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THIRD-PARTY “CLOSING” OPINIONS

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A Report of The TriBar Opinion Committee

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Introduction

This is a Report about legal opinion letters that lawyers in business transactions render to non-clients. Among the issues covered by this Report are (i) the content of opinion letters, (ii) the procedures opinion givers follow when conducting the factual and legal investigations required to support their opinions, and (iii) the meaning of language often used in opinion letters.

The TriBar Opinion Committee was formed more than twenty years ago, at a time when third-party legal opinion practice was as much folklore as analysis. Drawing its members from the three largest New York bar associations, the Committee consisted of lawyers from throughout New York State, from big firms and small, from larger cities as well as smaller ones. The Committee members began their work by exchanging information about and discussing their own opinion practices. The Committee members came to see that those on both sides of the opinion process—opinion givers and their clients on the one hand and opinion recipients and their counsel on the other—had a need for practical and continuing guidance on customary practices in giving and receiving legal opinions. The various TriBar Reports followed.

This Report is generally consistent with TriBar’s prior reports. It reexamines and replaces TriBar’s first report (the “1979 Report”), the two Addenda to it and the Committee’s Special Report on the Remedies Opinion.² This revision considers the nearly two decades of court decisions,

1. Reflecting the broad use of its Reports, the Committee in recent years has expanded its membership beyond New York. The TriBar Opinion Committee (“Committee” or “TriBar”) now consists of designees of the following organizations functioning as a single Committee: (i) Special Committee on Legal Opinions in Commercial Transactions, New York County Lawyers’ Association; (ii) Corporation Law Committee, The Association of the Bar of the City of New York, and (iii) Special Committee on Legal Opinions of the Business Law Section, New York State Bar Association. Members of the Allegheny County (Pa.), Atlanta, Boston, Chicago, Delaware and Ontario Bar Associations and of the State Bar of Texas are also members of the Committee. The members of the Committee and the Reporters and Editorial Group for this Report are listed in Appendix C.

2. See *Legal Opinions to Third Parties: An Easier Path*, 34 BUS. LAW. 1891 (1979); *An Addendum—Legal Opinions to Third Parties: An Easier Path*, 36 BUS. LAW. 429 (1981); *Second Addendum to Legal*

legal opinion literature,³ changes in corporate law and practice, and developments in legal opinion practice since the 1979 Report.⁴

The following three TriBar reports, each of which addresses a specialized area, are not affected by this Report:

- *Opinions in the Bankruptcy Context: Rating Agency, Structured Financing, and Chapter 11 Transactions*, 46 BUS. LAW. 717 (1991);
- *Use of the ABA Legal Opinion Accord in Specialized Financing Transactions*, 47 BUS. LAW. 1719 (1992); and
- *U.C.C. Security Interest Opinions*, 49 BUS. LAW. 359 (1993).

A NOTE ON USING THIS REPORT

Article I of this Report addresses matters having general application and thus applies to all subsequent Articles. Users of this Report should read Article I (including the Glossary in Section 1.9) as well as the particular Article they are concerned with to assure that they understand the context of that particular Article.

Article VI comments on specific opinions that are commonly rendered. It uses as a vehicle for discussion four **Illustrative Opinion Letters**, two on a loan (outside and inside counsel) and two on a related securities sale (outside and inside counsel). The opinion letters of inside counsel cover certain matters not covered (but which might have been covered) in the opinion letters of outside counsel.

An **Index of Typical Opinion Letter Features** precedes Article I and provides an alternative way to access materials about particular opinion provisions.

Citations to certain materials frequently referred to in this Report are in note 3 below.

Opinions to Third Parties: An Easier Path, 44 BUS. LAW. 563 (1989); *Special Report of the TriBar Opinion Committee: The Remedies Opinion*, 46 BUS. LAW. 959 (1991).

3. The following are of special relevance and are generally consistent with this Report: RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS §§ 73, 152 (Tentative Draft No. 8, 1997); RESTATEMENT (SECOND) OF TORTS § 552 (1976); and the “Guidelines for the Negotiation and Preparation of Third-Party Legal Opinions” (hereinafter “ABA Guidelines”) in *Third-Party Legal Opinion Report, Including the Legal Opinion Accord, of the Section of Business Law, American Bar Association*, 47 BUS. LAW. 167, 224 (1991) [hereinafter “ABA Opinion Report”]. The ABA Guidelines are not limited to opinion letters that adopt the Accord contained in the ABA Opinion Report.

4. This Report has not been approved by the governing body or membership of any of the bar associations whose Committees or members were involved in its preparation. Accordingly, the views expressed are solely those of TriBar. This Report reflects a consensus of the Committee. It does not, however, necessarily reflect the views of individual members or their firms, organizations or associations on any particular point.

INDEX OF TYPICAL OPINION LETTER FEATURES

This index directs the reader to sections of this Report containing explanations of typical opinion letter features.

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ARTICLE I GENERAL MATTERS

SECTION 1.9 CONTAINS A GLOSSARY OF CERTAIN TERMS USED IN THIS REPORT AND IS INTEGRAL TO THIS ARTICLE. TERMS DEFINED IN THE GLOSSARY APPEAR IN *BOLD ITALICS* WHEN INITIALLY USED IN ARTICLE I.

1.1 SCOPE OF THIS REPORT

Substantial business transactions often involve the delivery of an *opinion letter* to parties to the transaction who are *not* the *opinion giver's* client.⁵ These opinion letters usually are delivered at a *closing* and cover a number of legal and factual issues. This Report focuses on certain *opinions* that are often included in opinion letters to non-clients and the procedures lawyers usually follow in preparing them.⁶

A consensus has developed regarding the meaning of language used in third-party opinion letters as well as the factual and legal investigation required to support particular opinions (together referred to as “*customary practice*”, *see* Section 1.4). This Report provides guidance on customary practice in giving these opinions.⁷

Adherence to the customary practice described in this Report may not be sufficient to meet all of the rules and practices imposed by government agencies having authority in particular regulated areas (*e.g.*, securities law, taxation and patents). Also, in transnational transactions consideration must be given to the application of cross-border and foreign opinion practices.

1.2 SOME OPINION CHARACTERISTICS

(a) The Opinion Letter Context

An opinion on a legal issue provides the *opinion recipient* with the opinion giver's professional judgment⁸ about how the highest

5. The discussion in this Report also has implications for opinion letters to clients. The literature on legal opinions is largely devoted to third-party opinions rather than opinions to clients. Opinion letters to clients often follow the form of third-party opinions. However, the obligations of the opinion giver to a client differ from those to a third-party opinion recipient.

6. The Committee's reports on U.C.C. security interest opinions and opinions in the bankruptcy context address opinions that are not discussed in this Report. *See U.C.C. Security Interest Opinions*, 49 BUS. LAW. 359 (1993); *Opinions in the Bankruptcy Context: Rating Agency, Structured Financing, and Chapter 11 Transactions*, 46 BUS. LAW. 717 (1991).

7. The vast majority of closing opinions follow customary practice. To the extent they depart from customary practice, disclosure is required. *See* Section 1.5. The Accord contained in the ABA Opinion Report does not rely on customary practice but rather constitutes an agreement between the parties as to how opinion letters that incorporate it by reference should be interpreted.

8. *See* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 152 cmt. c (Ten-

court⁹ of the jurisdiction whose law is being addressed would appropriately resolve the issues covered by the opinion¹⁰ on the date of the opinion letter.¹¹ The possibility of later developments or changes of *law* or fact and other factors (*e.g.*, the possibility that an *undertaking* in an *agreement* will be invalidated on policy grounds by the courts of a jurisdiction whose law is not covered by the opinion¹²) limit the predictive value of an opinion letter. An opinion is not a guaranty of an outcome, but rather an expression of professional judgment. That professional judgment is necessarily limited by a variety of factors as discussed in this Report.

The opinion giver acts only with the assent of its own client (sometimes referred to in this Report as the *Company*) in giving an opinion to a non-client. If an opinion is rendered to a non-client, in most jurisdictions the opinion giver thereby takes on an obligation to the opinion recipient to exercise care in preparing the opinion.¹³ However, rendering a third-party opinion does not establish a lawyer-client relationship with the opinion recipient. Rendering a third-party opinion is one aspect of counsel's role in representing a client and does not give rise to an ethical conflict between the client and the opinion recipient.¹⁴

The relevant agreement in a business transaction will often provide for delivery of an opinion letter as a condition of closing. In some cases, such as a loan, the borrower will furnish an opinion letter of its counsel to the lender. In other cases, such as in some mergers, each side will furnish an opinion letter of its counsel to the other side. Opinion letters generally relate to matters involving the opinion giver's client (*e.g.*, corporate status, corporate power and authorization, lack of regulatory approval requirements). If a remedies opinion is rendered on the enforceability of an agreement, it will only cover the extent to which the opinion giver's client is

tative Draft No. 8, 1997) (stating that in rendering opinions the lawyer "does not function as an advocate . . . [His] duty is to provide a fair and objective opinion.").

9. An arbitration will not necessarily produce the same result as a judicial proceeding. Nevertheless, in the experience of the Committee, parties to agreements are no less likely to seek legal opinions because the agreement is subject to arbitration.

10. *See* Sections 1.9(o) and 4.1. The opinion letter, if it contains a remedies opinion, will cover the question whether the law chosen in the agreement (*see* Section 1.9(p)) will be applied by a court. Sometimes the opinion letter will also contain a separate opinion on governing law. *See* Section 4.4.

11. An opinion giver may not properly be asked to foresee changes in then applicable law, whether statutory, regulatory or decisional. Thus, an opinion giver is not expected to seek out information concerning proposed legislation that if adopted would require qualification of the opinion or a different legal conclusion. The opinion giver is responsible, however, for existing law, including legislation that has been adopted but is not yet effective. The significance of that legislation should be noted in the opinion letter if necessary to avoid misleading the opinion recipient. *See* Section 1.4(d).

12. *See* Section 4.5.

13. *See* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS §§ 73 and 152 (Tentative Draft No. 8, 1997).

14. *See* ABA Model Rules of Professional Conduct Rule 1.3.

bound (based on the assumption that the other parties are bound). Sometimes only counsel for one side will render an opinion that counsel for both could have rendered (*e.g.*, on the application of the usury laws or effectiveness of Uniform Commercial Code (“U.C.C.” filings). This kind of division of labor is common.

Opinions are often subject to qualifications, some stated and some not. Each qualification to an opinion is referred to as an **exception** (which term includes both a **limitation** and an **exclusion**). Some opinion exceptions are understood to be applicable whether or not stated. *See, e.g.*, Section 3.3.1. These exceptions are referred to as “standard exceptions”. Other exceptions are understood to be applicable only when stated. Opinions that are subject to stated exceptions that are not customary in opinions of the type to which they relate are referred to as **qualified opinions** (*see* Section 1.9(i)). In some cases opinion letters contain **reasoned** (sometimes called **explained**) **opinions** (*see* Section 1.9(j)), which may or may not be qualified.¹⁵ *See* Sections 2.6.1, 6.5.5 and 6.8 as to the use of the phrase “to our knowledge”.

Except for opinion letters containing reasoned opinions, opinion letters do not ordinarily identify the reference materials the opinion preparers have consulted, be those materials a case, a treatise or a law review article. By custom opinion preparers take into account all materials they have considered in preparing an opinion letter even when those materials are not described in the opinion letter.

The description of the meaning of particular opinions in this Report assumes that the opinion discussed is only subject to standard exceptions.

(b) No Obligation To Update

An opinion letter to a third-party does not require updating after its delivery, unless it specifies otherwise. By custom, the opinion giver provides a professional judgment at a specific time, ordinarily to facilitate a closing, and has no continuing responsibility to the non-client opinion recipient.

(c) The Bankruptcy (Insolvency) Exception And Equitable Principles Limitation

The bankruptcy exception and equitable principles limitation are standard exceptions to the remedies opinion and are discussed in that context in Section 3.3. However, opinion givers often include language in their opinion letters that purports to make other opinions or the entire opinion letter subject to the bankruptcy exception and equitable principles limitation. They do so because bankruptcy and equitable principles can affect opinions other than the remedies opinion. For example, an opinion that a security interest has been perfected indicates that the interest has achieved that status under the U.C.C. and that the holder of the perfected security

15. Lawyers have sometimes referred to “clean” opinions, by which they mean opinions limited only by standard exceptions. As opinion forms have become more varied in complex commercial transactions, the term has been used less frequently.

interest has the rights accorded by the U.C.C. to such status. However, enforcement of those rights may be limited in bankruptcy.

Application of the bankruptcy exception and equitable principles limitation to the entire opinion letter is technically overbroad. Some opinions, for example, the good standing opinion, are not affected by the bankruptcy exception or equitable principles limitation. Nevertheless, many opinion givers have adopted the all-inclusive form to save the time required to determine which opinions (in addition to the remedies opinion) should be limited by the bankruptcy exception and equitable principles limitation. Whether or not an opinion letter is drafted to apply the bankruptcy exception and equitable principles limitation outside the context of the remedies opinion, those limitations are understood as a matter of customary usage to apply to all opinions that raise the concerns to which they are addressed (but to no others).

(d) Dealing With Factual Material

Factual information that is the subject of an opinion (*e.g.*, no litigation)¹⁶ or that is relied on in giving an opinion must be established in a way that meets the needs of the parties to the transaction. *See* Section 2.2. Rather than establishing certain facts, opinion preparers as a matter of customary practice sometimes rely on factual assumptions. *See* Section 2.3. Under customary practice some assumptions (referred to as “assumptions of general application”) are applicable to virtually all opinion letters, whether or not stated. *See* Section 2.3(a) and note 23. Ordinarily, the parties will want the opinion giver to follow customary practice (*see* Section 1.4 and Article II). If the parties follow another approach, it should be described in the opinion letter.

(e) Dealing With Matters Of Law

Opinions involving matters of law are only given with respect to specific bodies of law. Thus, most opinion letters contain a provision limiting the law covered by the opinion letter (*e.g.*, to New York and federal law). *See* Section 1.9(o).

(f) “Performance” And Other Forward Looking Opinions

Some opinions are inherently backward looking and require an examination of historical materials (*e.g.*, the certificate of incorporation and proceedings of incorporators for an opinion that a corporation has been duly incorporated). Other opinions require the opinion preparers to establish the facts as they exist on the date of the opinion letter (*e.g.*, review of a Secretary of State’s certificate for an opinion that a corporation is validly existing). Still other opinions are forward looking, addressing as of the date of the opinion letter such matters as the future enforceability of

16. Some opinion givers believe that statements dealing primarily with factual matters should be referred to as “confirmations” rather than opinions. The customary practice for giving an “opinion” and a “confirmation” is the same. *See* Sections 1.9(h) and 6.8. *See also* ABA Guidelines Section I(A)(1).

contractual provisions or the effect on the Company’s existing contracts of the performance by the Company after closing of its obligations under the agreement. The inclusion in an opinion of forward looking language—*e.g.*, “enforceable”¹⁷ or “performance”¹⁸—broadens the matters counsel is required to consider.

(g) Opinions As To Other Entities By Analogy

The opinions discussed in this Report relate to corporations. The application of this Report to other entities may be derived by analogy to the corporate model. Thus, for example, as to a limited partnership, the analog to an officer’s certificate might be a certificate of the managing general partner.

1.3 A REALISTIC CONTEXT FOR NEGOTIATING OPINIONS

Third-party opinion letters should deal only with matters of concern to the addressee in the particular transaction. The opinions contained in an opinion letter for one transaction may (and often will) not be appropriate for another transaction. Thus, any standardized opinion requirements of an opinion recipient should be viewed only as an initial reference point and should be reexamined for each transaction in light of the circumstances involved. Requests for opinions that do not fit the transaction at hand impede communication and the conduct of customary opinion practice. *See* Section 1.4.

Similarly, opinion givers should not be rigid in responding to opinion requests. They should be prepared to explain their reasons for declining to give an opinion rather than merely asserting a law firm “no-opinion” policy on the issue. “Boilerplate” opinion forms that are designed to fit all or many opinion situations are only a starting point for discussion.

The opinion recipient may seek to identify potential problems by initially requesting very broad opinions.¹⁹ In doing so, the opinion recipient (or its lawyer) may not appreciate how much work the request will involve. If the opinion preparers conclude that the cost to their client of preparing the opinions requested will be high, the opinion preparers should seek reconsideration of the requested opinions in light of the likely cost and benefit involved. Counsel for the opinion recipient²⁰ should respond in good faith.

17. The remedies opinion, which uses the term “enforceable”, is inherently forward looking. *See* Section 3.1.

18. The term “performance” is sometimes included in the “no breach or default” and “no violation of law” opinions. *See* Sections 6.5.4 and 6.6. An opinion that refers only to “consummation of the transaction” is not understood to cover performance. *See* note 171.

19. In some cases, the opinion recipient may not want the opinion giver to identify in the opinion letter areas that the opinion recipient knows are problems. Consequently, experienced counsel for opinion recipients sometimes exclude from opinion requests matters that will require non-standard exceptions.

20. The opinion recipient (unlike the opinion giver) is not a lawyer, but rather the client of the lawyer on the other side.

No opinion letter should be sought that is so broad that it seeks to make the opinion giver responsible for its client's factual representations or the legal or business risks inherent in the transaction. An opinion recipient, for example, should not seek an unqualified opinion on an uncertain or disputed legal issue.²¹ An opinion cannot change the facts or the state of the law.

Opinion exceptions that are not common to opinions of the type to which they are applied often indicate transaction-specific risks. Sometimes a transaction can be restructured to avoid these risks, thus eliminating the need for an exception.

Three simple techniques are particularly helpful in negotiating opinions. *First*, the lawyers negotiating the opinion on behalf of the opinion recipient should consider whether, if they were counsel for the opinion giver's client, they would be prepared to furnish the opinions they have requested (with the assistance of local or specialized counsel, to the extent appropriate). Conscientious application of this "Golden Rule" will reduce requests for overly broad, burdensome or otherwise inappropriate opinions. *Second*, to avoid misunderstanding and last minute delay, the parties should agree early in the negotiation of the transaction documents on the precise wording of any required opinion letter. The need, if any, for local or specialized counsel's opinions should also be established at that time. *See* Article V. *Third*, material not relevant to the transaction should not be included in opinions. To do otherwise obscures the meaning of an opinion.

1.4 CUSTOMARY PRACTICE

(a) Customary Practice As A Starting Point

This Report describes what an opinion giver should consider when preparing an opinion letter. The starting point is customary practice. Opinion givers must of necessity use their own judgment as to their conformity with customary practice in the circumstances they face. The *Restatement (Second) of Torts* and the *Restatement (Third) of the Law Governing Lawyers* indicate that the customary practice of lawyers similarly situated is a key factor in determining liability.²²

Customary practice establishes the ground rules for rendering and receiving opinions and thus allows the communication of ideas between the opinion giver and counsel for the opinion recipient without lengthy descriptions of the diligence process, detailed definitions of the terms used and laborious recitals of standard, often unstated, assumptions and excep-

21. *See* ABA Guidelines Section I(B)(3).

22. *See* RESTATEMENT (SECOND) OF TORTS § 552 (1976); RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 152 cmt. c (Tentative Draft No. 8, 1997) (stating in part that "customary practice will . . . determine the nature and extent of the factual and legal diligence to be employed by the opinion giver in connection with [the] . . . issuance" of a legal opinion.). The ABA Guidelines state that they are "drawn from current custom and practice".

tions.²³ Thus, in opinion practice, customary practice is an important professional tool.

Unless otherwise indicated, an opinion recipient is entitled to assume that the opinion giver has followed customary practice in rendering an opinion. Reciprocally, an opinion giver is entitled to assume that the opinion recipient understands customary practice and recognizes that it has been followed in preparing the opinion letter.²⁴ Key aspects of customary practice are described in this Section 1.4.²⁵

(b) Customary Usage. This aspect of customary practice relates to how words are used in opinion letters. As will be seen in Articles III and VI, certain words and phrases expressing legal concepts are, by custom, understood to have special meanings in the context of specific opinions. Words and phrases are defined by their customary usage in that context and not simply by (i) dictionary meanings or (ii) meanings of the same words or phrases in other contexts. For example, the meaning of the phrase “legal, valid, binding and enforceable” in the context of a remedies opinion is not an aggregate of the dictionary meaning of each of those words. Together or separately, those words are understood in the context of the remedies opinion to be equivalent to the word “enforceable” used alone. *See* Section 3.1.

(c) Customary Diligence. This aspect of customary practice relates to the extent of the factual and legal investigation an opinion giver undertakes to support particular opinions. Customary practice relating to the opinion giver’s factual inquiry is described in Article II. As to matters of law, customary diligence requires the opinion giver to conduct such review of applicable *law* as lawyers in similar circumstances would normally conduct. Opinion letters often state (immediately before the opinion paragraphs) that the opinions being expressed are based on a review of certain identified documents “and such other investigation as we [the opinion

23. Some opinion givers, out of an abundance of caution, state assumptions of general application and standard exceptions. Stating the obvious tends to impede effective professional communication. Examples include assumptions regarding “the capacity of individuals, the conformity of copies to originals and the authenticity of original documents.” Language excluding changes of law or fact subsequent to the date of the opinion letter ordinarily falls into the same category.

24. Parties to transactions in which opinions are rendered normally are advised by counsel as to the scope and acceptability of those opinions. Opinion givers should consider whether an opinion recipient who is not represented by counsel is familiar with customary practice applicable to opinion letters. A sophisticated party that regularly requests opinion letters in the course of its business may ordinarily be assumed to understand customary practice concerning the opinion letters it receives, whether or not it is represented by counsel in connection with the transaction.

25. Customary practice also includes other matters such as the obligations of an opinion giver in relying on opinions of other counsel (*see* Section 5.1) and the appropriateness of rendering an opinion on the law of a jurisdiction in which the opinion preparers are not admitted to practice. *See* Section 5.3.

giver] have deemed appropriate.” The term “investigation” is understood to relate to both law and fact. Thus, the “such other investigation” statement merely emphasizes that the opinion letter is given in accordance with customary practice and its omission is not sufficient, by itself, to indicate that customary practice is not being followed.

(d) Avoiding Misleading The Opinion Recipient. Prior to the delivery of the opinion letter, the opinion preparers must ask themselves whether they believe that the opinions they intend to render will, under the circumstances, be misleading to the recipient. An opinion the opinion preparers believe to be misleading should not be delivered until **disclosures** are made to cure the problem. *See* Section 1.9(m).

When considering if an opinion to be given will mislead the opinion recipient, opinion preparers must think not only about the opinion itself but also about areas excluded from the opinion. Ordinarily, a non-standard exception²⁶ indicates to the opinion recipient an area of concern. A non-standard exception is thus likely to be informative, rather than misleading. A stated assumption (other than one of general application—*see* Section 2.3(a)) may also alert the opinion recipient to a problem area.

Common exceptions may mask problems that are different and more serious than the matters they are commonly understood to exclude. Consider the following situation.

The opinion recipient has agreed to accept a “no litigation” opinion that is limited to claims asserted in writing, a common form. An opinion containing that limitation would be misleading if to the knowledge of the opinion preparers (but not to the opinion recipient) a substantial and apparently serious claim had been made orally in a formal manner (*e.g.*, at a conference involving lawyers for both sides at which a draft complaint was discussed but not delivered).

In this case, the risk of misleading the opinion recipient could be avoided by an appropriate disclosure.

Exclusions from opinions (whether understood without being stated, *e.g.*, insolvency law and local law, or stated in the opinion letter) relate to areas that are left by custom to the opinion recipient and its counsel. The opinion recipient should not assume that the opinion giver does not have significant information about these excluded areas. However, the opinion giver is not expected to disclose any such information to the opinion recipient. Only if the opinion preparers determine that the opinion will, under the circumstances, mislead the opinion recipient will the need for disclosure (or withholding the opinion) arise.

In determining whether an opinion will mislead, the opinion preparers need only consider what the opinion letter (i) states and (ii) omits to state

26. For example, “we express no opinion as to the enforceability of paragraph _____ of the Agreement relating to liquidated damages.”

that is relevant to what is stated.²⁷ Thus, the omission of information not relevant to the opinion given (*e.g.*, information relevant to litigation if no opinion is rendered with respect to the absence of litigation) does not mislead.²⁸ The question the opinion preparers must consider is whether under the circumstances the opinion will cause the opinion recipient to misevaluate the specific opinion given.

NON-OPINION LIABILITY

OPINION GIVERS SHOULD CONSIDER WHETHER APART FROM THE OPINION LETTER THEY ARE EXPOSING THEMSELVES TO LIABILITY AS A RESULT OF THEIR INVOLVEMENT IN THE TRANSACTION UNDER THE ANTI-FRAUD RULES OF THE FEDERAL SECURITIES LAWS OR WHETHER CIVIL OR CRIMINAL FRAUD STANDARDS MAY BE APPLICABLE. THIS REPORT ASSUMES THAT THE REQUISITE STATE OF MIND (INTENT OR RECKLESSNESS) REQUIRED FOR CIVIL OR CRIMINAL FRAUD IS NOT PRESENT.

1.5 VARIATIONS FROM CUSTOMARY PRACTICE

The parties may have good reason to depart from customary opinion practice in particular circumstances. A material departure from any aspect of customary practice (including diligence or usage) should be expressly described in the opinion letter. For example, a mere listing in an opinion letter of documents examined is not sufficient to give notice to the recipient that the opinion giver reviewed only the listed documents (rather than the documents required by customary practice).

Since the third-party opinion is a part of the recipient’s business diligence, the parties to a transaction may agree that more or less investigation than is customary to support an opinion should be conducted by the opinion giver. In some situations an opinion letter may state that greater than customary diligence was performed with respect to a specific opinion. Similarly in other situations, a stated assumption, exception or description of the less than customary diligence that forms the basis for the opinion will be included.

27. *But cf.* *Roberts v. Ball, Hunt, Brown & Baerwitz*, 128 Cal. Rptr. 901 (1976).

28. However, action by the opinion giver unrelated to the opinion letter (*e.g.*, in making a representation in behalf of the client) may mislead and thus give rise to liability. For example, in *Rubin v. Schottenstein, Zox & Dunn*, 110 F.3d 1247 (6th Cir. 1997), *rev'd en banc*, No. 96-3017, 1998 WL 224080 (6th Cir. May 7, 1998), company counsel was held liable to the recipient of its legal opinion letter, but liability was based on misleading oral statements made by counsel and not on the opinion letter.

1.6 OPINION RECIPIENT RELIANCE ON OPINION LETTERS

Customary practice affects not only the conduct of the opinion giver but also that of the opinion recipient. The recipient of a third-party opinion letter is entitled (except in a few jurisdictions) to rely²⁹ on the opinions expressed without taking any action to verify those opinions.³⁰ If an opinion is qualified or reasoned (or both), the opinion recipient must decide whether to proceed with the transaction in view of the qualification or reasoning set forth in the opinion letter.

The third-party opinion recipient is entitled to rely only on what is stated in the opinion letter, regardless of what it requested be stated.³¹

As with the opinion giver's right to rely on information used in an opinion letter (*see* Section 2.1.4), the opinion recipient has no right to rely on an opinion if reliance is unreasonable under the circumstances or the opinion is known by the opinion recipient to be false.

1.7 CLIENT CONTROL OVER THIRD-PARTY OPINION LETTERS

The opinion giver has a professional obligation to protect the confidences and secrets of its client.³² Thus, the client must consent, specifically or by implication, to disclosures about the client before delivery of an opinion letter to a third-party.³³

29. The opinion recipient's "right to rely" means that a professional duty is owed by the third-party opinion giver to the opinion recipient. As a result, in most jurisdictions, if the opinion is negligently given and results in damage to the opinion recipient, the opinion recipient has a claim against the opinion giver. A few jurisdictions take the position that a professional cannot owe a duty to a non-client and, thus, that a third-party opinion recipient has no standing to sue the opinion giver. Still other jurisdictions extend the liability of opinion givers not only to opinion recipients but also to others to whom harm was foreseeable when a negligently prepared opinion was rendered. *See* TriBar Opinion Committee, Opinions in the Bankruptcy Context: Rating Agency, Structured Financing, and Chapter 11 Transactions, 46 BUS. LAW. 717, 735 & nn. 66-68 (1991).

30. *But see* Greyhound Leasing & Fin. Corp. v. Norwest Bank, 854 F.2d 1122, 1125-26 (8th Cir. 1988), which in imposing a duty of investigation on the opinion recipient does not follow customary practice.

31. *See, e.g.*, Prudential Ins. Co. v. Dewey, Ballantine, Bushby, Palmer & Wood, 605 N.E.2d 318 (N.Y. 1992). However, disputes may arise over what particular opinion language is intended to cover. *See* Section 3.5 relating to the ambit of the remedies opinion. *See also* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 152 cmt. c (Tentative Draft No. 8, 1997).

32. *See* N.Y. RULES OF COURT § 1200.19 (McKinney 1998); *see also* MODEL RULES OF PROFESSIONAL CONDUCT, Rules 1.6, 4.1 & 4.2 (1992).

33. A failure to consent may prevent delivery. *See also* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 152 cmt. d (Tentative Draft No. 8, 1997). Ordinarily, consent is obvious from the circumstances of the closing, and the opinion letter need not recite client consent. In one case a court refused to find a duty of care from the opinion giver to the opinion recipient on the ground that the client had not consented to delivery of the opinion letter. The reasoning of the decision is weak, but, even if followed, the case would not affect opinion letters delivered at closing as contemplated by the agreement. *See* United Bank of Kuwait PLC v. Enventure Energy Enhanced Oil Recovery Assocs., 755 F. Supp. 1195, 1203-04 (S.D.N.Y. 1989).

Opinion givers ordinarily do not obligate themselves in advance to deliver opinion letters to non-clients. Indeed, they ordinarily have no obligation of any sort to the opinion recipient prior to delivering an opinion letter. Even if the opinion giver is prepared to render the requested opinions, release of an opinion letter to a third party is ultimately a decision for the client, not the lawyer.³⁴

1.8 “OPINION PREPARERS” ACT FOR OPINION GIVER

The term “*opinion preparers*” is used in this Report (in contrast to “opinion giver”) to refer to the lawyers in a law firm who take on the responsibility to prepare an opinion letter.³⁵ This usage permits a more precise discussion of what a law firm and the lawyers in it must do to meet their professional obligations in rendering a legal opinion.

An opinion letter is usually written on a law firm’s letterhead and signed in the name of the firm. It thus purports to express the opinion of the firm, not merely that of the opinion preparers. The fact that an opinion letter is signed in the name of a law firm has given rise to confusion over the obligations of a law firm in preparing an opinion letter. A law firm practices law only through the lawyers who work on its behalf. The opinion preparers determine the content of the opinion letter and are responsible to perform the work required to support the opinions being expressed. The law firm fulfills its obligations to the opinion recipient through the performance by the opinion preparers of customary diligence in preparing and delivering the opinion letter. Except to the extent discussed in Section 2.2.2, other lawyers in the firm are not expected to take action in connection with the opinion letter.

1.9 OPINION TERMINOLOGY: A GLOSSARY FOR THIS REPORT

General Terms

- (a) **Agreement; Contract; Undertaking.** The terms “contract” and “agreement” are used interchangeably and refer to the document signed by the parties that sets forth the promises of each party to the other. The term “undertaking” is used to refer to a specific promise in the “agreement” and not to the “agreement” itself. Thus, an “agreement” typically contains many “undertakings”. Note that a statement that “this agreement shall be governed by the law of the State of New York” is an

34. Any obligation of the client to cause its lawyers to deliver an opinion is a different question and depends, among other things, on the wording of the agreement between the parties.

35. If a particular lawyer takes responsibility only for a specific opinion, for example, a lawyer specializing in ERISA matters with regard to a pension plan opinion, that lawyer is an opinion preparer only as to that opinion and not as to all the other opinions in the opinion letter.

“undertaking” in that it commits each party to the application of New York law. *See* Section 3.1.

- (b) **Charter; Charter Documents.** As to a corporation, the certificate (or articles) of incorporation and by-laws and any related documents, such as restatements, amendments and certificates of designation and merger.
- (c) **Closing.** In most substantial financial transactions the parties enter into a written agreement that specifies (among other things) the conditions upon which the contemplated transaction will be consummated. Delivery of a third-party legal opinion letter is often one of these conditions. The consummation of the transaction (as opposed to the execution and delivery of the agreement) is referred to as the “closing”.
- (d) **Company.** This Report refers to the opinion giver’s client as the “Company”. The Illustrative Opinions identify the Company as a corporation and at various places this Report refers to corporate officers’ certificates and board resolutions. For opinions as to other entities, *see* Section 1.2(g).

Participants

- (e) **Opinion Giver; Opinion Recipient.** The term “opinion giver” refers to the lawyer or law firm in whose name the opinion letter is signed. The term “opinion recipient” refers to the addressee of the opinion letter and others, if any, granted permission by the opinion giver to rely on the opinion letter. The opinion recipient ordinarily receives the letter as a participant in a business transaction.
- (f) **Opinion Preparers.** *See* Section 1.8.

Opinion Practice Terms

- (g) **Customary Practice; Customary Usage and Customary Diligence.** *See* Section 1.4.
- (h) **Opinion; Opinion Letter.** At the closing of many business transactions, counsel for one party to the transaction will deliver a letter to the other party expressing its conclusions on various matters of legal concern to that other party. That letter is normally referred to as an “opinion letter”. Each separate conclusion it expresses is referred to in this Report as an “opinion”. (In practice, the term “opinion” is often also used to refer to the opinion letter, with the context making clear the meaning intended.) “Opinion letters” often contain many “opinions”. For types of opinions (“qualified”, “reasoned”), *see* Section 1.2(a). Opinions that are primarily factual in nature (*e.g.*, no litigation) are sometimes referred to as “confirmations”.
- (i) **Qualified Opinion; Exception; Exclusion; Limitation.** An opinion giver uses an “exception,” which term includes both a “limitation” and an “exclusion”, to narrow an opinion. An exception is often phrased to indicate that no opinion is given as to a particular provision in the agreement or specific aspect of the matter covered, rather than to provide a negative opinion on that provision or aspect. An opinion is said

to be “qualified” if it contains an exception³⁶ that is not customary in opinions of that type, thereby putting the opinion recipient on notice as to uncertainties and limitations. Thus, a remedies opinion that excludes coverage of an indemnification provision in a supply contract is a qualified opinion, but a remedies opinion containing a “bankruptcy exception” (which is standard for remedies opinions) is not. *See* Section 1.2(a) as to “standard” exceptions. General unspecified “public policy” exceptions are not used because they make the entire opinion unacceptably vague, requiring the opinion recipient to guess at the opinion giver’s source of concern.

- (j) **Reasoned (or Explained) Opinion.**³⁷ A reasoned (or “explained”) opinion is typically rendered when, in the view of the opinion giver, the opinion’s conclusions should not be stated apart from its underlying reasoning (for example, when the opinion giver reaches a conclusion despite the existence of possibly contradictory authority). By setting forth the reasoning behind the opinion, the opinion giver spells out, for evaluation by the opinion recipient and its counsel, such matters as a lack of judicial authority, the presence of divided authority or contrary but outdated authority. The conclusions expressed in a “reasoned” opinion are sometimes limited by the phrase “while the matter is not free from doubt” or some similar phrase. However, at other times the opinion, although containing reasoning, will not be limited in this way because the opinion giver has concluded that the opinion as “reasoned” needs no further characterization.
- (k) **Assumptions.** *See* Section 2.3.
Assumptions of General Application. *See* Section 2.3(a)
- (l) **Unreliable Information.** *See* Section 2.1.4.
- (m) **Disclosure.** A disclosure is a statement that is intended to prevent the opinion recipient from being misled. *See* Section 1.4(d). A disclosure differs from an exception in that it does not directly limit the opinion. A disclosure may be made to the opinion recipient within or outside an opinion letter.

Opinion Usages of “Law”

- (n) **Law.** “Law” means statutory, decisional and regulatory law at the state or federal, but not the local, level. Thus, an opinion should not be read to cover such matters as local zoning or building codes unless it does so expressly. If an opinion letter does not state that it covers federal law, that law is understood not to be covered unless the context indicates otherwise (*e.g.*, an opinion as to exemption from registration under the

36. A typical opinion exception states that “we express no opinion as to Section _____ of the Agreement.”

37. Opinions phrased in terms of “would” or “should” convey the same professional judgment as to the judicial resolution of the issues covered under statutory law and existing legal precedent as applied to the facts on which the opinion is based. Thus, delivery of “would” and “should” opinions is equally appropriate as a matter of customary practice. TriBar Opinion Committee, *Opinions in the Bankruptcy Context: Rating Agency, Structured Financing, and Chapter 11 Transactions*, 46 BUS. LAW. 717, 733 (1991).

Securities Act of 1933). Since an opinion is a professional judgment and not a guaranty, the opinion preparers are only responsible for the areas of law customarily understood to be covered by the opinion given. Within those areas, the opinion preparers are responsible for law that is reasonably available to lawyers generally as well as the law actually known to them. *See* Sections 3.5.1 and 6.6. *See also* note 11.

- (o) **Law Covered By The Opinion Letter.** An opinion letter (unless it is limited to a specific statute e.g., whether a particular transfer constitutes a fraudulent transfer within the meaning of Article 10 of the N.Y. Debtor & Creditor Law) will normally recite what law it is intended to cover (e.g., “the opinions expressed herein are limited to the law of the State of New York and to the federal law of the United States”). *See* Section 4.1.
- (p) **Chosen-Law; Chosen-Law Provision; Governing Law.** *See* Sections 4.3 and 4.4. Many agreements contain a provision entitled “governing law provision”. However described, such provisions are analytically “chosen-law provisions” because such provisions reflect the choice of the parties. That choice is not always respected by the courts. *See* Article IV. The law applicable to the agreement as determined by a court is the “governing law”.

ARTICLE II FACTS

2.1 SOME GENERAL OBSERVATIONS ON FACTS

2.1.1 The Legal Opinion—Law Applied To Facts

Legal opinions typically involve the application of law to facts. For example, an opinion that an agreement has been duly authorized requires (i) an understanding of the “law”—the legal requirements for authorizing the agreement, such as shareholder or director approval, and (ii) a determination of the “facts”—that these requirements have been satisfied.

Certificates of corporate officers regarding records maintained by a corporation about itself provide the basis for much of the information relied on in opinions. Certificates of public filing officials as to public records provide the basis for many other opinions. Additional information may be derived from representations in agreements and statements, oral and written, from those with relevant information. *See* Section 2.2.1(d) as to the formality with which facts obtained from others are established. Lawyers also establish facts through their review of documents. Less frequently, they establish facts by actual observance of events. This Article II describes the customary practice lawyers follow in establishing facts. As discussed in Section 2.3, opinions may also be based on factual assumptions.

2.1.2 The Limitless Indicia Of Fact

Because most events relevant to an opinion occur outside the presence of counsel, opinion preparers must usually rely on information provided

by others about what has taken place. The steps that might be taken to obtain factual information are, as a theoretical matter, virtually limitless. For example, an opinion that an agreement has been authorized is often based on a certificate signed by the corporate secretary stating that (i) a meeting of the board of directors, at which a quorum was present, was held on a specified date on notice duly given and (ii) at the meeting a resolution authorizing the agreement was adopted by the required vote. The opinion preparers could also (but almost never do) interview the corporate secretary or obtain certificates from one or more participants in the meeting. Even if that were done, those who purported to participate in the meeting might claim that the meeting was held, even though it was not. The falsity of their claim might, in turn, be revealed by some further step—for example, locating witnesses who are aware of what really happened. In almost every situation the possibility that the information certified is not true would remain despite efforts to look beyond the information provided to that point.

2.1.3 The Lawyer’s Special Role In Guiding The Flow Of Factual Information

The opinion preparers must thoughtfully guide the process by which information is obtained in an effort to assure that the opinions given are meaningful. No opinion can be better than the factual information on which it is based.

The process for obtaining information in connection with the opinion will likely be inseparable from other diligence related to the transaction itself. This process usually requires a determination by the opinion preparers of: (i) the factual information required; (ii) the source of that information—*e.g.*, the Company records, a Company officer, a public record or public filing official and past opinion letters for the Company and related documents; and (iii) the vehicle by which the factual information is to be provided—*e.g.*, a specially prepared certificate, a representation in the agreement, or even an oral statement.

Opinion preparers typically draft certificates³⁸ that set forth with precision various key facts. They then customarily review the certificates with those who will be asked to sign them. In the course of that review, the opinion preparers satisfy themselves that the persons providing the factual information understand that the information provided is being relied on in an opinion letter and therefore must be based on knowledge, not on surmise or a willingness to “take the risk” of being wrong.³⁹ An equivalent process should be followed when reliance is placed on representations in an agreement, oral statements or other information.

38. Public officials usually draft their own certificates.

39. In some cases inside counsel will draft certificates of corporate officers and review the certificates with the officers although outside counsel gives the opinion. The obligation to review the certificate with the signer then falls on inside counsel.

In some situations, the opinion preparers will elect to go beyond customary diligence.⁴⁰ In other situations, the opinion recipient will seek more than customary diligence for a specific opinion. In the latter case, the lawyers on both sides should attempt to resolve at an early stage how much more diligence will be required. The cost of any additional diligence may be a significant factor to be considered by the parties to the transaction.

2.1.4 No Reliance On “Unreliable Information”

The opinion preparers may rely on information provided by an appropriate source (*see* Section 2.2.1) unless reliance is unreasonable under the circumstances in which the opinion is rendered⁴¹ or the information is known to the opinion preparers to be false⁴² (together “unreliable information”). Some information is false on its face: a meeting of the Board of Directors, for example, could not have been held on February 29, 1997. Other information is so improbable (*e.g.*, a certificate from a corporate officer of the owner of a television station that no business is done in the only jurisdiction in which the company is licensed to operate the station by the FCC) that it would be unreasonable for the opinion preparers to rely on it without further inquiry. Similarly, it would be unreasonable to rely on information that is inconsistent with a representation given in the same transaction or information known to the opinion preparers. If the opinion preparers identify information as “unreliable,” they must find other information to establish the facts. Alternatively, they may include an express assumption regarding those facts in order to give the opinion. *See* Section 2.3(b). In some cases disclosure may be required. *See* Section 1.4(d).

2.2 ESTABLISHING FACT

Customary diligence provides norms for establishing fact. These norms accept as fact information provided by persons who appear to be in a position to know the facts. Opinion preparation is not ordinarily an occasion to question factual information provided by apparently reliable sources nor is the opinion letter a vehicle to ferret out fraud. Of course, all relevant information known to the opinion preparers, however obtained, must be considered.

“Establishing” fact means that in accordance with customary practice (i) the opinion preparers have assembled factual information (whether in certificate, representation or other form), (ii) such information is not “un-

40. For example, when giving the no litigation opinion (*see* discussion in Section 6.8) some opinion preparers examine their firm’s litigation dockets even though they have received appropriate certificates from their clients as to litigation and claims.

41. The pace of transactions and the complexity of the businesses involved have resulted in a customary practice under which the opinion preparers do not challenge the facts provided by an appropriate source. The demands on counsel’s attention are intense and documents typically continue to change until the moment of closing.

42. Even if reasonable opinion preparers would not under the circumstances conclude that reliance on information was unreasonable, the opinion preparers may not rely if they know the information to be false.

reliable” (see Section 2.1.4) and (iii) the information so assembled includes the facts customarily required for giving the specific opinion. Once opinion preparers have met the standard of customary diligence in “establishing” facts required to support a specific opinion, they have discharged their professional responsibility and need not gather additional information or undertake verification procedures (unless they have specifically agreed to do so). Thus, comparison of factual material gathered to support an opinion with additional factual material that may otherwise be available (other than the representations made in the specific transaction) is not customary.

2.2.1 Information Obtained From Others

(a) The Need To Go To The Source To Establish Facts

Ordinarily, the client is the best source of information about itself; the keeper of a public record is the best source of information about that record;⁴³ the other parties to a transaction are the best source of information about themselves. Most corporations and other business entities maintain specific records on many matters characteristically covered by opinions (*e.g.*, minutes of meetings that cover authorization of agreements). However, in some cases a corporation’s records may not be an appropriate source. For example, while a corporation’s records will indicate whether it has taken action to grant a security interest (and are ordinarily the most reliable source of information on that issue), they are not ordinarily an appropriate source of information concerning the state of the public record relating to the security interest. Ordinarily, the person or entity that searches the public record (as a business or public service) is the most reliable source of that information.

Although lawyers, accountants and investment bankers may have information in their files, that information often will have been provided for another purpose and may not have been updated. To maintain reliability, each time an opinion letter is delivered, opinion preparers as a matter of customary diligence obtain information (or an assurance that the information in hand remains correct) from the source (*e.g.*, a certificate of a corporate officer or public official) regarding matters that might be subject to change.

(b) No Reliance On Statements Of “Ultimate Fact”; Special Rule As To Charter Documents And Public Official Certificates

Opinion preparers rely on certifiers of fact for the factual elements necessary to render legal opinions. However, they may not rely on certifiers of fact for statements that are tantamount to the legal opinions themselves. Thus, an opinion that stock has been validly issued cannot properly be based on a certificate of a corporate officer that the Company has taken

43. Service companies that search public records as part of their business are an alternative source that is equally reliable and often more accessible than an “official” source. See Section 6.1.6.

all steps required to issue the stock.⁴⁴ Such a statement, often referred to as a statement of “ultimate fact”, is in reality a conclusion of law. If the opinion giver could rely on it, the diligence the opinion recipient expects the opinion preparers to perform would be lost.

Customary statements contained in certificates issued by public officials are an exception to the general rule against reliance on statements of “ultimate fact”. Public officials are presumed to have established specific procedures to issue such certificates. For example, opinion givers customarily rely on certificates issued by the Secretary of State regarding a corporation’s “valid existence”,⁴⁵ “good standing” and “qualification to do business”⁴⁶. Unlike the corporate officer or other certifier of fact, the public official is assumed to understand (and to have undertaken the appropriate diligence to support) the statement of ultimate fact (conclusion of law) contained in the certificate.

There is an important limitation to this exception. By custom, opinion givers do not rely on public official certificates as to “due incorporation”.⁴⁷

(c) The Appropriateness Of The Source In Establishing Fact

Even if the institutional source of information (*e.g.*, the Company) is proper, the opinion preparers are only entitled to rely on information provided by a person they reasonably believe to be an appropriate representative of the institution. An officer with the title “Vice President—Engineering” may in fact be knowledgeable about corporate financial matters. However, the opinion preparers may not be able to verify that knowledge. Ordinarily, only a corporate officer who has responsibility for the subject matter involved (or a more senior officer to whom that officer reports, directly or indirectly) or an officer who has overall responsibility for the Company (*e.g.*, the President) may without further diligence be treated as an appropriate source of information about the Company.

(d) The Formality Of Establishing Facts

(i) The Formality Of Certificates

When rendering opinions, opinion preparers seldom rely on information that has been assembled informally. Ordinarily, they prepare certificates that set forth with precision the factual information they need, and then review the certificate with the proposed signer.⁴⁸ This process and the requirement of execution by an appropriate officer make the seriousness of the inquiry clear.

44. Instead, the opinion would require the opinion preparers to determine, among other matters, whose approval was required and whether that approval was obtained in accordance with applicable requirements. *See* Section 6.2.2.

45. *See* Section 6.1.3.

46. *See* Sections 6.1.4 and 6.1.6.

47. Public official certificates as to “due incorporation” are generally based on a review of filed documents that by themselves do not establish all of the elements of due incorporation. *See* Section 6.1.1.

48. *But see* note 39.

*(ii) Comparison Of Reliance On Representations Made
By Opinion Recipient With Those Made By Client*

Reliance on representations made by the opinion recipient in an agreement may be necessary as a practical matter. The opinion preparers have only limited access to the opinion recipient, and the recipient should understand that its representations are providing a basis for the opinion that is being rendered to it.⁴⁹ In the absence of representations about the opinion recipient necessary for an opinion letter, the opinion preparers, rather than seeking a certificate of a corporate officer of the opinion recipient, will usually state in the opinion letter that certain facts (or even legal conclusions) about the opinion recipient are assumed. *See* Section 2.3(b).

Reliance by the opinion preparers on representations in the agreement made by their client stands on a different footing. The opinion preparers have access to the client and are in a position to inquire whether a representation is based on actual knowledge, on surmise or even on a determination by the client (notwithstanding its lack of knowledge) that it is willing to risk the consequence of being wrong. Opinion preparers should not base a legal opinion on client representations in the agreement that reflect surmise or risk allocation concepts (unless that is disclosed in the opinion letter or is otherwise known to the opinion recipient).

The process of reviewing with appropriate corporate officers the representations in an agreement and the statements in certificates is essentially the same. Nevertheless, seeking information concerning the client through a certificate makes clear to the client that the information is being used for opinion purposes as well as contract purposes. Further, a representation in an agreement is more likely to be cast as a legal conclusion (*e.g.*, “the stock has been validly issued”) than a statement of fact in a certificate specifically prepared for use as a basis for a legal opinion. Thus, a certificate is often more effective in eliciting information from a client than representations in an agreement. *See* Section 2.5.4.

(iii) Discouraging Use Of Oral “Statements”

Some opinion letters state that as to certain matters of fact the opinion giver has relied on “statements”. A “statement” may include information received orally. Because memories fade and oral communications can be imprecise, reliance on oral communications creates a risk of misunderstanding that the opinion preparers ordinarily will want to avoid. When relying on oral information, opinion preparers would be well advised to consider recording in a memorandum what they have been told, when and by whom.

2.2.2 Information From Others In The Opinion Giver Firm

In applying the rule that lawyers may not rely on “unreliable infor-

49. In relying on representations of the opinion recipient, the opinion preparers are not required to make a judgment whether a representation for any reason constitutes unreliable information. *See* Section 2.1.4.

mation" (see Section 2.1.4), the question arises whether, in order to rely, the opinion preparers must inquire as to information unknown to them, but known to other lawyers in their firm or contained in the firm's files.

(a) The Opinion Giver Is Not Accountable For Everything Known To All Its Lawyers Or Contained In Its Files

Before delivering an opinion letter, opinion preparers (regardless of the size of the law firm) do not, as a matter of customary practice, circulate⁵⁰ a summary of the factual information on which they are relying to every lawyer (or even some lawyers) in the firm or check that information against the firm's client files. Customary practice reflects an appropriate balancing of the costs such a procedure would entail and the benefits it could be expected to produce. If the information to be relied on has been furnished by an appropriate source, is adequate to give the opinion, and is not "unreliable" (see Section 2.1.4), the opinion preparers customarily seek no further information. A law firm's files may be voluminous and the number of lawyers who have had some involvement with the client may be large. Whatever the effect in any specific situation, the probability is small that anything of value would be revealed by either a search of those files or a broad inquiry of lawyers who may not be knowledgeable about the details of a transaction.

(b) Opinion Giver Is Accountable For Information Obtained In Informal Consultations Within The Firm

The lawyers in a firm who represent a client in a transaction will ordinarily consider whether they should make general inquiries of others in the firm who are more familiar with the client's affairs in order to facilitate the handling of the transaction. Lawyers working on an accounts receivable financing, for example, may consult with other lawyers who by reason of prior representation of the client may be aware of contractual or other limits on the client's ability to grant a security interest in the receivables. Opinion preparers also may have occasion to make similar inquiries directed to specific issues raised by the opinion, particularly when they are aware that a lawyer in the firm who is not involved in the preparation of the opinion has information obtained through representation of the client in other matters that is likely to have a material bearing on the opinion issue. The timing and content of these inquiries will vary; they will usually be informal. The opinion preparers must take into account the responses to these inquiries in determining the reliability of the information being used to support the opinion. Ordinarily, however, the opinion preparers

50. This contrasts with responses to audit letter inquiries. See *ABA Statement of Policy Regarding Lawyers' Responses to Auditors' Requests for Information*, 31 BUS. LAW. 1709 (1976). The diligence required to respond to an audit letter inquiry for a client includes soliciting information from lawyers in the firm who have rendered professional services to the client during the period involved.

will have no reason to make inquiries within the firm with regard to specific information furnished by the client or others that appears regular on its face and that has been obtained from an appropriate source.

(c) Handling Information That Comes From A Lawyer Within The Opinion Preparers’ Firm

Lawyers within the opinion preparers’ firm may be the source of information relevant to an opinion. Such information is in general subject to the same rules as to reliability as information from third parties. However, the information customarily is put into a memorandum rather than into “certificate” form: one certifies to another, not to oneself.

2.3 USE OF ASSUMPTIONS AS FACT SUBSTITUTES

A factual assumption is a bridge that allows the opinion preparers to render an opinion without establishing the facts being assumed. Opinion preparers are often permitted by the opinion recipient⁵¹ to rely on assumptions when (i) information is not available (or is only available at substantial cost or delay), (ii) the facts being assumed relate to the opinion recipient, or (iii) the cost of establishing the facts exceeds the likely benefit (often because of the improbability that what is assumed would on investigation prove to be untrue).⁵²

(a) Assumptions Of General Application—Sometimes Unstated

Some facts are common to transactions generally and are customarily assumed as a matter of course. Thus, opinion preparers almost always assume the legal capacity of individuals, that the copies of documents furnished to them conform to the originals, that the original documents furnished them are authentic and that the signatures on executed documents are genuine. The alternative of requiring the opinion preparers to establish these matters is likely to generate costs that produce no corresponding benefit. Similarly, in giving a remedies opinion, the opinion preparers will usually assume that the agreement is binding on the other parties to it.⁵³ As a matter of customary practice, assumptions of general application need not be stated in opinion letters.

(b) Other Assumptions—Stated

Opinion preparers also rely on assumptions that are not of general application. Thus, if the opinion preparers have not been involved in all the steps needed to close a transaction, they frequently will be permitted

51. Prior to delivery of an opinion letter, the opinion preparers will want to consult with counsel for the opinion recipient as to the acceptability of stated assumptions. *See* Section 2.3(b). Acceptance by the opinion recipient of an opinion letter constitutes acceptance of its components, including assumptions stated in it.

52. For example, opinion recipients often permit opinion givers to assume the Company’s solvency although that fact has not been (and perhaps cannot be) established or is open to question. *See* Section 2.3(c).

53. Such an assumption may be needed to establish mutuality of obligation, a necessary element to contract formation.

to assume that all those steps were completed, *e.g.*, that a document was filed in a governmental office. Assumptions of specific application can reduce the cost of preparing an opinion and sometimes permit opinions to be rendered that would otherwise be impractical or impossible. Assumptions that are not of general application require an express statement in an opinion letter.

(c) Assumption Responsibilities

Opinion preparers should not rely on an unstated assumption if it is unreliable. *See* Section 2.1.4. Because of the nature of most unstated assumptions, this will seldom be the case. By way of contrast, stated assumptions, like opinion exceptions, put the opinion recipient on notice that the opinion preparers have not established the facts being assumed. Stated assumptions, therefore, shift to the opinion recipient the responsibility for confirming the assumed facts for itself or taking the risk that what is assumed might turn out to be untrue. As with opinion exceptions, reliance on a stated assumption is subject to the limitation described in Section 1.4(d) on rendering misleading opinions.

2.4 THE PRESUMPTION OF REGULARITY AND CONTINUITY

It is not unusual for a lawyer conducting a diligence review to find gaps in corporate minutes or records. For example, suppose that the opinion preparers cannot locate a shareholder resolution believed to have been adopted 30 years earlier approving an amendment to the certificate of incorporation increasing the Company's authorized stock. The minutes of shareholder meetings have been consistently maintained, but the minute book is missing for the period of the amendment. Later minutes indicate that the amendment has been consistently treated as having been effective and available corporate records cast no doubt on the shareholder authorization of it. May the opinion preparers in reliance on the presumption of regularity assume that a satisfactory resolution was set forth in the missing minutes without disclosing such reliance in the opinion letter?

Many lawyers would regard disclosure of that reliance as unnecessary because (i) the missing minutes are not recent, (ii) the minutes that have been preserved in the minute book reflect care on the part of the Company to observe formalities and (iii) subsequent minutes treat the amendment as having been properly authorized.⁵⁴ The presumption is frequently relied on without disclosure. The Committee believes that reliance on the presumption without disclosure is justified if, in light of other available facts, the gap in corporate records is unlikely to be significant.

54. The ABA Guidelines in Section II(B) indicate that reliance on this presumption should always be disclosed. However, that approach deprives the presumption of any value to the opinion giver: to require disclosure in every case is to treat use of the presumption as the equivalent to taking an exception.

2.5 OFFICERS’ AND OTHER CERTIFICATES

2.5.1 Widespread Reliance On Officers’ Certificates In Opinions

In establishing the factual bases for their opinions, opinion preparers customarily rely on officers’ certificates. Many lawyers mention reliance on such certificates in the opinion letter, often using language such as that set forth in the Illustrative Opinion Letters. Because nearly every opinion letter relies on certificates, that reliance should be understood, whether or not stated.⁵⁵ See Section 2.1.3 as to the preparation of officers’ certificates.

2.5.2 Officers’ Certificates Are Seldom A Substitute For Certificates Of Public Officials

The opinion preparers look to a certificate of a public official (*e.g.*, as to U.C.C. financing statements filed) when that official is the appointed custodian of the information and has the duty to provide information in writing as to the status of the public record. A service company is an acceptable substitute (and often is more accessible than an “official” source) because it makes a business of examining the records on file. *See* Section 2.2.1(a). On the other hand, a certificate of a corporate officer, even if it recites a search of public files, involves an interested party undertaking a less than familiar task. Sometimes an officer’s certificate is used to confirm that the client has executed no financing statements and received no notice of lien since the last available public official or service company certificate. Except in that limited situation, an officer’s certificate is not ordinarily regarded as an acceptable substitute for the certificate of a public official or service company.

2.5.3 No Responsibility To Review Certificate Back-Up Materials

Sometimes an opinion will be based on a certificate regarding financial, appraisal, engineering or other matters that contains (or to which have been attached) complex, technical or lengthy materials explaining or justifying the conclusory factual content of the certificate, *e.g.*, computational, diagrammatic or computer file “print-out” materials. As a matter of customary practice, the opinion giver may properly rely on conclusory material in the certificate without attempting to understand or even to examine the supporting materials.⁵⁶ In part, this practice relates to competence. In part, it relates to the time required to review and understand the supporting materials. If the opinion recipient wishes to review such materials (which may be technical and best reviewed by those with a technical background), it may require that the certificate and any related materials be provided to it, either as a condition of the agreement or in

55. The closing conditions in agreements will usually specify which certificates are to be presented at closing. Ordinarily, certificates of public officials are presented at closing. Practice varies on the presentation of officers’ certificates at closing.

56. *See* ABA Guidelines Section I(A)(1), which state that opinions requiring interpretation of such matters should not be requested.

connection with acceptance of the opinion letter. If the opinion recipient wishes the opinion giver to review these materials (and the opinion giver is willing to do so), the fact that such a review was conducted should be noted in the opinion letter if the opinion recipient intends to rely on the review.

2.5.4 Usual Certificate Style Is By Individual

An officer's certificate usually begins by identifying the signer as an officer of the Company but is executed by the signer as an individual (whether the signature line indicates the officer's title or not) rather than on behalf of the Company. This practice is followed because a certificate by the Company would merely restate a Company representation made in the agreement or another transaction document. By signing as an individual, the officer takes personal responsibility for the representations made in the certificate.

2.6 STATEMENTS IN OPINION LETTERS REGARDING COUNSEL'S RESPONSIBILITY FOR ESTABLISHING FACTS

The opinion recipient is entitled to assume that the opinion preparers have satisfied the standard of customary diligence described in this Report. *See* Section 1.4. To emphasize the nature and scope of the procedures conducted by the opinion preparers in establishing the facts on which the opinion letter is based, opinion givers sometimes include in their opinion letters a statement along the following lines:

As to certain matters of fact material to the opinions expressed herein we have relied on the representations made in the Agreement and certificates of public officials and officers of the Company [and others].⁵⁷ We have not independently established the facts so relied on.

Any such statement should be regarded as included solely as a matter of emphasis since that reliance is customary without any express statement.

2.6.1 "To Our Knowledge"; Defining "Knowledge"

Many lawyers include the phrase "to our knowledge" (or some variant of it)⁵⁸ in the "no breach or default" and "no litigation" opinions (dis-

57. It is often proper to rely on certificates from others, such as service companies that deal with U.C.C. filing status.

58. Among the usages are "to the best of our knowledge"; "we do not know of"; "we have no knowledge"; "known to us"; "to our knowledge after due inquiry"; and "to our knowledge after appropriate diligence". The Committee believes that these phrases are largely indistinguishable. Some lawyers define "knowledge" in the opinion letter. To date, no one definition has gained broad acceptance among those who define knowledge.

Opinion letters sometimes use the phrase "nothing has come to our attention" as a way of communicating what lawyers have learned during the course of a diligence process that is unrelated to the preparation of the opinion letter and goes well beyond the diligence that lawyers ordinarily conduct to support an opinion letter. That phrase is principally used in the context of a public offering of securities and appears in a separate paragraph or separate letter containing the so-called 10b-5 opinion or confirmation, which is typically lengthy and establishes the context in which the phrase is to be understood.

cussed in Sections 6.5.5 and 6.8 of this Report) and sometimes in other opinions as well.⁵⁹ Those who include the phrase do so to make clear that the opinion should not be read literally but rather in the context of customary practice. By doing so, they do not limit the customary diligence lawyers undertake to support the opinion, and the meaning of the opinion is the same whether or not the phrase is used.

The obligation of the opinion preparers to exercise customary diligence in establishing the factual basis for an opinion is implicit in every opinion letter. An opinion giver can limit or disclaim that obligation by including in the opinion letter an express statement describing the factual investigation it conducted on a particular point and making clear that no other investigation was conducted. Often, this is done simply by adding the phrase “without investigation”. Inclusion of the phrase “to our knowledge” in an opinion does not by itself (i) label the factual material involved as unreliable (*see* Section 2.1.4) or (ii) state a limitation on the investigation required by customary diligence.

ARTICLE III THE REMEDIES/ENFORCEABILITY OPINION

3.1 FORM AND SCOPE OF THE OPINION

A remedies opinion deals with the question whether the provisions of an agreement will be given effect by the courts. A typical remedies opinion reads as follows:

The Agreement is a valid and binding obligation of the Company enforceable against the Company in accordance with its terms.

The remedies opinion may take a number of forms without any difference in meaning. Some remedies opinions, for example, include the word “legal” (usually before the word “valid”). Others omit one or both of the words “valid” or “binding”. Still others omit the word “enforceable”. Neither the inclusion of “legal” nor any of these omissions expands or limits the generally understood meaning of the remedies opinion. Even an opinion that omits the entire phrase “enforceable against the Company in accordance with its terms”⁶⁰, as well as the bankruptcy exception and equitable principles limitation, or merely states that the “Agreement is enforceable against the Company” or that it is “binding on the Company”

59. The “to our knowledge” limitation deals with facts. This limitation should not be used with respect to matters of law.

60. The word “enforceable” or the phrase “enforceable in accordance with its terms” does not mean that a court will specifically enforce the terms of a contract. Specific enforcement is an equitable remedy, the availability of which depends on a variety of factors, including the conduct of the party seeking specific enforcement.

is understood to have the same meaning⁶¹ as the typical remedies opinion quoted above.

As a matter of customary usage, the remedies opinion is not analyzed word by word. Although it may be expressed in a variety of ways, the opinion is understood to have the same meaning so long as it contains one of the operative words, “binding” or “enforceable”.

A remedies opinion deals with the present but is also forward-looking. For example, an exception is required if a remedy specified in the agreement will not be made available by the courts in the circumstances contemplated, even though on the date of the opinion letter the event required to trigger the remedy (usually a default) has not occurred and may never occur.

The remedies opinion covers three related matters. First, it confirms that an agreement has been formed.⁶² Second, it confirms that the remedies provided by the agreement will be given effect by the courts (requiring an exception if (i) under applicable law the opinion recipient will not have a remedy for a breach of any “undertaking” by the other party to the agreement⁶³ or (ii) a remedy specified in the agreement will not be given effect under the circumstances contemplated).⁶⁴ Third, the opinion describes the extent to which the courts will enforce⁶⁵ the provisions of the agreement that are unrelated to the concept of breach⁶⁶ (requiring an exception if any of these provisions will not be given effect by the courts).

The broad reach of the remedies opinion can best be understood by analyzing the various undertakings to which it relates.

(a) Some provisions in an agreement obligate the Company to perform an affirmative act but say nothing about what will happen if the Company

61. Some lawyers refer to the opinion as the “enforceability” opinion; others refer to it as the “remedies” opinion. The two terms are synonymous. For simplicity, this Report refers to the opinion as the “remedies opinion.” The remedies opinion in its usual form is subject to the bankruptcy exception and equitable principles limitation. The discussion that follows assumes those exceptions are applicable.

62. An opinion that an agreement has been formed is seldom sought as a separate opinion.

63. Frequently, an agreement is entered into before the “closing,” and an opinion letter is required to be delivered only if the transaction closes. Thus, if the transaction does not close, no opinion will have been given on the enforceability of undertakings—such as those allocating expenses—that are intended to continue in effect even if the transaction does not close.

64. Some agreements state that they will be specifically enforced against a party. A remedies opinion as to such an agreement is understood to mean that the remedy specified will be available, subject to the bankruptcy exception and the equitable principles limitation. As a practical matter, therefore, all the opinion means is that a court will consider whether to provide specific performance as a remedy. *See* Section 3.3.4.

65. Representations are not undertakings and, therefore, are not covered by the remedies opinion. The opinion does cover, however, any remedies specified in the agreement for a false representation or warranty.

66. For example, chosen-law provisions. *See* Section 1.9(p).

fails to perform. For example, the agreement may require the Company to pay interest and principal on a note, to issue stock, or to obtain an annual audit of its financial statements. For these provisions, the opinion means that a court will either require the Company to fulfill its undertakings as written or grant damages or some other remedy in the event of a breach.

(b) Some agreements specify a remedy if the Company fails to perform particular undertakings. Remedies provisions may be couched as affirmative undertakings (for example, a requirement to pay liquidated damages). More often they take the form of a grant to the other party of a right to take action (for example, to accelerate the maturity of a loan, to enter the Company’s premises and recover specified assets, or to reduce the interest of a defaulting partner in a partnership). For those provisions, the remedies opinion means that a court will give effect to the specified remedies as written.⁶⁷

(c) Another type of provision establishes the ground rules for interpreting or administering the agreement and settling disputes under it. These provisions may choose the law by which the agreement is to be governed, indicate how the agreement is to be amended (for example, by a writing signed by all parties), designate the forum in which disputes are to be resolved (for example, arbitration by a specified organization or the courts of a particular state), or waive certain rights (such as the right to a jury trial). While this type of provision is cast as a statement, it constitutes an undertaking⁶⁸ of each party to the other. Unless excepted from the opinion, these provisions are covered by the remedies opinion, which is understood to mean that a court will give effect to the provision as written and require the Company to abide by its terms.

The remedies opinion should be read to cover each undertaking by the Company in the agreement. Any narrower reading would invite lengthy negotiations to determine which provisions of the agreement are being opined on and which are not.⁶⁹

67. See note 64. An agreement may specify a remedy that the courts in the governing law jurisdiction will never enforce (e.g., entry to the debtor’s premises to recover assets without judicial order). In such a case an exception to the remedies opinion should be taken. In other cases, the courts will enforce a stated remedy, but enforcement will be subject to equitable principles in which circumstance no stated exception need be taken. See Section 3.3.4 for a discussion of the equitable principles limitation.

68. See definition in Section 1.9(a).

69. TriBar’s 1979 Report offered a comprehensive definition of the scope of the remedies opinion based on New York custom and practice. Under that definition the opinion applies to each and every undertaking of the Company under the agreement. This approach has received broad acceptance not only in New York but across the country. Its acceptance, however, has not been universal. For example, a committee of the Business Law Section of the State Bar of California issued a report in 1990 endorsing a narrower definition of the scope of the remedies opinion, one that interprets the opinion to cover not all the provisions of an agreement but only those that are material. *1989 Report of the Committee on Corporations*

3.2 NARROWING THE SCOPE OF THE OPINION

Customary practice requires that any limit on the remedies opinion be explicit and not by way of omission of characteristic language. If an opinion giver wishes to render a remedies opinion that does not cover every undertaking of the Company in the agreement, the opinion letter should describe with particularity the limitations the opinion giver intends to impose. For example, if the opinion preparers conclude that a remedy specified in the agreement, such as an indemnification provision, is unlikely to be given legal effect, they should include an exception in the opinion.⁷⁰ See definition of "exception" in Section 1.9(i). The task of reviewing an agreement to identify the exceptions to be taken is an important part of the opinion process. The exceptions taken should be carefully tailored to the specific undertakings covered by the opinion.⁷¹

3.3 BANKRUPTCY AND EQUITABLE PRINCIPLES

3.3.1 The Remedies Opinion Does Not Cover Bankruptcy And Equitable Principles Questions

Two uniformly accepted qualifications to the remedies opinion are the bankruptcy exception⁷² and the equitable principles limitation. When

of the Business Law Section of the State Bar of California Regarding Legal Opinions in Business Transactions, 45 BUS. LAW. 2169 (1990). A materiality test has superficial appeal: an immaterial provision is by definition unlikely to be of any real interest to the opinion recipient and thus including it within the coverage of the opinion would appear to serve no useful purpose. On analysis, however, a materiality test reveals itself to be unworkable. An opinion giver is in no position to judge whether a provision is, in fact, unimportant to the opinion recipient, who is not the opinion giver's client. From the standpoint of an opinion giver, reliance on an undefined materiality standard therefore invites miscommunication. From the standpoint of the opinion recipient, an undefined materiality standard is equally unacceptable. By restricting the coverage of the opinion without identifying which provisions are omitted, such a standard leaves the opinion recipient unable to determine whether provisions it regards as valuable may later be found not to have been covered by the opinion. Thus, an undefined materiality test creates risk for the opinion giver while significantly undercutting the precision of an opinion and thus reducing its value to the opinion recipient. Its widespread adoption could complicate the opinion process by forcing opinion recipients to ask opinion givers to identify all provisions the opinion giver has deemed to be immaterial.

70. See, e.g., *Globus v. Law Research Serv., Inc.*, 418 F.2d 1276, 1287-89 (2d Cir. 1969), *cert. denied*, 397 U.S. 913 (1970).

71. For example, when considering the enforceability of an acquisition agreement, lawyers give special attention to "lock-up" options and "no shop" and "non-competition" clauses, among others, as well as provisions relating to the resolution of disputes (such as choice of forum, forum *non conveniens* and provisions on subject matter jurisdiction). When foreign obligors are involved, some lawyers add an exception for possible judicial deference by state or federal courts to acts of foreign sovereign states. Whether "comity" is viewed as an integral part of United States law or deference to the law of others, it is of general application and broadly understood. Concepts such as comity that are so broadly comprehended do not ordinarily require a specific exception. See SCOTT FITZGIBBON & DONALD W. GLAZER, FITZGIBBON & GLAZER ON LEGAL OPINIONS: WHAT OPINIONS IN FINANCIAL TRANSACTIONS SAY AND WHAT THEY MEAN, § 9.10.2 (Little, Brown & Co. 1992).

72. The bankruptcy exception excludes the effect of bankruptcy law on the remedies

stated, they often follow immediately after the affirmative statement of the remedies opinion and are typically phrased substantially as follows:

. . . except as may be limited by⁷³ bankruptcy, insolvency or other similar laws affecting the rights and remedies of creditors generally and general principles of equity.⁷⁴

As in the Illustrative Opinion Letters these qualifications are sometimes stated as being generally applicable to all opinions. *See* Section 1.2(c). These qualifications are understood to be applicable to the remedies opinion even if they are not expressly stated.

Sometimes the language quoted above begins with the words “except as enforcement may be limited by bankruptcy, insolvency. . .”. Use of the word “enforcement” is not intended, and should not be construed, to restrict the bankruptcy exception and equitable principles limitation to matters relating to enforcement of contract provisions. Any narrowing of the bankruptcy exception or equitable principles limitation requires clear language rather than reliance on a single word such as “enforcement”. *See* second paragraph of Section 3.1.

3.3.2 Bankruptcy Exception Relates To A Body Of Law Rather Than The Bankruptcy Of Particular Parties

The bankruptcy exception is more aptly an “insolvency law exception” in that it covers not only the federal Bankruptcy Code but also any other similar insolvency laws (state or federal) of general application.⁷⁵ The

opinion. *See* TriBar Opinion Committee, *Opinions in the Bankruptcy Context: Rating Agency, Structured Financing, and Chapter 11 Transactions*, 46 BUS. LAW. 717 (1991). The opinions discussed in that report (*e.g.*, non-consolidation of entities, fraudulent conveyances, and preferences) do not address the enforceability of an agreement, but rather the applicability of particular principles of bankruptcy law, the effect of which are excluded from consideration by the bankruptcy exception.

73. The language quoted above sometimes begins with the words “subject to the effect of” instead of “except as may be limited by”. These usages are understood to be synonymous.

74. The equitable principles limitation takes many forms. For example, the words “whether applied by a court of law or equity” are sometimes added after the word “equity.” The meaning of the limitation is now so well established that an opinion letter no longer needs to point out that the limitation applies even if a court is not sitting under local practice as a court of equity. Sometimes the equitable principles limitation will include language (often after the word “equity”) along the following lines: “including (without limitation) concepts of materiality, reasonableness, good faith and fair dealing.” Language such as this merely illustrates the breadth of the equitable principles limitation. It does not add to or subtract from the limitation.

75. The use of the word “similar” makes clear that the exception does not comprehend those laws that affect creditors’ rights generally but are unrelated to laws grounded in insolvency, *e.g.*, usury laws. However, the Committee believes that omission of the word “similar” should not be construed to broaden the scope of the exception: clearer language is required to do that. Some lawyers expressly include in the bankruptcy exception references to “reorganization” and “moratorium” laws. “Moratorium” laws refer to the type of emergency economic legislation enacted during the Great Depression as a means of halting foreclosure of certain classes of property, *e.g.*, farms. Both moratorium and “reorganization” (a term that

“bankruptcy exception” tells the opinion recipient that a specific body of law has been excluded from the opinion. The exception refers to all situations—whether involving insolvency proceedings or not—to which insolvency principles apply. Fraudulent conveyance (or transfer) laws are included in the laws covered by the exception. Sometimes the exception refers to those laws expressly (often after the word “insolvency”). If not, they are included *sub silentio* in the phrase “other similar laws”.

The bankruptcy exception relates to a body of law rather than to a proceeding relating to a particular person or entity. Thus, the exception will have application, for example, to a fraudulent transfer, even if the company never becomes subject to a bankruptcy proceeding. Further, the bankruptcy of another person or entity may affect the position of the Company. For example, the Bankruptcy Court may not permit the enforcement of a guaranty against the manager of a bankrupt company if that will disrupt the bankruptcy proceedings.

3.3.3 Whether Bankruptcy Exception Excludes All State Insolvency Law Is Unclear

Read literally, the bankruptcy exception excludes from the opinion (and therefore eliminates the need for the opinion giver to disclose by specific exception) all federal and state insolvency laws. However, the federal Bankruptcy Code specifically excludes domestic banks and insurance companies and certain others from coverage (11 U.S.C. § 109) (1994 & Supp. II 1996), relegating their insolvency to other applicable federal or state law. The opinion giver is entitled to assume that the opinion recipient’s lawyer knows federal law and is aware that state law applies to certain bank and insurance company insolvencies not covered by federal law. However, it seems unrealistic (particularly if opinions are submitted to opinion recipients whose lawyers do not customarily practice in the particular state) to assume that counsel for the opinion recipient will be familiar with the coverage of state laws (other than those applicable to banks and insurance companies) that apply to specific types of debtors.⁷⁶ As a result, and despite the broad language of the bankruptcy exception, the Committee believes that it is the better practice for the opinion giver not to rely on the bankruptcy exception to exclude from opinion coverage state insolvency laws applicable to specific types of debtors other than banks and insurance companies. Because current practice is unclear, if any question exists whether the Company may be in a class protected by state insolvency law, lawyers representing opinion recipients may wish to make at least an informal inquiry of the opinion giver as to state law.

is integral to the Bankruptcy Code) are within the scope of the bankruptcy exception, even if not expressly mentioned.

76. For example, under the Bankruptcy Code municipalities may be forbidden by state law from filing as a debtor; under the Bankruptcy Code an involuntary proceeding may not be commenced against a farmer. In each case state law can therefore provide a moratorium, if the state chooses to do so. The question is whether state law in fact does so.

3.3.4 Equitable Principles Limitation—The Attempt To Define Equity

Opinion preparers may conclude that particular provisions of an agreement are binding and yet envision that, under certain circumstances, those provisions may not be given effect by a court. The equitable principles limitation relates to those principles courts apply when, in light of facts or events that occur after the effectiveness of an agreement, they decline in the interest of equity to give effect to particular provisions in the agreement.⁷⁷ For example, under the circumstances of a particular case, a court may determine that a notice provision is too short or the withholding of a consent is unreasonable. When such court determinations are grounded in the belief that to enforce the contract literally would be inequitable in the context in which the dispute has arisen, the equitable principles limitation would apply. However, if the notice provision would in all circumstances be held to be too short or if the withholding of consent would in all circumstances be improper, the equitable principles limitation would not apply. Relief would be denied because of the invalidity of the provision, rather than because of the application of equitable principles.

What then is covered by the equitable principles limitation? It covers not only the availability of traditional equitable remedies (such as specific performance or injunctive relief) but also defenses rooted in equity that result from the enforcing party’s lack of good faith and fair dealing, unreasonableness of conduct,⁷⁸ or undue delay (*e.g.*, laches). In addition, the limitation covers those situations in which a court may decline to give effect to a contractual provision because the enforcing party has not been significantly harmed as where an alleged breach is not material and has not resulted in any meaningful damage to the party seeking enforcement.

Because the courts have an interest in justice (as well as predictability) and concepts relating to fair dealing provide broad discretion, any attempt to define with precision the limits of the equitable principles limitation is unlikely to succeed. Thus, opinion letter language purporting to narrow the equitable principles limitation is rarely requested or provided. Even an opinion that a specific remedy will be available is ordinarily subject to the equitable principles limitation.

77. The equitable principles limitation applies to the enforcement of an agreement, not to its formation. If before rendering the remedies opinion the opinion preparers believe that coercion, duress or similar inequitable conduct has prevented the formation of the agreement in question, they should not render the opinion (or should disclose their concerns, if the client consents). Unless they have knowledge to the contrary, the opinion preparers are entitled to assume the absence of conduct so egregious as to preclude formation of an agreement (without so stating and subject to the usual rules governing use of assumptions—*see* Section 2.3).

78. Lack of good faith and fair dealing and unreasonableness of conduct cover concepts such as coercion, duress, unconscionability, undue influence, and in some cases, estoppel.

3.4 PRACTICAL REALIZATION

3.4.1 “Practical Realization”—A Limitation On Stated Remedies Along With A Limited Assurance

While exceptions ordinarily identify with specificity the provisions of the agreement to which they apply, the “practical realization” qualification takes an entirely different approach. One common example of the qualification is as follows:

Certain of the [remedial]⁷⁹ provisions in the Agreement may be further limited or rendered unenforceable by applicable law, but in our opinion such law does not make the remedies afforded by the Agreement inadequate for the practical realization of the principal benefits intended to be provided.

Opinion givers use “practical realization” language of the sort quoted above as a way of opining on agreements (most often seen in lease and certain secured financing transactions) that contain many specific remedies, some of which may be unenforceable exactly as written or may be mutually inconsistent but are stated to be nonexclusive. By use of a “practical realization” qualification, opinion givers seek to avoid the time and cost of analyzing each remedial provision and its relationship with the other provisions and of taking numerous, specific opinion exceptions. Some experienced opinion recipients are receptive to this opinion “shortcut”. Others view it as depriving them of appropriate guidance concerning the availability to them of particular remedies. Despite its inherent ambiguity, the “practical realization” language quoted above has been entrusted with tradition and become an aspect of customary practice. The Committee believes that its continued use should be confined to its historical context of lease and secured financing transactions.

When the “practical realization” qualification is used, the remedies opinion should be understood to mean that, where inconsistent or legally defective remedies are set forth in an agreement, the remedial provisions available taken as a whole will nevertheless provide the opinion recipient, in the event of a default by the Company, the benefit of its bargained-for ability to realize upon security or leased property and pursue a claim for damages.⁸⁰ Like the remedies opinion itself, a reference to practical realization should always be understood to be subject to the bankruptcy exception and equitable principles limitation and to any other specifically stated opinion exceptions.

79. An often-used version of this exception omits the word “remedial,” thereby seemingly making the qualification applicable to the entire agreement. The opinion giver thus avoids any risk of controversy over whether a provision is a “remedy.” The Committee prefers omitting the word “remedial” for this reason.

80. “The practical realization” conclusion should not be understood to cover benefits conferred by a legal status, *e.g.*, whether a lease is a “true lease,” who holds title to property, or whether the lessor is the “tax owner” of leased equipment. Opinions on these issues, if desired, should be requested as separate opinions.

The risk for both opinion givers and opinion recipients is that each will understand “practical realization” to mean something different. Attempts to define the “principal benefits” of the agreement have been unsuccessful.

3.4.2 Broad Practical Realization As A Reassurance Is Inappropriate

Sometimes an opinion recipient, faced with myriad opinion exceptions, will request that the practical realization language quoted in Section 3.4.1 be modified to read substantially as follows:

Notwithstanding the exceptions noted above, [lender] will achieve the practical realization of the benefits intended to be conferred by the Agreement.

This broad “practical realization” language is qualitatively different from the more limited version described in Section 3.4.1. Unlike the more limited version, which is subject to all the standard and specifically stated exceptions, this version overrides all those exceptions, requiring the opinion giver to conclude that those exceptions collectively will not prevent the opinion recipient from enjoying the “benefits” of the agreement. Sometimes availability of the benefits depends on the value of the security involved because a lender may have no recourse against the borrower. In addition, this language is undesirable because of the possibility of its being confused with the narrower and more frequently seen practical realization form described in Section 3.4.1. In the view of the Committee this form of opinion is inappropriate and should not be requested or rendered.

3.5 AMBIT OF THE REMEDIES OPINION

3.5.1 Other Limits

Besides contract law, other bodies of law also bear on the effectiveness of the provisions of an agreement. These include, for example, usury laws, the antitrust laws, the Securities Act of 1933, the Securities Exchange Act of 1934, statutory shareholder approval requirements and requirements for approval of related-party transactions. Which bodies of law are covered by the remedies opinion depends on customary practice.

Customary practice requires the opinion preparers to take account of law that lawyers who render legal opinions of the type involved would reasonably recognize as being applicable (i) to transactions of the type covered by the agreement and (ii) to the role of the Company (but not other parties to the agreement) in the transaction. The analysis involved is a complex one. It is made more complex by the exclusion of laws that lawyers would recognize as being applicable to the transaction, but that are customarily not covered unless specifically addressed. *See* Section 3.5.2(c). The practicalities of opinion recipient need and the amount of work required to support an opinion have defined customary practice. Opinion preparers do not customarily seek (nor are they requested to seek)

guidance from experts in every specialized field of law that might be implicated by the undertakings in an agreement. Such an effort would seldom be cost-justified even in very large transactions.

Under customary practice, an issue is deemed to be covered by the remedies opinion only when it is both (i) essential to the particular conclusion expressed and (ii) reasonable under the circumstances for the opinion recipient to conclude that it was intended to be covered. The remedies opinion does not cover laws that do not affect enforceability of the agreement but merely create an adverse legal consequence (*e.g.*, a fine) for a party to an agreement.

3.5.2 Specific Examples Of Remedies Opinion Limits

(a) Coverage Of Remedies Opinion Where Regulatory System Voids Certain Obligations

(i) Regulatory Issues Involving The Client's Status Or Activities Are Covered

The nature of the business conducted by the Company will affect the scope of the opinion. The opinion giver can fairly be charged with the responsibility to advise whether its client has complied with regulatory statutes applicable to it because of the nature of its business if non-compliance impairs enforceability. Thus, in a state such as New York, where a purchase of shares of a telephone corporation by another telephone corporation requires prior New York Public Service Commission approval, a remedies opinion rendered by purchaser's counsel is understood as a matter of customary practice to cover the effect of the Public Service Law on the purchase agreement's enforceability against its client. Similarly, the opinion preparers should consider the effect of the Investment Company Act of 1940 when preparing an opinion on the binding effect of an agreement on a registered investment company.⁸¹

(ii) Regulatory Issues Involving Other Parties Are Not Covered

On the other hand, a remedies opinion is not as a matter of customary practice normally read to cover regulatory statutes applicable solely to the opinion recipient. Thus, in rendering a remedies opinion on a bank loan, borrower's counsel is not passing on whether the loan violates the bank's lending limit or whether the bank obtained any required governmental approvals.

(iii) Regulatory Issues Involving Both Parties Are Sometimes Covered

Some statutes affect both the opinion recipient and the opinion giver's client. For example, usury laws, which limit a lender's interest charges, affect the enforceability of the borrower's interest payment obligation. A remedies opinion by borrower's counsel as a matter of customary usage covers usury laws that affect enforceability of the borrower's obligations although those laws also apply to the other party to the transaction, the lender.

A more difficult case is presented by the Federal Reserve Board's margin

81. The opinion preparers should also consider the application of the Act if they recognize that the Company's activities may make it an inadvertent investment company.

regulations, which also contain provisions applicable both to the lender and to the borrower. Unlike coverage of the usury laws, custom is not clear here. Not all experienced counsel believe that compliance with the margin regulations by both parties to a financing transaction is within the scope of the remedies opinion of borrower’s counsel, although a violation of the regulations may void a loan. Therefore, many lenders require a separate opinion addressing this question. In light of the unusually complex issues the margin regulations may present concerning a particular transaction structure or a particular borrower, the Committee believes that a separate opinion on the effect of these regulations is the better practice, if such an opinion is desired.

(b) Coverage Of Remedies Opinion As To Disclosure And Discharge Of Fiduciary Obligation—Issues Affecting Authorization

Opinion preparers will routinely obtain certificates or other evidence of various approvals (*e.g.*, approval by the board of directors or shareholders) that are required to give an opinion. The certificate or other evidence is to the effect that the required vote has been obtained and, if necessary, that a meeting was held and appropriate notice was given. Because of the essentially legal nature of these matters (*see* Section 2.2.1(b)), such a certificate is understood as not covering the questions (i) whether those voting were sufficiently informed about the matter on which they voted and (ii) whether those voting were doing so inappropriately because, for example, they had not disclosed an interest in the transaction or had violated a fiduciary obligation. As for the first of those questions, the opinion preparers may assume without disclosure and without investigation (subject to the customary limits on unstated assumptions) that the information required to be presented to obtain an effective approval has been provided. Any assessment of the adequacy of factual disclosure (for example, in proxy statements) is a significant task and one that is customarily not undertaken in order to render a remedies opinion. Similarly, the opinion preparers are not required as a matter of customary diligence to inquire into whether those approving the transaction have violated their fiduciary obligations or have an interest they have failed to disclose, unless the opinion expressly covers those issues. The remedies opinion is based on the assumption, usually unstated, that those who have approved an agreement have satisfied their fiduciary obligations and appropriately disclosed any interest.⁸²

(c) Coverage Of Remedies Opinion—Specific Laws: Tax, Antitrust and Securities Excluded By Custom

The remedies opinion addresses enforceability questions. Thus, it calls on the opinion preparers to consider whether provisions of the agreement

82. Some lawyers see these issues as excluded from the opinion rather than being the subject of an assumption. *See* note 148. As a practical matter differences in these approaches are not significant.

would be given effect by a court on the date of the opinion letter and whether they would be given effect in the future in various circumstances. For example, a "floating rate" loan might not be usurious at closing, but if it contains no cap on the interest rate, at some point the loan might be unenforceable in part or whole, thus requiring that an exception be taken to a remedies opinion given at closing. While the emphasis is on corporate and other everyday commercial laws (*e.g.*, N.Y. General Obligations Law), a broad range of other laws may have some affect on the enforceability of an agreement. The antitrust laws might void a joint venture deemed anti-competitive. A transfer of technology to a non-American might be deemed to be subject to the Exon-Florio amendment to the Defense Production Act of 1952. There are many other examples. Which of these statutes should be considered in giving a remedies opinion, and which not? Custom is that (in the absence of language indicating the contrary) the opinion does not cover the tax laws, insolvency laws, antitrust laws, securities laws (except as contemplated by note 81 and the accompanying text) and the Exon-Florio amendment.

3.5.3 Absence Of Custom

The Committee believes that, as to the many areas where custom is unclear, the opinion recipient should request opinions on the matters it wishes to have covered. The Committee also believes that it would ordinarily be counterproductive for opinion givers to try to identify in opinion letters each area that is not covered. First, the list of exclusions will never be complete, yet any list may suggest that it is complete. Second, lists of exclusions in opinion letters are likely to provide a new area for negotiations that will impede rather than facilitate the opinion process.

3.6 REMEDIES OPINIONS AND ARBITRATION

3.6.1 Opinion That Dispute Is Arbitrable Is Inherent In Remedies Opinion

An arbitration provision in an agreement constitutes an "undertaking," a promise by each party to the other, concerning the forum for resolution of disputes. The remedies opinion covers arbitration provisions just as it covers others undertakings in the agreement. Remedies opinions on agreements containing arbitration clauses do not customarily indicate when disputes arising under the agreement are subject to arbitration, nor do they attempt to describe the differences between the resolution of disputes through litigation and arbitration.⁸³

83. In arbitration, no appellate court is available to correct a mistake of law. Often the parties will not even be able to determine whether the arbitrators (some or all of whom may not be lawyers) have properly understood and applied the law. Under the rules governing many arbitrations, no explanation of how the tribunal reached its decision is provided; only a statement of the decision is given. Differences may also exist in the discovery that is permissible, the remedies available and other matters.

Public policy sometimes requires that a dispute be resolved in a judicial forum instead of in arbitration. Public policy may also preclude the submission to arbitration of certain issues. For example, some courts will not give effect to an arbitration clause that provides that arbitration can only be commenced by one party to an agreement. However, in recent years a pronounced judicial trend has developed toward narrowing the areas in which public policy will preclude arbitration. If opinion preparers are unable to conclude that the arbitration provision will be given effect in all respects, they should include in the opinion letter an exception to the remedies opinion, for example, as follows:

We express no opinion with respect to the provision in the agreement requiring arbitration as to matters of _____.

3.6.2 Rules Of Arbitral Tribunals Not Covered By Remedies Opinion

Agreements that contain arbitration provisions usually incorporate by reference the rules of an arbitral tribunal (*e.g.*, “any dispute is to be determined in accordance with the Commercial Arbitration Rules of the American Arbitration Association”). While the remedies opinion addresses the enforceability of the arbitration provision, as a matter of customary usage the remedies opinion is understood not to address the enforceability of these rules.

ARTICLE IV LAW COVERED BY THE OPINION LETTER

4.1 SETTING LIMITS ON THE LAW OPINION LETTERS COVER

Opinion letters customarily include a statement that limits their coverage to the law of a specific state or states.⁸⁴ Sometimes the limiting statement relates to a particular area of state law or even a single statute, *e.g.*, the Delaware General Corporation Law.⁸⁵ Opinion letters also often state that they cover federal law. If in identifying the law covered an opinion letter does not state that it covers federal law (or the law of a particular state), that law is understood, as a matter of customary usage, not to be covered except to the extent that it is expressly addressed by specific opinions in the letter.

When, as discussed in Article V, opinion preparers are relying on opinions of other counsel with regard to the law of particular states, they

84. Such a statement is not necessary when an opinion letter is directed to a particular statute, such as the Securities Act of 1933, and its coverage is apparent from the specific opinion or opinions being rendered.

85. Many lawyers who do not practice in Delaware regard themselves as competent to render opinions on various matters covered by the Delaware General Corporation Law, such as corporate status. *See* Section 6.1.

typically will include in the statement specifying the law covered by the opinion letter a reference to the law of those other states. In doing so, many lawyers take care to avoid broadening the coverage of the opinion letter beyond what they intend by limiting the reference to the law of other states to the specific opinion paragraphs they intend that law to cover. A statement along the following lines might be used:

The opinions expressed herein are limited to the law of the State of New York, the Delaware General Corporation Law, the federal law of the United States and, as to the opinion given in paragraph _____, the law of the Commonwealth of Massachusetts and, as to the opinion given in paragraph _____, the law of the State of Connecticut.

In deciding what laws to cover, opinion preparers will consider the competence of their firm in the applicable areas of law as well as other relevant factors. However, even if their firm has the requisite competence, opinion preparers may decline to give an opinion for a variety of reasons. For example, other lawyers available to render the opinion may be more knowledgeable as to the particular subject matter or the opinion preparers may not have done the diligence required to give the opinion.

4.2 EVALUATING PROPOSED LIMITS ON THE LAW COVERED

Once the law to be covered in an opinion letter is tentatively set, the opinion recipient's counsel will need to consider the consequences of the proposed limits. Assume that the Company is a Delaware corporation, based in Massachusetts, represented by Delaware counsel. The transaction involved is a loan by a New York bank secured by accounts receivable and New York law is the chosen-law in the loan agreement and in the security agreement. The opinion letter states that it is limited to the law of Delaware and to federal law. It contains what purports to be a remedies opinion.

The limitation on the laws covered (which, by not specifically including New York as a jurisdiction whose law is covered, excludes New York law) is by custom read to limit the meaning of the opinions given.⁸⁶ The No Violation of Law and Approvals and Filings opinions, limited to Delaware and federal law, may be insufficient in the mind of the opinion recipient, given the lack of borrower activity in Delaware. In such a case the opinion recipient may require opinions or other diligence from counsel familiar with New York law and the law of the states in which the borrower's principal operations are conducted. *See* Section 4.6. Creation of a security interest in the accounts receivable will be governed by New York law, but perfection will be governed by Massachusetts law.⁸⁷

86. This is more fully discussed at Section 4.6.

87. U.C.C. §§ 1-103, 9-203, 9-401(d) (1995).

4.3 DETERMINING THE LAW APPLICABLE TO THE AGREEMENT

Agreements often specify the law intended to govern their interpretation (the “chosen-law”) using a provision along the following lines:⁸⁸

This agreement shall be governed by the law of the State of New York.⁸⁹

If a chosen-law is specified in an agreement⁹⁰ the court that hears a contract dispute, if required to determine the law applicable to the agreement (the “governing law”), will ordinarily treat the chosen-law as the governing law *if* at least one of the parties or the transaction bears a “reasonable relationship” to the state whose law is the chosen-law.⁹¹

New York and Delaware,⁹² by statute, authorize parties to agreements involving larger monetary amounts to adopt their law as the chosen-law, even if neither the transaction nor any of the parties to the agreement has any relationship to them.⁹³

88. See definition of chosen-law in Section 1.9(p). If a chosen-law is not specified, a court will ordinarily apply the law of the state that bears the “most significant relationship” to the transaction and the parties. See RESTATEMENT (SECOND) OF CONFLICTS OF LAWS § 188 (1971). The result of the analysis of “contacts” made by courts to determine the most significant relationship may be unpredictable. Also, separate agreements forming a part of the same transaction may be subjected to different governing law as a result of such an analysis.

89. Although the authority is to the contrary (*see, e.g.*, *Siegelman v. Cunard White Star Ltd.*, 221 F.2d 189, 194 (2d Cir. 1955)), some lawyers are concerned that courts may construe a clause such as the one quoted in the text to authorize the application of the choice-of-law rules as well as the substantive law of the state whose law has been selected as the chosen-law. Because of this concern, they use a chosen-law provision along the following lines:

This agreement shall be governed by the law of the State of New York, excluding, however, its choice-of-law rules.

The Committee believes that both chosen-law provisions mean the same thing. Neither provision can be intended to exclude N.Y. GEN. OBLIG. LAW § 5-1401 (McKinney 1989 & Supp. 1998) or any similar statute, nor can it be interpreted (and an opinion as to its enforceability cannot be read) to exclude mandatory choice-of-law rules. See Section 4.5.

90. See RESTATEMENT (SECOND) OF CONFLICTS OF LAWS § 187 (1971).

91. While chosen-law provisions in agreements usually specify only the law of a state, relevant federal law will apply to the agreement as well. However, as a matter of customary usage an opinion letter is not understood to cover federal law unless the opinion letter indicates that it does. See Section 4.1.

Revisions of U.C.C. Article 1 (§ 1-302 replacing current § 1-105) now proposed would require deference to chosen-law provisions in transactions governed by the U.C.C., even when the transaction bears no reasonable relationship to the chosen-law state.

92. N.Y. GEN. OBLIG. LAW § 5-1401 (McKinney 1989 & Supp. 1998); DEL. CODE ANN. tit. 6 § 2708 (1993). Texas takes a different approach in TEX. BUS. & COM. CODE ANN. § 35.51 (1987 & Supp. 1998); that statute permits a choice, but only among jurisdictions to which the transaction bears a reasonable relationship.

93. Those who adopt the law of a state (pursuant to statute like that of New York) in a transaction that may not meet the “reasonable relationship” test will ordinarily provide in

4.4 "CHOSEN-LAW PROVISION" COVERED BY REMEDIES OPINION

The chosen-law provision of an agreement constitutes an undertaking by each party to the other regarding the choice of law that is to govern their obligations. Accordingly, like all other undertakings of the parties in the agreement, the effectiveness of the chosen-law provision is covered by the remedies opinion. Sometimes opinion letters contain a separate opinion that specifically addresses the effectiveness of the chosen-law provision. These opinions are included merely as a matter of emphasis if the opinion letter also contains a remedies opinion.

4.5 INHERENT LIMITATIONS ON CHOSEN-LAW

Even if the chosen-law is determined by a court to be the law generally governing the agreement, it will not necessarily govern every aspect of the agreement. Some aspects will be governed by mandatory choice-of-law rules. Consider a loan agreement granting a lender a mortgage on real estate and a security interest in accounts receivable. The law of the situs governs real estate conveyances and the choice-of-law rules specified in the Uniform Commercial Code govern the perfection of a security interest in accounts receivable. Similarly, the law of the state of incorporation governs the "internal affairs" of a corporation. As a matter of customary usage, these inherent limitations are not ordinarily stated in opinion letters.

As with other opinions, an opinion on the enforceability of an agreement covers only the law of the jurisdictions specifically identified for coverage in the opinion letter. The enforceability opinion (assuming that it covers the chosen-law jurisdiction, as it normally will) considers (among other things) whether the courts in the chosen-law jurisdiction will, in applying the law of that jurisdiction, give effect to the chosen-law provision. The opinion does not address whether the courts outside the chosen-law jurisdiction will give effect to the chosen-law provision. Even if a court outside the chosen law jurisdiction generally were to give effect to such a provision, it might apply the law of some other jurisdiction to particular provisions of the agreement if it determined that (i) another jurisdiction had a "paramount interest"⁹⁴ or (ii) the application of the chosen-law offended the public policy⁹⁵ of the forum state in some substantial way.

the agreement that any litigation is to be heard only in the courts of the state whose governing law has been chosen. This, too, has been authorized by statute. *See, e.g.*, N.Y. GEN. OBLIG. LAW § 5-1402 (McKinney 1989 & Supp. 1998). Note that the New York statute addresses adoption only of the law of that state and the Delaware statute only of Delaware law.

94. In the following cases, one involving a franchise and the other a distributorship, the chosen-law was rejected as the governing law and statutory safeguards under the law of the forum were applied: *Electrical & Magneto Serv. Co. v. AMBAC Internat'l Corp.*, 941 F.2d 660, 662 (8th Cir. 1991) (Missouri interest overrides provision choosing South Carolina law as governing law); *Soloman Distributors, Inc. v. Brown-Forman Corp.*, 888 F.2d 170, 172 (1st Cir. 1989) (Maine interest overrides provision choosing California law as governing law).

95. The public policy of a forum state is a part of its "law".

4.6 ALTERNATIVES WHEN CHOSEN-LAW PROVISION IN AGREEMENT SPECIFIES LAW OF A STATE NOT COVERED BY OPINION LETTER

In many transactions the Company and its counsel will be located in one state and the other party to the agreement and its counsel will be located in another. In such transactions, the other party to the agreement, for example, a New York bank lending to a borrower headquartered in Massachusetts and incorporated in Delaware, often will require that the law of its state (New York) be the chosen-law. Because borrower’s counsel in this example is typically not willing to render an opinion under the chosen-law, a question will naturally arise regarding the adequacy of its opinion (if limited to Massachusetts law) on the loan agreement.

One alternative is for the opinion recipient to require the borrower to retain special counsel to render a remedies opinion under the chosen-law. This is the traditional approach and it is adhered to in many transactions. However, the borrower may object to the additional expense of bringing in another law firm and argue that the bank’s counsel, who drafted the agreement, should be the one the bank looks to for an opinion on the loan agreement’s enforceability. In some situations (particularly if the loan is small and the cost of preparing the opinion is large in relation to the loan), a lender may forgo a remedies opinion from the borrower’s counsel.

Another alternative, and one that has received growing acceptance, is for the opinion recipient not to receive an opinion from borrower’s counsel on the enforceability of the agreement under the chosen-law (New York). Instead, the opinion recipient obtains opinions from borrower’s counsel⁹⁶ that (i) the chosen-law provision in the agreement will be given effect by the courts of the headquarters state (Massachusetts),⁹⁷ but (ii) if the law of the headquarters state were nevertheless held to be applicable to the loan agreement,⁹⁸ the agreement would be a binding obligation of the Company enforceable in accordance with its terms under the law of the headquarters state. Since the headquarters state is a likely place for a suit to be brought to enforce the agreement, the opinion recipient has reason to be concerned about the effectiveness of the chosen-law provision under that state’s law and, more generally, the enforceability under that law of key provisions in the agreement.

96. This assumes, as will usually be the case, that borrower’s counsel is in a position to render an opinion on the law of the headquarters state.

97. In some states the applicable conflict-of-laws rules may make such an opinion difficult to give. In those circumstances, opinion recipients will often be satisfied solely with the opinions described in subparagraph (ii).

98. An alternative to the opinion described in subparagraph (ii) that has also gained wide acceptance is for borrower’s counsel to render a remedies opinion as if the agreement selected the law of the headquarters state as the chosen-law. Both alternatives are preferable to an opinion based on an assumption that the chosen-law is the same as the law of the headquarters state because it avoids the imprecision inherent in that assumption.

An approach the Committee recommends be avoided is for borrower's counsel to render a remedies opinion without specifying how it is affected by the statement in the opinion letter excluding coverage of the chosen-law. To do so risks misunderstanding between the opinion giver and the opinion recipient's counsel over the coverage of the opinion. Some lawyers have argued that when the chosen-law is different from the law covered by the opinion letter, the remedies opinion should be understood to mean that the chosen-law provision in the agreement is effective under the law of the state covered by the opinion letter—but nothing more. Such an approach lacks general acceptance. The Committee recommends that opinion preparers discuss with counsel for the opinion recipient what the opinion should cover and, once an understanding is reached, reflect that understanding expressly in the opinion letter.

4.7 GOVERNING LAW AND OTHER COMMON OPINIONS

(a) “No Litigation” Opinion

The “No Litigation” Opinion (Section 6.8) is primarily factual in nature. Thus, the determination of governing law is irrelevant.

(b) “No Breach Or Default” Opinion

The “No Breach or Default” opinion will often relate to agreements governed by the law of jurisdictions whose law is not covered by the opinion letter. Nevertheless, the agreements are covered by the opinion. For a discussion of how the opinion is interpreted, *see* Section 6.5.6.

(c) “No Violation Of Law” And “Approvals And Filings” Opinions

The “No Violation of Law” (Section 6.6) and “Approvals and Filings” (Section 6.7) opinions are usually not intended to cover the law of all the jurisdictions in which the Company carries on its operations. This limitation on coverage is accomplished either by (i) the opinion letter provision regarding the law covered by the opinion letter or (ii) the language of the specific opinion (which may contain a limitation beyond that applicable to the opinion letter generally).

ARTICLE V OPINIONS BEYOND THE EXPERTISE OF THE OPINION GIVER

5.1 THE UMBRELLA OPINION

Most complex financial transactions involve the laws of more than one state. For example, assume that a Delaware corporation headquartered in Massachusetts produces a patented item. A New York bank has agreed to lend to the Company on the security of its accounts receivable and its patent, using documentation that designates New York law as the chosen-law. The law of Delaware, Massachusetts and New York as well as federal patent law are involved. The Company's counsel (referred to as the “primary opinion giver” here) is a New York law firm with some expertise in

Delaware corporate law. The primary opinion giver is not willing to provide an opinion on either patent law or Massachusetts law.

Many lenders will prefer to receive a single opinion letter from the primary opinion giver containing all opinions. If the primary opinion giver is agreeable to this approach, it will obtain opinion letters from other lawyers (“other counsel”) covering the opinions not within its expertise (here Massachusetts law and patent matters) and will include in its opinion letter (the “primary opinion letter”) opinions on those matters in reliance on other counsel’s opinions. It will render the New York and Delaware law opinions based on its own expertise. The primary opinion giver will incorporate the conclusions of the other counsel in its opinion *in haec verba* (or by reference) including all applicable opinion limitations. The primary opinion letter will state that the Massachusetts opinions and the patent opinions are given in reliance on opinions of the other counsel (who will be identified by name), and the primary opinion giver will deliver to the opinion recipient copies of the opinion letters of other counsel that it is relying on. The primary opinion letter will state that it covers New York, Massachusetts, Delaware and federal law. Since the opinion (in the primary opinion letter) on Delaware law will be limited to such matters as corporate status, authority to enter into the agreement and good standing, the primary opinion letter often will state that it is limited to the Delaware General Corporation Law, rather than to Delaware law generally. Similarly, the reference in the opinion letter to Massachusetts law will be limited to the specific paragraphs of the primary opinion letter that are based on the opinion of Massachusetts counsel. The primary opinion giver may also wish to rely (in the primary opinion letter) on an opinion of inside counsel regarding litigation and claims since inside counsel is often in a better position than the primary opinion giver to know about these matters.

In relying on opinions of other counsel, an opinion giver takes on the responsibilities described in the following paragraph with respect to those opinions. These responsibilities flow from its statement of reliance rather than from any undertaking in the primary opinion letter or elsewhere. However, many opinion letters, in addition to stating the fact of reliance, state that the opinion recipient (or opinion giver) is “justified” in relying on the other counsel opinions or that those opinions are “satisfactory in form and scope”. Such language does no more than state expressly the responsibility of any primary opinion giver who relies on opinions of other counsel and as a matter of customary usage is understood not to broaden that responsibility. By contrast, statements that the opinion is “satisfactory in form and substance” or that the opinion giver “concur[s]” are understood to go farther.⁹⁹

99. “Concur[s]” and “satisfactory in form and substance” require not only that the opinion preparers satisfy themselves that reliance is reasonable as described in the next paragraph of

By stating reliance on the opinion of a local or specialized law firm or inside counsel (other than counsel for the opinion recipient), the primary opinion giver indicates that such reliance is in its professional judgment reasonable. To establish that reasonableness, the preparers of the primary opinion must ascertain the reputation of counsel relied on for competence in matters of the kind involved.¹⁰⁰ Such a determination is ordinarily made as a part of the process of engaging that other counsel to render the required opinion. In addition, the preparers of the primary opinion must determine that the opinion of other counsel responds to the needs of the primary opinion giver in its opinion. Since the primary opinion giver's opinion normally will mirror that of other counsel, that burden is not a substantial one.

5.2 UNBUNDLING OPINIONS

Opinion recipients are far more willing today to accept separate opinions of counsel than they were even a decade ago. Thus, in the example above, the primary opinion giver may limit its opinion letter to New York law and the Delaware General Corporation Law, and the opinion recipient will rely on separate opinion letters of other counsel on Massachusetts and patent law. Opinion recipients recognize that the burden of reviewing several separate opinion letters to establish their overall coverage is often not a substantial one. Sometimes the opinion recipient's counsel will prefer to deal directly with one or more of the law firms rendering the separate opinions on behalf of the borrower. For example, counsel for the lender might find an informal discussion with patent counsel informative.

5.3 OPINIONS, EXPERTISE AND ADMISSIONS

In the example in Section 5.1, the opinion giver renders a Delaware corporate law opinion, although none of its lawyers is admitted to practice law in Delaware. The opinion is rendered because the opinion preparers

the text but also that they make some independent investigation of the law involved. While "concurrency" represents the greater responsibility, the diligence these formulations require the opinion preparers to perform is not clearly established by customary practice. In the unusual situations in which these formulations are required, the opinion preparers should consider describing the diligence done rather than using terms that may give rise to misunderstanding as to the responsibility undertaken. In most cases, other counsel is engaged because the opinion giver lacks relevant expertise. Thus, whatever responsibility the opinion giver may undertake in giving a concurrence or similar opinion, that responsibility is by necessity limited by this lack of expertise. Given this context, many lawyers resist "concurrency" and "satisfactory in form and substance" opinions as being inappropriate in most situations. *See* ABA Guidelines Section I(C)(3).

100. If the opinion letter states that it relies on the opinion of counsel for the opinion recipient, such reliance is equivalent to reliance on a stated assumption. *See* Section 2.3. In accordance with customary practice, the opinion preparers are not required to make a judgment as to the reputation of the opinion recipient's counsel. *See also* note 49.

believe they are competent to render it.¹⁰¹ Customary practice permits the rendering of such an opinion. Had the opinion preparers determined that they lacked competence (or were otherwise unwilling to give the opinion), the Company would have had to engage Delaware counsel as well, unless the opinion recipient was willing to modify its opinion request.

5.4 RELIANCE ON AN OPINION LETTER OF OTHER COUNSEL

An opinion giver who relies on an opinion letter of other counsel customarily obtains permission from the other counsel to do so. Typically, that permission is granted by making the primary opinion giver the addressee of the opinion letter of other counsel or by including permission for use in the other counsel’s opinion letter or in some other document. For example, the opinion letter of other counsel might state that:

The undersigned agrees that [the primary opinion giver firm] may rely on the opinions set forth in paragraphs 1, 2 and 3 of this letter in rendering its opinion furnished pursuant to Section _____ of the Credit Agreement.

The opinion recipient may also obtain permission to rely on the other counsel opinion letter in the same way.¹⁰² Permission to rely is one key element in any malpractice claim against the other counsel. Without it, the claimant may have difficulty showing that its reliance was justified, a necessary part of the claim.

Ordinarily the opinion letter of other counsel to be relied on is prepared for the specific transaction at hand. An opinion letter on the same issue in a previous or even contemporaneous related transaction for the same client normally is not intended for use in other transactions.

On occasion, an opinion giver will rely (with permission) on an opinion of counsel for the opinion recipient. (*See* note 100). More commonly, opinion givers expressly assume the conclusions set forth in the opinion letter of counsel for the opinion recipient (*see* Section 5.5). The responsibility undertaken by the opinion giver is the same, whichever approach is taken.

5.5 ASSUMPTIONS RATHER THAN RELIANCE

In recent years, the business community has increasingly and properly asserted its authority to determine the extent of diligence done and the source of the diligence. This makes transactions more cost-effective. At

101. Even if a lawyer in the opinion giver firm is admitted to practice in the jurisdiction whose law is to be covered, the firm may not feel competent to provide the opinion requested. Mere admission to practice does not establish competency. In any case, the opinion recipient often will not be willing to accept an opinion letter except from counsel known to it to be experienced in the area involved.

102. The opinion letter might state: “In addition to the addressee, _____ may rely on this opinion letter as if it were addressed to and delivered to it on the date hereof.” The addressee is the primary opinion giver.

the same time, it presents new questions for opinion givers who are asked to provide full opinions with a different and sometimes less than customary diligence mix. For example, sometimes the client permits other counsel to be chosen by the opinion recipient; sometimes the other counsel is chosen by the client or is inside counsel. The opinion giver may be concerned about relying on an unknown lawyer or one thought to be unfamiliar with the issues. One answer is to unbundle the opinions. *See* Section 5.2. Another is to give the full opinion but to rely on express assumptions for the matters covered by the opinions of other counsel instead of relying on the other counsel's opinions themselves. Still another is for the primary opinion giver to become comfortable enough to rely on the other counsel, after working with it and checking its reputation with lawyers who are knowledgeable about the other counsel.

If the assumption approach is followed and other counsel opinion letters are obtained, the assumptions need not merely "mirror" the conclusions expressed in the relevant opinion letters but may properly go beyond them. For example, an opinion of other counsel might be based on a review of specified documents; the parallel assumption by the primary opinion giver would not ordinarily be limited by the documents reviewed by other counsel.¹⁰³

ARTICLE VI SPECIFIC OPINIONS

Opinion recipients customarily seek information from counsel for the Company regarding the Company, the transaction and the relevant agreement. An opinion recipient typically wants to know, for example, whether the entity it is dealing with is a *de jure* corporation, whether that entity has the corporate power to enter into the transaction and has taken the steps required to authorize it (including obtaining any necessary regulatory approvals), whether the transaction violates applicable law or will result in a breach of other agreements to which the Company is a party, and whether the agreement will be given legal effect in the courts. The Illustrative Opinion Letters at the end of this Report include opinions that are commonly requested and rendered in debt and equity financings. This Article discusses those opinions (except for the remedies opinion, which is discussed in Article III).

The comments in this Article regarding the meaning of an opinion and the work the opinion preparers are expected to do to support it are based on customary usage and customary diligence, which, as discussed in Section 1.4, are key aspects of customary practice. In particular transactions

103. For example, an assumption may be made that the transaction will not result in a breach or default under "other agreements" although inside counsel who came to that conclusion only reviewed agreements identified in his opinion as material. If inside counsel's opinion contains an exception as to specific provisions, the assumption will ordinarily contain the same exception. *See* Section 1.4(d).

the opinion giver and counsel for the opinion recipient may choose to depart from customary practice. Departures from customary practice are appropriate provided the opinion letter clearly specifies any material departures. *See* Section 1.5.

The opinions discussed in the following sections tend to be expressed in much the same way from firm to firm and from transaction to transaction. An opinion giver who wishes to limit the meaning of an opinion framed in customary terms needs to make its intentions clear, ordinarily by means of an express statement in the opinion letter. *See* Section 1.5. If an opinion giver has concerns, for example, about a corporation’s existence or the authorization of a class of stock, its omission of the adverb “validly” from the “validly existing” opinion¹⁰⁴ or the adverb “duly” from the “duly authorized” opinion¹⁰⁵ would not adequately communicate those concerns. The comments in the following sections apply not only to the formulation used in the Illustrative Opinion Letters but to all the standard formulations of the opinions discussed.

The following sections refer at various points to the Company’s charter. “Charter” is defined in Section 1.9(b).

6.1 CORPORATE STATUS

When lenders or purchasers of stock or other parties to a significant financial transaction enter into an agreement with an entity that purports to be a corporation, they ordinarily request an opinion from counsel to that entity regarding its status as a corporation¹⁰⁶ under the law of its jurisdiction of incorporation. (*See* Paragraph 1 of the Illustrative Opinion Letters).¹⁰⁷ The corporate status opinion appears as the first opinion in most opinion letters. In identifying the Company’s form of business organization and the law governing its internal affairs, the opinion serves as a cornerstone for many of the opinions that follow. The corporate status opinion passes on the Company’s *de jure* status as a corporation. Thus, it could not be rendered in standard form if the Company is only a *de facto* corporation or corporation-by-estoppel.

How the corporate status opinion is expressed determines the inquiry the opinion preparers customarily conduct to support it. As discussed in Sections 6.1.1 and 6.1.2, both the opinion that the Company has been “duly incorporated” and the opinion that it has been “duly organized”

104. *See* Section 6.1.3.

105. *See* Section 6.2.1.

106. Although the discussion in this Section 6.1 is directed to the status of the Company as a corporation, it may by analogy be applicable to opinions on the status of non-corporate entities, such as limited partnerships and limited liability companies. *See* definition of “Company” in Section 1.9(d).

107. The Illustrative Opinion Letters express the opinion as follows: “The Company is a corporation [duly incorporated and] validly existing under the law of the State of Delaware.” The bracketed language appears in the Illustrative Opinion Letters in Appendices B-1 and B-2.

address compliance with applicable incorporation requirements in effect at the time the Company was incorporated. The duly organized opinion also addresses any post-incorporation matters that may be required to complete the organizational process, such as the initial election or selection of directors and officers. As discussed in Section 6.1.3(b), in many transactions opinion recipients have become comfortable in recent years accepting an opinion (a “stand-alone” validly existing opinion) that simply addresses the Company’s current status as a corporation as reflected on the public record.

The corporate status opinion is directed to the existence of the Company as a corporation. It does not address the potential liability of stockholders for a corporation’s obligations, for example under a piercing-the-corporate-veil theory or pursuant to a statute relating to employee compensation or other matters.

6.1.1 Duly Incorporated

An opinion that the Company has been “duly incorporated” means that the steps taken by the incorporators to incorporate the Company complied with statutory requirements in effect at the time of incorporation. Those steps typically include execution by an appropriate person or persons of a charter in the statutorily prescribed form and the filing of the charter with the proper state officials.¹⁰⁸ The duly incorporated opinion requires that the opinion preparers satisfy themselves that these requirements were met. In doing so, the opinion preparers will be entitled to disregard defects in the incorporation process that the courts of the applicable jurisdiction would deem inconsequential for determining corporate status. In addition, when the record is incomplete, the opinion preparers may be able to rely on the presumption of regularity and continuity.¹⁰⁹

In rendering a duly incorporated opinion, the opinion preparers customarily rely on (i) a confirmation from the Secretary of State that the charter was filed, (ii) a list prepared by the Secretary of State of all amendments that have been filed to the charter and (iii) copies certified by the Secretary of State of the charter and all amendments.¹¹⁰ They then ex-

108. Depending on where and when an entity was incorporated, those steps may also include approval by a specified number of qualified incorporators of prescribed matters at a meeting (or by written consent) and execution by incorporators of statutorily mandated documents. Massachusetts, for example, at one time required the incorporators to execute an “agreement of association” and to hold a meeting before signing and filing articles of organization with the Secretary of State. Determining the requirements that were applicable when an entity was incorporated can be a daunting task if the incorporation took place long ago under a corporation statute that is no longer in effect.

109. See Section 2.4.

110. A duly incorporated opinion would not seem to require an examination of charter amendments because those amendments relate to a corporation’s on-going existence, not its incorporation. However, a duly incorporated opinion is almost always accompanied by a valid existence opinion since an incorporation opinion ordinarily has meaning only if the

amine those documents to confirm that the entity covered by the opinion is the entity to which the documents relate¹¹¹ and that the documents do not contain a provision (for example, a limitation on corporate existence to a term of years) that has resulted in its dissolution as a corporation.¹¹²

6.1.2 Duly Organized

An opinion that the Company has been “duly organized” is a more expansive version of the duly incorporated opinion. In addition to the matters covered by “duly incorporated,” it also covers any matters that under the law of the state of incorporation are necessary to complete the organizational process but take place only after the incorporation process is completed. Thus, it typically addresses such matters as the adoption of by-laws, the election or selection of directors and officers, the issuance of stock and the satisfaction of minimum capital requirements, if any. Like the steps required for incorporation, the steps required to complete a corporation’s organization are governed by the law in effect when the corporation was organized, not the law at the time the opinion is given.

An inquiry into organizational matters following incorporation can be onerous or even impossible if the actions were taken long ago. Thus, opinions on due organization are rendered most often when a corporation has been recently organized or is being formed specifically for the transaction addressed by the opinion. An opinion giver may also routinely render the opinion when it has rendered it before—*e.g.*, when the corporation was initially organized.

6.1.3 Validly Existing

The due incorporation and due organization opinions look to the past. The validly existing opinion looks to the present, addressing the Company’s existence as a corporation on the date of the opinion letter.¹¹³

corporation continues to exist. *See* Section 6.1.3(a). Therefore, opinion preparers have customarily examined both the original charter and charter amendments without distinguishing whether they do so to support the incorporation opinion or the valid existence opinion.

111. This may not be as straightforward as it seems at first glance. For example, sometimes corporations in an affiliated group have similar names, with the only difference being the use of “Inc.” or “Corp.”

112. The opinion preparers are not required to address charter provisions that will result in termination of the Company’s existence as a corporation following the date of the opinion letter. Nevertheless, if the opinion preparers are aware of a provision that would cause the Company’s corporate status to terminate during the term of the agreement to which the opinion letter relates, they will need to consider whether, to avoid misleading the opinion recipient, they should bring the provision to the opinion recipient’s attention. *See* Section 1.4(d).

113. As in the Illustrative Opinion Letters, the most common formulation of this opinion states that the Company is “validly existing.” Sometimes, the opinion omits the adverb “validly.” As a matter of customary usage, that omission is understood not to change the meaning of the opinion.

In New York, the certificate issued by the Secretary of State regarding an entity’s current status as a corporation uses the word “subsisting” instead of “existing.” The two words are understood to be synonymous.

(a) As A Supplement To An Incorporation Opinion

When supplementing a due incorporation or due organization opinion, the validly existing opinion is based as a matter of customary practice solely on a certificate of the Secretary of State confirming the Company's status as a corporation as of a recent date. Because that date may precede the closing date, opinion preparers often also obtain a confirmation (over the telephone or electronically) from the Secretary of State updating the certificate to the closing date or a certificate of a corporate officer stating that as of the date of the opinion letter no action has been taken by the Company or notice received from a government official looking to the Company's dissolution as a corporation.

(b) As A Substitute For An Incorporation Opinion

In many transactions opinion recipients in recent years have been willing to accept (in lieu of an incorporation opinion) a stand-alone opinion that simply states that the Company is "validly existing as a corporation under the law of" the jurisdiction in which it was incorporated, without also referring to "incorporation" or "organization". The growing acceptance of this opinion reflects a recognition that in many transactions¹¹⁴ reconstructing and interpreting the corporation statute as it existed at the time the Company was incorporated and reviewing old corporate records are likely to be of limited value relative to the cost and trouble involved. Challenges to corporate status based on a failure to comply with statutory incorporation requirements are extremely rare. Indeed, in many states filing of the charter with the Secretary of State by itself will be effective to discourage such challenges.¹¹⁵

When a corporate status opinion states that the Company is validly existing as a corporation without also addressing incorporation or orga-

114. Opinions on recently organized corporations are an exception (because of the ease with which due incorporation and due organization opinions can be given). In addition, while the practice may be changing, purchasers of equity securities still often request a "duly incorporated" or "duly organized" opinion out of concern that if a defect in the incorporation process were later identified, it could result in the Company's ceasing to be recognized as a corporation, thus affecting their rights as stockholders or their status as stockholders (rather than partners) for liability purposes under the applicable corporation law. Lenders, by way of contrast, have less concern about those issues since their rights derive principally from contract law, which is a subject addressed by the remedies opinion, and their status as creditors does not depend on a Company's incorporation. Nevertheless, lenders may also have concerns about the nature of the entity with which they are dealing, for example when they are seeking to comply with legal investment statutes or usury statutes that contain an exemption for loans to corporations.

115. In Delaware, for example, a certificate of incorporation, certified by the Secretary of State, constitutes *prima facie* evidence of the observance and performance of all acts and conditions necessary for the certificate of incorporation's becoming effective. DEL. CODE ANN. tit. 8, § 105 (1991 & Supp. 1997). New York provides that the certificate as filed is "conclusive evidence . . . that the corporation has been formed . . . except in an action . . . brought by the attorney general." N.Y. BUS. CORP. LAW § 403 (McKinney 1986 & Supp. 1998).

nization, the opinion customarily is based on an examination by the opinion preparers (as described in the second paragraph of Section 6.1.1) of the Company’s charter (a copy of which normally is certified by the Secretary of State), and a current certificate from the Secretary of State confirming the Company’s existence as a corporation (updated to the closing date as described in Section 6.1.3(a)). The opinion does not require a review of the corporate record books. To eliminate any risk of misunderstanding, some opinion letters describe the limited inquiry the opinion preparers conducted to support the opinion. The Committee believes that the limited basis for this opinion is sufficiently well understood that this disclosure is not necessary.

6.1.4 Good Standing Opinions

The corporate status opinion often concludes with a statement regarding the Company’s “good standing” in its state of incorporation. What good standing means varies from state to state. In many states it covers the filing of reports with the Secretary of State and the filing of franchise or income tax returns with state tax authorities.¹¹⁶ That, however, is not so in every jurisdiction. In some jurisdictions, for example, certificates from tax officials are not readily available, and lawyers customarily render good standing opinions based solely on a certificate from the Secretary of State.¹¹⁷ When used in an opinion, the term “good standing” is understood as a matter of customary usage to cover the matters addressed by the certificates of government officials that lawyers in the jurisdiction in question customarily obtain to support the opinion.

Good standing opinions have been said to provide the opinion recipient comfort that a corporation’s charter is not subject to revocation for a failure to keep its state filings current. That comfort, however, is likely to be small. Tax and other filings are usually required at least annually, and thus, depending on when the transaction takes place, key filings may be due not long after the closing.

Good standing opinions customarily are based solely on certificates of government officials, updated, when a certificate is dated prior to the closing date, by a representation of an officer of the Company regarding the matters covered by the certificate (for example, the filing of tax returns and payment of taxes due during the period between the date of the certificate and the closing).

Because opinion preparers customarily do nothing more than rely on certificates of government officials (which normally are presented at closing), good standing opinions usually add little of value analytically. How-

116. This is the case in New York. To render this opinion on a New York corporation, opinion preparers customarily obtain two certificates, one from the Secretary of State and the other from the Department of Taxation and Finance. *See* Section 2.5.2.

117. In Massachusetts, for example, opinion givers customarily render an opinion on “corporate” good standing in reliance solely on a certificate regarding filings with the Secretary of State. *See* MASS. GEN. LAWS ANN. ch. 156B, § 116 (West 1992).

ever, good standing opinions do provide comfort that the opinion preparers do not know the certificates to be unreliable and do place on them the responsibility for confirming that appropriate certificates have been obtained from the proper officials. In situations in which the benefits of good standing opinions are marginal, the Committee believes that the opinion process could be streamlined if opinion recipients were to refrain from requesting them and relied on the certificates alone.

6.1.5 Treatment Of Subsidiaries

When the Company has subsidiaries, the opinion recipient may request opinions on their corporate status as well as that of the parent. At the outset of the transaction thought should be given to which subsidiaries are sufficiently important to warrant a corporate status opinion. When the Company has many subsidiaries, the opinion recipient will usually be willing to limit the subsidiaries on which opinions are rendered to those it views as significant to the Company's consolidated operations or to the particular transaction at issue.

6.1.6 Foreign Qualification And Foreign Good Standing

When the Company's business activities extend beyond its state of incorporation, opinion recipients often seek an opinion on the Company's qualification and good standing as a foreign corporation in the other states in which it conducts business. This opinion provides the recipient comfort that in the states named in the opinion¹¹⁸ the Company has completed the steps required to qualify as a foreign corporation and, therefore, is not exposed to fines, penalties or administrative sanctions for a failure to qualify.¹¹⁹

Although at one time foreign qualification opinions sometimes stated that the Company was qualified in all states in which a failure to qualify would have a material adverse effect on its financial condition, the opinion now usually refers simply to the states in which the Company has qualified. The older form of opinion called for an inquiry by the opinion preparers that was often impractical if not impossible.¹²⁰

Foreign qualification opinions customarily are based solely on certificates of state officials. Although different states use different wording, opinions normally recite that the Company "is qualified" or "is duly qualified" without identifying minor differences in the language used in certificates of particular states.

118. The decision as to which states, if any, are to be covered should be made at the outset of the transaction and typically will depend on the nature and breadth of the Company's activities as well as the type and size of the transaction.

119. A corporation that has failed to qualify will under most circumstances be able to enforce its contracts if it later qualifies. *See* What Constitutes Doing Business, CT Corporation System (1995). Thus, concerns about the Company's standing to bring a legal action usually are not the motivating force behind the opinion.

120. *See* ABA Guidelines Sections I(B)(4) and I(C)(2).

The opinion paragraph on foreign qualification also usually addresses the Company’s good standing in the states in which it has qualified. Like the opinion on the Company’s good standing in its state of incorporation, good standing in this context customarily is understood to have whatever meaning is ascribed to it in the certificates on which the opinion preparers are relying.¹²¹

Depending on the state, good standing certificates may be available from the Secretary of State and/or state tax authorities. Because opinion preparers ordinarily do not have a state-by-state knowledge of what certificates are available, as a matter of customary diligence they normally have an experienced corporate service company obtain for them the good standing certificates customarily obtained in the particular states involved and then rely on those certificates without further inquiry into what other certificates might have been obtained.

Opinion letters ordinarily identify by name the jurisdictions whose laws they are intended to cover, thereby excluding any opinion on the laws of other jurisdictions.¹²² Many opinion letters (such as the one quoted in Section 4.1) name as covered jurisdictions the jurisdictions addressed by the foreign qualification and foreign good standing opinions, expressly limiting the coverage of those jurisdictions to those particular opinions. However, even if the jurisdictions addressed by the foreign qualification and foreign good standing opinions are not so named the limitation on the laws covered is not read to exclude them. This is contrary to the normal rule. *See* Section 4.2. As a matter of customary usage, the foreign qualification and foreign good standing opinions are understood to cover the jurisdictions to which they expressly refer even if that coverage is inconsistent with standard language appearing elsewhere in the opinion letter regarding the jurisdictions whose law the opinion letter is intended to cover.

Because opinion preparers customarily base foreign qualification and foreign good standing opinions solely on certificates of government officials, which normally are presented at closing, those opinions usually add little (if anything) of value other than confirming that the opinion preparers do not know the certificates on which the opinions are based to be unreliable. The Committee believes that the opinion process could be streamlined without any meaningful detriment to opinion recipients if absent special circumstances the practice of rendering foreign qualification and foreign good standing opinions were discontinued and opinion recipients were to rely directly on the certificates themselves.¹²³

121. *See* Section 6.1.4.

122. *See* Sections 4.1 and 1.9(o).

123. *See* ABA Guidelines Section I(C)(2).

6.2 STOCK

When an underwriter in a public offering, a purchaser in a private placement or some other investor agrees to acquire stock from a corporation, it usually requires as a condition of closing an opinion from counsel for the Company regarding the shares it is acquiring. (See Paragraph 2 of the Illustrative Opinion Letter in Appendix B-1.)¹²⁴ Regulatory agencies also often require such opinions (for example the Securities and Exchange Commission in connection with the registration of shares) as do stock exchanges when a corporation lists its shares on the exchange.

The opinion on the Company's stock typically addresses the authorization of the stock in the Company's charter, the issuance of shares of that stock, the receipt by the Company of payment for those shares and the nonassessable nature of the shares in the hands of stockholders.

6.2.1 Duly Authorized

The first part of the opinion, the phrase "duly authorized," addresses the creation (either in the Company's charter or in the manner provided in the charter) of the class of stock in question and the authority of the Company to issue shares of that class.¹²⁵ The opinion means that, under the corporation law¹²⁶ of the state in which the Company was organized and the Company's charter, the shares to which the opinion relates (the "Shares") were (or will be) immediately prior to their issuance included within the shares that the Company had the authority to issue. The opinion covers such matters as whether (i) the applicable state corporation law permits shares having the characteristics of the Shares, (ii) the provisions of the Company's charter relating to the Shares comply with that law and (iii) sufficient authorized shares of the class of which the Shares are a part were available when the Shares were issued. If the Shares were authorized subsequent to the Company's incorporation, the opinion also covers whether the resolution approving their authorization received the required vote and was otherwise properly adopted under applicable state corporation law and whether the charter amendments contained required information and were in proper form. In addition, when the Shares are part of a class or series created by the directors pursuant to authority granted to them in the charter, the opinion covers whether the directors acted pursuant to their authority in a manner consistent with the charter, by-laws and applicable state corporation law.

124. The Illustrative Opinion Letter expresses the opinion as follows: "The Shares have been duly authorized and validly issued and are fully paid and nonassessable."

125. The first part of the opinion (the phrase "duly authorized") is directed to creation of the shares in the charter documents not their issuance—even though the issuance of shares commonly is referred to as having been "authorized" by the directors. As discussed in Section 6.2.2, the steps required to approve a particular stock issuance are covered by the second part of the opinion, the phrase "validly issued."

126. Some state constitutions contain requirements relating to the issuance of stock. Those requirements are regarded as part of the corporation law and thus are covered by the opinion.

The duly authorized opinion does not cover compliance with disclosure and other requirements of state or federal securities laws. Those requirements raise complex and intensely factual issues¹²⁷ and, when covered at all, customarily are addressed in a separate paragraph or letter containing broad disclaimers and carefully qualified terms.

6.2.2 Validly Issued

The opinion that Shares have been “validly issued” means that the stockholders, board of directors and/or a board committee¹²⁸ properly took all action required by applicable state corporation law to approve the issuance of the Shares and that the Shares were issued in compliance with the requirements of that law,¹²⁹ the Company’s charter and by-laws and the resolution approving their issuance. The opinion covers such matters as whether (i) the body (or bodies)¹³⁰ whose approval is required by applicable state corporation law and the Company’s charter and by-laws acted on the resolution approving the issuance, (ii) it (or they) acted at a properly called and held meeting (or by an appropriate written consent), (iii) the resolution received the required vote and (iv) the Company received legally sufficient consideration for the Shares. In addition, if action was taken by a committee, the opinion covers whether the committee had the requisite authority to approve the issuance. An opinion that shares have been “validly issued” could not be rendered if the shares were not “duly authorized.”

Shares would not be validly issued if their issuance violated preemptive rights requirements of the applicable state corporation law or the Company’s charter.¹³¹ Shares may, however, be validly issued even though their issuance resulted in a breach of or default under another contract to which the Company is a party. The absence of such breaches and defaults is customarily the subject of a separate opinion (*see* Section 6.5).

127. Ordinarily, lawyers address disclosure requirements only with regard to prospectuses for underwritten offerings of securities. Of course, if the opinion preparers are aware of a disclosure problem that may affect the authorization of the shares, they should consider whether they would be misleading the opinion recipient if they were to deliver the opinion letter without bringing the problem to the opinion recipient’s attention. *See* Section 1.4(d).

128. In many states, a committee of directors may be granted the power to approve issuances of stock.

129. The opinion does not address state or federal securities law requirements (disclosure or registration) applicable to sales of securities. Compliance with those requirements, if addressed at all, is dealt with separately as a matter of customary practice.

130. Stockholder approval usually is not required unless the charter otherwise provides. *See, e.g.,* DEL. CODE ANN. tit. 8 § 153(a) (1991). *But see, e.g.,* N.Y. BUS. CORP. LAW § 505(d) (McKinney 1996 & Supp. 1998) (stockholder approval required for grants to directors, officers or employees of rights or options to purchase stock). Although not covered by the opinion, stockholder approval nonetheless may in some cases be required by stock exchange rules.

131. Sometimes corporations obtain waivers from stockholders of their preemptive rights. An opinion may be based on a valid waiver as well as on compliance with the procedures specified in the statute or charter for affording stockholders preemptive rights.

The validly issued opinion rests on an assumption, customarily unstated (*see* Section 2.3(a)), that fiduciary duty requirements relating to the issuance have been satisfied.¹³² If this assumption is unreliable, the opinion preparers should not render the opinion without stating the assumption or otherwise making appropriate disclosure.

In some states businesses in regulated industries (such as public utilities) are required to incorporate under special statutes that call for approval of issuances of stock by a regulatory authority (for example, a public utilities commission). An opinion that stock of corporations organized under such statutes has been validly issued covers receipt of those approvals. In other states businesses in regulated industries are required to incorporate under the general business corporation statute but also are subject to a separate statute requiring regulatory approval of stock issuances.¹³³ In those states, even though the requirement for regulatory approval is not contained in the corporation statute, as a matter of customary usage the opinion also is understood to cover receipt of those approvals.¹³⁴ If the validly issued opinion were interpreted to cover only regulatory approvals required by the statute under which an entity was incorporated, the coverage of the opinion would turn not on a matter of substance but of form, *i.e.*, on the happenstance of where the approval requirement was located in the statutory scheme of a particular jurisdiction.

Once shares have been validly issued, they do not lose their validly issued character even if they are subsequently repurchased or reacquired by a corporation, unless the shares are restored to authorized but unissued status. Validly issued shares that have been reacquired, commonly called "treasury shares," typically may be resold by a corporation without complying with the requirements of state corporation law for an initial issuance.¹³⁵

6.2.3 Fully Paid

The opinion that Shares have been "fully paid" means that the consideration required by the resolution or other corporate action authorizing their issuance has been received in full by the Company¹³⁶ and that the consideration received satisfied the requirements of state corporation law¹³⁷ and the requirements, if any, in the Company's charter and by-laws.

132. This issue may arise, for example, when in an effort to prevent a hostile takeover the board of directors approves an issuance of shares to a Company retirement plan or other friendly party. For reliance on an assumption regarding compliance with fiduciary duty requirements in Delaware, *see* note 148.

133. This is also covered by the approvals and filings opinion. *See* Section 6.7.

134. As noted above, approvals under the securities laws are not covered. *See* note 129.

135. *See, e.g.*, N.Y. BUS. CORP. LAW § 504(c) (McKinney 1986 & Supp. 1998).

136. As a matter of customary diligence, opinion preparers normally base this aspect of the opinion on an officer's certificate. *See* Section 2.5.

137. This requirement may be contained in the state constitution. *See, e.g.*, DEL. CONST., art. IX, § 3.

The sufficiency of the consideration received for shares is tested both quantitatively and qualitatively. State corporation law often requires that consideration not only be in the correct amount but also be of an acceptable nature. In some states, for example, a promise to pay or to render services in the future does not constitute adequate consideration. Generally, shares having par value must be issued for consideration worth at least par value. When non-cash consideration is involved, the opinion preparers may rely on a determination by the board of directors regarding the value of that consideration.

Opinions covering shares issued or to be issued as stock dividends can present special problems. For example, Section 173 of the Delaware General Corporation Law requires the board of directors to “direct that there be designated as capital” from surplus “an amount which is not less than the aggregate par value of par value shares being declared as a dividend . . .”. An opinion may be based on board action to that effect. If, however, the opinion preparers know that the Company did not have sufficient surplus to transfer to stated capital, they should not render the opinion notwithstanding the action of the board.

6.2.4 Nonassessable

The opinion that the Shares are nonassessable means that once the original purchase price has been paid (which is the subject of the “fully paid” opinion) holders of the Shares will not as a result of their ownership be subject to assessments by the Company under the corporation law of the state in which the Company was incorporated. The opinion relates to assessment statutes of a type that were once common (and that may still sometimes be in effect for banks and other specialized businesses) that authorize corporations under certain circumstances to assess stockholders on a per share basis for an additional amount even though their Shares have been fully paid. The opinion does not mean that stockholders will not be subject to other types of liability: for example, liability to the Company for receipt of an unlawful dividend or liability for obligations of the Company under a piercing-the-corporate-veil theory.

Section 630 of the New York Business Corporation Law imposes liability for unpaid wages on the ten largest stockholders of New York corporations (other than registered investment companies) whose shares are not listed on a stock exchange or regularly quoted in an over-the-counter market. Although Section 630 is not strictly an assessment statute (since it does not impose liability on a per share basis on all stockholders), many lawyers make express reference to it in opinions on the nonassessability of stock of privately-held New York corporations.

6.2.5 Coverage Of All Outstanding Shares

Sometimes opinion recipients, for example underwriters in a corporation’s first public offering or stock exchanges in connection with an initial listing of shares, will request an opinion covering not only the due authorization and valid issuance of the Shares (as is done in the Illustrative

Opinion Letter in Appendix B-1) but also of all of the corporation's outstanding shares. This opinion addresses the concern of opinion recipients that, if all of the Company's outstanding shares were not validly issued, their existence might adversely affect trading in the Shares or preclude subsequent listing of the Shares on a stock exchange. If, however, the Company has had many stock issuances over many years, this opinion can require an extraordinary expenditure of time and effort on the part of the opinion preparers. In some cases opinion recipients, when alerted to the problem, will be willing to withdraw their request for the opinion, particularly when reputable counsel have previously rendered opinions covering past issuances. If opinions have not been rendered in the past, the parties should consider whether the benefit to the opinion recipient (particularly in view of the assumptions that will be required) is justified in terms of the cost and time involved.

Sometimes opinion recipients will ask the opinion giver to supplement an opinion on the due authorization and valid issuance of outstanding shares with an opinion on the number of outstanding shares of each authorized class of stock. When the Company's stock is publicly traded, an opinion on the number of outstanding shares adds nothing to what is set forth in a transfer agent's certificate (which normally provides the only basis for the opinion). Accordingly, the Committee believes that the opinion process could be streamlined, without meaningful detriment to opinion recipients, if absent special circumstances the practice of rendering such opinions were discontinued and opinion recipients were to rely directly on the transfer agent's certificate. When the Company's stock is closely held, the opinion preparers may, depending on the condition of the Company's records, have no difficulty ascertaining the number of outstanding shares from a review of the stock transfer book and a certificate of a corporate officer. If that can be done readily, the opinion preparers often will render the opinion, even though, because the opinion is principally factual in nature, an officer's certificate alone might have sufficed.

6.3 CORPORATE POWER

Opinion recipients often request an opinion that the Company has the corporate power¹³⁸ to execute, deliver and perform the agreement.¹³⁹ (*See*

138. Although the adjective "corporate" helps clarify the coverage of the opinion, as a matter of customary usage its omission does not change the meaning of the opinion.

The phrase "corporate power and authority" is also often used. Because as a matter of customary usage the phrases "corporate power" and "corporate power and authority" are understood to have the same meaning, the words "and authority" have been omitted from the discussion in this section and from the Illustrative Opinion Letters.

Opinion recipients sometimes request a "full power" opinion. The phrase "full power" has no generally accepted meaning, and its use, therefore, should be avoided.

139. The discussion in Section 6.5.4 of the coverage of obligations to be performed in the future also applies to the corporate power opinion to the extent the opinion covers future performance.

Paragraphs 2 and 3, respectively, of the Illustrative Opinion Letters in Appendices A-1 and B-1).¹⁴⁰ A corporate power opinion means that the Company has the power to take the specified actions under its charter and by-laws and applicable corporation law.¹⁴¹

The corporate power opinion relates to the Company’s power under *corporation* law. As such, it addresses the question whether the actions the Company is taking are *ultra vires*. The opinion does not address whether those actions are restricted by other laws, such as those requiring the receipt of licenses or permits.

The corporate power opinion also does not cover provisions in the corporation statute that have collateral consequences, such as the imposition of liability on directors who vote to approve a loan to a director when the loan is not also approved by disinterested directors or stockholders.¹⁴² It does, however, cover statutory, charter and by-law provisions and judge-made doctrines that deny a corporation the power to engage in a specified activity. For example, a corporation organized under a general corporation statute may lack the power to engage in activities, such as accepting interest bearing deposits or writing insurance, that generally are reserved to corporations organized under special statutes.¹⁴³ Similarly, in many states a subsidiary may lack the power under the applicable corporation statute or a judge-made doctrine to guarantee the obligations of its corporate parent if the guarantee is not in furtherance of the subsidiary’s purposes.¹⁴⁴

6.4 CORPORATE ACTION

Opinion letters almost always contain an opinion on the Company’s authorization, execution and delivery of the agreement (or agreements) governing the transaction into which the parties are entering. (*See* Paragraphs 2 and 3, respectively, of the Illustrative Opinion Letters in Appendices A-1 and B-1).¹⁴⁵ This opinion is intended to respond to the under-

140. The Illustrative Opinion Letters express the opinion as follows: “The Company . . . has the corporate power to execute, deliver and perform the [Agreement].”

141. The opinion presupposes, therefore, that the Company exists as a corporation under the applicable corporation law. That issue typically is addressed in the valid existence opinion discussed in Section 6.1.3.

142. *See, e.g.*, N.Y. BUS. CORP. LAW § 714 (McKinney 1986 & Supp. 1998).

143. Some state statutes permit the exercise of specific powers only if they are expressly set forth in the corporation’s charter. *See, e.g.*, MASS. GEN. LAWS ANN. ch. 156B, § 9A (West 1992 & Supp. 1998) (power to act as a partner).

144. *But see* DEL. CODE ANN. tit. 8, § 122(13) (1991 & Supp. 1996). Although the issue of fraudulent conveyance is not covered by the corporate power opinion, such guarantees may also be subject to challenge as fraudulent conveyances.

145. The Illustrative Opinion Letters express the opinion as follows in two subsections of the same paragraph: “The Company . . . (b) has taken all corporate action necessary to authorize the execution, delivery and performance of the . . . Agreement, . . . and (c) has duly executed and delivered the . . . Agreement.” Many lawyers include this opinion in the opinion paragraph containing the remedies opinion. Others include it in a separate paragraph or, as in the case of the Illustrative Opinion Letters, in the paragraph containing the corporate power opinion.

standable concern of the opinion recipient that those who executed the agreement had actual and not merely apparent authority to act on the Company's behalf. The opinion means that the agreement was approved (or its execution and delivery were authorized), in a manner consistent with the applicable corporation statute and the Company's charter and by-laws, by the proper body or bodies—*e.g.*, the stockholders, directors (or board committee) or both—by the required vote at a properly called and held meeting (or by an appropriate written consent).¹⁴⁶ The opinion also means that the persons identified in the agreement as signatories had actual authority to execute the agreement on behalf of the Company, that all required signatures were obtained¹⁴⁷ and that the Company delivered the executed agreement (or caused it to be delivered) in a manner permitted by applicable law.

Opinion preparers customarily base the opinion on an assumption, ordinarily unstated (*see* Section 2.3(a)), that those who approved the agreement did not violate the fiduciary duty requirements, such as those governing transactions between a corporation and its directors, imposed on them by the corporation law of the Company's state of incorporation.¹⁴⁸ As with assumptions generally, opinion preparers ordinarily rely on that assumption without making an independent determination that fiduciary duty requirements were met. If, however, the assumption is not reliable, the opinion preparers should not render the opinion without stating the assumption or otherwise making appropriate disclosure.

6.5 NO BREACH OR DEFAULT

Opinion recipients often seek opinions that the execution and delivery by the Company of the agreement do not, and performance by the Company of its obligations under the agreement will not,¹⁴⁹ result in (i) a

146. Approval need not always take the form of a resolution specifically addressing the agreement. Officers may be able to rely on a general resolution granting them authority within appropriate limits to bind the Company.

147. The opinion preparers are entitled to assume, without so stating, that the signatures are genuine. *See* Section 2.3(a).

148. In Delaware a merger requiring stockholder approval has been held to be valid even though the directors violated their fiduciary duty of disclosure by failing to inform stockholders of all material facts. *Arnold v. Society for Sav. Bancorp, Inc.*, 678 A.2d 533, 536-37 (Del. 1996). The court pointed out that the corporation "complied with all of the express statutory requirements for the merger" and concluded that so long as the directors acted in good faith that was enough. *Id.* at 536. The implication of *Arnold*, not only for mergers but possibly also for other transactions subject to express statutory requirements, is that in the case of Delaware corporations reliance on an assumption regarding compliance with fiduciary duty requirements may not be necessary. However, since a requirement of good faith on the part of the directors applies even in Delaware, *Arnold* probably has little practical significance for the opinion process.

149. Opinions sometimes refer simply to "consummation of the transaction" rather than "performance". *See* note 171 for the meaning of that opinion. If an opinion does not use the word "performance" expressly, it is understood as a matter of customary usage not to cover performance. *See also* Section 1.2(f).

violation of the Company’s charter or by-laws, (ii) a breach of or default under other contracts to which the Company is a party, or (iii) a violation of any court order to which the Company is a party. (See Paragraphs 4 and 5, respectively, of the Illustrative Opinion Letters in Appendices A-1 and B-1 and Paragraph 2 of the Illustrative Opinion Letters in Appendices A-2 and B-2.)¹⁵⁰

6.5.1 Purpose Of Opinion

The opinion on the charter and by-laws adds nothing to the corporate power and remedies opinions (which could not be given if the agreement violated the charter or by-laws). Nevertheless, the practice of drafting the opinion to cover those documents is well established and, while some members of the Committee think the practice should be changed to avoid redundancy, the Committee regards either approach as acceptable.

As it relates to other contracts (which include instruments for purposes of the discussion that follows) and courts orders, the no breach or default opinion provides the opinion recipient information regarding the effect of the transaction on the Company’s other legally binding obligations, thus permitting the recipient to evaluate whether the commitments the Company is making in the agreement will expose the Company to the risk of creating inconsistent legal obligations. The opinion as it relates to other contracts provides the recipient comfort that the transaction will not be subject to attack because it violates restrictions in another contract and will not expose the recipient to a possible claim by a third-party, for example for tortious interference with existing contractual relationships. This opinion is different from the remedies opinion in that, depending on the circumstances,¹⁵¹ the remedies opinion could be rendered even though performance of the agreement might result in a violation of another contract.¹⁵²

150. Although the no breach or default opinion does not appear in its entirety in any one of the Illustrative Opinion Letters, the Illustrative Opinion Letters collectively express the opinion as follows:

The execution and delivery by the Company of the . . . Agreement [does] not, and the performance by the Company of its obligations thereunder will not,

- [(a)] result in a violation of the Certificate of Incorporation or By-laws of the Company[,] . . .
- [(b)] breach or result in a default under any agreement or instruments listed on Schedule [] . . . hereto [or result in the acceleration of (or entitle any party to accelerate) any obligation of the Company thereunder], or
- [(c)] result in a violation of any court order listed on Schedule [] hereto.

151. For example, the ability of the opinion recipient to enforce the agreement may depend on whether it has actual knowledge that it violates another contract. RESTATEMENT (SECOND) OF CONTRACTS § 194 (1979). As a matter of customary practice, opinion preparers assume, without so stating in the opinion letter, that the recipient has no such knowledge so long as they do not know that assumption to be unreliable.

152. In some circumstances, a corporation may choose to bind itself to two legally enforceable contracts even though performance of one will violate the other. For example, a corporation might decide to enter into a merger agreement even though consummation of

The opinion as it relates to court orders permits the opinion recipient to avoid involvement in a violation of a judicial decree.

6.5.2 “No Violation” And “No Breach Or Default” Are Preferred Because They Are More Precise Than “No Conflict”

Historically, the “no breach or default” opinion addressed “conflicts” with the Company’s charter and by-laws, other contracts and court orders. In recent years, however, prompted by a growing concern about the imprecision of the word “conflict,” a trend has developed of replacing the word “conflicts” with “violations” when the opinion refers to the charter, by-laws and court orders and with “breaches” and “defaults” when it refers to other contracts. The Committee supports this trend and in this Report refers to the opinion as the “no breach or default” rather than the “no conflict” opinion.¹⁵³ However, if an opinion uses “no conflict” language without definition, as a matter of customary usage it should be read as if it used “no violation” and “no breach or default” instead.

6.5.3 Adverse Consequences Not Addressed

The no breach or default opinion is *not* an opinion that no adverse consequences will result from the Company’s entering into (and, if covered, performing its obligations under) the agreement. The opinion only addresses breaches and defaults. Adverse consequences that do not result from a breach or default (and that therefore are not covered by the opinion) may include, for example, termination of a credit commitment, a change in the manner in which a royalty is computed, an increase in the interest rate payable on outstanding debt, creation of a lien on the Company’s properties, a requirement to provide additional collateral to secured lenders, or, in the event of a change of control, creation of “puts” to the Company by existing equity holders or rights to accelerate or require prepayment by existing debt holders.

The concept of adverse consequences is inherently subjective. For that reason a lawyer is not in a position to render an opinion that a transaction will not have any adverse consequences for the Company. Lawyers do, however, often render opinions on whether the transaction will have specific consequences that have been identified to them by opinion recipients as being of particular concern. The no breach or default opinion, for example, could be supplemented with language that deals expressly with the acceleration, and the creation of rights of other parties to accelerate

the merger will result in a breach by the corporation of an existing credit agreement. In making its decision, the corporation may expect to receive a waiver from the lender and, if it does not, to pay off the credit agreement with funds provided by its merger partner. If the opinion recipient did not know that the merger would breach the credit agreement (*see* note 151), the remedies opinion might be rendered while the no breach or default opinion could not. By requesting a no breach or default opinion, the opinion recipient obtains information that might not be provided by the remedies opinion.

153. For convenience this Report uses “no breach or default” to refer to the entire opinion, including the opinions on the charter, by-laws and court orders.

or require the prepayment or purchase by the Company, of outstanding indebtedness and the creation of liens on the Company’s property.¹⁵⁴ In the context of a particular transaction, opinion recipients may wish to consider whether to request such language or other language that addresses with specificity consequences that are of substantial concern to them but that do not stem from a breach of or default under another contract.

6.5.4 Coverage Of Obligations To Be Performed In The Future

The no breach or default opinion covers not only breaches and defaults that occur as a result of the Company’s entering into the agreement but also, to the extent it refers to “performance,” breaches or defaults that could occur as a result of the Company’s performance in the future of its obligations under the agreement.

When the opinion is drafted to cover performance, it addresses the performance by the Company of its obligations under the agreement after the closing. Suppose, for example, the Company is entering into a common stock purchase agreement with an investor that grants the investor a right to put its shares to the Company if the Company is still private after a specified period and the opportunity to piggyback its shares in any registration statements filed by the Company after an initial public offering. An opinion that performance by the Company of its obligations under the common stock purchase agreement will not breach or result in a default under existing contracts of the Company covered by the opinion would require an exception if one of those existing contracts was with a venture capitalist and prohibited the Company from repurchasing its stock prior to an initial public offering or granted the venture capitalist exclusive piggyback registration rights once the Company was public. The opinion by its terms addresses the *obligations* of the Company under the agreement. Thus, if the common stock purchase agreement, instead of granting the investor a put, gave the Company a right to call the investor’s shares, the opinion would not require an exception, even though repurchases are prohibited by an existing contract, because the opinion covers performance by the Company of its obligations not the exercise by the Company of its rights under the agreement.

Provisions in existing contracts that will be breached or result in a default only if specified events have (or have not) occurred or specified circumstances exist (or do not exist) at the time the Company is called on to perform its obligations under the agreement are beyond the scope of the no breach or default opinion since the opinion preparers have no way to determine on the date of the opinion letter what the effect of those pro-

154. The Illustrative Opinion Letters contain bracketed language that addresses these issues as follows: “or result in the acceleration of (or entitle any party to accelerate) any obligation of the Company thereunder.”

visions will be when performance by the Company is required to occur.¹⁵⁵ For example, in the case of the common stock purchase agreement and the Company's grant of a put, the opinion preparers are not required to take into account a negative covenant in an existing loan agreement if the covenant only prohibits stock repurchases if specified financial ratios are not met at the time a particular repurchase is to be effected.¹⁵⁶ By way of contrast, the opinion preparers are required to take into account provisions in existing contracts whose future application is not subject to a contingency. Thus, to use the example of the common stock purchase agreement and the grant by the Company of a put, the opinion preparers would be required to take an exception if the negative covenant flatly prohibited stock repurchases.

Historically, the opinion often has been cast in the present tense—*i.e.*, “execution, delivery and performance of the Agreement do not. . . .” Recently, the practice has developed of drafting the portion of the opinion relating to performance in the future tense. As a matter of customary usage the meaning of the opinion is the same regardless of which tense is used. The Committee believes, however, that in the case of performance the future tense better expresses what the opinion is intended to convey. Thus, the Committee suggests that the clearest way to phrase the opinion is to state that the “execution and delivery by the Company of the Agreement do not, and the performance by the Company of its obligations thereunder will not, breach or result in a default under. . . .”

6.5.5 Identifying Which Contracts And Court Orders Are Covered

Unless the Company is very small or newly formed, the opinion preparers are unlikely to have personal knowledge of every contract and court order to which the opinion might conceivably apply. Therefore, preferably early in the negotiation of the opinion, the parties should agree on a method for identifying the contracts and court orders the opinion preparers will be expected to review.

In the case of contracts, one commonly used approach is to limit the opinion to the contracts listed in an exhibit to the agreement, in a filing by the Company with the Securities and Exchange Commission or in an

155. If the opinion preparers are aware of specific facts that they know would cause the Company, in performing a future obligation under the agreement, to breach an existing contract, they should not render the opinion if to do so would be misleading to the opinion recipient. For example, depending on the knowledge of the opinion recipient, delivery of the opinion might be misleading if under the new agreement one of the obligations to be performed by the Company is to repurchase shares of its stock a few months after the closing and the opinion preparers are aware that the Company is planning a writedown of inventory that will cause the repurchase to breach a net worth covenant in an existing loan agreement. See Section 1.4(d).

156. As in the loan agreement example, the future circumstances will often be of a financial nature. However, they need not be. For example, they could involve a specific event such as a change in control of the Company.

attachment to the opinion. Another is to draft the opinion to cover only specified types of contracts—*e.g.*, agreements for money borrowed—or contracts that meet a specified standard of materiality such as a particular dollar amount and to state, as discussed below, that the contracts covered include only those of which the opinion preparers have knowledge. If the contracts are not specifically identified, the opinion preparers often will obtain a certificate from an appropriate officer of the Company¹⁵⁷ listing all the contracts that fall within the specified category. Whatever approach is used, it should be described in the opinion letter.

The practice for court orders is similar. The court orders covered by the opinion often are listed in a schedule referred to specifically in the opinion. Alternatively, the opinion may be drafted to refer to court orders known to the opinion preparers, in which case the opinion ordinarily will be based on a certificate of an appropriate officer of the Company identifying all the relevant court orders.

When an opinion is not limited to a specific list of contracts or court orders, opinion recipients will sometimes request that it be drafted to cover not only contracts and court orders to which the Company is a party but also those to which the Company is otherwise subject. In the case of contracts, inclusion of the phrase extends coverage of the opinion to contracts that the Company did not affirmatively enter into but by which it became bound in some other way. The Company, for example, may have become subject to a collective bargaining agreement to which it is not a party if it acquired substantially all the assets of a corporation that was bound by such an agreement. Similarly, property of the Company may be subject to a mortgage lien (even though the Company did not grant the mortgage) if, when the property was acquired, it was subject to a mortgage previously granted by the seller (and the obligation of the seller was not discharged when the property was acquired by the Company). In the case of court orders, the phrase “otherwise subject” extends coverage of the opinion to proceedings that are applicable to the Company but in which it has not been joined as a named party, such as an *ex parte* proceeding or an industry-wide court order (*e.g.*, an antitrust decree prohibiting specified business practices of all members of an industry group).

Despite the interest opinion recipients may have in contracts and court orders to which the Company is otherwise subject, coverage of those contracts and court orders can raise troublesome diligence problems because their existence may be unknown not only to the opinion preparers but also to the officer on whose certificate the opinion is based. Thus, thought should be given to the implications of including the phrase “otherwise subject” (at least without limitation) before the opinion preparers agree to add it to the opinion.

157. See Section 2.5.

Many lawyers include in the no breach or default opinion the phrase "to our knowledge" when referring to the contracts and court orders covered by the opinion. Lawyers include the phrase out of concern that the opinion might otherwise be susceptible to being read as covering every contract and court order to which the Company is a party, whether known to the opinion preparers or not. *See* Section 2.6.1.

When the opinion refers specifically to a list of contracts and court orders, the opinion on its face is clear as to what contracts and orders are covered. In that case, the phrase "to our knowledge" serves no purpose and should not be used.

When the opinion does not refer specifically to a list of contracts and court orders, inclusion of the phrase "to our knowledge" underscores what the opinion as a matter of customary usage is understood to cover. Inclusion (or omission) of the phrase does not, however, change the customary diligence required to support the opinion. *See* Sections 2.2 and 2.6.1.

Opinion preparers increasingly are including a definition of "to our knowledge" in opinion letters. When "to our knowledge" is defined, the definition used in the opinion letter will control.

Customary diligence may be varied by agreement between the opinion preparers and the opinion recipient (or its counsel).¹⁵⁸ Opinion recipients sometimes seek more diligence. Alternatively, the opinion recipient (or its counsel) may agree that less diligence than is customary is appropriate. Ordinarily, whatever agreement is reached will be described in the opinion letter.

Inside counsel is often more knowledgeable about contracts and court orders binding on the Company than outside counsel handling a particular transaction for the Company. Thus, opinion recipients often accept (and may prefer receiving) the no breach or default opinion from inside counsel, even if other opinions are provided by outside counsel.¹⁵⁹

6.5.6 Interpretation Of Contracts Governed By The Law Of Other States

Contracts covered by the no breach or default opinion may be governed (because of chosen-law provisions¹⁶⁰ in those contracts or other reasons) by the law of jurisdictions that are not specified for coverage in the opinion letter. In that event the opinion preparers are entitled to assume, without so stating in the opinion letter, that those contracts would be interpreted in accordance with their plain meaning¹⁶¹ (unless the opinion preparers

158. *See* Section 1.5.

159. Outside counsel not only may lack general familiarity with court orders to which the Company is a party but may have no knowledge of court orders to which the Company is not a party but is otherwise subject.

160. *See* Section 1.9(p).

161. In the case of technical terms, their meaning would be what lawyers generally understand them to mean in the jurisdiction (or principal jurisdiction if more than one) whose law is specified for coverage in the opinion letter.

identify a possible problem, in which event they may want to obtain an opinion from local counsel).

6.6 NO VIOLATION OF LAW

Opinion recipients often seek an opinion that the execution and delivery of the agreement¹⁶² do not, and performance by the Company of its obligations under the agreement will not,¹⁶³ violate applicable provisions of law.¹⁶⁴ (See Paragraphs 5 and 6, respectively, of the Illustrative Opinion Letters in Appendices A-1 and B-1.) This opinion complements the remedies opinion by addressing legal consequences of the transaction, such as fines or government sanctions, that would not prevent the opinion giver from rendering an unqualified opinion on the agreement’s enforceability but that may be significant to the opinion recipient. A corporation, for example, could enter into an agreement on which an unqualified remedies opinion could be rendered to sell the assets of a division, but, if the corporation is in the pharmaceutical business and the assets it is selling include controlled substances, the sale could under certain circumstances expose it (and the buyer) to serious sanctions if it does not satisfy government requirements governing the sale of narcotics.

Despite its apparent breadth, the no violation of law opinion does not cover all law. As with other opinions, the no violation of law opinion addresses only the law (including published rules and regulations of government agencies) of jurisdictions that are specified for coverage in the opinion letter. In addition, the opinion is understood to exclude local law, such as city ordinances and county zoning regulations, that are adopted by political subdivisions below the state level.¹⁶⁵

162. Although some opinions are drafted to cover “related transactions” or transactions “contemplated by” the agreement, those terms are imprecise and may be misleading. If other transactions are to be covered, the Committee recommends that they be identified expressly in the opinion. In addition, opinion givers should not be asked to render an opinion that covers compliance by the Company with laws generally. See ABA Guidelines Section I(B)(5). Such an opinion would require a detailed understanding of a Company’s business activities and could almost never be rendered (assuming it could be rendered at all) without great expense.

163. The Illustrative Opinion Letters express this opinion as follows: “The execution and delivery by the Company of the [Agreement] do not, and the performance by the Company of its obligations thereunder will not, result in any violation of any law of the United States or the State of New York, or any rule or regulation issued thereunder.” In the Illustrative Opinion Letter the word “published” has not been included before “rule or regulation.” As a matter of customary practice, the opinion is understood to cover only published rules and regulations whether the word “published” is used or not. For opinions that refer to consummation of the transaction instead of performance, see note 171.

164. For purposes of this opinion the term “law” is understood as a matter of customary usage to include published rules and regulations of government agencies even if the opinion does not refer to those rules and regulations expressly. See definition of “Law” and “Law Covered by the Opinion Letter” in Sections 1.9(n) and (o).

165. See note 170.

Because of the great number and variety of statutes, rules and regulations, no lawyer or firm, no matter how diligent, can reasonably be expected to be familiar with every law, rule and regulation (even within the jurisdiction whose law is covered by the opinion letter) that might possibly apply to the Company and the transaction. For example, depending on the circumstances, counsel for the borrower in a loan for construction of a manufacturing facility might not be expected, even after exercising customary diligence, to recognize that the borrower, because it intends to sell the timber cut when clearing the land on which the facility is to be built, is subject to a statute governing companies engaged in the timber business. As in the case of the remedies opinion (*see* Section 3.5.1), the no violation of law opinion is understood as a matter of customary practice to cover only law (including published rules and regulations) that, given the nature of the transaction and the parties to it, a lawyer in the relevant jurisdiction exercising customary diligence would reasonably recognize as being applicable.

Even when the applicability of a statute or published rule or regulation is readily apparent, counsel as a matter of customary practice might still not be expected to address it.¹⁶⁶ As in the case of the remedies opinion (*see* Section 3.5.2(c)), among the laws the opinion is understood as a matter of customary usage not to cover are tax, insolvency, antitrust and securities laws (except as contemplated by note 81 and the accompanying text) and the Exon-Florio amendment.

To the extent the no violation of law opinion addresses performance of the agreement, the same analysis regarding future performance applies as is set forth in Section 6.5.4 with respect to the no breach or default opinion. In addition, the opinion covers only those laws (including published rules and regulations) in effect on the date of the opinion letter and laws and published rules and regulations adopted on that date that by their terms are to take effect while the Company is performing its obligations under the agreement.¹⁶⁷

6.7 APPROVALS AND FILINGS

Opinion recipients often seek an opinion that the Company is not required, except as set forth in the opinion, to obtain any approvals from or make any filings with governmental bodies in connection with its execution and delivery of the agreement and, in many cases, the performance of its obligations under the agreement. (*See* Paragraph 6 of the Illustrative Opinion Letter in Appendix B-1).¹⁶⁸ The approvals and filings opinion provides

166. For example, the opinion is understood as a matter of customary practice not to cover compliance with fiduciary duty requirements even when those requirements are statutory in nature. *See* second paragraph of Section 6.4 and note 148.

167. *See* note 11.

168. The Illustrative Opinion Letter in Appendix B-1 expresses this opinion as follows: "The execution and delivery by the Company of the . . . Agreement do not, and the per-

information to the opinion recipient regarding the Company’s compliance with legal and regulatory requirements applicable to the transaction. As such, it overlaps to a considerable extent the remedies and no violation of law opinions.¹⁶⁹

The approvals and filings opinion only addresses approvals and filings that are required by the law of the jurisdictions that are specified for coverage in the opinion letter. As a matter of customary usage, the opinion is understood not to cover requirements of local law unless the opinion letter refers to local law expressly.¹⁷⁰ In some transactions, for example in project financings involving real estate or sales of businesses involving transfers of city or county permits such as liquor licenses or taxi medallions, local law will be important, and opinion recipients may appropriately request specific opinions on approvals and filings required by local law.

As with the no breach or default and no violation of law opinions, the approvals and filings opinion often is drafted to cover not only approvals and filings required for the Company to enter into the agreement but also those required for it to perform its obligations under the agreement.¹⁷¹ Future performance is discussed in Section 6.5.4. Even though performance will take place after the closing, the opinion only addresses approvals and filings that are required under the laws in effect on the date of the opinion letter and laws adopted on that date that by their terms are to take effect while the Company is performing its obligations under the agreement. The opinion does not (and could not) cover requirements that do not exist when the opinion letter is delivered.

6.8 NO LITIGATION

Opinion recipients sometimes seek an opinion (referred to by some lawyers as a “confirmation”¹⁷² because of its factual nature) concerning pending and threatened actions and proceedings (and sometimes government investigations) against the Company that may affect the transaction. The opinion also often covers actions and proceedings (and investigations) not

formance by the Company of its obligations thereunder will not, . . . require approval from or any filings with any government authority under any law of the United States or the State of New York, or any rule or regulation thereunder.” *See* notes 162 and 163.

169. As in the case of the remedies and no violation of law opinions, the opinion is understood as a matter of customary usage not to cover every law, rule and regulation that conceivably might be applicable. For a discussion of which laws, rules and regulations are covered, *see* Sections 3.5, 6.6 and 1.9(n).

170. Local law includes laws, rules, ordinances and the like adopted by political subdivisions below the state level. Ordinarily, local law materials are not available in a way that allows a lawyer to do more than review specific ordinances or regulations. *See* Section 1.9(n).

171. If the opinion does not refer expressly to performance of the agreement but only to consummation of the transaction, the opinion as a matter of customary usage is understood to cover only approvals and filings required for the Company to enter into the agreement and close the transaction and not those that are required for it to perform its obligations under the agreement after the closing. *See* note 149.

172. *See* Section 1.9(h).

relating to the transaction that nonetheless may have a materially adverse effect on the Company. (See Paragraph 3 of the Illustrative Opinion Letters in Appendices A-2 and B-2.)¹⁷³ When the Company has inside counsel, that counsel often renders the no litigation opinion even when outside counsel is rendering the other standard opinions.

The no litigation opinion does not pass on the merits of particular actions or predict their likely outcome. If the opinion recipient requests the opinion giver's evaluation of a specific matter, the opinion preparers should look for guidance to the ABA Statement of Policy Regarding Lawyers' Responses to Auditors' Requests for Information.¹⁷⁴

The no litigation opinion is intended to elicit information regarding the *existence* of pending and threatened actions and proceedings ("litigation" for purposes of the following discussion) that might be of concern to the opinion recipient. Thus, the opinion often takes the form of a statement that the Company is not a party to any litigation known to the opinion preparers¹⁷⁵ that may have an adverse effect on the transaction or a material adverse effect on the Company and that is not identified in a schedule to the agreement, an officer's certificate or some other list of litigation referred to in the opinion letter. The presence or absence of the phrase "to our knowledge" does not change the meaning of the opinion. With or without "to our knowledge," the opinion does nothing more than provide comfort to the opinion recipient that the opinion preparers do not know the list of litigation referred to in the opinion letter to be incomplete or unreliable. As a matter of customary diligence the opinion does not require that the opinion preparers check court or other public records or review the firm's files (and an express disclaimer to that effect in the opinion letter is not necessary). See Section 2.2.2(a). Nevertheless, the opinion preparers may check the firm's litigation docket (if one exists) and, if they are not themselves familiar with the litigation the firm is handling for the Company, may seek the advice of a litigator or other lawyer in the firm who is. See Section 2.2.2(b).

As it relates to litigation affecting the transaction, the no litigation opinion does not ordinarily raise difficult questions. The portion of the opinion, however, that covers litigation generally affecting the Company can be quite challenging. It normally will require the opinion preparers and counsel for the opinion recipient to work out an objective definition of mate-

173. The Illustrative Opinion Letter expresses the opinion as follows: "Except as listed on Schedule [] hereto, the Company is not a party to any pending [or overtly threatened in writing] action or proceeding known to me that may adversely affect the transactions contemplated by the . . . Agreement or that may have a material adverse effect on the Company."

174. 31 BUS. LAW. 1709 (1976). In most cases the opinion preparers, in applying the ABA Statement, will conclude that an evaluation is not appropriate.

175. See Sections 2.2.2(b) and 2.6.1.

riality, such as a specific dollar amount.¹⁷⁶ That definition ordinarily will be set forth in the opinion letter.

As a matter of customary usage the opinion is usually limited to pending and threatened actions and proceedings against the Company to which it is a party.¹⁷⁷ Moreover, because of the difficulty of evaluating the seriousness of oral threats (as well as lawyer-client privilege considerations), opinion preparers often seek to limit the opinion to legal proceedings “overtly threatened in writing.”¹⁷⁸

The no litigation opinion is largely based on information furnished by the Company or a Company officer. Thus, the Committee believes that in most cases the no litigation opinion could be omitted with no real loss to opinion recipients if opinion recipients were instead to rely directly on the Company or its officers for information regarding litigation affecting the transaction and the Company.

CONCLUSION

The formal study of third-party opinion practice began with James Fuld’s seminal 1973 article.¹⁷⁹ TriBar’s 1979 Report (itself inspired by Fuld) gave rise to a spate of state bar reports, articles and treatises. More recently, the 1991 Third-Party Opinion Report of the ABA Section of Business Law (cited at note 3) provided valuable insights into opinion practice, including brief “Guidelines” for the negotiation and preparation of third-party legal opinions, and the Legal Opinion Committee of the ABA Section of Business Law is currently preparing “Principles” for Third-Party Opinions. The American Law Institute in its Restatement (Third) of the Law Governing Lawyers (cited at note 3) deals with the practices and responsibilities of third-party opinion givers, albeit very briefly. The work of all these groups has clarified the Bar consensus as to what is customary in giving third-party “closing” opinions.

176. One purpose of an objective definition is to avoid the need for the opinion preparers to make subjective judgments regarding the significance of litigation not identified in the referenced schedule or list. Another is to keep the list from becoming overly long by permitting the omission of litigation that would clearly be of no interest to the opinion recipient. Use of a specific dollar amount, however, may not be a complete solution since some complaints may not specify the damages being sought and others may seek a non-monetary form of relief, for example an injunction. Consideration might also be given, therefore, to excluding specific types of actions, such as routine slip-and-fall cases against a retailer, or adopting some other technique for keeping the list within reasonable bounds.

177. Opinion recipients sometimes request that the opinion also be drafted to cover litigation to which the Company is not a party but is otherwise subject. See Section 6.5.5. This opinion can raise a variety of problems for the opinion giver and, when given at all, normally should be given only by inside counsel (or by outside counsel who performs a similar function).

178. *But see* Section 1.4(d).

179. James J. Fuld, *Legal Opinions in Business Transactions—An Attempt to Bring Some Order Out of Some Chaos*, 28 BUS. LAW. 915 (1973). The 1979 Report and this Report use a number of Mr. Fuld’s ideas, including the “golden rule” described in Section 1.3.

Custom is a dynamic concept. TriBar's mission is to describe the current consensus on customary practice and to provide guidance as to how to proceed in those areas where custom remains unclear.

Opinions can be extraordinary teaching and learning devices. While an opinion letter is primarily for the benefit of the opinion recipient, the process of preparing an opinion letter often provides a useful focus for the lawyers on both sides of a transaction. Indeed, at its best, the opinion preparation process can serve to clarify and improve transactions. Yet, to glorify the opinion process would be a mistake. Many opinion letters are drafted in haste; many are delivered in transactions too small to justify the attention they require. Too often recipients view opinions as solutions rather than predictive expressions of professional judgment that, of necessity, are limited in scope to certain jurisdictions and circumstances.

Most transactional lawyers do not see themselves as opinion experts, nor should they. Lawyers should be able to render opinions without extraordinary effort. To assist them, TriBar continues in its efforts to clarify and simplify.

AN INVITATION TO COMMENT ON THIS REPORT

TriBar intends to continue to comment on important opinion issues from time to time. TriBar members learn from each other and importantly from those who read this Report and send comments on it. Please write to: Chair, TriBar Opinion Committee, c/o New York County Lawyers' Association, 14 Vesey Street, New York, N.Y. 10007.

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APPENDIX A-1
ILLUSTRATIVE OPINION LETTER

(Outside Counsel -
Loan Agreement)

[Law Firm Letterhead]

[DATE]

The Lenders listed on Schedule I hereto
parties to the Credit Agreement referred
to below and World Wide Bank,
as Agent
Ten World Trade Center
New York, New York 10048
re: Macromoney Corporation
Credit Agreement dated as of _____

Ladies and Gentlemen:

We have acted as counsel for Macromoney Corporation, a Delaware corporation (the “Company”), in connection with the preparation, execution and delivery of, and borrowing under, the Credit Agreement, dated as of _____, among the Lenders, the Agent and the Company (the “Credit Agreement”). This opinion letter is delivered to you pursuant to Section _____ of the Credit Agreement.¹⁸⁰ Terms defined in the Credit Agreement are used herein as therein defined.

For purposes of this opinion letter we have reviewed such documents and made such other investigation as we have deemed appropriate.¹⁸¹ As to certain matters of fact material to the opinions expressed herein, we have relied on the representations made in the Credit Agreement and certificates of public officials and officers of the Company [and others].¹⁸² We have not independently established the facts so relied on.¹⁸³

Based on the foregoing and subject to the other paragraphs hereof, we express the following opinions.

1. The Company is a corporation validly existing under the law of the State of Delaware.¹⁸⁴

180. Note: This form of opinion letter is for illustrative purposes. It is intended only to provide a context for the Report of which it is a part.

It is not ordinarily necessary to state that the opinion letter is being delivered at the request of the client. This normally is implicit. *See* note 33.

181. *See* Section 1.4(c).

182. *See* Sections 2.1 and 2.2 regarding the appropriateness of reliance in general, Section 2.2.1(d)(ii) regarding reliance on representations, Section 2.3 regarding reliance on assumptions (many of which customarily are not stated; *see* note 23 and Section 2.3(a)) and Section 2.5 regarding reliance on officers’ certificates.

183. *See* Section 2.6

184. *See* Section 6.1.

2. The Company
 - (a) has the corporate power to execute, deliver and perform the Credit Agreement and the Note,¹⁸⁵
 - (b) has taken all corporate action necessary to authorize the execution, delivery and performance of the Credit Agreement and the Note,¹⁸⁶ and
 - (c) has duly executed and delivered the Credit Agreement and the Note.¹⁸⁷
3. The Credit Agreement and the Note are valid and binding obligations of the Company enforceable against the Company in accordance with their terms.¹⁸⁸
4. The execution and delivery by the Company of the Credit Agreement and the Note do not, and the performance by the Company of its obligations thereunder will not, result in a violation of the Certificate of Incorporation¹⁸⁹ or By-Laws of the Company.¹⁹⁰
5. The execution and delivery by the Company of the Credit Agreement and the Note do not, and the performance by the Company of its obligations thereunder will not, result in any violation of any law of the United States or the State of New York, or any rule or regulation thereunder.

[Insert any other opinions.]

Our opinions above are subject to bankruptcy, insolvency and other similar laws affecting the rights and remedies of creditors generally and general principles of equity.¹⁹¹

[Insert any other exceptions, stated assumptions, etc.]¹⁹²

The opinions expressed herein are limited to the federal law of the United States, the law of the State of New York, and the Delaware General Corporation Law.¹⁹³

This opinion letter is being delivered to you in connection with the above described transaction and may not be relied on by you for any other purpose. This opinion letter may not be relied on by or furnished to any other Person without our prior written consent.

Very truly yours,

Attachment—Schedule I

185. See Section 6.3.

186. See Section 6.4.

187. See Section 6.4.

188. See Section 3.1.

189. This is an example of the use of a defined term in the Agreement.

190. See Section 6.5.

191. See Sections 1.2(c) and 3.3.

192. See, e.g., Sections 2.3, 3.1, 3.2, 3.4, 3.5, 4.6 and 5.5.

193. See Section 4.1.

APPENDIX A-2
ILLUSTRATIVE OPINION LETTER

(Inside Counsel -
 Loan Agreement)

[Letterhead of [General] Counsel]

[DATE]

The Lenders listed on Schedule I hereto
 parties to the Credit Agreement referred
 to below and World Wide Bank,
 as Agent
 Ten World Trade Center
 New York, New York 10048
 re: Macromoney Corporation
 Credit Agreement dated as of _____

Ladies and Gentlemen:

I am [general] counsel of Macromoney Corporation, a Delaware corporation (the “Company”). This opinion letter is delivered to you pursuant to Section _____ of the Credit Agreement, dated as of _____ among the Lenders, the Agent and the Company (the “Credit Agreement”).¹⁹⁴ [Describe participation, or lack thereof, in transaction.] Terms defined in the Credit Agreement are used herein as therein defined.

For purposes of this opinion letter, I have reviewed such documents and made such other investigations as I have deemed appropriate.¹⁹⁵ As to certain matters of fact material to the opinions expressed herein, I have relied on the representations made in the Credit Agreement and certificates of public officials and officers of the Company [and others].¹⁹⁶ I have not independently established the facts so relied on.¹⁹⁷

Based on the foregoing and subject to the other paragraphs hereof, I express the following opinions.

1. The Company is a corporation validly existing under the law of the State of Delaware.¹⁹⁸
2. The execution and delivery by the Company of the Credit Agree-

194. Note: This form of opinion letter is for illustrative purposes. It is intended only to provide a context for the Report of which it is a part.

It is not ordinarily necessary to state that the opinion letter is being delivered at the request of the Company. This normally is implicit. *See* note 33.

195. *See* Section 1.4(c).

196. *See* Sections 2.1 and 2.2 regarding the appropriateness of reliance in general, Section 2.2.1(d)(ii) regarding reliance on representations, Section 2.3 regarding reliance on assumptions (many of which are not stated; *see* note 23 and Section 2.3(a)) and Section 2.5 regarding reliance on officers’ certificates.

197. *See* Section 2.6.

198. *See* Section 6.1. If this opinion is not included, ordinarily it will have to be assumed. *See* first paragraph of Section 6.1.

ment and the Note do not, and the performance by the Company of its obligations thereunder will not,

(a) breach or result in a default under any agreement or instruments listed on Schedule II hereto¹⁹⁹ [or result in the acceleration of (or entitle any party to accelerate) any obligation of the Company thereunder],²⁰⁰ or

(b) result in a violation of any court order listed on Schedule III hereto,^{201,202,203}

3. Except as listed on Schedule IV hereto,²⁰⁴ the Company is not a party to any pending [or overtly threatened in writing] action or proceeding known to me that may adversely affect the transactions contemplated by the Credit Agreement or that may have a material adverse effect on the Company.^{205,206}

[Insert any other opinions.]

The opinions expressed herein are limited to the federal law of the United States, the law of the State of New York, and the Delaware General Corporation Law.²⁰⁷

This opinion letter is being delivered to you in connection with the above described transactions and may not be relied on by you for any other purpose. This opinion letter may not be relied on by or furnished to any other Person²⁰⁸ without my prior written consent.

Very truly yours,

Attachments—Schedule I
Schedule II
Schedule III
Schedule IV

199. If there is no schedule, the specific items to which the opinion relates should be otherwise identified.

200. See Section 6.5.

201. If there is no schedule, the specific items to which the opinion relates should be otherwise identified.

202. See Section 6.5.

203. If inside counsel does not give the opinions in Paragraph 2, outside counsel may be requested to give “no breach or default” and “no violation” opinions.

204. Reference to Schedule IV may be omitted if there are no exceptions.

205. If inside counsel does not give the opinions in Paragraph 3, outside counsel may be requested to give a litigation opinion.

206. See Section 6.8, in general, and note 176, regarding the need for a definition of materiality.

207. See Section 4.1.

208. This is an example of the use of a defined term in the Agreement.

APPENDIX B-1
ILLUSTRATIVE OPINION LETTER

(Outside Counsel -
Stock Purchase Agreement)

[Law Firm Letterhead]

[DATE]

World Wide Ventures L.P.
Ten World Trade Center
New York, New York 10048
re: Macromoney Corporation
Sale of Stock Under Stock Purchase Agreement
dated as of _____

Ladies and Gentlemen:

We have acted as counsel for Macromoney Corporation, a Delaware corporation (the “Company”), in connection with the preparation, execution and delivery of, and sale of stock under, the Stock Purchase Agreement, dated as of _____, between you and the Company (the “Stock Purchase Agreement”). This opinion letter is delivered to you pursuant to Section _____ of the Stock Purchase Agreement.²⁰⁹ Terms defined in the Stock Purchase Agreement are used herein as therein defined.

For purposes of this opinion letter we have reviewed such documents and made such other investigation as we have deemed appropriate.²¹⁰ As to certain matters of fact material to the opinions expressed herein, we have relied on the representations made in the Stock Purchase Agreement and certificates of public officials and officers of the Company [and others].²¹¹ We have not independently established the facts so relied on.²¹²

Based on the foregoing and subject to the other paragraphs hereof, we express the following opinions.

1. The Company is a corporation [duly incorporated and] validly existing under the law of the State of Delaware.²¹³
2. The Shares have been duly authorized and validly issued and are fully paid and nonassessable.²¹⁴

209. Note: This form of opinion letter is for illustrative purposes. It is intended only to provide a context for the Report of which it is a part.

It is not ordinarily necessary to state that the opinion letter is being delivered at the request of the client. This normally is implicit. *See* note 33.

210. *See* Section 1.4(c).

211. *See* Sections 2.1 and 2.2 regarding the appropriateness of reliance in general, Section 2.2.1(d)(ii) regarding reliance on representations, Section 2.3 regarding reliance on assumptions (many of which customarily are not stated; *see* note 23 and Section 2.3(a)) and Section 2.5 regarding reliance on officers’ certificates.

212. *See* Section 2.6.

213. *See* Section 6.1.

214. *See* Section 6.2.

3. The Company
 - (a) has the corporate power to execute, deliver and perform the Stock Purchase Agreement,²¹⁵
 - (b) has taken all necessary corporate action to authorize the execution, delivery and performance of the Stock Purchase Agreement,²¹⁶ and
 - (c) has duly executed and delivered the Stock Purchase Agreement.²¹⁷
4. The Stock Purchase Agreement is a valid and binding obligation of the Company enforceable against the Company in accordance with its terms.²¹⁸
5. The execution and delivery by the Company of the Stock Purchase Agreement do not, and the performance by the Company of its obligations thereunder will not, result in a violation of the Certificate of Incorporation²¹⁹ or By-Laws of the Company.²²⁰
6. The execution and delivery by the Company of the Stock Purchase Agreement do not, and the performance by the Company of its obligations thereunder will not,
 - (a) result in any violation of any law of the United States or the State of New York, or any rule or regulation thereunder,²²¹ or
 - (b) require approval from or any filings with any governmental authority under any law of the United States or the State of New York, or any rule or regulation thereunder.²²²

[Insert any other opinions.]

Our opinions above are subject to bankruptcy, insolvency and other similar laws affecting the rights and remedies of creditors generally and general principles of equity.²²³

[Insert any other exceptions, stated assumptions, etc.²²⁴]

The opinions expressed herein are limited to the federal law of the United States, the law of the State of New York, and the Delaware General Corporation Law.²²⁵

This opinion letter is being delivered to you in connection with the above described transaction and may not be relied on by you for any other purpose. This opinion letter may not be relied on by or furnished to any other Person without our prior written consent.

Very truly yours,

215. See Section 6.3.

216. See Section 6.4

217. See Section 6.4.

218. See Section 3.1.

219. This is an example of the use of a defined term in the Agreement.

220. See Section 6.5.

221. See Section 6.6.

222. See Section 6.7.

223. See Sections 1.2(c) and 3.3.

224. See, e.g., Sections 2.3, 3.1, 3.2, 3.4, 3.5, 4.6 and 5.5.

225. See Section 4.1.

APPENDIX B-2
ILLUSTRATIVE OPINION LETTER

(Inside Counsel -
 Stock Purchase Agreement)

[Letterhead of [General] Counsel]
 [DATE]

World Wide Ventures L.P.
 Ten World Trade Center
 New York, New York 10048
 re: Macromoney Corporation
 Sale of Stock Under Stock Purchase Agreement
 dated as of _____

Ladies and Gentlemen:

I am [general] counsel of Macromoney Corporation, a Delaware corporation (the “Company”). This opinion letter is delivered to you pursuant to Section ____ of the Stock Purchase Agreement, dated as of ____, between you and the Company (the “Stock Purchase Agreement”).²²⁶ [Describe participation, or lack thereof, in transaction.] Terms defined in the Stock Purchase Agreement are used herein as therein defined.

For purposes of this opinion letter, I have reviewed such documents and made such other investigation as I have deemed appropriate.²²⁷ As to certain matters of fact material to the opinions expressed herein, I have relied on the representations made in the Stock Purchase Agreement and certificates of public officials and officers of the Company (and others)²²⁸. I have not independently established the facts so relied on.²²⁹

Based on the foregoing and subject to the other paragraphs hereof, I express the following opinions.

1. The Company is a corporation [duly incorporated and] validly existing under the law of the State of Delaware.²³⁰
2. The execution and delivery by the Company of the Stock Purchase Agreement do not, and the performance by the Company of its obligations thereunder will not,

226. Note: This form of opinion letter is for illustrative purposes. It is intended only to provide a context for the Report of which it is a part.

It is not necessary to state that the opinion letter is being delivered at the request of the Company. This normally is implicit. *See* note 33.

227. *See* Section 1.4(c).

228. *See* Sections 2.1 and 2.2 regarding the appropriateness of reliance in general, Section 2.2.1(d)(ii) regarding reliance on representations, Section 2.3 regarding reliance on assumptions (many of which customarily are not stated; *see* note 23 and Section 2.3(a)) and Section 2.5 regarding reliance on officers’ certificates.

229. *See* Section 2.6.

230. *See* Section 6.1. If this opinion is not included, ordinarily it will have to be assumed. *See* first paragraph of Section 6.1.

- (a) breach or result in a default under any agreement or instruments listed on Schedule I hereto²³¹ [or result in the acceleration of (or entitle any party to accelerate) any obligation of the Company thereunder],²³² or
 - (b) result in a violation of any court order listed on Schedule II hereto.^{233,234,235}
3. Except as listed on Schedule III hereto,²³⁶ the Company is not a party to any pending [or overtly threatened in writing] action or proceeding known to me that may adversely affect the transactions contemplated by the Stock Purchase Agreement or that may have a material adverse effect on the Company.^{237,238}

[Insert any other opinions.]

The opinions expressed herein are limited to the federal law of the United States, the law of the State of New York, and the Delaware General Corporation Law.²³⁹

This opinion letter is being delivered to you in connection with the above described transaction and may not be relied on by you for any other purpose. This opinion letter may not be relied on by or furnished to any other Person²⁴⁰ without my prior written consent.

Very truly yours,

Attachments—Schedule I
Schedule II
Schedule III

231. If there is no schedule, the specific items to which the opinion relates should be otherwise identified.

232. See Section 6.5.

233. If there is no schedule, the specific items to which the opinion relates should be otherwise identified.

234. See Section 6.5.

235. If inside counsel does not give the opinion in Paragraph 2, outside counsel may be requested to give “no breach or default” and “no violation” opinions.

236. Reference to Schedule III may be omitted if there are no exceptions.

237. If inside counsel does not give the opinions in Paragraph 3, outside counsel may be requested to give a litigation opinion.

238. See Section 6.8, in general, and note 176, regarding the need for a definition of materiality.

239. See Section 4.1.

240. This is an example of the use of a defined term in the Agreement.

APPENDIX C

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