction and the execution of the Transaction Documents in accordance with the articles of organization and operating agreement;
- The executed Transaction Documents, together with evidence of delivery; and
- Incumbency certificate (showing that those persons acting on behalf of the Company have been properly empowered).[81]

In addition, statutes dealing with a specialized or professional company, or a company operating in a regulated industry.

The Committee recommends that the opinion giver view the execution and delivery of the documents and, in certain cases, any necessary "release" of the Transaction Documents. If this is not possible, the opinion giver should be permitted to rely upon a certification of the corporate officers or limited liability company managers as to the execution and delivery of the documents. Such certification should state the Company has delivered possession to the other party(ies) with

---

[78] *See* N.C. Gen. Stat. § 55-2-02.

[79] *See* N.C. Gen. Stat. § 55-2-06.

[80] *See* N.C. Gen. Stat. § 57C-2-21.

[81] For designation and authority of limited liability company managers, *see generally* Commentary ¶ a of this § 8.1 above; N.C. Gen. Stat. §§ 57C-3-20 to 57C-3-25; ROBINSON § 34.04.

the intent to form a binding contract. This may be particularly important in multistate transactions or where an attorney serves only as local or special counsel.

a. *Authorization.* Authorization for a corporation is usually obtained by resolutions adopted by the Board of Directors. The Board of Directors may adopt a resolution granting specific officers authority to approve and execute certain types of agreements on behalf of the Company without seeking separate Board approval. This opinion is usually requested in connection with agreements executed in a transaction requiring a separate Board resolution, such as the Company's borrowing of monies or issuance of stock. The resolution should authorize the Transaction outlined in the Transaction Documents and authorize the officers to execute and deliver the Transaction Documents in the form submitted to the directors or a form otherwise identified. The manner in which resolutions are adopted, whether at a meeting or by written consent, must comply with the applicable statute and with the bylaws of the Company. Authorization depends on express approval as well as the validity and regularity of the meeting at which the action is taken.

As described in paragraph a of the Commentary above, it is necessary to review the articles of organization and operating agreement of a limited liability company to determine whether one or more of the limited liability company's members, managers, directors, or executives has authority to authorize the Transaction. Authorization for a limited liability company is obtained by resolutions adopted by the parties authorized by the articles of organization and operating agreement. The resolution should authorize the Transaction outlined in the Transaction Documents and authorize the managers, directors, or executives in accordance with the articles of organization and operating agreement to execute and deliver the Transaction Documents in the form submitted to the members (or managers, as appropriate) or a form otherwise identified. The manner in which the resolutions are adopted, whether at a meeting or by written consent, must comply with the operating agreement.

The opinion giver should review resolutions authorizing the Transaction, approving the form of Agreement and other Transaction Documents and authorizing their execution and delivery to support the rendering of the opinion. For a corporation, it is usually acceptable to rely on a secretary's certificate, preferably one made under corporate seal, to authenticate the resolutions. Under North Carolina law, the function of certifying corporate resolutions is normally within the authority of the corporate secretary, and the corporate seal raises a rebuttable presumption of regularity.[82] There may be occasions when the opinion giver should investigate beyond the certified resolutions to confirm who is on the Board of Directors of the Company and whether they were duly elected and qualified. This further investigation may be warranted when the Company is generally not attentive to following correct corporate procedure or when the nature of the

[82] ROBINSON § 6.03

Transaction justifies more detailed due diligence. For a limited liability company, it is acceptable to rely on a manager's certificate to authenticate the resolutions.[83]

b. *Execution*. For a corporation, execution of the Transaction Documents by officers of the Company generally must be approved by the Board of Directors. The Board of Directors should adopt a resolution to authorize specific officers to sign the Agreement. If particular officers are not mentioned in the resolution, execution should be effected in accordance with the Company's bylaws. For a limited liability company, execution of the Transaction Documents must be approved as required by the LLC Act, the articles of organization, and the operating agreement.[84]

When execution of documents is not observed firsthand, the opinion giver should be entitled to rely on an officer's certificate for a corporation, generally referred to as an "incumbency certificate," that certifies the identity of the officers and the genuineness of their signatures and that recites the officers' execution and delivery of the Agreement. It should also be determined that the copy of the Agreement being signed is in the form approved by the Board of Directors. For a limited liability company, the incumbency certificate is typically signed by a manager, and certifies the identity of the managers, directors, or officers and the genuineness of their signatures and recites their execution and delivery of the Transaction Documents.[85] It should also be determined that the copy of the Transaction Documents being signed are in the form approved by the parties authorized by the operating agreement and the LLC Act.

c. *Delivery*. Delivery, it is generally assumed, can be made by the person who is authorized to execute the Transaction Documents, but resolutions should be drafted to authorize delivery along with execution. Giving this opinion is generally straightforward if delivery is observed firsthand or an appropriate incumbency certificate is obtained. If the documents are to be physically transferred, inquiry should be made to determine whether there are any conditions attached to such transfer and, if so, whether such conditions have been satisfied. If delivery is to be accomplished other than by actual physical transfer, inquiry should be made to determine that the Company in fact intends to be bound at the pertinent point in time.

---

[83] *See* § 8.1 of this Report (Commentary ¶ a); N.C. Gen. Stat. § 57C-3-25(b).

[84] *See* § 8.1 of this Report (Commentary ¶ a).

[85] *See id.*

SECTION 9. THE OPINION ON AUTHORIZATION AND ISSUANCE OF STOCK

§ 9.0 The Operative Opinion. The following is a standard formulation of the opinion on capital stock:

> **The authorized capital stock of the Company consists of _____ common shares, of which _____ shares are outstanding. [Describe other classes if applicable.] The Shares have been duly authorized and validly issued, and are fully paid and nonassessable.**

COMMENTARY

a. *General Effect of the Opinion*. As described more fully below, the opinion is composed of the following parts: the "authorized" opinion, the "outstanding" opinion, the "duly authorized" opinion, the "validly issued" opinion, and the "fully paid and nonassessable" opinion. An opinion on the capital stock of a corporation may be given either with respect to the entire capitalization of the corporation or with respect to only certain shares being issued or transferred.[86] As used above, "Shares" may be either all of the outstanding shares of the corporation or certain shares to be issued or transferred pursuant to the Transaction and should be defined accordingly in the opinion letter.

Where the shares are to be issued or transferred, the opinion provides assurance to the purchaser of such purchaser's rights as a shareholder to the extent provided by the articles of incorporation and applicable corporate law. Where all shares of the corporation are covered, the opinion provides confirmation that defects do not exist in previous share issuances.

To the extent the opinion confirms compliance with applicable corporate law, the Committee concurs with § 19(a) of the ACCORD, which excludes from the opinion compliance with federal or state securities laws unless specifically addressed. Additionally, references to applicable corporate law herein also exclude fiduciary obligations of officers and directors and corporate statutes not included in the BCA.

b. *The "Authorized" Opinion*. The opinion on "authorized" shares (as differentiated from the opinion on "duly authorized" shares discussed in § 9.0.d. below) means that the number of shares of each class set forth in the opinion are as described in the corporation's articles of incorporation.[87] The opinion giver is entitled to rely on the

---

[86] *See generally* GLAZER § 10.1.

[87] *See* N.C. Gen. Stat. § 55-1-40(2); N.C. Gen. Stat. § 55-2-02(a)(2); N.C. Gen. Stat. § 55-6-01. For membership interests in limited liability companies, *see* N.C. Gen. Stat. § 57C-3-01. Because LLCs are afforded broad discretion in the design of ownership arrangements, it is not practicable to formulate standard opinion language regarding the authorization and issuance of LLC membership interests. The following clause contains sample language that might be of use as a starting point for opinion givers called upon to provide such an opinion:

number and class of shares as set forth in the current articles of incorporation. If the shares have been the subject of an amendment to the articles of incorporation, then the opinion also confirms that proper amendment procedures were followed.[88]

c. *The "Outstanding" Opinion*. Shares that are issued are "outstanding" shares until they are reacquired, redeemed, converted or canceled.[89] The "outstanding shares" opinion provides assurance that defects do not exist in previous stock issuances. Where counsel is also giving an opinion on valid issuance of all shares of the Company, an opinion on the number of shares outstanding may be a simple addition but without legal content, since an officer's certificate can provide the same degree of satisfaction.[90] Where counsel is not opining on valid issuance of all shares, the due diligence necessary to give an "outstanding" opinion may be an unjustified expense. An alternative to such opinions is to have the opinion recipient rely on a certificate from the transfer agent or corporate secretary. Audited financial statements are also an alternative source of confirmation.

Although some commentators believe counsel is justified in refusing to include an opinion on outstanding shares,[91] the Committee believes the opinion includes legal conclusions as well as statements of fact. Historical practice may also justify inclusion of the "outstanding" shares opinion.

d. *The "Duly Authorized" Opinion*. The "duly authorized" opinion means that (i) the shares have been created pursuant to the constituent documents of the corporation and applicable corporation law, and (ii) the rights of the holder of the shares under the terms of the articles of incorporation are consistent with both other provisions of the articles and applicable corporation law.

Where it is impractical for the opinion giver to confirm compliance with the appropriate procedures to adopt and amend the articles of incorporation, a specific exception or assumption may be appropriate.

In order to render the opinion regarding authorized shares, the opinion giver should, of course, have determined that the issuer is a corporation, which is normally part of a separate opinion on corporate status, and is an essential implied portion of the due

---

"The authorized membership interests of the Company consist of _____ [insert appropriate description], of which _____ membership interests are outstanding. All of the Company's membership interests have been duly authorized and validly issued."

For a discussion of due diligence that might be conducted to support this opinion, *see infra* n. 107.

[88] *See* N.C. Gen. Stat. §§ 55-10-01 to 55-10-09.

[89] N.C. Gen. Stat. § 55-6-03(a). For cessation of membership interests in limited liability companies, *see* N.C. Gen. Stat. § 57C-3-02.

[90] *See* GLAZER § 10.10 at 376-77.

[91] *See id*.

authorization opinion. The opinion giver should also have determined that the rights of the holder of the shares are consistent with the articles of incorporation and applicable corporate law. The opinion giver should confirm that the necessary corporate steps were taken to create the shares, whether by original articles of incorporation or amendment, and that such provisions continue in effect. However, the opinion does not cover the adequacy of disclosure information contained in proxy materials or whether directors or shareholders acted in accordance with their fiduciary obligations in authorizing creation or issuance of the shares. The opinion giver should confirm that the articles of incorporation describe the attributes of the shares as required by applicable corporate law,[92] and that sufficient authorized shares of the appropriate class were available at the time of issuance.[93]

In determining whether the corporation has sufficient authorized and unissued shares available to be issued, in cases where share certificates were previously lost or misplaced, an issue may exist as to whether the allegedly lost share certificate was actually acquired by a bona fide purchaser, resulting in more shares having been issued than authorized. The Committee adopts the approach that the opinion giver may render a "duly authorized" opinion in reliance on the representation of a company officer or other appropriate evidence that the replacement certificates were issued because the original certificates were lost or destroyed.[94]

Where the issuance of shares previously exceeded the authorized amount, and the articles of incorporation were subsequently amended to increase the authorized amount to cover the invalidly issued shares, the opinion giver should analyze the facts and applicable corporate law to determine whether a court would view the later amendment as sufficient to validate the previously issued shares.[95]

---

[92] *See* N.C. Gen. Stat. § 55-6-01.

[93] The "duly authorized" opinion does not mean that the creation of the shares complied with agreements by which the corporation is bound. However, the opinion giver would not be able to give the "no breach or default" opinion in § 11 of this Report, if such share creation violated an agreement covered by such opinion.

[94] *See* GLAZER § 10.4.5.2 at 347; ACCORD §§ 3(a), 4(e) and 5; *see also* Legal Opinion Committee of the Corporate and Banking Law Section of the State Bar of Georgia, *Report on Legal Opinions to Third Parties in Corporate Transactions, reprinted at* GLAZER Appendix Thirteen (GEORGIA REPORT) at 11.03A, adopting the approach that if (i) the corporation has sufficient authorized and unissued shares of the class available to be issued, and (ii) the number of shares represented by the replacement certificates is *de minimis*, the lost certificate issue may be ignored. Otherwise, an exception may be noted in the opinion. The GEORGIA REPORT also allows the opinion to be given without exception in reliance on appropriate certifications from the shareholders of the lost shares in accordance with the corporation's Bylaws.

[95] *See* GLAZER § 10.4.5.3 at 348.

The BCA does not expressly require a reserve of authorized shares for outstanding and unexercised rights, options and warrants.[96] However, after exercise, sufficient authorized shares must be available on the date of issuance.[97]

Minor defects in corporate proceedings with respect to adoption or amendment of the articles of incorporation should be analyzed to determine whether the defect would cause a court to refuse to recognize (i) the existence of the shares or (ii) any of the rights which the articles of incorporation and applicable corporate law would otherwise confer on the holders of the shares.[98]

If a corporation acquires its own shares, such shares constitute authorized but unissued shares,[99] except where the articles of incorporation prohibit the reissue of acquired shares, in which case the articles of incorporation are to be amended to reduce the number of authorized shares by the number of shares acquired.[100]

e. *The "Validly Issued" Opinion*. The "validly issued" opinion means that (i) the corporation has issued the shares in compliance with its articles of incorporation and bylaws and applicable corporate law, and (ii) the corporation has not taken any action, nor failed to take action, where the result would be to deprive the shares of their validly issued status.

To form these legal conclusions, the opinion giver should confirm that the issuance complies with applicable corporation law, including N.C. Gen. Stat. § 55-6-21. Sufficient authorized and unissued shares should be available for issuance. Other applicable corporation laws, such as preemptive rights, should be satisfied. Although receipt of proper consideration is required by the BCA for shares to be issued, the payment of consideration is addressed below in the "fully paid and nonassessable" opinion. The issuance should be in compliance with the articles of incorporation and bylaws of the corporation. The issuance of the shares should be approved in the manner provided by the corporation's constituent documents and applicable corporate law, and such approval should not have been withdrawn at the time of issuance.

The issuance should also comply with any further requirements of any authorizing resolution of the shareholders, directors or a board committee. The corporation should also have taken such other steps as may be necessary to confer shareholder status on the transferee, such as issuance of certificates in accordance with N.C. Gen. Stat. § 55-6-25

---

[96] *See* N.C. Gen. Stat. § 55-6-24.

[97] *See* GLAZER § 10.4.5.1 at 345-46.

[98] *See id*. § 10.4.3, at 341; *see also Rogers v. Hill*, 289 U.S. 582, 591 (1933) (presumption of regularity and continuity in connection with corporate proceedings which grows stronger with age).

[99] N.C. Gen. Stat. § 55-6-31(a).

[100] N.C. Gen. Stat. § 55-6-31(b).

and any applicable bylaw provisions, and adding the transferee's name to the shareholder list. The corporation should not have taken any action to cause the shares to cease to be validly issued, such as merger, dissolution, or reacquiring the shares from the transferee.

The Committee adopts the approach that the "validly issued" opinion does not address possible violations of agreements to which the corporation is a party.[101]

The "validly issued" opinion is generally regarded as covering only the corporation law under which the Company was incorporated and not receipt of any regulatory approvals required for the issuance of the stock. The singular exception is for entities in regulated industries, such as banking and insurance, that are incorporated under the general corporation statute but are required by a different statute to obtain approval of their stock issuance from a state regulatory authority.[102]

f. *The "Fully Paid and Nonassessable" Opinion*. The "fully paid and nonassessable" opinion means the corporation has received the consideration for which the board of directors authorized the issuance of the shares,[103] or as specified in a preincorporation subscription agreement[104] and the consideration satisfied any requirements of the Company's articles of incorporation or bylaws.

The opinion giver should determine that the board of directors has specified the consideration to be received for the shares to be issued and determined that such consideration is adequate.[105] There is no requirement that the board specify a value for any noncash consideration to be received. The opinion giver is not responsible for confirming compliance by the directors with their fiduciary obligations in determining the adequacy of consideration.

The opinion giver should obtain an officer's certificate stating that the corporation received the consideration called for by the respective authorizing resolutions or subscription agreements. The Committee adopts the view that the opinion giver may rely on such certificate to the extent counsel does not have actual knowledge that the certificate is false or of facts that would make reliance unreasonable under the

---

[101] *Cf.* Tri Bar Report § 6.2.2.

[102] *See* GLAZER §10.2.1 at 333 and §10.6.1 at 354. *See also* Tri Bar Report § 6.2.2, at 649-650; N.C. Gen. Stat. § 55-3-01(b).

[103] N.C. Gen. Stat. § 55-6-21(d).

[104] N.C. Gen. Stat. § 55-6-20(c).

[105] *See* N.C. Gen. Stat. § 55-6-21(c). Although par value is no longer a mandatory statutory concept under the BCA, optional charter provisions may address par value. N.C. Gen. Stat. § 55-2-02(b)(2)(iv); *see also* ROBINSON § 2.5.

circumstances.[106] Alternatively, the opinion giver may state an assumption in the opinion letter that such consideration has been received by the corporation.

It should be noted that the stock of North Carolina banking corporations is subject to assessment under N.C. Gen. Stat. § 53-42 upon "impairment of capital" of the bank. Accordingly, an opinion as to the nonassessability of bank stock should be qualified in this regard.

DUE DILIGENCE

The opinion giver should generally consider examining:

a. "*Authorized*."

- The Company's certified articles of incorporation, verifying classes of shares and number of shares authorized for each class.[107]

b. "*Outstanding*."

- Share certificate records, verifying the number of shares of each class issued and the number of shares of each class acquired by the corporation, if any;[108]
- Merger or share exchange agreements, determining the treatment of shares pursuant to any merger or share exchange agreements; and
- The Company's certified articles of incorporation, verifying, *e.g.*, reverse stock splits.

c. "*Duly Authorized*."

- The Company's certified articles of incorporation, verifying authorization of shares, share characteristics and attributes;
- Bylaws, certified by corporate secretary, verifying procedure for approval of share creation, share attributes, chronological sufficiency of quantity of unissued shares;

---

[106] *See* ACCORD § 3.

[107] For a limited liability company, *see* N.C. Gen. Stat. § 57C-3-01. Due diligence for an opinion regarding membership interests of an LLC should be tailored to fit the manner in which the entity is organized and the design of its ownership structure. In addition to a review of the articles of organization, the operating agreement and the ownership records of the Company, such due diligence might include reliance upon representations of the Company in the Transaction Documents and a certificate of a member, manager or officer of the Company. *See* n. 87 *supra*.

[108] Where a corporation acquires its own shares, such shares are deemed unissued and not outstanding. N.C. Gen. Stat. § 55-6-31(a).

- Resolutions of board of directors (or committee if authorized), certified by corporate secretary, verifying approval of share creation, share attributes;

- Resolution of shareholders, if required, certified by corporate secretary, verifying approval of share creation and share attributes;

- Certificate of Existence;[109]

- Officer's certificate, confirming absence of dissolution, nonabandonment of resolutions, etc.; and

- The Company's record of shareholders, including previously issued, reacquired, notations on lost certificates, options, subscription and other reserved shares, if appropriate.

d. "*Validly Issued*."

- Resolution of board of directors, confirming consideration to be received and adequacy thereof;

- Officer's certificate, confirming receipt of consideration;

- The Company's certified articles of incorporation, verifying authorization of shares, share attributes, confirming compliance with terms of sale or transfer, if appropriate;

- Bylaws, certified by corporate secretary, verifying procedure for approval of share creation, share attributes, chronological sufficiency of quantity, confirming compliance of terms of sale or transfer, if appropriate;

- Resolution of board of directors (or executive committee if authorized), certified by corporate secretary, verifying approval of share creation, share attributes, confirming approval of terms of issuance, proper approval procedure;

- Resolution of shareholders, if required, certified by corporate secretary, verifying approval of share creation, share attributes, confirming approval of terms of issuance, proper approval procedure;

- The Company's record of shareholders, confirming share issuance; and

---

[109] Subject to any qualification stated in the certificate, a Certificate of Existence or authorization issued by the Secretary of State may be relied upon as conclusive evidence that the domestic or foreign corporation is in existence or is authorized to transact business in North Carolina, as the case may be. N.C. Gen. Stat. § 55-1-28. *See* § 6.0 of this Report (Commentary ¶ c).

- Officer's certificate, confirming absence of act causing cessation of valid issuance (*e.g.*, merger, dissolution, reacquisition).

e. "*Fully Paid and Nonassessable*."

- The Company's certified articles of incorporation, verifying compliance with specified minimum amounts or form of consideration, if any;

- Bylaws, certified by corporate secretary, verifying compliance with specified minimum amounts or form of consideration, if any.

- Preincorporation subscription agreements, if applicable, confirming consideration to be received;

- Resolution of board of directors, confirming consideration to be received and adequacy thereof; and

- Officer's certificate, confirming receipt of consideration.

SECTION 10. THE REMEDIES OPINION

§ 10.0 The Operative Opinion. The following is a standard formulation of the remedies opinion:

> **The Agreement constitutes the legal, valid and binding obligation of the Company, enforceable against the Company in accordance with its terms.**

COMMENTARY

a. *General Effect of the Remedies Opinion*. The Committee concurs with the ACCORD'S position that the remedies opinion means (i) a remedy will be available with respect to each promise or undertaking of the Company in the Agreement or such promise or undertaking will otherwise be given effect and (ii) each remedy expressly provided for in the Agreement will be given effect as stated. ACCORD § 10(a). As a prerequisite to these legal conclusions, the opinion giver must first be satisfied that a contract has been formed under applicable law (ACCORD § 10(a)), that the Company validly exists in its jurisdiction of organization and that all actions or approvals by the Company necessary to bind the Company have been taken or obtained. ACCORD § 10.4. The remedies opinion should not cover enforceability against parties to the Transaction Documents other than the Company.

b. *Relationship to Other Opinion Clauses*. In practice, the remedies opinion is frequently combined with opinions on company power and authorization. *See* § 8 of this Report.

DUE DILIGENCE

a. The opinion giver should generally consider examining:

- The Company's certified articles of incorporation or articles of organization, verifying company name, company duration (usually perpetual), and corporate or limited liability company powers[110] and checking for special voting requirements and preemptive rights;
- Certificate of Existence;[111]
- For a corporation, its bylaws, certified by corporate secretary, verifying number of directors, applicable notice and quorum requirements, designation and authority

[110] *See* N.C. Gen. Stat. § 55-3-02. For limited liability company powers, *see* N.C. Gen. Stat. § 57C-2-02.

[111] For the effect of such certificate, *see* N.C. Gen. Stat. § 55-1-28. For a limited liability company, *see* N.C. Gen. Stat. § 57C-1-28. *See also* § 6.0 of this Report (Commentary ¶ c).

of officers, and absence of any relevant limitations upon power or authority or, for a limited liability company, its operating agreement certified by any manager;[112]

- For a corporation, resolution of board of directors (or executive committee if authorized),[113] verifying authorization of the transaction and of the execution, delivery and performance of the Agreement, or, for a limited liability company, resolution of the parties authorized by its articles of organization and operating agreement;[114]

- For a corporation, resolution of shareholders or, for a limited liability company, members, if required;[115]

- The Agreement, executed by authorized officer(s) of a corporation or the manager(s) or officer(s) of a limited liability company,[116] together with evidence of delivery;[117]

- Officer's certificate for a corporation, or manager's certificate for a limited liability company, confirming absence of dissolution and nonabandonment;

- Incumbency certificate, confirming that persons signing the Agreement occupy the office they purport to hold;[118]

- Relevant laws and statutes bearing upon whether a contract has been formed under applicable law, whether the actions or approvals necessary to bind the Company have been taken or obtained, whether specified remedies will be available; and

- Other items, where applicable, *e.g.*, tax good standing letter, "bring down" certificate of existence.

---

[112] *See* § 8.1 of this Report (Commentary ¶ a); N.C. Gen. Stat. § 57C-3-25(b).

[113] *See generally* ROBINSON ch. 12 (describing the governance of a corporation by the board of directors).

[114] *See* § 8.1 of this Report (Commentary ¶ a).

[115] *See* ROBINSON ch. 7 (describing shareholders' voting rights). Consult articles of incorporation, bylaws and any shareholders' agreements for existence of any special shareholder approval requirements. For limited liability companies, *see* § 8.1 of this Report (Commentary ¶ a); ROBINSON § 34.04.

[116] *See* § 8.1 of this Report (Commentary ¶ a and Due Diligence, ¶ b).

[117] *See* § 8.1 of this Report (Due Diligence ¶ c).

[118] *See* § 8.1 of this Report (Due Diligence ¶ b).

The type of Transaction Document covered by the remedies opinion will in large measure determine additional due diligence steps, if any, that should be undertaken.

b. Given the broad effect of the remedies opinion (*see* § 10.0 *supra*, Commentary ¶ a), the opinion giver should read the Agreement in its entirety and carefully consider the enforceability of each promise or undertaking of the Company set forth in the Agreement and each remedy expressly provided for in the Agreement.

To opine as to the validity of an agreement may require legal research to determine that there will be no basis for a successful defense based on illegality or contravention of public policy. The type of transaction will determine the areas of regulation in which verification will need to be obtained.

Various laws might affect the validity of an agreement, and a comprehensive discussion of such laws is beyond the scope of this Report. Further, the effect of certain laws may be excluded from the opinion. *See supra* § 2.7. The following laws are typical of those which may affect the validity or enforceability of an agreement:

(i) *Uniform Commercial Code*. Agreements dealing with commercial law should be carefully reviewed for provisions which may be prohibited under the Uniform Commercial Code. Opinions with respect to validity of agreements should be qualified appropriately where an agreement contains a blanket prohibition on assignments or a specific prohibition on assignment of payments due or to come due. *See* N.C. Gen. Stat. §§ 25-9-406(d), 407, 408 and 409 (setting forth certain prohibitions against assignments and restrictions on alienability). Provisions giving secured creditors rights to take possession of and dispose of collateral may also require qualifications. GLAZER § 9.14.7.

(ii) *Federal securities laws*. If the remedies opinion covers the effect of securities laws (*see* § 2.7 *supra* of this Report), the opinion giver should consider several aspects of the securities laws. First, at least three of the statutes administered by the Securities and Exchange Commission contain provisions invalidating any contract made in violation of the statute or the performance of which involves such a violation: Section 29(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78cc(b) (1995), Section 26(b) of the Public Utility Holding Company Act of 1935, 15 U.S.C. § 79z(b) (1997), and Section 47(b) of the Investment Company Act of 1940, 15 U.S.C. § 80a-46(b) (1997). Second, indemnification provisions (especially in underwriting agreements) should be examined and excluded from the opinion. *See* GLAZER § 9.14.2.

(iii) *Laws regarding indemnification*. Indemnification sections of an agreement may be held invalid as contrary to public policy. (For example, N.C. Gen. Stat. § 22B-1 declares void and unenforceable certain indemnity agreements in connection with construction and related contracts.) Indemnification may also be limited under certain securities laws, as noted above. Furthermore, contractual agreements providing for the indemnification of officers and directors may be

limited by N.C. Gen. Stat. §§ 55-8-50 to -8-58, and by N.C. Gen. Stat. § 57C-3-32 for limited liability company managers, directors, executives, and members.

(iv) *Usury*. Provisions in a note or other evidence of indebtedness charging a higher rate of interest than permitted by applicable law are unenforceable, and the party who has paid a higher rate of interest than the lawful amount has an action to recover twice the amount of interest paid. N.C. Gen. Stat. § 24-2.

(v) *Laws pertaining to noncompetition agreements*. Noncompetition agreements are by their nature restrictive and are carefully scrutinized by the courts. In general, restrictive covenants are valid and enforceable only if they are supported by adequate consideration, are reasonable and not against public policy. *See, e.g., A.E.P. Industries v. McClure*, 308 N.C. 393, 302 S.E.2d 754 (1983). Since a determination of enforceability depends upon the particular facts and the application of a reasonableness standard by the court, attorneys should exclude such agreements or covenants from the remedies opinion. In the event that an enforceability opinion on a noncompetition agreement is specifically negotiated, the opinion giver should give a reasoned opinion and recite the applicable facts underlying the opinion.

§ 10.1 Standard Exceptions. The following exceptions to the remedies opinion should be included in the opinion letter as a matter of course:

a. This opinion is subject to the effect of applicable bankruptcy, insolvency, reorganization, fraudulent conveyance, moratorium and similar laws affecting the enforcement of creditors' rights generally.

b. This opinion is subject to the effect of general principles of equity (regardless of whether considered in a proceeding in equity or at law), which may, among other things, deny rights of specific performance.

COMMENTARY

a. *Standard Exceptions Generally*. The foregoing standard exceptions should ordinarily be included in any opinion letter containing a remedies opinion. If the opinion recipient considers that special circumstances render any of these standard exceptions inappropriate for the Transaction, it is incumbent upon the opinion recipient to address this issue at the outset and seek to justify the basis for excluding these standard exceptions.

b. *Insolvency Exception*. Clause 10.1a is consistent with the ACCORD. *See* ACCORD § 12. The insolvency exception does not include laws that affect creditors generally but that are not of a character similar to those listed in the exception. Thus, for example, usury laws or a provision of the Uniform Commercial Code that would affect the enforceability of a provision in the agreement but is not grounded in bankruptcy, insolvency or similar concepts would not be included in the bankruptcy exception and should be specifically referenced in the opinion letter, if applicable.

c. *Equitable Principles Exception*. Clause 10.1b is consistent with the ACCORD. *See* ACCORD § 13. This phrasing of the exception should be adequate to cover the availability of traditional equitable remedies (such as specific performance or injunctive relief), and also defenses rooted in equity that result from the enforcing party's lack of good faith and fair dealing, unreasonableness of conduct or undue delay. If an opinion recipient who has been damaged only insignificantly by an immaterial breach seeks to enforce a remedy, the equitable principles limitation also encompasses the refusal of a court to reward that party's overreaching pursuit of disproportionate relief.

The equitable principles limitation relates to the performance and enforcement of the agreement and to conduct of the parties after execution of the agreement. If on the date of the proposed opinion letter, the attorney has actual knowledge that one of the principles included within this limitation would limit the enforceability of a specific provision or the entire contract, the attorney should decline to give the remedies opinion, or if the opinion is given, should specifically call the unenforceability issue to the attention of the opinion recipient in the opinion letter.

§ 10.2 Other Common Exceptions. The following additional exceptions to a remedies opinion may be included in the opinion letter where applicable:

We do not express any opinion as to the enforceability of:

a. any provisions of the Agreement that purport to excuse a party for liability for its own acts.

b. any provisions of the Agreement that purport to make void any act done in contravention thereof.

c. any provisions of the Agreement that purport to authorize a party to act in its sole discretion or that provide that determination by a party is conclusive.

d. any provisions of the Agreement that require waivers or amendments to be made only in writing.

e. any provisions of the Agreement that purport to effect waivers of constitutional, statutory or equitable rights or the effect of applicable laws.

f. any provisions of the Agreement that impose liquidated damages, penalties or forfeiture or that limit or alter laws requiring mitigation of damages.

g. any provisions of the Agreement concerning choice of forum or consent to the jurisdiction of courts, venue of actions or means of service of process.

h. any provisions of the Agreement purporting to waive the right of jury trial.

i. any provisions of the Agreement purporting to reconstitute the terms thereof as necessary to avoid a claim or defense of usury.

j. any provisions of the Agreement purporting to require a party thereto to pay or reimburse attorneys' fees incurred by another party, or to indemnify another party therefore, which provisions may be limited by applicable statutes and decisions relating to the collection and award of attorneys' fees.

k. provisions of the Agreement providing for arbitration.

l. any provisions relating to evidentiary standards or other standards by which the Agreement is to be construed.

m. the Guaranty, to the extent that enforcement may be limited by the provisions of Chapter 26 of the North Carolina General Statutes, and we express no opinion as to the effectiveness of any waiver by any Guarantor of his or her rights under that Chapter.

n. provisions prohibiting (i) competition, (ii) the solicitation or acceptance of customers, of business relationships or of employees, (iii) the use or disclosure of information, or (iv) activities in restraint of trade.

o. provisions that enumerated remedies are not exclusive or that a party has the right to pursue multiple remedies without regard to other remedies elected or that all remedies are cumulative.

p. severability provisions.

q. provisions permitting the exercise, under certain circumstances, of rights without notice or without providing opportunity to cure failures to perform.

r. provisions that purport to create rights of setoff otherwise than in accordance with applicable law.

COMMENTARY

a. *Non-Exclusive Listing*. The foregoing list of other common exceptions to a remedies opinion is not intended to be exclusive but is intended to reflect the principal exceptions for provisions typically appearing in commercial agreements and loan documents. The ACCORD contains a similar listing and should be consulted for other possible qualifications. ACCORD § 14. Exceptions relating to secured transactions under Articles 8 and 9 of the Uniform Commercial Code ("UCC") are discussed in § 15.7 of this Report.[119]

[119] *See also* Real Property Committee Report; *see also* Uniform Commercial Code Committee of the Business Law Section of the State Bar of California, *Report Regarding Legal Opinions in Personal Property Secured Transactions,* 44 BUS. LAW. 791 (1989) (reporting on the use of legal opinions in personal property secured transactions); Special TriBar Report.

b. *Overlap with Equitable Principles Limitation*. Certain of the listed other common exceptions may be encompassed within the standard equitable principle exception but are included here to enable opinion givers to make explicit reference to such exceptions in the opinion to remove any doubt about the applicability of such exception to the particular transaction. For example, with respect to the qualification set forth in Clause 10.2b, note that the enforceability of provisions that purport to make determinations by a party conclusive may be subject to equitable limitations in certain contexts. *See, e.g., Ruffin Woody & Assoc., Inc. v. Person County*, 92 N.C. App. 129, 135, 374 S.E.2d 165, 169 (1988) (holding, in a construction context, that even where the contract provides that the decisions of the architect are conclusive, those decisions may be attacked if there is evidence of fraud or failure to exercise honest judgment). *See also* N.C. Gen. Stat. § 32-27(23) (stating that the decisions of a fiduciary to a trust are conclusive between the fiduciary and the beneficiaries unless there is evidence of fraud, bad faith, or gross negligence). The equitable principles exception, Clause 10.1b of this Report, should be sufficient to cover findings of fraud or bad faith by a court, but the opinion giver may nonetheless wish to include a specific exception for a clause of this nature. The reference to mitigation in the qualification set forth in Clause 10.2f above is consistent with the ACCORD, § 14(h), which calls for an implied exception that the remedies opinion is subject to general rules of law that "govern and afford judicial discretion regarding the determination of damages." Mitigation of damages is an equitable doctrine, and therefore is normally within the scope of the equitable principles exception, Clause 10.1b of this Report. The opinion giver may nonetheless wish to include a specific exception where mitigation of damages is likely to be an issue due to the nature of the Transaction.

Likewise, setoff is generally an equitable doctrine and the qualification set forth in Clause 10.2r may be covered by the standard exception.

c. *Waiver or Amendment in Writing*. With respect to Clause 10.2d above, *see*, *e.g.*, *Son-Shine Grading, Inc. v. ADC Construction Co.*, 68 N.C. App. 417, 422, 315 S.E.2d 346, 349 (1984), *disc. rev. denied*, 312 N.C. 85, 321 S.E.2d 900 (1984); *Triangle Air Conditioning, Inc. v. Caswell County Bd. of Educ.*, 57 N.C. App. 482, 488, 291 S.E.2d 808, 812 (1982), *cert. denied*, 306 N.C. 564, 294 S.E.2d 376 (1982); *W.E. Garrison Grading Co. v. Piracci Construction Co.*, 27 N.C. App. 725, 729, 221 S.E.2d 512, 515 (1975), *disc. rev. denied*, 289 N.C. 296, 222 S.E.2d 695 (1976). *See generally* Brinkley, *The Regulation of Contractual Change: A Guide to No Oral Modification Clauses for North Carolina Lawyers*, 81 N.C. L. REV. 2239 (2003) (*citing* 1999 Report).

d. *Waiver of Rights*. With respect to Clause 10.2e above, note that contractual waivers of constitutional rights are often enforceable if completed "knowingly and intelligently." *Bell Atlantic Tricon Leasing Corp v. Johnnie's Garbage Service, Inc.*, 113 N.C. App. 476, 480, 439 S.E.2d 221, 224 (1994) (citing *D.H. Overmyer Co. v. Frick Co.*, 405 U.S. 174 (1972)). Waiver of the right to a jury trial is a notable exception to this principle in North Carolina, *see* Clause 10.2h and ¶ e below. Similarly, contractual waivers of *statutory* rights are generally enforceable unless the waiver would violate public policy or involve the rights of third parties. *State ex rel. Utilities Comm'n v. Carolina Utility Customers Ass'n, Inc.*, 348 N.C. 452, 464, 500 S.E.2d 693, 702 (1998). Note also that N.C. Gen. Stat. § 25-2-725(1) provides that parties may reduce by agreement, but not

extend, the statute of limitations applicable to actions arising from breach of a sales contract. *See also* GLAZER, § 9.14.1, at 307. For public policy exceptions, *see generally* ABA Guidelines § 4.8. For exceptions involving equitable rights and principles, *see generally* GLAZER § 9.9; *see also* § 10.1 of this Report, Commentary ¶ c.

e. *Venue*. With respect to Clause 10.2g above, note that N.C. Gen. Stat. § 22B-3 provides that any provision in any contract entered into in North Carolina that requires the prosecution of any action that arises from the contract to be instituted or heard in another state is against public policy and is void and unenforceable. This prohibition does not apply to non-consumer loan transactions or to any action that is commenced in another state pursuant to a forum selection provision with the consent of all parties to the contract at the time the dispute arises. *See generally* Note*, Civil Procedure -- Forum Selection -- N.C. Gen. Stat. § 22B-3 (1994)*, 72 N.C. L. REV. 1608 (1994).

f. *Waiver of Jury Trial*. With respect to Clause 10.2h above, note that N.C. Gen. Stat. § 22B-10 provides that any provision in a contract requiring a party to the contract to waive his or her right to a jury trial is unconscionable as a matter of law and is unenforceable.

g. *Usury*. With respect to Clause 10.2i above, it should be noted that the defense of usury is generally not an issue in commercial transactions. Under N.C. Gen. Stat. § 24-9, any for-profit corporation, limited liability company or partnership may agree to pay interest, fees, and other charges at any rate which the entity may agree or be required to pay. As to "usury savings clauses," the North Carolina Supreme Court has held that such clauses are not enforceable. *Swindell v. Fed. Nat'l Mtg. Ass'n*, 330 N.C. 153, 160, 409 S.E.2d 892, 896 (1991). If the Agreement also contains a provision providing for interest at a "default rate," which rate is higher than the rate otherwise stipulated in the Agreement, it is likely, but not certain, that North Carolina courts will enforce such a provision. The law disfavors penalties, and it is possible that interest at the "default rate" may be held to be an unenforceable penalty, to the extent such rate exceeds the rate applicable prior to a default under the Agreement. Also, since N.C. Gen. Stat. § 24-10.1 expressly provides for late charges, it is possible that North Carolina courts, when faced specifically with the issue, might rule that the statutory late charge preempts any other charge (such as default interest) by a lender for delinquent payment. The only North Carolina case that appears to address this issue is a 1978 Court of Appeals decision, *North Carolina Nat'l Bank v. Burnette*, 38 N.C. App. 120, 128, 247 S.E.2d 648, 653 (1978), *rev'd on other grounds*, 297 N.C. 524, 256 S.E.2d 388 (1979), which may be of limited precedential value. While the court in that case did allow interest after default (commencing with the date requested in the complaint) at a rate six percentage points in excess of pre-default interest, it is not clear from the opinion that any question was raised as to this being penal in nature. The court, likewise, did not address the possible question of the statutory late charge preempting a default interest surcharge. Since the North Carolina Supreme Court has not ruled in a properly presented case raising issues of its possible penal nature and those of N.C. Gen. Stat. § 24-10.1, the opinion giver may wish to consider an additional qualification if a default rate of interest is prescribed in the Agreement.

h. *Attorneys' Fees*. With respect to the qualification set forth in Clause 10.2j above regarding enforceability of an attorneys' fees provision, note that N.C. Gen. Stat. § 6-21.2 sets forth the procedures and limitations applicable to the collection of attorneys' fees pursuant to certain agreements. If that statute applies, then any provisions in the Agreement relating to the ability of a party to collect attorneys' fees are subject to those limitations. To determine applicability, the opinion giver must determine whether the Agreement is an "evidence of indebtedness" within the meaning of the statute.

i. *Arbitration*. With respect to the exception set forth in Clause 10.2k above, it should be noted that a provision in a Transaction Document purporting to require the parties to arbitrate disputes is an undertaking of the Company and the enforceability of such provision, absent an exception in the opinion, will thus be encompassed within the remedies opinion. *See* TriBar Report § 3.6.1. Arbitration has long been recognized in North Carolina. In 1927, North Carolina became one of the first four states to adopt the original Uniform Arbitration Statute,[120] and in 1973, North Carolina adopted the Revised Uniform Arbitration Act, which was repealed and replaced by Article 45C of Chapter 1 of the General Statutes, effective January 1, 2004. N.C. Gen. Stat. §§ 1-569.1 to -569.31. Unlike the original Uniform Act, the Revised Uniform Arbitration Act provided for the enforcement of future arbitration clauses. Thus, arbitration agreements subject to the North Carolina Arbitration Statute are enforceable as to any future disputes covered by the agreement, subject to countervailing public policy considerations under some circumstances. Consideration should also be given to the applicability of the Federal Arbitration Act, 9 U.S.C. §§ 1 *et seq*. (1995). If the Agreement provides that disputes arising thereunder are subject to binding arbitration in a location other than North Carolina, such provision may be unenforceable. N.C. Gen. Stat. § 22B-3 provides that any provision in a contract entered into in North Carolina that requires the arbitration of any dispute arising from the contract to be instituted or heard in another state is against public policy and is void and unenforceable, except in the case of non-consumer loan transactions. A determination whether a contract is "entered into in North Carolina" for purposes of N.C. Gen. Stat. § 22B-3 should be made based upon the same principles as are applied to determine the place where a contract is made for purposes of choice of law (generally, where the last act to form the contract occurs), but the Committee is not aware of any North Carolina authority on point, nor is it aware of any North Carolina authority as to the scope of the "non-consumer loan transaction" exception to § 22B-3. Consequently, the opinion giver may wish to assume, for purposes of the opinion as to the validity and enforceability of the provisions of the Agreement specifying that arbitration thereunder be conducted at a location other than North Carolina, that the Agreement was entered into in some jurisdiction other than North Carolina or the opinion should take general exception to the arbitration provision. An arbitration clause in a contract has also been challenged as violative of the North Carolina statute (N.C. Gen. Stat. § 22B-10) that renders contract provisions waiving a jury trial unenforceable. *See* Comment e above. The North Carolina Court of Appeals has ruled, however, that an

---

[120] MARTIN DOMKE, DOMKE ON COMMERCIAL ARBITRATION (THE LAW AND PRACTICE OF COMMERCIAL ARBITRATION) § 4:02 (1997).

agreement to arbitrate a dispute is not an unenforceable contract requiring waiver of a jury trial and does not violate Article I, §§ 18 and 25 of the North Carolina Constitution. *Miller v. Two State Construction Co.*, 118 N.C. App. 412, 416, 455 S.E.2d 678, 681 (1995).

Although the North Carolina Arbitration Statute provides that an agreement to arbitrate is "valid, enforceable, and irrevocable except upon a ground that exists at law or in equity for revoking a contract," N.C. Gen. Stat. § 1-569.6(a), public policy may require that some disputes be resolved by the courts or may preclude the arbitration of certain issues. TriBar Report § 3.6.1. The Georgia Report takes the position that enforceability of arbitration clauses should not be covered by the remedies opinion unless such an opinion is specifically addressed. GEORGIA REPORT § 10.05F. The exception set forth in Clause 10.2k is provided for use by North Carolina opinion givers to exclude the arbitration provision from the remedies opinion under appropriate circumstances; this language may be modified to limit the exception to specific matters.

Because results in an arbitration proceeding may be different from a court proceeding and because arbitration awards are not appealable, the opinion giver may want to include the following statement in the opinion:

> "We note that the Agreement provides that disputes arising thereunder are subject to binding arbitration. While our opinion as to the validity and enforceability of the Agreement includes our opinion as to the validity and enforceability of such arbitration provisions, our opinion as to the validity and enforceability of the Agreement is subject to the discretion afforded to an arbitrator under applicable law in rendering a binding and enforceable arbitration award."

GLAZER takes the position that this caveat is so well understood that this statement is not necessary. GLAZER § 9.14.2, at 313-14.

j. *Guaranties*. With respect to the qualification set forth in Clause 10.2m above, note that N.C. Gen. Stat. § 26-7(a) provides that after any obligation becomes due, the guarantor may require the obligee to use all reasonable diligence to recover against the principal obligor and N.C. Gen. Stat. § 26-9(a)(1) provides that if the obligee refuses or fails to take appropriate action the guarantor may be discharged on the obligation. While as a general rule, a person *sui juris* may waive any right he has, such waiver will not be effective if the right is one forbidden by law to be waived or such a waiver is determined to be against public policy. *Carrow v. Westin*, 247 N.C. 735, 737, 102 S.E.2d 134, 136 (1958). A federal case, *Community Bank & Trust Co. v. Copses*, 953 F.2d 133 (4th Cir. 1991), expressly held that a guarantor can waive certain rights under N.C. Gen. Stat. §§ 26-7 through 26-9. In *Borg-Warner Acceptance Corp. v. Johnston*, 97 N.C. App. 575, 389 S.E.2d 429 (1990), the North Carolina Court of Appeals held that the guarantors in that case had expressly waived their rights under N.C. Gen. Stat. § 26-7. The Committee is not aware of any North Carolina case specifically holding that defenses afforded by N.C. Gen. Stat. § 26-9 may be waived. That section contains the following language: "The fact that an instrument contains a provision waiving any defense of any . . .

guarantor by reason of the extension of time for payment does not prevent the operation of this section." N.C. Gen. Stat. § 26-9(b). By the express terms of this statute, therefore, there are some circumstances under which the protections of the statute cannot be waived. In *Copses*, no waiver of defenses by reason of extension of time was involved, and the Fourth Circuit Court of Appeals held that the guarantor was not therefore prohibited by § 26-9(b) from relinquishment of his rights under § 26-9 through a general waiver of all defenses. In other words, the federal court appears to conclude that a waiver of all defenses under Chapter 26 is permissible, except by reason of the extension of time for payment. Furthermore, even if the opinion giver concludes that the protections of the statute may be waived, the opinion giver must in each instance determine that the language in the particular guaranty is sufficient to effect the waiver, preferably by explicit reference to the statute itself. For guaranties of individuals, the following exception should also be considered: "We express no opinion as to the enforceability of any provision of the Guaranty against the estate of a deceased or incompetent guarantor to the extent of advances made after such guarantor's death or incompetency." *Real Property Committee Report* at 25.

k. *Noncompetition provisions*. With respect to the qualification set forth in Clause 10.2n above, note that covenants not to compete are enforceable in North Carolina only if they are (1) in writing, (2) based on reasonable consideration, (3) reasonable both as to time and territory, and (4) not against public policy. *A.E.P. Indus., Inc. v. McClure*, 308 N.C. 393, 402-403, 302 S.E.2d 754, 760 (1983). It is difficult for an opinion giver to determine the enforceability of such provisions because these elements are subjective and depend largely on the particular facts. Accordingly, the Committee recommends that these covenants be excluded from the remedies opinion, *see* § 10.0 of this Report, Due Diligence ¶ b(v). For a brief discussion of opinions regarding "no switch" provisions in which a seller commits not to hire employees of the business being sold, *see* GLAZER, § 9.14.1, at 306.

l. *Multiple Remedies*. With respect to the qualification set forth in Clause 10.2p above, *see* § 10.1 of this Report, Commentary ¶ c (noting that the availability of certain remedies will be subject to equitable principles on a case-by-case basis). Provisions in the Agreement allowing for multiple or cumulative remedies may be invalidated if a court determines that such relief would be disproportionate to the harm suffered. For opinions incorporating the ACCORD, there is an implied qualification that the remedies opinion is subject to any rules of law in the opining jurisdiction that "limit the availability of a remedy under certain circumstances where another remedy has been elected." ACCORD § 14(c).

m. *Severability*. The qualification set forth in Clause 10.2p above is consistent with the ACCORD, § 14(g). In North Carolina, when one or more terms of a contract are unenforceable, the remaining terms are enforceable only if they are "in no way dependent upon the enforcement of the illegal provision for their validity" and the illegal term "does not constitute the main or essential feature or purpose of the agreement." *Rose v. Vulcan Materials Co.*, 282 N.C. 643, 658, 194 S.E.2d 521, 531-32 (1973). Since determinations of whether terms are "essential" or "dependent" require subjective evaluation by a court, the opinion giver may wish to exclude severability provisions from the remedies opinion.

n. *Exercise of Rights without Notice*. With respect to the qualification set forth in Clause 10.2q above, note that the equitable principles exception, Clause 10.1b of this Report, encompasses the refusal of a court to award disproportionate relief for an immaterial breach. *See* § 10.1 of this Report, Commentary ¶ c. Even where the Agreement includes a provision permitting the exercise of certain rights without notice, a court may find it equitable in certain circumstances to deny specific performance. *See, e.g.*, ACCORD § 14(j) (providing an exception for rules of law that may permit a defaulting party to cure the default if no substantial harm will be caused to the aggrieved party).

o. *Setoff*. With respect to the qualification set forth in Clause 10.2r above, note that setoff is generally an equitable doctrine within the discretion of the court. *Lake Mary Ltd. Partnership v. Johnston*, 145 N.C. App. 525, 539-540, 551 S.E.2d 546, 557 (2001). To the extent that limits on setoff are based in equity, they may be covered by the equitable principles exception, Clause 10.1b of this Report. In some specific contexts, however, there may also be legal principles affecting enforceability. For example, the enforceability of a setoff provision permitting a bank lender to apply the deposits of the debtor against the debt may depend on the nature of the deposit. *See generally* GLAZER § 9.14.1, at 305.

§ 10.3 Governing Law and Choice of Law.

a. The following qualification to the remedies opinion should be included if the Agreement contains a provision choosing the law of a state other than North Carolina as the governing law:

> **For purposes of our opinions, we have disregarded the choice of law provision in the Agreement and, instead, have assumed that the Agreement is governed exclusively by the internal, substantive laws and judicial interpretations of the State of North Carolina.**

b. Where the Agreement provides that the law of another state shall govern and where the opinion giver considers it to be appropriate under the circumstances to render an enforceability opinion regarding such provision, the following clause may be used:

> **Based on the provisions in the Agreement providing that the laws of the State of _____ will govern the enforcement and interpretation of the Agreement, we believe that a North Carolina court, if properly presented with the question, would apply the internal laws of the State of _____ as the laws governing the Agreement, unless (a) the court finds that the State of _____ has no substantial relationship to the parties or the Transaction and there is no other reasonable basis for the parties' choice, or (b) application of the laws of the State of _____ would be contrary to a fundamental policy of the State of North Carolina. We note, however, that choice-of-law issues are decided on a case-by-case basis, depending on the facts of a**

particular transaction, and we are thus unable to conclude with certainty that a North Carolina court would give effect to such provisions.[121]

COMMENTARY

a. *Governing Law*. The approach taken in Clause 10.3a is similar to that taken in the ACCORD § 10(b), which provides that the remedies opinion is by definition given as if the law of the opining jurisdiction (North Carolina) governs the Transaction Document, without regard to whether the Transaction Document so provides. Opinions should expressly state that North Carolina law is assumed to govern the Transaction notwithstanding any governing law provision in the Agreement to the contrary; opining counsel should not rely upon the more general clause to the effect that the opinion letter is limited to the laws of North Carolina.

b. *Enforceability of Choice-of-Law Provision Under North Carolina Law*. Clause 10.3b applies to the situation where the Agreement provides that the law of a state other than the State of North Carolina will govern the Transaction and the opinion recipient requests an opinion as to whether a court applying relevant choice-of-law rules of North Carolina will give effect to the governing law provision. *See* ACCORD § 10.5. The ACCORD notes that this matter is "frequently complex and quite possibly, in the final analysis, unclear." *Id.* Accordingly, the opinion giver should provide this opinion only by examining the facts of the particular situation carefully and by conducting research of recent cases to determine if the language used is appropriate.[122] Since this clause is in the nature of a reasoned opinion, the opinion giver should include a recitation in the opinion letter of the relevant facts underlying the opinion. *See Real Property Committee Report* at 35-37.

---

[121] If the Transaction is a loan secured by real or personal property, language to the following effect should be included:

> "Moreover, notwithstanding the governing law provisions of the Transaction Documents: (a) North Carolina laws will govern the creation, enforcement and priority of any lien created by the Transaction Documents on real property located in North Carolina, (b) the law governing perfection and priority of the Article 9 Security Interest will be determined under the provisions of Part 3 of Article 9 of the UCC, and (c) North Carolina usury laws will apply to determine the enforceability of any liens in favor of Lender in real and personal property located in North Carolina."

[122] North Carolina cases considering choice of law contract provisions include *Tanglewood Land Co. v. Byrd*, 299 N.C. 260, 261 S.E.2d 655 (1980), *Cable Tel Services, Inc. v. Overland Contracting, Inc.*, 154 N.C. App. 639, 574 S.E.2d 31 (2002), *Torres v. McLean*, 140 N.C. App. 238, 535 S.E. 2d 623 (2000), *Bueltel v. Lumber Mutual Insurance Co* 134 N.C. App. 626, 631, 518 S.E. 2d 205, 209 (1999), *Tohato, Inc. v. Pinewild Management, Inc.* 128 N.C. App. 386, 390, 496 S.E. 2d 800, 803 (1998). *See also* Restatement (Second) of Conflict of Laws § 187.

§ 10.4 <u>"Practical Realization" Exception.</u> In some circumstances the following exception may be added to the remedies opinion:[123]

> **Certain of the remedies provided under the terms of the Agreement may be further limited or rendered unenforceable by applicable law, but in our opinion such law does not, subject to the other qualifications and exceptions stated elsewhere in this opinion, make the remedies afforded by the Agreement inadequate for the practical realization of the principal benefits purported to be provided thereby.**

COMMENTARY

"Practical realization" language of the type set forth above is meant to qualify the remedies opinion with respect to complex documents (*e.g.*, in asset-based transactions such as leveraged lease and secured financing transactions) that set forth a list of specific remedies, some of which may be unenforceable in whole or in part as written or may be mutually inconsistent but are stated to be cumulative or nonexclusive. Remedies that may concern an opinion giver include (i) contractual commitments that require a party, particularly a borrower in a lending transaction, to waive certain rights otherwise afforded by governing law, and (ii) the agreement of a party to accept certain definite standards for potentially vague Uniform Commercial Code concepts such as "commercially reasonable manner" or "without breach of the peace."

The goal of the "practical realization" language is to avoid the expense of scrutinizing the application of each of the specific remedies provided in the agreement under every conceivable circumstance and to take specific exceptions therefore. If used in this manner, the "practical realization" exception may be useful to indicate generically problems such as those described above without cataloguing each doubtful provision in the legal opinion for possible future reference in a court proceeding. To avoid the possibility of having the "practical realization" language construed as overriding other qualifications and exceptions contained in the opinion, the "practical realization" exception should state expressly that the exception is in addition to the standard insolvency and other equitable principles qualification and to any other specifically stated opinion exceptions.[124]

---

[123] The "practical realization" exception is not found in the ACCORD and is stated in the ACCORD commentary to be "beyond the scope of the ACCORD." ACCORD § 11.2. The reservations regarding utilization of this exception principally relate to the uncertainty as to its effect and interpretation and to its imprecision as to which provisions create concern of unenforceability. The Tri Bar Report acknowledges that this exception has become an aspect of customary practice, but states that its continued use should be limited to its traditional context of lease and secured financing transactions. Tri Bar Report § 3.4.1, at 626. The Committee believes the "practical realization" exception has gained general acceptance in opinion practice and is useful under appropriate circumstances.

[124] *But see* Tri Bar Report at § 3.4.1, 626, stating that this proviso is implicit.

SECTION 11. THE NO BREACH OR DEFAULT OPINION

§ 11.0 The Operative Opinion. The following is a standard formulation of the no breach or default opinion:

> **The execution and delivery by the Company of the Agreement and the performance by the Company of its obligations therein (a) do not violate the articles of incorporation [articles of organization] or bylaws [operating agreement] of the Company, (b) do not breach or result in a default under any Other Agreement, and (c) do not violate the terms of any Court Order. For purposes hereof, (I) the term "Other Agreement" means any of those agreements listed on [the disclosure schedule to the Agreement][the officer's certificate rendered to us in connection with this opinion] and (II) the term "Court Order" means any judicial or administrative judgment, order, decree or arbitral decision that names the Company and is specifically directed to it or its properties and that is listed on [the disclosure schedule to the Agreement] [the officer's certificate rendered to us in connection with this opinion] or that is known to us.**

COMMENTARY

a. *General Effect of the Opinion*. The no breach or default opinion means that the execution and delivery of the Agreement by the Company and performance by the Company of its obligations therein will not violate the Company's constituent documents or Court Orders, nor cause a breach or default under specified other agreements of the Company.

b. *Terms*. The terms "violate," "breach" and "default" are often used interchangeably. Care should be taken with these terms. The ACCORD defines "breach or default" as any act or failure that by itself, or with the giving of notice or the passage of time, or both, would constitute an event of default or other event empowering another person, or a court, to take remedial or other action under an Other Agreement or a Court Order. ACCORD § 15. It would not appear that a corporation could be "in default" under its articles of incorporation or bylaws, but it could "violate" its articles of incorporation or bylaws. The term "conflict" often appears in the "no breach or default" opinion in conjunction with, or in lieu of, the terms "violate," "breach" or "default." The meaning of the term "conflict" is not as precise as the other terms when used in this context. The opinion that the Company's performance of its obligations under the Agreement does not "conflict" with its Other Agreements could be taken to refer to potentially adverse consequences that do not rise to the level of a "breach" or "default" under the Agreement. *Id*. § 15.2. The better approach is not to use the term "conflict" in this context. If used, however, the term "conflict" should be interpreted as a conflict that constitutes a breach or default, unless otherwise indicated. *Id*.

§ 11.1 No Violation of Organizational Documents. The first component of this opinion confirms that the Company's execution and delivery of the Agreement and performance of its obligations therein will not violate a corporation's articles of incorporation or bylaws or,

for a limited liability company, its articles of organization or operating agreement. This portion of the opinion is fairly straightforward; there is little need for express or implied qualifications or exceptions. To a certain extent, the opinion duplicates the company authority opinion (*see* § 8 of this Report, *supra*), but it is customarily requested and rendered.

§ 11.2 No Breach or Default Under Other Agreements. The second component of this opinion confirms that the Company's execution and delivery of the Agreement and performance of its obligations therein do not breach or cause a default under specified other agreements to which the Company is a party. In addition to "agreements," opinions often refer to "instruments," "contracts," "indentures" or "obligations." Reference to "agreements" is comprehensive and sufficient. The opinion should be limited to written agreements, as the opinion giver cannot be expected to opine on verbal agreements of the Company.

a. *Agreements Covered*. Unless limited, the no breach or default opinion could be construed to cover every agreement to which the Company is a party, and every court order to which the Company or its properties is subject. The opinion giver most likely cannot be expected to know of all the Company's agreements and relevant court orders, and he or she should specifically identify the agreements and court orders, or categories of agreements and court orders, intended to be covered. This approach should be acceptable to the opinion recipient. There are three principal approaches to identifying the agreements covered (the approaches described also apply to identifying the Court Orders covered by the opinion):

   (i) The preferred approach is to list the agreements that are covered by the opinion or otherwise expressly to cross-reference the agreements to an external source, *e.g.*, a schedule to the Agreement. ACCORD § 15(a). The agreements could be referenced by categories in the opinion, and itemized in an officer's certificate.

   (ii) A second approach is to limit the opinion with an appropriate knowledge qualification, *i.e.*, agreements that are "known" to the opinion giver. This approach, however, raises a number of interpretive issues regarding the scope of the implied inquiry. For example, agreements "known" to the opinion giver could include not only those on which the firm has rendered services, but agreements that are known to members of the firm generally. When limiting the no breach or default opinion to "known" agreements, the opinion giver should state the specific meaning of the knowledge limitation. *See* § 5 of this Report ("Knowledge Qualification").

   (iii) A third approach is to limit the subject agreements to "material" agreements, with or without specifying the definition of materiality. The materiality qualification is factual in nature and, unless objectively defined, can create uncertainty regarding exactly which agreements are material in the context of the Company's business. One approach to defining the meaning of "material" is to rely on an officer's certificate identifying which agreements are "material." Without a precise definitional reference, that identification may convey little or no

information as to how the officer determined which of the Company's agreements are material. A better approach is to define materiality using objective criteria (*e.g.*, dollar amount involved or term of agreement) as established in the opinion letter or by cross-reference to a definition of materiality in the Agreement. ABA Guidelines § I.A(5).

b. *Breaches or Defaults Covered*. The opinion giver must determine what kinds of breaches or defaults should be noted. Generally, only violations that are readily ascertainable from the face of the Other Agreement should be deemed addressed by the opinion. The opinion giver, however, should also consider whether the opinion should address covenants contained in Other Agreements of a financial or numerical nature or requiring computation. If it is obvious from the face of the Other Agreement that consummation of the Transaction will violate a financial covenant contained therein, then the opinion giver should consider adding an appropriate qualification to the opinion. An appropriate course is to obtain a certificate from the Company's financial officer or outside accountants with respect to compliance with covenants of a financial or numerical nature, and expressly to state in the opinion that as to such covenants, the opinion giver relied upon that certificate. Alternatively, the opinion giver could specifically disclaim any opinion regarding breach or default of covenants in Other Agreements of a financial or numerical nature.

c. *Background Opinion*. An opinion giver may be asked to deliver a background opinion, confirming that the Company is not in violation of its articles of incorporation or bylaws, or in breach or default under agreements, generally, and not with reference specifically to the Agreement and Transaction. For reasons similar to those described with respect to the "general compliance with laws" opinion, this is an inappropriate opinion request, as it would require extensive factual investigation by the opinion giver, and is more appropriate as a representation by the Company. *See* § 12.0g of this Report ("General Compliance With Laws").

d. *Applicable Laws*. One or more of the Other Agreements may be governed by the laws of a state other than North Carolina. In those instances, the opinion giver is entitled to assume that the laws of the other state are the same as the laws of North Carolina. ACCORD § 15.6. The opinion giver need not explicitly state that assumption in the opinion. This opinion does not constitute an opinion as to enforceability of the Other Agreements.

e. *No Creation of Lien*. The opinion giver may be asked to opine that the Company's execution and delivery of the Agreement and performance of its obligations therein will not, under the Company's Other Agreements, result in the creation or imposition of any lien on the Company's properties or assets. The same concerns cited above regarding identification of the "Other Agreements" apply to the "no creation of lien" opinion. The opinion giver should limit the opinion to liens created under Other Agreements, in order to avoid delivering an opinion on liens arising by operation of law. That opinion involves primarily a

factual determination. *See, e.g.*, N.C. Gen. Stat. § 44A-2 (creation of mechanics' liens).

§ 11.3 No Violation of Court Orders. The third component of this opinion is that the Company's execution, delivery and performance of the Agreement do not violate the terms of any Court Orders. The opinion on Court Orders covers only judgments, orders, decrees or arbitral decisions that name the Company and are specifically directed to it or its properties. ACCORD § 15.7. The term Court Order includes all directives of the courts, including temporary restraining orders, injunctions, and judgments. The definition of Court Orders includes not only those specifically identified in the disclosure schedule to the Agreement or in an officer's certificate, but also those which are known to the opinion giver. *See* § 5 of this Report ("Knowledge Qualification"). This is a distinction from the opinion covering Other Agreements. The universe of Court Orders is not likely to be as large as the universe of Other Agreements. The opinion also covers decisions of arbitrators that are identified in the manner described above or known to the opinion giver and that are specifically directed to the Company or its properties.

The opinion giver should avoid an opinion on Court Orders that "affect" the Company or its property, as too broad. As with the "general compliance with laws" opinion (*see* § 12.0.g. of this Report), the opinion giver should refrain from delivering an opinion to the effect that the Company is not in violation of any Court Order generally. The burden should be on the opinion recipient to request an opinion specifically addressing a problem, if the recipient is concerned about a specific problem. *See* ABA Guidelines, § I.A(2) (an opinion should not be requested if the issues to be covered are not of sufficient importance to warrant the time and expense necessarily involved in addressing them).

DUE DILIGENCE

a. *No Violation of Organizational Documents.* The opinion giver should generally consider examining:

- The corporation's certified articles of incorporation or, for a limited liability company, its certified articles of organization.

- The corporation's bylaws, certified to be complete and unamended as of a current date by the Secretary or other authorized officer of the Company, or, for a limited liability company, its operating agreement, certified to be complete and unamended as of a current date by a manager of the Company.

b. *No Breach or Default Under Other Agreements.*

- Depending on how the Other Agreements are identified for purposes of the opinion (whether by reference to a disclosure schedule, through an officer's certificate or otherwise), the opinion giver should review those documents for any breaches or defaults that would result from the Company's execution, delivery and performance of the Agreement.

- o If the opinion giver sets forth a materiality standard for purposes of limiting the no breach or default opinion or incorporates such a standard by reference to another Transaction Document, obtain an officer's certificate stating that the list of agreements attached is a complete and accurate list of all agreements that meet the specific materiality standard. Consider obtaining a certificate from the Company's financial officer or outside accountants with respect to the Company's compliance with any financial or numerical covenants in the Other Agreements.

c. *No Violation of Court Orders*.

- o The opinion giver should examine a certificate from an appropriate officer of the Company listing all applicable judgments, orders, decrees and arbitral decisions. The opinion giver should also obtain copies of any judgments, orders, decrees and arbitral decisions constituting Court Orders from the appropriate court or regulatory authority, and review their contents to determine whether the Company's execution, delivery and performance of the Agreement would violate any of their terms. It is not necessary to conduct a search of the court dockets, nor to review all litigation files of the opinion giver's firm.[125]

[125] *See* § 14 of this Report ("Statement of No Litigation") for a discussion of the scope of due diligence investigation recommended to identify Court Orders.

SECTION 12. THE NO VIOLATION OF LAW OPINION

§ 12.0 The Operative Opinion. The following is a standard formulation of the no violation of law opinion:

> **The execution and delivery by the Company of the Agreement, and performance by the Company of its obligations therein, do not violate applicable provisions of statutory laws or regulations.**

COMMENTARY

a. *General Effect of the Opinion*. The no violation of law opinion means that the Company's performance of its obligations in the Agreement will not expose the Company to sanctions for violating a civil or criminal statutory or regulatory prohibition. ACCORD § 16.1.

b. *Law Coverage*. The standard formulation of the no violation of law opinion is limited to "statutory laws or regulations" of the applicable jurisdiction. Most North Carolina opinion letters will specify that they are limited to the laws of North Carolina and, possibly, federal laws; thus this opinion would apply to statutes and regulations of North Carolina and the United States. The opinion should not be interpreted to cover common law doctrines, such as those of contract or tort, that have not been enacted by a legislature. By limiting the overall opinion to the laws and regulations of North Carolina, it is implicit that the "no violation of law" opinion does not address local laws, including ordinances, zoning restrictions, rules and regulations adopted by counties and municipalities. It should not be necessary to include an express exception for local laws.

   The no violation of law opinion addresses North Carolina and federal statutory laws and regulations that a North Carolina lawyer exercising customary professional diligence would reasonably recognize as being directly applicable to the Company, the Transaction, or both. *See* §§ 2.6 and 2.7 of this Report; ACCORD § 16. The cost is not justified, and it is thus inappropriate to ask the opinion giver to conduct a broader inquiry. ACCORD § 16.1.

c. *Specialized Laws; Exclusions*. The ACCORD § 19 omits specialized laws from the reach of the opinion, *e.g.*, securities laws and antitrust laws, unless specifically included. The opinion giver should consider whether specifically to exclude the specialized laws listed in the ACCORD, and possibly other laws, from the opinion. The opinion giver should give special consideration to transactions involving companies within regulated industries. *See* § 2.7 of this Report ("Effect of Certain Laws") for a discussion of considerations in excluding the effect of certain laws from the opinion.

   The no violation of law opinion is generally based on the opinion giver's general legal knowledge and familiarity with the Company and its business, combined with such specific research and review as may be appropriate under the circumstances. If the opinion giver is not experienced in an area of law that is clearly relevant to the Transaction, he or she should consider obtaining assistance from counsel qualified in that

area, or exclude that area from the opinion's coverage with an express exception. ABA Guidelines § I.B(1)(b). In certain circumstances, it may be advisable to obtain an officer's certificate regarding factual representations to support the no violation of law opinion, but that is not typically necessary.

The no violation of law opinion does not cover judicial or administrative judgments, orders or decrees. Those are covered by the no breach or default opinion (*see* § 11 of this Report).

d. *Limitation to "Violations."* The no violation of law opinion covers only provisions of law that prohibit specified conduct and that impose fines, penalties or other sanctions for a violation. It is not intended to cover laws, rules and regulations that merely attach adverse consequences to the conduct. An opinion giver, for example, could render an unqualified no violation of law opinion about a transaction that creates adverse tax consequences but does not otherwise violate any applicable statute or regulation. *See* GLAZER, § 12.8, at 434.

e. *Materiality Qualification*. Opinion givers often limit the no violation of law opinion to "material" violations, or to laws that are "material" to the Company and its business, or both. This approach raises questions regarding the definition of "materiality." See the discussion of the "materiality" qualification in § 11.2 of this Report ("No Breach or Default Under Other Agreements").

f. *Consummation of Transaction vs. Future Conduct*. The no violation of law opinion typically addresses either the "consummation" of the Transaction by the Company, or the "performance by the Company of its obligations" under the Transaction Documents. There is a distinction between these terms. Reference to "consummation" of the Transaction limits the opinion to the Company's obligations up to and including the closing. Reference to the Company's "performance" of its obligations under the Transaction Documents includes the Company's post-closing obligations under those documents. To the extent the no violation of law opinion addresses future conduct, the opinion relates only to conduct required by the Agreement or required in order to consummate the Transaction set forth in the Agreement in accordance with its terms. ACCORD § 16.1. The opinion giver may assume the Company will take no future discretionary action that would result in the violation of a law, and that it will obtain all permits and governmental approvals required in the future under relevant statutes or regulations. *Id*.; GLAZER § 13.2.3. As noted in § 4.0 of this Report, the Committee considers that such assumptions are deemed to be implicit as a matter of customary practice.

g. *General Compliance with Laws*. The opinion giver might be asked to provide an opinion that the Company is in compliance with applicable laws generally. This opinion is too broad. In order to be rendered properly, it would require the opinion giver to have extensive knowledge of the Company's past and present operations, and it would require comprehensive and costly research. The opinion goes beyond assuming facts, and calls for substantive and in-depth forays into a client's files, all of the client's activities, and the multitude of laws that might be implicated by those activities. The costs and delays

of such a thorough inquiry would outweigh the benefits of the opinion to the opinion recipient. It is generally considered an inappropriate opinion request.[126]

DUE DILIGENCE

In determining whether the Transaction violates any applicable statutory laws or regulations, the opinion giver should give specific regard to whether the Company operates in an industry that is regulated, such as banking, trucking, insurance, securities investments or telecommunications. If the Company's activities involve areas of the law in which the opinion giver is not experienced, the opinion giver should either make an express exception or consult with another attorney who has such expertise.

[126] *See* ACCORD § 16.5; ABA Guidelines § I.B(5).

SECTION 13. THE OPINION ON NO GOVERNMENTAL CONSENTS OR APPROVALS

§ 13.0 The Operative Opinion. The following is a standard formulation of the opinion on no governmental consents or approvals being required for the Transaction:

No consent, approval, authorization or other action by, or filing with, any governmental authority of the United States or the State of North Carolina is required for the Company's execution and delivery of the Transaction Documents and consummation of the Transaction [except . . .].

COMMENTARY

a. *General Effect of the Opinion*. The no governmental consent or approval opinion means that the execution and delivery of the Transaction Documents by the Company and consummation of the Transaction do not require any consent, approval, authorization or other action by, or filing with, any governmental authority of the State of North Carolina or of the federal government. Some commentators have noted that the matters covered by this opinion may overlap with other opinions, including the enforceability opinion or the no violation of law opinion, and may be perceived as less important unless the Company is in a regulated industry for which governmental approval of the Transaction is required.

b. *Express Exceptions*. The opinion should expressly exclude any consents or approvals required and specify whether such consents or approvals have been obtained. The opinion should address only those consents, approvals, authorization, filings or other actions that must be obtained on or before the execution and delivery of the Transaction Documents and the closing of the Transaction. In a secured transaction, for example, it may be necessary to note that the deed of trust or financing statements have not been filed.

c. *Post-Closing Obligations*. The opinion should not cover any consents, approvals, authorizations, filings, etc., that may be required for performance of the Company's post-closing obligations under the Transaction Documents. In certain cases, the parties may desire to negotiate the inclusion of an opinion regarding post-closing obligations after considering, among other issues, the cost of obtaining such an opinion.

d. *Local Consents*. The opinion does not include consideration of any consents and approvals or filings with any local governmental authority or a political subdivision of a state, such as a county or municipality.

e. *Necessary to Conduct Business*. An opinion recipient may occasionally request that the opinion include all governmental consents, approvals, permits and licenses necessary to conduct business. In most cases, the opinion giver might be not be able to ascertain whether the Company has obtained every permit required to operate its business without engaging in an expensive and time-consuming investigation. However, there may be circumstances in which it is appropriate for the opinion giver to address a specific

consent necessary to operate its business, such as where the Company's business is in a highly regulated industry.

f. *No Violation of Law*. The no consent or approval opinion does not include an opinion that the Company is not in violation of any law, regulation or administrative ruling, or of the terms and conditions of any of the Company's permits and licenses. An opinion that the Company is not in violation of any law is very broad and fact-intensive and generally beyond the scope of what the opinion giver could be reasonably requested to give. ABA Guidelines § 4.3.

g. *Knowledge; Materiality*. The no consent or approval opinion might be limited as to the knowledge of the opinion giver, or "except for those consents and approvals, the failure to obtain which would not have a material adverse effect on the company or its business." In the event of a materiality limitation, the opinion giver might consider including a definition of materiality to be agreed upon by the parties. See the discussion of the "materiality" qualification in § 11.2 of this Report ("No Breach or Default Under Other Agreements.")

h. *Other Matters Not Covered*. Matters not customarily covered would include, inter alia, insolvency, tax and securities matters. Therefore, the opinion would not cover SEC filings, approvals of state securities regulators and related filing responsibilities of parties. Hart-Scott-Rodino filings would normally be covered unless expressly dealt with in a separate part of the opinion. GLAZER § 15.2, at 479. Furthermore, the opinion would normally cover only published rules and regulations as differentiated from unpublished rules and regulations. Nor, as mentioned in § 2.7 of this Report, does the opinion include consideration of any consents or approvals required by any laws that a lawyer exercising customary professional diligence would not reasonably recognize as being directly applicable to the Company or the Transaction. See § 2.7 of this Report ("Effect of Certain Laws") for a discussion of considerations in excluding the effect of certain laws from the opinion.

i. *UCC and Lien Perfection Matters*. If the requested opinion includes matters with respect to the perfection of liens or security interests created by the Transaction Documents, then those filings need to be specifically addressed. See the discussion in § 15.2 of this Report.

DUE DILIGENCE

The opinion giver should generally consider the following prior to giving the no consent or approval opinion:

a. *Certificate of Officer*. Obtain from an officer or manager of the Company a certificate (i) containing a general description of the type of business in which the Company and its subsidiaries are engaged and the jurisdictions in which the businesses are conducted, (ii) specifying those governmental authorities or agencies that regulate the Company or any of its subsidiaries or any of their businesses or assets and with which the Company

reports or deals; and (iii) stating whether the officer is aware of any filings that must be made or consents or approvals that must be obtained in connection with the transaction.

Where the opinion relates to the specific consents, approvals, permits or licenses necessary to the conduct of the Company's business, the certificate should include the detailed description of the business at least as detailed as that required in a registration statement or periodic report filed with the Securities and Exchange Commission or a cross-reference to such description.

b. *Review of Applicable Law*. The opinion giver should also review applicable federal and state laws, rules and regulations to determine what consents, approvals, etc., may be required based on the information contained in the certificate received from the officer. Where the Company conducts its business in multiple jurisdictions or in specialized industries, the opinion giver should consider obtaining opinions of local counsel with respect to those laws with which the opinion giver is unfamiliar. In negotiating the form of the opinion, the parties should consider the additional expense of engaging separate counsel and whether the benefits of such opinion would justify the benefits received.

SECTION 14. STATEMENT OF NO LITIGATION

§ 14.0 Standard Formulation. The following is a standard formulation of the statement of no litigation:

> **In addition, we advise you that to our knowledge, there is no action, suit or proceeding at law or in equity, or by or before any governmental instrumentality or agency or arbitral body, now pending or overtly threatened against the Company, except as listed on [the disclosure schedule to the Agreement] [the officer's certificate rendered to us in connection with this opinion].**

COMMENTARY

a. *Nature of Statement*. The statement of no litigation is a statement of fact. The language used is intended to reflect that the statement is a confirmation of fact and not a legal opinion which requires legal analyses and conclusions. For that reason, the statement is set forth in a separate, unnumbered paragraph.

b. *Purpose of Statement*. Typically, an opinion recipient requests the statement of no litigation primarily as additional assurance of the nonexistence of pending or threatened litigation. Such a statement is requested of the opinion giver because of the likelihood that the opinion giver would be involved in the representation of the Company in connection with any legal proceedings to which the Company is a party. Of course, this premise is questionable in cases where the opinion giver is not the regular counsel for the Company.

c. *No Action, Suit or Proceeding at Law or in Equity*. The phrase "no action, suit or proceeding at law or in equity" encompasses all legal proceedings regardless of whether the requested relief is of an equitable or legal nature. The language of the statement is limited to legal proceedings before bodies that can render binding results on the parties to such legal proceedings. Therefore, a dispute that is the subject of non-binding arbitration or mediation would not be required to be disclosed.

d. *Now Pending or Overtly Threatened Litigation*. The phrase "overtly threatened" includes both oral and written threats. This phrase does not include unasserted claims that might arise from an existing state of facts but that are better left to the audit (either formal or informal) process.

e. *Disclosure Schedule*. By disclosing all legal proceedings in a disclosure schedule or officer's certificate, the obligation of determining the materiality of any particular legal proceeding is avoided. The disadvantage of the disclosure schedule or officer's certificate is that it may become so extensive as to make the statement cumbersome. If this occurs, then the opinion recipient and the opinion giver may reduce the list of legal proceedings to material legal proceedings, provided they can establish objective criteria for legal proceedings that are required to be disclosed. *See* § 11.2a of this Report ("No Breach or Default Under Other Agreements - Agreements Covered"). Of course,

equitable proceedings do not present readily identifiable, objective benchmarks. Therefore, if the approach of full disclosure becomes too cumbersome, there may be compelling reasons not to include the statement of no litigation in the opinion letter.

f. *Knowledge Qualification*. The "to our knowledge" qualification emphasizes that the statement is fact-based and establishes the scope of the inquiry necessary to meet the due diligence obligations of the opinion giver. *See* § 5 of this Report ("Knowledge Qualification"). As discussed there, the guiding principle underlying the statement and its knowledge qualification is that the benefits associated with the statement should outweigh the costs associated with the scope of the required due diligence. In rendering the statement, the opinion giver could in theory review all of the files of the Company and of the opinion giver and could make inquiries with every adjudicative tribunal in the relevant jurisdiction. With such a review, the opinion giver could make the statement with a reasonable degree of certainty but at a prohibitive cost. Conversely, the opinion recipient could rely entirely on the statements and certificates of the Company. Practice reveals that the opinion recipient may desire some additional assurances beyond the statements and certificates of the Company. Therefore, the objective of the knowledge qualification is to derive reasonable, additional assurances for the opinion recipient while placing reasonable limitations on the costs to be incurred by the opinion giver and the Company in the conduct of the required due diligence.

DUE DILIGENCE

The opinion giver generally should consider examining:

- Certificates of officers or managers of the Company listing actions, suits or proceedings pending or overtly threatened against the Company;[127]

- Representations of the Company in the Agreement; and

[127] Except with respect to the officer's certificate, the opinion giver should not be required to inquire with the Company about pending or overtly threatened legal proceedings. The opinion giver is not an auditor. Absent the requirement of an audit, the opinion giver should not be required to speculate as to whom in an organization has personal knowledge about legal proceedings to which the Company is a party. Therefore, the opinion giver should be entitled to rely on the information provided to the opinion recipient in the Agreement (normally the Company's representations and warranties) absent information known to the opinion giver that would prevent the opinion giver from justifiably relying upon such information. The opinion recipient and the opinion giver may agree, however, that inquiry should be conducted of Company officers. In that case, an express statement of such reliance should be included in the opinion letter.

- Listing of the firm's current legal proceedings, if maintained.[128]

The opinion giver should also identify members of the opinion giver's law firm of whom inquiry is reasonable and make inquiry.[129]

[128] The opinion giver has no obligation to search court dockets to support the statement of no litigation. ACCORD § 17. The purpose of the statement is to elicit factual information already known by counsel, not factual information that might be uncovered by outside research.

[129] While an opinion giver should not be expected to be familiar with the internal structure of the Company, the opinion giver should be familiar with the internal structure of its law firm. The opinion giver should make inquiry of the lawyers in its firm who constitute the "Primary Lawyer Group." *See* § 5 ("Knowledge Qualification") of this Report. If the opinion giver does not incorporate the concept of "Primary Lawyer Group" into the opinion, then the opinion giver's inquiry should include those people in its firm whom the opinion giver reasonably believes would have knowledge of any pending or overtly threatened legal proceedings against the Company. This may involve reviewing the litigation docket of the firm or such other listing of current legal proceedings that the firm keeps on a regular basis. Because of the associated costs, the opinion giver should not be expected to inquire of all of the attorneys in the firm or to review all of the files of the firm.

SECTION 15. SECURED TRANSACTION OPINION UNDER ARTICLE 9 OF THE UNIFORM COMMERCIAL CODE

Although the Illustrative Form of UCC Opinion is largely based upon the general Illustrative Form of Opinion, there are several organizational and structural differences between the two forms. These differences facilitate use of the Illustrative Form of UCC Opinion in the context of a typical UCC secured lending transaction. More specifically, the differences are (a) the inclusion of a suggested list of loan and collateral documents applicable to a "typical" secured lending transaction, (b) the addition of the customary opinions that are requested and rendered in secured lending transactions, and (c) the expansion of the list of explicit qualifications and assumptions to include those that customarily arise in the context of a secured lending transaction.

The commentary included in this Section discusses the legal underpinnings for the customary opinions and the explicit qualifications and assumptions included in the Illustrative Form of UCC Opinion. Additionally, where applicable, this Section includes a general overview of the type of due diligence that should be considered to render a legal opinion with regard to Article 9 secured transactions. It is important to note, however, that the law of secured transactions under Article 9 of the UCC is a fairly complex and specialized area of law. Therefore, it is impossible to provide a "one size fits all" due diligence "checklist" that is applicable to every type of Article 9 secured transaction opinion.[130] Moreover, practitioners that do not frequently deal with Article 9 of the UCC should consult with more experienced colleagues as necessary when preparing an Article 9 secured transaction opinion.[131]

§ 15.0 <u>General Matters.</u> Because of the nature of a secured loan transaction, the general paragraphs describing the structure of the transaction, as well as the types of documents typically reviewed, will vary from the Illustrative Form of Opinion. The following paragraphs describe a typical secured loan transaction. These paragraphs will need to be conformed to the facts of the actual transaction.

We have acted as counsel to *[Insert Name of Borrower]* (the "Borrower") in connection with the secured loan transaction (the "Loan Transaction") contemplated by the Credit Agreement dated _____ (the "Credit Agreement") between the Borrower and *[Insert Name of Lender]* (the "Lender"). This opinion letter is delivered pursuant to Section ____ of the Credit Agreement. All capitalized terms used herein and not otherwise defined herein shall have the same meanings as are ascribed to them in the Credit Agreement. Terms defined in the Uniform Commercial Code in effect in the State of North Carolina (the "UCC") shall have the meanings set forth in the UCC.

---

[130] For a more comprehensive review of Article 9 secured transaction opinion due diligence, *see* Special TriBar Report; and American Bar Association, *Third-Party Closing Opinions 2002 Update: Revised ABA Guidelines for Preparing Closing Opinions; Inside Counsel Opinions; Opinions under Revised UCC Article 9 (hereafter "ABA 2002 Opinion Update")* (2002) at 37, 69.

[131] *See* Special TriBar Report at 1454.

In rendering the opinions set forth herein, we have reviewed *[Insert as Applicable]:*

(i) the Credit Agreement;

(ii) the Security Agreement dated _____ (the "Security Agreement"), between the Borrower, as the debtor, and the Lender, as the secured party;

(iii) the Pledge Agreement dated _____ (the "Pledge Agreement"), between the Borrower, as the pledgor, and the Lender, as the pledgee;

(iv) the Deposit Account Control Agreement dated _____ (the "Deposit Account Control Agreement"), among the Borrower, the Lender and _____, as the bank (the "Bank");

(v) the Securities Account Control Agreement dated _____ (the "Securities Account Control Agreement"), among the Borrower, the Lender and _____ , as the securities intermediary[132] (the "Securities Intermediary");

(vi) the UCC financing statement naming the Borrower, as the debtor, and the Lender, as the secured party (the "Financing Statement"), describing personal property of the Borrower that is subject to the UCC and in which a security interest may be perfected by the filing of financing statements under the UCC (such personal property, except for fixtures, as-extracted collateral and timber to be cut, being herein called the "UCC Filing Collateral"),[133] as well as other property of the Borrower; and

(vii) the other loan documents described on Exhibit A hereto.

The documents described and identified in clauses (i) through (vii) above, excluding the Financing Statement, are herein for convenience referred to as the "Loan Documents."

---

[132] Defined in N.C. Gen. Stat. § 25-8-102(a)(14) as a clearing corporation, or a bank or broker that, in ordinary course of its business, maintains securities accounts for others and is acting in that capacity.

[133] N.C. Gen. Stat. § 25-9-310(a) states the general rule that a financing statement must be filed to perfect a security interest in personal property subject to the UCC. However, a financing statement will *not* be effective in certain circumstances. *See* N.C. Gen. Stat. § 25-9-312(b) (stating that a security interest in (a) deposit accounts and in letter of credit rights may be perfected only by "control" and (b) money may be perfected only by possession); *see also* N.C. Gen. Stat. § 25-9-311(a) (financing statement ineffective to perfect a security interest in property subject to (a) a statute, regulation, or treaty of the United States that preempts § 25-9-310(a) or (b) a certificate-of-title statute).

COMMENTARY

In most non-real estate financing transactions, fixtures are not a critical element of collateral. Although a security interest in fixtures may be perfected by filing in the Office of the Secretary of State of North Carolina,[134] such a filing will not qualify as a "fixture filing" under N.C. Gen. Stat. § 25-9-102(a)(40) and will not be entitled to the special priority rules that protect "fixture filings."[135] In a real estate financing, the secured party should take advantage of N.C. Gen. Stat. § 25-9-502(c) and file a deed of trust that will qualify as a fixture filing. In addition to eliminating the need to file a separate fixture filing, a deed of trust that qualifies as a fixture filing will remain effective without the need to file a continuation statement until the deed of trust is released, satisfied or otherwise terminated.[136] Similarly, because "as-extracted collateral" and "timber to be cut" will not be relevant to most transactions, the opinion giver may wish to avoid the added expense of analyzing the specific UCC provisions applicable to such collateral by excluding such items from the opinion.

The Illustrative Form of UCC Opinion assumes that the Borrower is a corporation or limited liability company and is incorporated or formed under the laws of the State of North Carolina. If the Borrower is not a corporation or limited liability company, but instead another kind of "registered organization" (within the definition of N.C. Gen. Stat. § 25-9-102(a)(73)) that has been formed under the laws of another state or of the United States, then N.C. Gen. Stat. § 25-9-301 provides that the local laws of the jurisdiction where the Borrower is located will govern perfection, the effect of perfection or nonperfection, and the priority of a security interest in collateral. In turn, N.C. Gen. Stat. § 25-9-307(e) provides that the Borrower is deemed located in the jurisdiction in which organized. Because a number of registered organizations are organized under the laws of the State of Delaware, Delaware law will frequently govern perfection of a security interest. Therefore, practitioners may be asked to render a perfection opinion that will necessarily involve Delaware law. In this instance, the practitioner would appear to have three choices: (a) hire local Delaware counsel, (b) do not give the opinion or (c) give the opinion based solely upon a review of the applicable provisions of the Delaware UCC, as contained in a recognized loose leaf service.[137] Opinion practice is currently unsettled in this area.[138]

---

[134] S*ee* N.C. Gen. Stat. § 25-9-501(a)(2).

[135] *See* N.C. Gen. Stat. § 25-9-501(a)(1) (requiring "fixture filings" to be filed in "the office designated for the filing or recording of a record of a mortgage on the related real property"); *see also* N.C. Gen. Stat. §§ 25-9-502(a), (b) (setting forth required contents of a fixture filing); s*ee generally* N.C. GEN. STAT. § 25-9-334.

[136] *See* N.C. Gen. Stat. § 25-9-515(g).

[137] A sample form of such language is as follows: "Our opinion herein as to the perfection of the Lender's security interest in the UCC Filing Collateral (other than the Pledged Investment Property (*see* sections 15.3 and 15.4 *infra)* to the extent the security interest therein is perfected by a means other than by filing) is, with your permission, based solely on a review of pertinent provisions of Article 9 of the Uniform Commercial Code (200_) as reprinted in Volume 3 of the Uniform Laws Annotated (200_) (such review being limited to Sections 9-102, 9-108, 9-109, 9-203, 9-301, 9-307, 9-501, 9-502(a), 9-503(a)(1), 9-504, 9-509 and 9-521 of Article 9 of the Delaware UCC and annotations identifying non-uniform provisions of Article 9 of the UCC as in effect in the State of Delaware only and not including

§ 15.1 Creation of Security Interest in UCC Filing Collateral.

The Security Agreement creates a security interest in favor of the Lender in all of the right, title and interest of the Borrower in the UCC Filing Collateral described in the Security Agreement.

COMMENTARY

The general enforceability opinion contained in the Illustrative Form of UCC Opinion addresses only the status of the Security Agreement as an enforceable contract – it does not answer the more specific question of whether or not an enforceable security interest has been created under the UCC.[139] The opinion set forth above addresses this point specifically. Since the definition of UCC Filing Collateral used in the opinion is limited to collateral in which a security interest may be perfected by filing, the general enforceability opinion does not cover letter-of-credit rights as original collateral, collateral subject to federal statutes, certificate of title statutes or deposit accounts.[140] Because letter of credit rights and certificate of title collateral are not significant in most transactions, such exclusion is more cost effective than analyzing the legal principles applicable to such collateral. Deposit accounts as original collateral are covered by the opinion discussed in § 15.5 *infra*.

DUE DILIGENCE

Under N.C. Gen. Stat. § 25-9-203, in order for a security interest to "attach" (or become enforceable against the debtor), value must have been given, the debtor must have rights in the collateral and there must be an authenticated security agreement that "provides a description of the collateral."

Although N.C. Gen. Stat. § 25-1-201(44) defines "value" broadly, most opinion givers treat the value issue as a question of fact and assume that value has been given. Because there is usually not much dispute as to the existence of value, most opinion recipients are comfortable with such assumptions.[141] Similarly, because the existence of "rights" in (or the ability to

---

any other annotations or commentary or other parts of such publication) and is not intended to address any other matters of the law of the State of Delaware. We are not admitted to practice law in the State of Delaware and do not purport to be experts on the laws of Delaware generally and disclaim any representations or implications to the contrary; and with your permission such opinions are based solely on the limited review as described in the preceding sentence." For a comprehensive treatment of State variations to Article 9 of the UCC, *see* P. Christophorou, K. Kettering, L. Soukup & S. Weise, *Under the Surface of Revised Article 9: Selected Variations in State Enactments from the Official Text of Revised Article 9,* 34 UNIFORM COMMERCIAL CODE L.J. 331 (Spring 2002)(*"Under the Surface"*).

[138] *See* Special TriBar Report at 1460, n. 38, Appendix B, at 84-85.

[139] *See* Special TriBar Report at 1460-61, and GLAZER § 12.2, at 411.

[140] The use of the defined term "UCC Filing Collateral" to limit the scope of the security interest opinion to a specific type of collateral (filing collateral) subject to the UCC is customary and appropriate. *See* Special TriBar Report at 1457-59.

[141] *See* Special TriBar Report at 1467, n. 83.

transfer rights in) personal property is not susceptible to legal verification, the second element of attachment will be the subject of an express assumption of the opinion.[142] A security agreement is defined in N.C. Gen. Stat. § 25-9-102(a)(76) as an agreement that creates or provides for a security interest. Under the UCC, "authenticate" means to sign or otherwise execute a record of the agreement.[143]

Therefore, assuming that value has been given and the debtor has rights in the collateral, to render an opinion with respect to the creation and enforceability of a UCC security interest, the opinion giver must: (a) review the Security Agreement to confirm the existence of an authenticated record evidencing the creation or provision of a security interest and (b) confirm the sufficiency of the collateral description contained in the security agreement.[144]

§ 15.2 Perfection by Filing.

The Financing Statement is in proper form for filing in the Office of the Secretary of State of North Carolina, and, upon the filing of the Financing Statement in that filing office, the security interest of the Lender granted pursuant to the Security Agreement will be perfected in the Borrower's right, title and interest in the UCC Filing Collateral.[145]

COMMENTARY AND DUE DILIGENCE

N.C. Gen. Stat. § 25-9-509 states that the authentication of a security agreement by the debtor gives the secured party the authority to file a financing statement covering the collateral described in the security agreement.[146] Because we have assumed for purposes of this report that

---

[142] *See* Special TriBar Report at 21-22; *see also* list of assumptions set forth in § 15.7 *infra*.

[143] *See* N.C. Gen. Stat. § 25-9-102(a)(7). It is important to note that under N.C. Gen. Stat. § 25-9-102(a)(72), a record can be stored electronically and need not exist in a tangible form.

[144] Under N.C. Gen. Stat. § 25-9-108(b), describing the collateral in terms of specific Article 9 "types" of collateral (such as "accounts" or "general intangibles") is legally sufficient. Under N.C. Gen. Stat. § 25-9-108(c), however, supergeneric descriptions (such as "all assets") in a security agreement are legally insufficient.

[145] N.C. Gen. Stat. §25-9-301(1) sets forth the general choice of law rule that the law of the jurisdiction in which the debtor is located governs the perfection (including the effect of perfection or non-perfection) of security interests in both tangible and intangible collateral. Section 25-9-307 contains the rules for determining the location of a debtor. Because a North Carolina corporation or limited liability company is a registered organization under § 25-9-102(a)(73), it is located in North Carolina under § 25-9-307(e). See also N.C. Gen. Stat. § 55D-15 (describing the obligations of the Secretary of State of the State of North Carolina to maintain public records showing that corporations and limited liability companies have been duly incorporated or formed – a necessary element of the determination that corporations and limited liability companies are registered organizations.)

[146] Because N.C. Gen. Stat. § 25-9-504 expressly permits the use of supergeneric collateral descriptions in a financing statement, it is possible that the collateral description in the security agreement will not match the collateral description in the financing statement exactly. In these instances, the opinion giver should request that the security agreement specifically authorize the filing of a financing statement containing a supergeneric collateral description.

the Borrower is a corporation or limited liability company and is incorporated or formed under the laws of the State of North Carolina, the Borrower is deemed to be located in North Carolina and the law of North Carolina will govern perfection, the effect of perfection or nonperfection, and priority of a security interest in the UCC Filing Collateral.[147]

An effective financing statement is required to contain (a) the correct legal name of the debtor, (b) the correct legal name of the secured party, and (c) an indication of the collateral covered by the financing statement (which may be styled as an "all assets" or "blanket" security interest).[148] The applicable filing office is required to reject any financing statement that lacks the required information.[149] Before giving the perfection by filing opinion set forth above, the opinion giver should confirm that the financing statement contains all of the required information. With respect to debtors that are "registered organizations" organized under the laws of North Carolina, the opinion giver should rely on an appropriate certificate from the North Carolina Secretary of State to confirm the debtor's exact legal name.

§ 15.3 Creation of Security Interest in Pledged Investment Property.

The provisions of the Pledge Agreement are effective to create a security interest in favor of the Lender in all of the right, title and interest of the Borrower in all of the investment property (the "Pledged Investment Property") described in the Pledge Agreement.

COMMENTARY AND DUE DILIGENCE

This opinion is essentially a more specific form of the opinion described above in § 15.1 with respect to the creation and attachment of a security interest generally. Therefore, the same Commentary and Due Diligence set forth in that section are applicable here as well.

§ 15.4 Perfection of Pledged Investment Property.

With respect to that portion of the Pledged Investment Property that are certificated securities,[150] the Lender will have a perfected security interest in such certificated securities upon delivery to the Lender in the State of North Carolina the originals of the certificated securities for holding by the Lender in the State of North Carolina[151] either (a) in bearer form or (b) in registered form, issued or indorsed in

---

[147] *See generally* N.C. Gen. Stat. § 25-9-301, -9-307.

[148] *See* N.C. Gen. Stat. §§ 25-9-502, -503 and -504.

[149] N.C. Gen. Stat. § 25-9-516.

[150] *See* N.C. Gen. Stat. § 25-8 102(a)(4) (defining certificated securities).

[151] This assumption is necessary to ensure that the opinion set forth in this paragraph is a matter of North Carolina law. Under N.C. Gen. Stat. § 25-9-305(a), the local law of the jurisdiction where a "security certificate" (which includes certificated limited liability company interests and partnership interests that qualify as "securities" under the

the name of the Lender or in blank by an effective indorsement or accompanied by undated stock powers with respect thereto duly indorsed in blank by an effective indorsement.[152]

With respect to that portion of the Pledged Investment Property that are uncertificated securities,[153] the Lender will have a perfected security interest in such uncertificated securities when the issuer thereof has agreed that it will comply with the instructions with respect to such uncertificated securities originated by the Lender without further consent by the registered owner of such uncertificated securities.[154]

With respect to that portion of the Pledged Investment Property that are security entitlements,[155] the Lender will have a perfected security interest in such security entitlements upon the execution and delivery of the Securities Account Control Agreement by the Borrower, the Lender and the Securities Intermediary.

DUE DILIGENCE

A security interest in investment property[156] may be perfected by filing or by control.[157] Additionally, a security interest in investment property that is a certificated security may be perfected by delivery.[158] Because perfection by filing is covered in § 15.2 above, this section addresses only perfection by control or possession. N.C. Gen. Stat. § 25-9-106 states that a

---

UCC) is located governs matters of perfection, the effect of perfection or non-perfection, and the priority of a security interest in the certificated security represented thereby, when such security interest is perfected by a method other than by filing. Note, similar assumptions may be needed (or further qualifications included) to the extent the choice of law provisions of the UCC require the application of the law of a state other than North Carolina with respect to perfection.

[152] *See generally* N.C. Gen. Stat. § 25-8-106(b).

[153] *See* N.C. Gen. Stat. § 25-8-102(a)(18) (defining uncertificated securities as any security that is not represented by a certificate).

[154] *See generally* N.C. Gen. Stat. § 25-8-106(c).

[155] *See* N.C. Gen. Stat. § 25-8-102(a)(17) (defining security entitlements).

[156] The proper classification of a "certificated" limited liability company interest or partnership interest frequently causes opinion issues. Under N.C. Gen. Stat. § 25-8-103, regardless of whether or not they are certificated, neither limited liability company interests nor partnership interests are "securities" unless (a) such interests are in a company that is an investment company, (b) the interests are traded on a market, (c) the interests are held in a brokerage account or (d) the company issuing such interests has "opted" to have such interests treated as "securities" under Article 8 of the UCC. If none of those exceptions apply, then limited liability company interests and partnership interests are general intangibles pursuant to N.C. Gen. Stat. § 25-9-102(a)(42).

[157] *See* N.C. Gen. Stat. §§ 25-9-312, -9-314.

[158] *See* N.C. Gen. Stat. § 25-9-313. The requirements for delivery of certificated securities are set forth in N.C. Gen. Stat. § 25-8-301(a).

secured party has control of investment property once it has established control "as provided in" N.C. Gen. Stat. § 25-8-106. Pursuant to N.C. Gen. Stat. § 25-8-106, control exists:

(a) with respect to certificated securities in bearer form, when such securities are delivered to the secured party;
(b) with respect to certificated securities in registered form (i) upon delivery of the security to the secured party together with an effective indorsement or (ii) upon re-registration or re-issue of the security in the name of the secured party;
(c) with respect to an uncertificated security (i) upon delivery[159] of the security to the secured party or (ii) upon the agreement of the issuer of such security to comply with the instructions of the secured party without further consent by the debtor; and
(d) with respect to a security entitlement (i) at the time (if any) at which the secured party becomes the entitlement holder of such securities entitlement, (ii) upon the agreement of the securities intermediary to comply with the instructions of the secured party without further consent by the debtor, or (iii) at the time (if any) upon which another person having control of such securities entitlement agrees that such control is on behalf of the secured party.

Prior to rendering a perfection opinion with respect to investment property, the opinion giver will need to verify that the applicable elements of possession or control are satisfied.

§ 15.5 Creation of Security Interest in Deposit Accounts.

The provisions of the Deposit Account Control Agreement are effective to create a security interest in favor of the Lender in all of the right, title and interest of the Borrower in all of the deposit accounts[160] and the funds therein (the "Deposit Account Collateral") described in the Deposit Account Control Agreement.

COMMENTARY AND DUE DILIGENCE

This opinion is essentially a more specific form of the opinion described above in § 15.1 with respect to the creation and attachment of a security interest generally. Therefore, the same Commentary and Due Diligence set forth in that section are applicable here as well. Furthermore, the opinion giver must either assume or confirm that the collateral at issue is in fact a "deposit account" under N.C. Gen. Stat. § 25-9-102(a)(29).

---

[159] The requirements for delivery of uncertificated securities are set forth in N.C. Gen. Stat. § 25-8-301(b).

[160] Defined in N.C. Gen. Stat. § 25-9-102(a)(29) to include "a demand, time, savings, passbook, or similar account maintained with a bank." A deposit account "does not include investment property or accounts evidenced by an instrument."

§ 15.6 Perfection of Security Interest in Deposit Accounts.

The security interest of the Lender in the Deposit Account Collateral will be perfected upon the execution and delivery of the Deposit Account Control Agreement by the Borrower, the Lender and the Bank.

COMMENTARY AND DUE DILIGENCE

Pursuant to N.C. Gen. Stat. § 25-9-312(b)(1), "control" is the only method of perfection for security interests in deposit accounts. N.C. Gen. Stat. § 25-9-104 describes three methods for achieving control with respect to a deposit account. These are: (a) for the depositary bank to be the secured party, (b) for the secured party to become the depositary bank's customer with respect to such deposit account, or (c) for the depositary bank to agree to comply with instructions regarding the deposit account from the secured party without further consent of debtor in an authenticated record agreed to by the debtor, the secured party and the depositary bank.[161] In order to render this opinion, the opinion giver must verify that the appropriate elements of "control" under N.C. Gen. Stat. § 25-9-104 have been satisfied.

Unlike the general choice of law provisions of N.C. Gen. Stat. § 25-9-301, which are based on the location of the debtor, the law governing the perfection and priority of a security interest in a deposit account is determined by the "location" of the depositary bank.[162] Note that the Illustrative Form UCC Opinion assumes that the depositary bank is *not* the secured party.

§ 15.7 Specific Assumptions and Qualifications Applicable to Article 9 Secured Transaction Opinions.

__ **We express no opinion with respect to the security interest of the Lender in any commercial tort claims.[163]**

__ **Our opinion in paragraph 5 above is also subject to the effect of general principles of commercial reasonableness, good faith and fair dealing to the extent required of the Lender by applicable law.[164]**

---

[161] N.C. Gen. Stat. § 25-9-104.

[162] Fortunately, N.C. Gen. Stat. § 25-9-304(b)(1) allows the depositary bank and the debtor to specify the "location" of the depositary bank for choice of law purposes. The deposit account control agreement provides a convenient mechanism for making such designation.

[163] Because this type of collateral is very specific and uncommon, and N.C. Gen. Stat. § 25-9-108(e)(1) requires that the security agreement describe commercial tort claims with specificity, it should probably be excluded from the security agreement unless it is actually relevant to the transaction at issue. In that case, the secured party should insist on deleting this exclusion.

[164] Because a secured loan transaction is subject to the UCC, N.C. Gen. Stat. § 25-1-203 imposes "an obligation of good faith" in the performance and enforcement of such transaction.

__ **The Loan Documents contain provisions to the effect that the acceptance by the Lender of a past-due installment or other performance by the Borrower shall not be deemed a waiver of any right to declare an event of default and to exercise any rights and remedies thereunder. The North Carolina Court of Appeals has held that when the holder of a promissory note regularly accepts late payments, it is deemed to waive its right to accelerate the indebtedness because of late payments until it notifies the maker that prompt payments are again required. *Driftwood Manor Investors v. City Federal Savings & Loan Ass'n*, 63 N.C. App. 459, 464, 305 S.E.2d 204, 207 (1983).**

__ **Perfection of the security interest of the Lender in any proceeds of the UCC Filing Collateral is subject to the limitations set forth in Section 25-9-315 of the North Carolina General Statutes and, in addition, we note that with respect to certain types of proceeds other parties such as holders in due course, protected purchasers of securities, persons who obtain control over securities entitlements and buyers in the ordinary course of business may acquire a superior interest or may take their interest free of the security interest of the Lender.**

__ **No opinion is expressed as to (i) the priority of the Liens in favor of the Lender granted by any of the Loan Documents,[165] (ii) whether the Lender is a "protected purchaser" of any securities within the meaning of Section 25-8-303,[166] of the North Carolina General Statutes or (iii) the effect of any prohibitions against assignment that may be contained in any account, lease agreement, promissory note, chattel paper, general intangible, health-care receivable or letter-of-credit right.[167]**

---

[165] In view of all of the exceptions typically included in a full priorities opinion, the costs and expenses of rendering such a full priorities opinion would far exceed the value of the opinion and would probably confuse the opinion recipient. As a less costly alternative, the opinion recipient may desire a filing priorities opinion which focuses primarily on counsel's review of a UCC search report rather than a listing of theoretical adverse interests that could, under every conceivable circumstance, have priority. Such a filing priority opinion would confirm that (a) a UCC search correctly identifying the debtor has been obtained from the proper filing office, (b) the search report shows financing statements on file as of an identified date, (c) the financing statement for the transaction has been properly indexed, and (d) counsel has reviewed the search report and made a determination, unless otherwise stated, that no other person has a currently effective financing statement naming the debtor or that no prior filing has priority either because the earlier filing describes different collateral or because appropriate releases, terminations or subordinations have been obtained.

[166] A "protected purchaser" is a purchaser of a certificated or uncertificated security, or of an interest therein, who (a) gives value, (b) does not have notice of an "adverse claim" to such security (as defined in N.C. Gen. Stat. § 25-8-102(a)(1)), and (c) obtains control of such security. A "purchaser" is defined broadly in N.C. Gen. Stat. § 25-1-201(33) to include a person who is granted a security interest in the security.

[167] Prohibitions against assignments are found generally in N.C. Gen. Stat. §§ 25-9-406, -407, -408 and -409. Revised Article 9 has expanded the invalidation of restrictions on alienability, but applicability of the restrictions should be carefully analyzed for particular classes of collateral.

__ **The continued perfected security interest of the Lender in that portion of the UCC Filing Collateral perfected by the filing of the Financing Statement (i) requires the filing of continuation statements within the period of six (6) months prior to the expiration of five (5) years from the date of filing of the Financing Statement, and (ii) may also depend on (A) the continued incorporation or formation of the Borrower in the State of North Carolina and (B) the continuation of the Borrower's present corporate or limited liability name and structure.**[168]

__ **In the case of any UCC Filing Collateral hereafter acquired by the Borrower, § 552 of the Bankruptcy Code (11 U.S.C. §101 *et seq*., as amended from time to time) limits the extent to which the property acquired by a debtor after the commencement of a case under the Bankruptcy Code may be subject to a security interest arising from a security agreement entered into by the debtor before the commencement of such case.**[169]

__ **We have assumed that the Borrower has rights in the UCC Filing Collateral or the power to transfer rights in the UCC Filing Collateral to a secured party,**[170] **and we express no opinion as to the nature or extent of the Borrower's rights in, or title to, any of the Collateral and we note that the security interest of the Lender will not attach to any after acquired property until the Borrower acquires rights therein.**

__ **We have assumed that the Lender has given "value" (as defined in Section 25- 1-201(44) of the UCC) to the Borrower.**[171]

__ **We have assumed that the Borrower is not incorporated *or* [formed] in any jurisdiction other than as indicated in its Articles of Incorporation *or* [Articles of Organization].**[172]

---

[168] N.C. Gen. Stat. § 25-9-515(d); *see* N.C. Gen. Stat. §§ 25-9-507, -508.

[169] Although the Illustrative Form of UCC Opinion includes an express statement that *enforcement* of the Loan Documents is subject to applicable bankruptcy laws, that qualification does not address limitations on the *attachment* of a pre-petition security interest on property of the Borrower acquired following the commencement of a bankruptcy proceeding. The qualification set forth in this paragraph identifies these additional limitations for the opinion recipient.

[170] A debtor need not have "rights in the collateral" for a security interest to attach so long as it has the "power to transfer rights in the collateral to a secured party." N.C. Gen. Stat. § 25-9-203(b)(2).

[171] As indicated in § 15.1 of this Report, the giving of "value" is a requirement for a security interest to attach.

[172] Because the definition of "registered organization" refers to "an organization organized solely under the law of a single state," this qualification is necessary to protect against the risk that the borrower is incorporated or formed in multiple jurisdictions. *See* N.C. Gen. Stat. § 25-9-102(a)(73).

__ **We express no opinion on any provisions of the Loan Documents wherein the Borrower appoints the Lender or others as the Borrower's agent or attorney-in-fact.**

III. ILLUSTRATIVE FORM OF OPINION

[Date][173]

[Addressee][174]

Ladies and Gentlemen:

We have acted as counsel[175] to _____ (the "Company") in connection with the transaction (the "Transaction") contemplated by the _____ Agreement dated _____ (the "Agreement") between the Company and _____ (the "[Other Party]").[176] This opinion letter is delivered pursuant to Section _____ of the Agreement.[177] All capitalized terms used herein and not otherwise defined herein shall have the same meanings as are ascribed to them in the Agreement.[178]

We have reviewed such documents and considered such matters of law and fact as we, in our professional judgment, have deemed appropriate to render the opinions contained herein.[179] With respect to certain facts, we have considered it appropriate to rely upon certificates or other comparable documents of public officials and officers or other appropriate representatives of the Company, without investigation or analysis of any underlying data contained therein.[180]

[In addition, we have relied, without investigation, on the following assumptions:][181]

---

[173] *See* § 2.1 of Report.

[174] *See* § 2.2 of Report.

[175] *See* § 2.4 of Report.

[176] *See* § 2.3 of Report.

[177] *See* § 2.3 of Report.

[178] *See* § 2.5 of Report.

[179] *See* § 3.0 of Report.

[180] *See* § 3.1 of Report.

[181] *See* § 4 of Report, which sets forth a list of standard assumptions. As noted in that section, the Committee believes that these assumptions are implicit and it is not necessary to state them in the opinion. Should the opinion

[insert specific assumptions, if applicable]

The phrases "to our knowledge" and "known to us" mean the conscious awareness by lawyers in the primary lawyer group of factual matters such lawyers recognize as being relevant to the opinion or confirmation so qualified. Where any opinion or confirmation is qualified by the phrase "to our knowledge" or "known to us," the lawyers in the primary lawyer group are without knowledge, or conscious awareness, that the opinion or confirmation is untrue. "Primary lawyer group" means any lawyer in this firm (i) who signs this opinion letter, (ii) who is actively involved in negotiating or documenting the transaction, or (iii) solely as to information relevant to a particular opinion or factual confirmation issue, who is primarily responsible for providing the response concerning the particular opinion or issue.[182]

The opinions set forth herein are limited to matters governed by the laws of the State of North Carolina [and the federal laws of the United States], and no opinion is expressed herein as to the laws of any other jurisdiction.[183] [For purposes of our opinions, we have disregarded the choice of law provision in the Agreement and, instead, have assumed that the Agreement is governed exclusively by the internal, substantive laws and judicial interpretations of the State of North Carolina.[184]] We express no opinion concerning any matter respecting or affected by any laws other than laws that a lawyer in North Carolina exercising customary professional diligence would reasonably recognize as being directly applicable to the Company, the Transaction or both.[185]

Based upon and subject to the foregoing and the further assumptions, limitations and qualifications hereinafter expressed, it is our opinion that:[186]

1. The Company is a corporation [limited liability company] in existence under the laws of the State of North Carolina.

---

giver prefer to set forth such assumptions in the opinion letter or in an attachment thereto, § 4 of the Report provides sample language. The opinion giver should also set forth here any specific assumptions not covered by the list of standard assumptions.

[182] *See* § 5.0 of Report.

[183] *See* § 2.6 of Report.

[184] *See* § 10.3.a of Report. This sentence is used only where the Agreement provides that the law of a state other than North Carolina will govern the Agreement. Where the opinion covers the enforceability of such choice-of-law provision, the opinion language set forth in § 10.3.b of Report may be used. If used as an operative opinion, rather than an assumption, such opinion clause may properly be placed along with the other operative opinion clauses in the main body of the letter.

[185] *See* § 2.7 of Report.

[186] *See* § 2.8 of Report.

2. Company Subsidiary is authorized to transact business in the State of North Carolina.[187]

3. The authorized capital stock of the Company consists of _____ common shares, of which _____ shares are outstanding. [Describe other classes if applicable.] The Shares have been duly authorized and validly issued, and are fully paid and nonassessable.[188]

4. The Company has the corporate [limited liability company] power to execute, deliver and perform its obligations under the Transaction Documents [and to operate its business as currently conducted. For purposes of this opinion, we have assumed that the business presently conducted by the Company consists of _____ and activities directly related thereto, as set forth in an officer's certificate rendered to us in connection with this opinion].[189]

5. The Company has authorized the execution, delivery and performance of the Transaction Documents by all necessary corporate [limited liability company] action and has duly executed and delivered the Transaction Documents.[190]

6. The Agreement constitutes the legal, valid and binding obligation of the Company, enforceable against the Company in accordance with its terms.[191]

7. The execution and delivery by the Company of the Agreement and the performance by the Company of its obligations therein (a) do not violate the articles of incorporation [articles of organization] or bylaws [operating agreement] of the Company, (b) do not breach or result in a default under any Other Agreement, and (c) do not violate the terms of any Court Order. For purposes hereof, (I) the term "Other Agreement" means any of those agreements listed on [the disclosure schedule to the Agreement][the officer's certificate rendered to us in connection with this opinion] and (II) the term "Court Order" means any judicial or administrative judgment, order, decree or arbitral decision that names the Company and is specifically directed to it or its properties and that is listed on [the disclosure schedule to the Agreement] [the officer's certificate rendered to us in connection with this opinion] or that is known to us.[192]

---

[187] *See* § 7.0 of Report. Since paragraph 1 of this form of opinion reflects that the Company is a North Carolina entity, this foreign authorization clause is written to cover a subsidiary for illustrative purposes. In actual usage, the subsidiary would need to be identified properly.

[188] *See* § 9.0 of Report; "Shares" should be defined in the opinion to mean the shares to be issued or transferred in the Transaction or to mean all outstanding shares, as the case may be.

[189] *See* § 8.0 of Report.

[190] *See* § 8.1 of Report.

[191] See § 10.0 of Report.

[192] *See* § 11 of Report.

8. The execution and delivery by the Company of the Agreement, and performance by the Company of its obligations therein, do not violate applicable provisions of statutory laws or regulations.[193]

9. No consent, approval, authorization or other action by, or filing with, any governmental authority of the United States or the State of North Carolina is required for the Company's execution and delivery of the Transaction Documents and consummation of the Transaction [except . . .].[194]

The opinions expressed above are subject to the following assumptions, qualifications and limitations:[195]

(a) This opinion is subject to the effect of applicable bankruptcy, insolvency, reorganization, fraudulent conveyance, moratorium and similar laws affecting the enforcement of creditors' rights generally.

(b) This opinion is subject to the effect of general principles of equity (regardless of whether considered in a proceeding in equity or at law), which may, among other things, deny rights of specific performance.

[Include the following as appropriate:][196]

__ In rendering our opinion that the Company "is a corporation" ["is a limited liability company"] and "is in existence," we have relied solely upon a Certificate of Existence regarding the Company from the North Carolina Secretary of State dated _____.[197]

__ We express no opinion as to the enforceability of any provisions contained in the Agreement that (i) purport to excuse a party for liability for its own acts, (ii) purport to make void any act done in contravention thereof, (iii) purport to authorize a party to act in its sole discretion or provide that determination by a party is conclusive, (iv) require waivers or amendments to be made only in writing, (v) purport to effect waivers of constitutional, statutory or equitable rights or the effect of applicable laws, or (vi) impose liquidated damages, penalties or forfeiture or that limit or alter laws requiring mitigation of damages.

---

[193] *See* § 12 of Report.

[194] *See* § 13.0 of Report.

[195] *See* §§ 10.1, 10.2, 10.3 and 10.4 of Report.

[196] *See* § 10.2 of Report. The first paragraph shows how several exceptions may be combined into a single sentence in the opinion.

[197] *See* § 6.0 of Report (Due Diligence ¶ b).

__ We do not express any opinion as to the enforceability of provisions of the Agreement concerning choice of forum or consent to the jurisdiction of courts, venue of actions or means of service of process.

__ We do not express any opinion as to the enforceability of provisions of the Agreement purporting to waive the right of jury trial.

__ We do not express any opinion as to the enforceability of provisions of the Agreement purporting to reconstitute the terms thereof as necessary to avoid a claim or defense of usury.

__ We do not express any opinion as to the enforceability of provisions of the Agreement purporting to require a party thereto to pay or reimburse attorneys' fees incurred by another party, or to indemnify another party therefore, which provisions may be limited by applicable statutes and decisions relating to the collection and award of attorneys' fees.

__ We do not express any opinion as to the enforceability of provisions of the Agreement providing for arbitration.

__ We do not express any opinion as to the enforceability of provisions relating to evidentiary standards or other standards by which the Agreement is to be construed.

__ Enforcement of the Guaranty may be limited by the provisions of Chapter 26 of the North Carolina General Statutes, and we express no opinion as to the effectiveness of any waiver by any Guarantor of his or her rights under that Chapter.

__ We do not express any opinion as to the enforceability of provisions prohibiting (i) competition, (ii) the solicitation or acceptance of customers, of business relationships or of employees, (iii) the use or disclosure of information, or (iv) activities in restraint of trade.

__ We do not express any opinion as to the enforceability of provisions that enumerated remedies are not exclusive or that a party has the right to pursue multiple remedies without regard to other remedies elected or that all remedies are cumulative.

__ We do not express any opinion as to the enforceability of severability provisions.

__ We do not express any opinion as to the enforceability of provisions permitting the exercise, under certain circumstances, of rights without notice or without providing opportunity to cure failures to perform.

__ We do not express any opinion as to the enforceability of provisions that purport to create rights of setoff otherwise than in accordance with applicable law.

— Certain of the remedies provided under the terms of the Agreement may be further limited or rendered unenforceable by applicable law, but in our opinion such law does not, subject to the other qualifications and exceptions stated elsewhere in this opinion, make the remedies afforded by the Agreement inadequate for the practical realization of the principal benefits purported to be provided thereby.[198]

* * *

In addition, we advise you that to our knowledge, there is no action, suit or proceeding at law or in equity, or by or before any governmental instrumentality or agency or arbitral body, now pending or overtly threatened against the Company, except as listed on [the disclosure schedule to the Agreement] [the officer's certificate rendered to us in connection with this opinion].[199]

* * *

This opinion letter is delivered solely for your benefit in connection with the Transaction and may not be used or relied upon by any other person or for any other purpose without our prior written consent in each instance.[200] Our opinions expressed herein are as of the date hereof, and we undertake no obligation to advise you of any changes in applicable law or any other matters that may come to our attention after the date hereof that may affect our opinions expressed herein.[201]

Very truly yours,

Signature of Opining Lawyer or Firm[202]

---

[198] *See* § 10.4 of Report.

[199] *See* § 14.0 of Report.

[200] *See* § 2.2 of Report.

[201] *See* § 2.1 of Report.

[202] *See* § 2.9 of Report.

ILLUSTRATIVE FORM OF UCC OPINION

[Date]

[Addressee]

Ladies and Gentlemen:

We have acted as counsel to _____ (the "Borrower") in connection with the secured loan transaction (the "Loan Transaction") contemplated by the Credit Agreement dated _____ (the "Credit Agreement") between the Borrower and _____ (the "Lender"). This opinion letter is delivered pursuant to Section ____ of the Credit Agreement. All capitalized terms used herein and not otherwise defined herein shall have the same meanings as are ascribed to them in the Credit Agreement. Terms defined in the Uniform Commercial Code in effect in the State of North Carolina (the "UCC") shall have the meanings set forth in the UCC.[203]

In rendering the opinions set forth herein, we have reviewed *[Insert as Applicable]:*

(i) the Credit Agreement;

(ii) the Security Agreement dated _____ (the "Security Agreement"), between the Borrower, as the debtor, and the Lender, as the secured party;

(iii) the Pledge Agreement dated _____ (the "Pledge Agreement"), between the Borrower, as the pledgor, and the Lender, as the pledgee;

(iv) the Deposit Account Control Agreement dated _____ (the "Deposit Account Control Agreement"), among the Borrower, the Lender and _____, as the bank (the "Bank");

(v) the Securities Account Control Agreement dated _____ (the "Securities Account Control Agreement"), among the Borrower, the Lender and _____ , as the securities intermediary (the "Securities Intermediary");

(vi) the UCC financing statement naming the Borrower, as the debtor, and the Lender, as the secured party (the "Financing Statement"), describing personal property of the Borrower that is subject to the UCC and in which a security interest may be perfected by the filing of financing statements under the UCC (such personal property, except for fixtures, as extracted collateral and timber to be cut, being herein called the "UCC Filing Collateral"), as well as other property of the Borrower; and

(vii) the other loan documents described on Exhibit A hereto.

---

[203] *See* § 15.0 of the Report.

The documents described and identified in clauses (i) through (vii) above, excluding the Financing Statement, are herein for convenience referred to as the "Loan Documents."

We have also reviewed a copy of the articles of incorporation [articles of organization] of the Borrower as certified by the North Carolina Secretary of State dated _____ (the "Articles of Incorporation") [(the "Articles of Organization")], the bylaws [operating agreement] of the Borrower, the minute book of the Borrower, certified copies of the resolutions of the board of directors [members or managers] of the Borrower and such other documents, and have considered such matters of law and fact, in each case as we, in our professional judgment, have deemed appropriate to render the opinions contained herein. With respect to certain facts, we have considered it appropriate to rely upon certificates or other comparable documents of public officials and officers or other appropriate representatives of the Borrower, without investigation or analysis of any underlying data contained therein.

The phrases "to our knowledge" and "known to us" mean the conscious awareness by lawyers in the primary lawyer group of factual matters such lawyers recognize as being relevant to the opinion or confirmation so qualified. Where any opinion or confirmation is qualified by the phrase "to our knowledge" or "known to us," the lawyers in the primary lawyer group are without knowledge, or conscious awareness, that the opinion or confirmation is untrue. "Primary lawyer group" means any lawyer in this firm (i) who signs this opinion letter, (ii) who is actively involved in negotiating or documenting the Loan Transaction, or (iii) solely as to information relevant to a particular opinion or factual confirmation issue, who is primarily responsible for providing the response concerning the particular opinion or issue.

The opinions set forth herein are limited to matters governed by the laws of the State of North Carolina [and the federal laws of the United States], and no opinion is expressed herein as to the laws of any other jurisdiction. [For purposes of our opinions, we have disregarded the choice of law provision in the Loan Documents and, instead, have assumed that the Loan Documents are governed exclusively by the internal substantive laws and judicial interpretations of the State of North Carolina.] We express no opinion concerning any matter respecting or affected by any laws other than laws that a lawyer in North Carolina exercising customary professional diligence would reasonably recognize as being directly applicable to the Borrower, the Loan Transaction or both.

Based upon and subject to the foregoing and the further assumptions, limitations and qualifications hereinafter expressed, it is our opinion that:

1. The Borrower is a corporation [limited liability company] in existence under the laws of the State of North Carolina.

2. The authorized capital stock of the Borrower consists of _____ common shares, of which _____ shares are outstanding. [Describe other classes if applicable.] The Shares have been duly authorized and validly issued, and are fully paid and nonassessable.

3. The Borrower has the corporate [limited liability company] power to execute, deliver and perform its obligations under the Loan Documents [and to operate its business as currently conducted. For purposes of this opinion, we have assumed that the business presently

conducted by the Borrower consists of _____ and activities directly related thereto, as set forth in an officer's certificate rendered to us in connection with this opinion].

4. The Borrower has authorized the execution, delivery and performance of the Loan Documents by all necessary corporate [limited liability company] actions and has duly executed and delivered the Loan Documents.

5. The Loan Documents constitute the legal, valid and binding obligation of the Borrower, enforceable against the Borrower in accordance with their respective terms.

6. The execution and delivery by the Borrower of the Loan Documents and the performance by the Borrower of its obligations therein (a) do not violate the Articles of Incorporation [Articles of Organization] or bylaws [operating agreement] of the Borrower, (b) do not breach or result in a default under any Other Agreements, and (c) do not violate the terms of any Court Order. For purposes hereof, (I) the term "Other Agreements" means any of those agreements listed on [the disclosure schedule to the Credit Agreement] [the officer's certificate rendered to us in connection with this opinion] and (II) the term "Court Order" means any judicial or administrative judgment, order, decree or arbitral decision that names the Borrower and is specifically directed to it or its properties and that is listed on [the disclosure schedule to the Credit Agreement] [the officer's certificate rendered to us in connection with this opinion] or that is known to us.

7. The execution and delivery by the Borrower of the Loan Documents, and performance by the Borrower of its obligations therein, do not violate applicable provisions of statutory laws or regulations.

8. No consent, approval, authorization or other action by, or filing with, any governmental authority of the United States or the State of North Carolina is required for the Borrower's execution and delivery of the Loan Documents and consummation of the Loan Transaction except for the filing of the Financing Statement [and . . .].

9. The Security Agreement creates a security interest in favor of the Lender in all of the right, title and interest of the Borrower in the UCC Filing Collateral described in the Security Agreement.[204]

10. The Financing Statement is in proper form for filing in the Office of the Secretary of State of North Carolina, and, upon the filing of the Financing Statement in that filing office, the security interest of the Lender granted pursuant to the Security Agreement will be perfected in the Borrower's right, title and interest in the UCC Filing Collateral.[205]

---

[204] *See* § 15.1 of the Report.

[205] *See* § 15.2 of the Report.

11. The provisions of the Pledge Agreement are effective to create a security interest in favor of the Lender in all of the right, title and interest of the Borrower in all of the investment property (the "Pledged Investment Property") described in the Pledge Agreement.[206]

12. With respect to that portion of the Pledged Investment Property that are certificated securities, the Lender will have a perfected security interest in such certificated securities upon delivery to the Lender in the State of North Carolina the originals of the certificated securities for holding by the Lender in the State of North Carolina either (a) in bearer form or (b) in registered form, issued or indorsed in the name of the Lender or in blank by an effective indorsement or accompanied by undated stock powers with respect thereto duly endorsed in blank by an effective indorsement.[207]

13. With respect to that portion of the Pledged Investment Property that are uncertificated securities, the Lender will have a perfected security interest in such uncertificated securities when the issuer thereof has agreed that it will comply with the instructions with respect to such uncertificated securities originated by the Lender without further consent by the registered owner of such uncertificated securities.[208]

14. With respect to that portion of the Pledged Investment Property that are security entitlements, the Lender will have a perfected security interest in such security entitlements upon the execution and delivery of the Securities Account Control Agreement by the Borrower, the Lender and the Securities Intermediary.[209]

15. The provisions of the Deposit Account Control Agreement are effective to create a security interest in favor of the Lender in all of the right, title and interest of the Borrower in all of the deposit accounts and the funds therein (the "Deposit Account Collateral") described in the Deposit Account Control Agreement.[210]

16. The security interest of the Lender in the Deposit Account Collateral will be perfected upon the execution and delivery of the Deposit Account Control Agreement by the Borrower, the Lender and the Bank.[211]

[The following is a list of possible assumptions and qualifications to the opinion letter. The lawyer drafting the opinion should only include those qualifications that are relevant given the specific nature of the transaction and the documents subject to the opinion letter. General

---

[206] *See* § 15.3 of the Report.

[207] *See* § 15.4 of the Report.

[208] *Id.*

[209] *Id.*

[210] *See* § 15.5 of the Report.

[211] *See* § 15.6 of the Report.

assumptions and qualifications are listed under "Part I," and assumptions and qualifications that relate only to the secured transactions opinions are listed under "Part II."]

Part I

The opinions expressed above are subject to the following assumptions, qualifications and limitations:

(a) This opinion is subject to the effect of applicable bankruptcy, insolvency, reorganization, fraudulent conveyance, moratorium and similar laws affecting the enforcement of creditors' rights generally.

(b) This opinion is subject to the effect of general principles of equity (regardless of whether considered in a proceeding in equity or at law), which may, among other things, deny rights of specific performance.

[Include the following as appropriate:]

__ In rendering our opinion that the Company "is a corporation" ["is a limited liability company"] and "is in existence," we have relied solely upon a Certificate of Existence regarding the Company from the North Carolina Secretary of State dated _____.

__ We express no opinion as to the enforceability of any provisions contained in the Loan Documents that (i) purport to excuse a party for liability for its own acts, (ii) purport to make void any act done in contravention thereof, (iii) purport to authorize a party to act in its sole discretion or provide that determination by a party is conclusive, (iv) require waivers or amendments to be made only in writing, (v) purport to effect waivers of constitutional, statutory or equitable rights or the effect of applicable laws, or (vi) impose liquidated damages, penalties or forfeiture.

__ We do not express any opinion as to the enforceability of contractual provisions of the Loan Documents concerning choice of forum or consent to the jurisdiction of courts, venue of actions or means of service of process.

__ We do not express any opinion as to the enforceability of provisions of the Loan Documents purporting to waive the right of jury trial.

__ We do not express any opinion as to the enforceability of provisions of the Loan Documents purporting to reconstitute the terms thereof as necessary to avoid a claim or defense of usury.

__ We do not express any opinion as to the enforceability of provisions of the Loan Documents purporting to require a party thereto to pay or reimburse attorneys' fees incurred by another party, or to indemnify another party therefore, which provisions may be limited by applicable statutes and decisions relating to the collection and award of attorneys' fees.

__ We do not express any opinion as to the enforceability of any provisions of the Loan Documents providing for arbitration.

__ We do not express any opinion as to the enforceability of provisions relating to evidentiary standards or other standards by which the Loan Documents are to be construed.

__ Enforcement of the Guaranty may be limited by the provisions of Chapter 26 of the North Carolina General Statutes, and we express no opinion as to the effectiveness of any waiver by any Guarantor of his or her rights under that Chapter.

__ We do not express any opinion as to the enforceability of provisions prohibiting (i) competition, (ii) the solicitation or acceptance of customers, of business relationships or of employees, (iii) the use or disclosure of information, or (iv) activities in restraint of trade.

__ We do not express any opinion as to the enforceability of provisions that enumerated remedies are not exclusive or that a party has the right to pursue multiple remedies without regard to other remedies elected or that all remedies are cumulative.

__ We do not express any opinion as to the enforceability of severability provisions.

__ We do not express any opinion as to the enforceability of provisions permitting the exercise, under certain circumstances, of rights without notice or without providing opportunity to cure failures to perform.

__ We do not express any opinion as to the enforceability of provisions that purport to create rights of setoff otherwise than in accordance with applicable law.

__ Certain of the remedies provided under the terms of the Loan Documents may be further limited or rendered unenforceable by applicable law, but in our opinion such law does not, subject to the other qualifications and exceptions stated elsewhere in this opinion, make the remedies afforded by the Loan Documents inadequate for the practical realization of the principal benefits purported to be provided thereby.

Part II[212]

__ We express no opinion with respect to the security interest of the Lender in any commercial tort claims.

---

[212] *See* § 15.7 of the Report.

__ Our opinion in paragraph 5 above is also subject to the effect of general principles of commercial reasonableness, good faith and fair dealing to the extent required of the Lender by applicable law.

__ The Loan Documents contain provisions to the effect that the acceptance by the Lender of a past-due installment or other performance by the Borrower shall not be deemed a waiver of any right to declare an event of default and to exercise any rights and remedies thereunder. The North Carolina Court of Appeals has held that when the holder of a promissory note regularly accepts late payments, it is deemed to waive its right to accelerate the indebtedness because of late payments until it notifies the maker that prompt payments are again required. *Driftwood Manor Investors v. City Federal Savings & Loan Ass'n*, 63 N.C. App. 459, 464, 305 S.E. 2d 204, 207 (1983).

__ Perfection of the security interest of the Lender in any proceeds of the UCC Filing Collateral is subject to the limitations set forth in section 25-9-315 of the North Carolina General Statues and, in addition, we note that with respect to certain types of proceeds other parties such as holders in due course, protected purchasers of securities, persons who obtain control over securities entitlements and buyers in the ordinary course of business may acquire a superior interest or may take their interest free of the security interest of the Lender.

__ No opinion is expressed as to (i) the priority of the Liens in favor of the Lender granted by any of the Loan Documents, (ii) whether the Lender is a "protected purchaser" of any securities within the meaning of section 25-8-303 of the North Carolina General Statutes, or (iii) the effect of any prohibitions against assignment that may be contained in any account, lease agreement, promissory note, chattel paper, general intangible, health-care receivable or letter-of-credit right.

__ The continued perfected security interest of the Lender in that portion of the UCC Filing Collateral perfected by the filing of the Financing Statement (i) requires the filing of continuation statements within the period of six (6) months prior to the expiration of five (5) years from the date of filing of the Financing Statement, and (ii) may also depend on (A) the continued incorporation of the Borrower in the State of North Carolina and (B) the continuation of the Borrower's present corporate name and structure.

__ In the case of any UCC Filing Collateral hereafter acquired by the Borrower, § 552 of the Bankruptcy Code (11 U.S.C. § 101 *et seq.*, as amended from time to time) limits the extent to which the property acquired by a debtor after the commencement of a case under the Bankruptcy Code may be subject to a security interest arising from a security agreement entered into by the debtor before the commencement of such case.

__ We have assumed that the Borrower has rights in the UCC Filing Collateral or the power to transfer rights in the UCC Filing Collateral to a secured party, and we

express no opinion as to the nature or extent of the Borrower's rights in, or title to, any of the Collateral and we note that the security interest of the Lender will not attach to any after acquired property until the Borrower acquires rights therein.

__ We have assumed that the Lender has given "value" (as defined in section 25-1-201(44) of the UCC) to the Borrower.

__ We have assumed that the Borrower is not incorporated *or* [formed] in any jurisdiction other than as indicated in its Articles of Incorporation *or* [Articles of Organization].

__ We express no opinion on any provisions of the Loan Documents wherein the Borrower appoints the Lender or others as the Borrower's agent or attorney-in-fact.

* * *

In addition, we advise you that to our knowledge, there is no action, suit or proceeding at law or in equity, or by or before any governmental instrumentality or agency or arbitral body, now pending or overtly threatened against the Borrower, except as listed on [the disclosure schedule to the Credit Agreement] [the officer's certificate rendered to us in connection with this opinion].

* * *

This opinion letter is delivered solely for the benefit of the Lender and any successor or permitted assignee of the Lender in connection with the Loan Transaction and may not be used or relied upon by any other person or for any other purpose without our prior written consent in each instance [except that it may be relied upon by any successor or permitted assignee of [the Lender] succeeding to the rights of [the Lender] under the [Credit Agreement] to the same extent as though this opinion letter were addressed to such successor or permitted assignee.][213] Our opinions expressed herein are as of the date hereof, and we undertake no obligation to advise you of any changes in applicable law or any other matters that may come to our attention after the date hereof that may affect our opinions expressed herein.

Very truly yours,

Signature of Opining Lawyer or Firm

[213] *See* § 2.2 of the Report.

APPENDIX -- THE ABA GUIDELINES

The following Guidelines for the Preparation of Closing Opinions were published by the American Bar Association's Committee on Legal Opinions in 2002 in THE BUSINESS LAWYER and are reprinted below with permission. The Legal Opinion Committee of the Business Law Section of the North Carolina Bar Association endorses the ABA Guidelines and commends them to North Carolina practitioners for use in connection with the negotiation and preparation of legal opinions.

Guidelines for the Preparation of Closing Opinions[†]

By The Committee on Legal Opinions[*]

The Section of Business Law of the American Bar Association has adopted the following *Guidelines* for preparing legal opinions delivered at the closing of a business transaction by counsel for one party to another party (or parties) ("closing opinions").[1] These *Guidelines* replace the *Guidelines* included in the Section's 1991 *Third-Party Legal Opinion Report*[2] and reflect developments in customary practice in the decade since 1991.[3] These *Guidelines* complement and are intended to be read and applied with the Section's *Legal Opinion Principles*[4] adopted in 1998 for closing opinions that do not adopt the *Legal Opinion Accord*

[†] From *The Business Lawyer*, V.57:875 (February, 2002).

[*] Donald W. Glazer, Chair. Steven O. Weise, Reporter. These *Guidelines* were first printed in the November 2001 issue. This printing contains corrections to footnotes 1, 2, and 20 that accurately represent the intent of the authors.

[1] These *Guidelines* use "closing opinion" and opinion letter" interchangeably. "Opinion" refers to a legal conclusion expressed in a closing opinion.

[2] Committee on Legal Opinions, *Third-Party Legal Opinion Report, Including the Legal Opinion Accord, of the Section of Business Law, American Bar Association*, 47 BUS. LAW. 167 (1991).

[3] *See, e.g.*, RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS §§ 51(2), 95 (2000) [hereinafter RESTATEMENT]; TriBar Opinion Committee, *Third-Party "Closing" Opinions*, 53 BUS. LAW. 591 (1998) [hereinafter 1998 TriBar Report].

[4] Committee on Legal Opinions, *Legal Opinion Principles*, 53 BUS. LAW. 831 (1998). A copy of the *Legal Opinion Principles* is included with these *Guidelines* as Appendix A.

included in the Section's 1991 *Report*.[5] Like the *Legal Opinion Principles*, these *Guidelines* provide guidance[6] regarding closing opinions whether or not referred to in an opinion letter.

1. PURPOSE, SCOPE, AND RELIANCE

1.1 PURPOSE

The agreement for a business transaction will often condition a party's obligation to close on its receipt of a closing opinion covering specified legal matters from counsel for another party. When received, the closing opinion serves as a part of the recipient's diligence, providing the recipient with the opinion giver's professional judgment on legal issues concerning the opinion giver's client, the transaction, or both, that the recipient has determined to be important in connection with the transaction.

1.2 COVERAGE

The opinions included in a closing opinion should be limited to reasonably specific and determinable matters that involve the exercise of professional judgment by the opinion giver. The benefit of an opinion to the recipient should warrant the time and expense required to prepare it.[7]

1.3 RELEVANCE

Opinion requests should be limited to matters that are reasonably related to the transaction. Closing opinions should not include assumptions, exceptions, and limitations that do not relate to the transaction and the opinions given.

1.4 PROFESSIONAL COMPETENCE

Opinion givers should not be asked for opinions that are beyond the professional competence of lawyers. To the extent a matter such as financial statement analysis, economic forecasting, or valuation is relevant to an opinion, an opinion giver may properly rely on a factual certificate or assumption.

---

[5] These *Guidelines* also apply to opinions that adopt the *Accord*. In the event of any inconsistencies between these *Guidelines* and the *Accord*, the *Accord* controls for opinions that adopt it. The adoption of the *Legal Opinion Principles* and these *Guidelines* is not intended to discourage use of the *Accord*.

[6] In appropriate circumstances opinion givers and opinion recipients (or their counsel) may together decide not to follow these *Guidelines* in particular respects.

[7] When the benefit of an opinion to the recipient is not sufficient, depending on the circumstances, the scope of the particular opinion could be limited (e.g., the opinion on an agreement could be limited to due authorization, execution and delivery) or the opinion could be omitted entirely (*see infra* § 4.2 (opinion on all of a company's outstanding equity securities may not be cost justified)).

1.5 MISLEADING OPINIONS

An opinion giver should not render an opinion that the opinion giver recognizes will mislead the recipient with regard to the matters addressed by the opinions given.[8]

1.6 "MARKET" OPINIONS

An assertion that a specific opinion is "market" — i.e., that lawyers are rendering it in other transactions—does not make it appropriate to request or render such an opinion if it is inconsistent with these *Guidelines*.

1.7 RELIANCE

An opinion giver is entitled to assume, without so stating, that in relying on a closing opinion the opinion recipient (alone or with its counsel) is familiar with customary practice concerning the preparation and interpretation of closing opinions. On occasion, a closing opinion expressly authorizes persons to whom it is not addressed (for example, assignees of notes) to rely on it. Those persons are permitted to rely on the closing opinion to the same extent as—but to no greater extent than—the addressee.

2. PROCESS

2.1 OPINION REQUEST AND RESPONSE

Early in the negotiation of the transaction documents, counsel for the opinion recipient should specify the opinions the opinion recipient wishes to receive. The opinion giver should respond promptly with any concerns or proposed exceptions, providing, to the extent practicable, the form of its proposed opinions. Both sides should work in good faith to agree on a final form of opinion letter. Discussion of opinion issues while the transaction documents are being prepared can produce constructive adjustments in the documents and the transaction structure and help to avoid delays in closing the transaction. Should a problem be identified that might prevent delivery of an opinion in the form discussed, the opinion giver should promptly alert counsel for the opinion recipient.

2.2 OTHER COUNSEL'S OPINION

When the opinion giver lacks the legal expertise to render a requested opinion, consideration should be given to whether that opinion should be sought from other counsel. An opinion of other counsel should be sought by the opinion recipient only when the opinion's benefits justify its costs. A primary opinion giver normally should not be asked to express its concurrence in the substance of an opinion of other counsel.

---

[8] For a general discussion of this subject (including the role of disclosure), *see* 1998 TriBar Report, *supra* note 3 at 602-03, 607. This *Guideline* does not preclude limiting the matters addressed by an opinion through the use of specific language if the limitation itself will not mislead the recipient. *See Legal Opinion Principles* §§ I.B, I.C. For an opinion giver's ethical obligations to its client, *see infra* § 2.4.

2.3 FINANCIAL INTEREST IN OR OTHER RELATIONSHIP WITH CLIENT

Lawyers preparing a closing opinion do not normally attempt to determine whether others in their firm have a financial interest (including an equity or prospective equity interest) in, or other relationship with, the client nor do they ordinarily disclose in an opinion letter any such interest or relationship that they or others in the firm may have. Although some lawyers may choose to make such disclosures, disclosure does not excuse those preparing a closing opinion from considering whether a financial interest in, or relationship with, the client that is known to them will compromise their professional judgment in delivering the closing opinion.

2.4 CLIENT CONSENT AND CONFIDENTIAL INFORMATION

When the client's consent to the delivery of a closing opinion is required by applicable rules of professional conduct, that consent normally may be inferred from a provision in the agreement that makes delivery of a closing opinion a condition to closing. The opinions contained in a closing opinion ordinarily do not disclose information the client would wish to keep confidential. If, however, an opinion would require disclosure of information that the lawyers preparing the opinion are aware the client would wish to keep confidential, the implications should be discussed with the client and the opinion should not be rendered unless the client consents to the disclosure.

3. CONTENT

3.1 GOLDEN RULE

An opinion giver should not be asked to render an opinion that counsel for the opinion recipient would not render if it were the opinion giver and possessed the requisite expertise. Similarly, an opinion giver should not refuse to render an opinion that lawyers experienced in the matters under consideration would commonly render in comparable situations, assuming that the requested opinion is otherwise consistent with these *Guidelines* and the opinion giver has the requisite expertise and in its professional judgment is able to render the opinion. Opinion givers and counsel for opinion recipients should be guided by a sense of professionalism and not treat opinions simply as if they were terms in a business negotiation.

3.2 MATERIALITY

When possible, an opinion giver should avoid use of a materiality standard by using objective criteria (for example, a particular dollar amount, a specific category, or inclusion on a specified list) when limiting the matters addressed by an opinion.

3.3 PRESUMPTION OF REGULARITY

An opinion giver may rely upon the presumption of regularity[9] for matters relating to its client, such as actions taken at meetings during the period covered by a missing minute book,

[9] *See* Rogers v. Hill, 289 U.S. 582, 591 (1933).

that are not verifiable from the client's records (assuming the matters are not inconsistent with those records). Opinion givers ordinarily need not disclose their reliance on the presumption.[10]

3.4 USE OF THE PHRASE "TO OUR KNOWLEDGE"

Certain factually-oriented opinions, such as the opinions on the existence of legal proceedings,[11] ordinarily are expressed as being to the opinion giver's knowledge.[12] To avoid a possible misunderstanding over the meaning of knowledge," the opinion preparers should consider describing in the opinion letter the factual inquiry they have conducted (for example, by stating what they intend "to our knowledge" to mean or by indicating that they are rendering the opinion based solely on their personal knowledge without making any inquiry).[13]

3.5 EXPLAINED OPINIONS; "WOULD/SHOULD"

Although closing opinions ordinarily do not set forth any legal analysis, opinion givers may include their legal analysis in an opinion when they believe it involves a difficult or uncertain question of professional judgment and have decided that the conclusions expressed should not be stated without setting forth the underlying reasoning. Such an opinion, which is commonly referred to as an "explained" or "reasoned" opinion, may be unqualified or qualified (i.e., subject to exceptions that are not customary for opinions of the type involved).

Opinions have the same meaning whether stated as "would" or "should."[14] Either way they express the opinion giver's professional judgment in the circumstances.

4. SPECIFIC OPINIONS

4.1 FOREIGN QUALIFICATION AND GOOD STANDING

An opinion giver should not be asked for an opinion that the opinion giver's client is qualified to do business as a foreign corporation in all jurisdictions in which its property or

---

[10] An exception is when, based on the available facts, the lawyers preparing the opinion conclude that the deficiency in company records is likely to be significant.

[11] Because these opinions lack legal analysis, some lawyers prefer to refer to them as "confirmations."

[12] "To our knowledge" is also sometimes used in opinions that address other factual matters, such as the no breach or default opinion. The trend today in many types of transactions is away from using "to our knowledge" to limit the scope of the opinion. Instead, for example, when giving a no breach or default opinion, lawyers often prefer to identify the contracts covered by referring expressly in the opinion to an existing list or a list prepared specifically for opinion purposes.

[13] Such a description would not be required if the opinion preparers have conducted the inquiry described in the 1998 TriBar Report, *supra* note 3, at 618-19, 659, 664-65, or there otherwise is no risk of misunderstanding.

[14] *See* TriBar Opinion Committee, *Opinions in the Bankruptcy Context: Rating Agency, Structured Financing, and Chapter 11 Transactions*, 46 BUS. LAW. 717, 733 (1991); 1998 TriBar Report, *supra* note 3, at 607 n.37. Closing opinions may be different in this regard from tax opinions.

activities require qualification or in which the failure to qualify would have a material adverse effect on the client. Analysis of the "doing business" requirements of each jurisdiction in which the client has property or conducts activities would require an extensive factual inquiry and a review of the law of jurisdictions as to which the opinion giver cannot reasonably be expected to have expertise. This analysis rarely would be cost-justified.

Because an opinion on qualification to do business or good standing in foreign jurisdictions is based solely on certificates of public officials, delivery of those certificates without an opinion ordinarily should be sufficient to satisfy the needs of the opinion recipient.

4.2 OUTSTANDING EQUITY SECURITIES

An opinion that all outstanding equity securities of the client are duly authorized, validly issued, fully-paid, and non-assessable can require an extensive legal and factual inquiry (for example, when the client has been in existence for a long time and has had many stock issuances). Consideration should be given to whether the benefit of the opinion to the opinion recipient justifies the cost and time required to support it.

4.3 COMPREHENSIVE LEGAL OR CONTRACTUAL COMPLIANCE

An opinion giver should not be asked for an opinion that its client possesses all necessary licenses and permits or has obtained all approvals and made all filings required for the conduct of the client's business. Similarly, an opinion giver should not be asked for an opinion that its client is not in violation of any applicable laws or regulations or that its client is not in default under any of the client's contractual obligations.[15] Neither a materiality exception nor a knowledge limitation makes these opinions appropriate.

4.4 LACK OF KNOWLEDGE OF PARTICULAR FACTUAL MATTERS

An opinion giver normally should not be asked to state that it lacks knowledge of particular factual matters.[16] Matters such as the absence of prior security interests or the accuracy of the representations and warranties in an agreement or the information in a disclosure document (subject to section 4.5 below) do not require the exercise of professional judgment and are inappropriate subjects for a legal opinion even when the opinion is limited by a broadly worded disclaimer.

4.5 NEGATIVE ASSURANCE

Opinion recipients sometimes seek negative assurance from the opinion giver regarding the adequacy of the disclosure in the prospectus or other disclosure documents furnished to investors in connection with a sale of securities. Such negative assurance is not an opinion in the

---

[15] This *Guideline* is not intended to preclude a request for an opinion, otherwise appropriate, on a specific matter, for example, on whether specified activities of the client comply with the requirements of a specific statute.

[16] The principal exception is the "confirmation" often included in closing opinions regarding the opinion giver's knowledge of legal proceedings to which the client is a party. *See supra* § 3.4.

traditional sense. Rather, the practice of providing negative assurance is unique to securities offerings and is intended to assist the opinion recipient in establishing a due diligence or similar defense. A request for negative assurance is appropriate only when it is requested for that purpose in connection with a registered securities offering or, depending on the nature of the disclosure document and the process by which it was prepared, an offering of securities exempt from registration.[17]

4.6 FRAUDULENT TRANSFER

An opinion on the enforceability of an agreement does not address the effect of fraudulent transfer laws on the other party's rights under the agreement.[18] Although a party to a transaction may be concerned about the effect of fraudulent transfer laws, an opinion giver could not render an opinion on those laws without relying heavily on assumed facts. Because opinions on the effect of fraudulent transfer laws are of limited value, they should not be requested absent a compelling justification.

4.7 LITIGATION EVALUATION

The opinion giver ordinarily should not be asked to express an opinion on the expected outcome of pending or threatened litigation.[19]

4.8 MATTERS OF PUBLIC POLICY

Because public policy is a principal basis for invalidating contractual provisions, opinion givers should not qualify their opinions as a whole with a general exception for "matters of public policy."[20] When appropriate, however, an opinion giver may include an exception for matters of public policy with respect to a particular provision (such as a provision releasing the other party from liability without excluding liability for willful misconduct or fraud).

4.9 WHEN LAW COVERED BY OPINION AND LAW SELECTED TO GOVERN AGREEMENT ARE DIFFERENT

When a closing opinion does not cover the law of a jurisdiction whose law is selected as the governing law in an agreement, the opinion giver should explore with counsel for the opinion recipient how best to respond to a request for an opinion on the agreement's enforceability. When an opinion of local counsel is not cost justified, an acceptable alternative may be an

---

[17] A request for negative assurance will be appropriate, for example, in many Rule 144A and Regulation S offerings.

[18] The "bankruptcy exception" (which is implied even when not stated) excludes the effect of fraudulent transfer laws from the enforceability opinion. *See* 1998 TriBar Report, *supra* note 3, at 624.

[19] *See generally* American Bar Association, *Statement of Policy Regarding Lawyers' Responses to Auditors' Requests for Information*, 31 BUS. LAW. 1709 (1976).

[20] *See supra* note 6.

opinion of the opinion giver that is limited to the enforceability of the governing law clause under the law covered by the opinion. Another acceptable alternative (which might be combined with the first) may be an opinion that the entire agreement would be enforceable if the law covered by the opinion were to apply (notwithstanding the governing law clause).

APPENDIX

LEGAL OPINION PRINCIPLES

By The Committee on Legal Opinions[*]

In the Committee's 1991 *Third-Party Legal Opinion Report*[1] the Committee undertook to monitor developments respecting the *Report* and the *Legal Opinion Accord* contained in the Report. It also undertook in due course to take such further action as might seem appropriate. These *Legal Opinion Principles* are a product of those undertakings.

The *Report* and the *Accord* have made an important contribution to the learning on legal opinions. While the *Accord* has not gained the national acceptance the Committee had hoped, the *Guidelines* in the *Report* are frequently looked to for guidance regarding customary legal opinion practice. In section 152 of the recently adopted *Restatement (Third) of the Law Governing Lawyers*, the American Law Institute affirmed the importance of customary practice in the preparation and interpretation of legal opinions. The Committee has prepared these Principles to provide further guidance regarding the application of customary practice to third-party "closing" opinions that do not adopt the *Accord*. The Committee hopes that these *Principles* will prove useful both to lawyers and their clients and to courts that from time to time are called upon to address legal opinion issues.

The Committee intends to consider the possible extension of these *Principles* to issues they do not now address. The Committee would welcome the assistance of all who are interested in participating in that effort.

I. GENERAL

A. At the closing of many business transactions legal counsel for one party delivers legal opinion letter(s) to one or more other parties. Those opinion letters, often referred to as third-party opinion letters, are the subject of these *Legal Opinion Principles*.

B. The matters usually addressed in opinion letters, the meaning of the language normally used, and the scope and nature of the work counsel is expected to perform are based (whether or not so stated) on the customary practice of lawyers who regularly give, and lawyers who regularly advise opinion recipients regarding, opinions of the kind involved. These *Legal Opinion Principles* are intended to provide a ready reference to selected aspects of customary practice.

---

[*] Thomas L. Ambro, Chair. Donald W Glazer and Steven O. Weise, Co-Reporters.

[1] Committee on Legal Opinions, *Third-Party Legal Opinion Report, Including the Legal Opinion Accord, of the Section of Business Law, American Bar Association*, 47 BUS. LAW. 167 (1991).

C. An opinion giver may vary the customary meaning of an opinion or the scope and nature of the work customarily required to support it by including an express statement in the opinion letter or by reaching an express understanding with the opinion recipient or its counsel.

D. The opinions contained in an opinion letter are expressions of professional judgment regarding the legal matters addressed and not guarantees that a court will reach any particular result.

E. In accepting an opinion letter, an opinion recipient ordinarily need not take any action to verify the opinions it contains.

F. The lawyer or lawyers preparing an opinion letter and the opinion recipient and its legal counsel are each entitled to assume that the others are acting in good faith with respect to the opinion letter.

II. LAW

A. Opinion letters customarily specify the jurisdiction(s) whose law they are intended to cover and sometimes limit their coverage to specified statutes or regulations of the named jurisdiction(s). When that is done, an opinion letter should not be read to cover the substance or effect of the law of other jurisdiction(s) or other statutes or regulations.

B. An opinion letter covers only law that a lawyer in the jurisdiction(s) whose law is being covered by the opinion letter[2] exercising customary professional diligence would reasonably be expected to recognize as being applicable to the entity, transaction, or agreement to which the opinion letter relates.

C. An opinion letter should not be read to cover municipal or other local laws unless it does so expressly.

D. Even when they are generally recognized as being directly applicable, some laws (such as securities, tax, and insolvency laws) are understood as a matter of customary practice to be covered only when an opinion refers to them expressly.

III. FACTS

A. The lawyers who are responsible for preparing an opinion letter do not ordinarily have personal knowledge of all of the factual information needed to support the opinions it contains. Thus, those lawyers necessarily rely in large measure on factual information obtained from others, particularly company officials. Customary practice permits such reliance unless the factual information on which

---

[2] *See* § II.A.

the lawyers preparing the opinion letter are relying appears irregular on its face or has been provided by an inappropriate source.

B. As a matter of customary practice the lawyers preparing an opinion letter are not expected to conduct a factual inquiry of the other lawyers in their firm or a review of the firm's files, except to the extent the lawyers preparing the opinion letter have identified a particular lawyer or file as being reasonably likely to have or contain information not otherwise known to them that they need to support an opinion.

C. An opinion should not be based on a factual representation that is tantamount to the legal conclusion being expressed. An opinion ordinarily may be based, however, on legal conclusions contained in a certificate of a government official.

D. Opinions customarily are based in part on factual assumptions. Some factual assumptions need to be stated expressly. Others ordinarily do not. Examples of factual assumptions that ordinarily do not need to be stated expressly are assumptions of general application that apply regardless of the type of transaction or the nature of the parties. These include assumptions that copies of documents are identical to the originals, signatures are genuine and the parties other than the opinion giver's client have the power to enter into the transaction.

IV. DATE

An opinion letter speaks as of its date. An opinion giver has no obligation to update an opinion letter for subsequent events or legal developments.