Report on Legal Opinions To Third Parties

in Corporate Transactions

The Executive Committee of the Corporate and Banking Law Section of the State Bar of Georgia has approved and endorsed this Report on Legal Opinions to Third Parties in Corporate Transactions and recommends that members of the Section comply with this Report in rendering opinions. This Report has not been considered or approved by the State Bar of Georgia. Comments regarding the contents of this Report may be directed to:

Frazer Durrett, Jr., Esq.
Co-Chairman
Alston & Bird
One Atlantic Center
1201 West Peachtree Street
Atlanta, GA 30309

Sidney J. Nurkin, Esq.
Co-Chairman
Powell, Goldstein, Frazer
& Murphy
16th Floor
191 Peachtree Street, N.E.
Atlanta, GA 30303

JANUARY 1, 1992

MEMBERS OF THE LEGAL OPINION COMMITTEE OF THE CORPORATE AND BANKING LAW SECTION

Frazer Durrett, Jr., Esq., Co-Chairman
Alston & Bird

Sidney J. Nurkin, Esq., Co-Chairman
Powell, Goldstein, Frazer & Murphy

Charles R. Beaudrot, Jr., Esq.
Morris, Manning & Martin

W. Stanley Blackburn, Esq.
Kilpatrick & Cody

Ward S. Bondurant, Esq.
Morris, Manning & Martin

Elizabeth B. Chandler, Esq.
Troutman, Sanders, Lockerman & Ashmore

Hazen H. Dempster, Esq.
Troutman, Sanders, Lockerman & Ashmore

Robert W. Grout, Esq.
Troutman, Sanders, Lockerman & Ashmore

Jeffrey K. Haidet, Esq.
Long, Aldridge & Norman
Murphy

Thomas C. Herman, Esq.
Sutherland, Asbill & Brennan

Beth Hornbuckle, Esq.
King & Spalding

J. Stephen Hufford, Esq.
Powell, Goldstein, Frazer & & Murphy

Barbara A. McIntyre, Esq.
Long, Aldridge & Norman

Karen Meadows, Esq.
Rogers & Hardin

Stephen A. Opler, Esq.
Alston & Bird

Robert D. Pannell, Esq.
Trotter, Smith & Jacobs

Barry Phillips, Esq.
Kilpatrick & Cody

Richard W. Probert, Esq.
Trotter, Smith & Jacobs

Anne M. Rector, Esq.
Rogers & Hardin

G. William Speer, Esq.
Powell, Goldstein, Frazer &

Jeffrey M. Stein, Esq.
King & Spalding

Bradley E. Wahl, Esq.
Sutherland, Asbill & Brennan

Anne Tyler
Powell, Goldstein, Frazer
& Murphy
Secretary to the Committee

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REPORT ON LEGAL OPINIONS TO THIRD PARTIES
IN CORPORATE TRANSACTIONS

I. INTRODUCTION

> *We have corrected Thy Work and have founded it upon miracle, mystery and authority. And men rejoiced that they were again led like sheep ....*
>
> F. M. Dostoyevsky

1.01 Purposes of Report. Through this Report, the Legal Opinion Committee of the Corporate and Banking Law Section, State Bar of Georgia (the "Committee"), seeks to bring order out of chaos, to conserve energy, to reduce conflict, to increase certainty, to educate lawyers and clients about the purpose and limitations of legal opinions to third parties and to suggest standards of performance for lawyers preparing such opinions, all objectives encouraged by James J. Fuld in his pathbreaking articles in The Business Lawyer.[1]

By articulating model opinions and Interpretive Standards, a standard format of legal opinions to third parties in customary corporate acquisition or financing transactions, the Committee seeks to achieve a golden mean, where the Opinion Recipient receives the finest quality of legal advice consistent with the time and risk reasonably required to deliver the opinion letter, and the Opinion Giver and Recipient share a common perception of the meaning of terms used in each opinion. However, this Report does not assume that a legal opinion is necessary or advisable in every transaction. To the contrary, in many circumstances, including considerations of expense, the parties to a transaction may prudently decide to omit any legal opinion or to limit its scope.

By defining words used in the model opinion letter, the Committee seeks to promote understanding. We do not rest with the identification and analysis of perceived ambiguity, but attempt to erase ambiguity by defining it away, in the belief that in a model opinion it is better to settle the question of meaning than to worry whether we have settled it "right."[2] In defining words, however, we have attempted to follow those neutral principles articulated by FitzGibbon and Glazer: fidelity to language and respect for practice, respect for needs of the Recipient, respect for the limits of knowledge and ability of the lawyer opining, internal consistency, and independence of context.[3] The Committee, comprised of practitioners who represent both sellers and purchasers, lenders and borrowers, issuers and underwriters, has considered the interests of each of these

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1 Fuld; Fuld II. This Report uses numerous citation abbreviations throughout. The abbreviations are found in the Bibliography at the end of this Report.

2 Cf. Fuld II at 1314 ("I have received many comments from lawyers that there are differences within the same firm as to the meaning of words commonly used in its opinions.")

3 Fitzgibbon I at 462.

constituencies, and has attempted to arrive at a fair resolution of those matters upon which they often disagree.

We recommend steps of investigation and procedure in the course of preparing the model opinion letter. This recommended procedure goes beyond that required by minimum disciplinary or liability standards, consistent with the call of Ethical Consideration 6-5 of the Georgia Code of Professional Responsibility ("CPR") to a "higher motivation [to competence] than that arising from fear of civil liability or disciplinary penalty." In the absence of statute, case and bar canon,[4] there is no better source of recommended practice than the considered judgment of a specialized bar. These recommendations do not represent standards for the evaluation of legal opinions given in the past, however, but derive out of the Committee's deliberated balancing of a cost-benefit analysis in the light of the purposes of the opinion. Furthermore, these recommendations should not be used to evaluate or interpret third party legal opinions which do not adopt the Interpretive Standards.

The Committee identifies in the Interpretive Standards appended to this Report qualifications of general application to the model opinion letter, not only to clarify but also to compress the opinion. One purpose of this effort is to discourage the proliferation in opinion letters of multiple qualifications arising out of the herd instinct. If one firm states a qualification, another follows, fearing the first firm's statement must confirm an implication the second firm previously had not found.[5]

> Each such meticulous refinement in the language of legal opinions . . . tends to dilute the value . . . raises further doubt about the need . . . and justifies further cynicism . . . regarding the value and purposes of counsel's role . . . .[6]

Finally, we describe in the Interpretive Standards and not in the model opinion letter all assumptions of fact we believe generally appropriate for the model opinion, again for the purposes of clarity and concision.

As important as understanding the issues addressed in this Report is identifying the types of legal opinions not addressed by this Report. Among opinions not discussed are opinions to a client, opinions related to securities laws, real estate opinions, opinions related to secured transactions under Article 9 of the Uniform Commercial Code, tax shelter opinions, audit response letters and opinions in partnership transactions. Certain aspects of each of these opinions will undoubtedly be identical to matters addressed in the model opinion letter; for example, an opinion concerning a loan to a partnership should contain many parts of an opinion concerning a loan to a corporation. In those instances, this Report should be a source of guidance and authority.

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4 Fuld at 915 ("Yet I can hardly find any cases considering the substance and form of legal opinions ...."); Fuld II at 1298 ("[T]here are no cases or statutes or rulings or bar association guides which can be cited ....").

5 Cf. Term Loan Handbook at 123. ("The inclusion in every opinion of at least one express qualification of general application ... puts the implication of the rest [of such qualifications] in some question.")

6 Kraus at 30.

In order to promote the benefit of these purposes, the Committee suggests that each Georgia lawyer consider incorporating the Interpretive Standards of this Report by reference in each opinion letter to one or more third parties delivered in connection with a corporate acquisition or financing transaction.

1.02 Format of Report; Definitions. Sections relating to particular opinions are organized in the following format: first, the model opinion; second, comment, including the purpose and background of the model opinion and an explanation of the elements and scope of the model opinion; third, additional notes of matters considered by the Committee to be helpful to an understanding of the model opinion and, last, the procedure recommended for preparing the model opinion.

Throughout this Report, we have used certain capitalized terms with the meanings set forth below:

(a) **"Agreement"** means the primary legal document evidencing the Transaction and the document that typically requires delivery of the legal opinion letter as a condition to closing.

(b) **"Assets"** means all of the tangible and intangible real and personal property of Company.

(c) **"Company"** means the entity on whose behalf the legal opinion letter is given, customarily a seller in an acquisition and a borrower in a financing Transaction.

(d) **"Documents"** means the Agreement, together with other specified documents containing obligations or evidencing acts of Company related to the Transaction.

(e) **"GBCC"** means the Georgia Business Corporation Code in effect on the date of this Report.

(f) **"Opining Jurisdiction"** means the jurisdiction, the law of which the Opinion Giver addresses.

(g) **"Opinion Giver"** means the person giving the legal opinion letter.

(h) **"Opinion Recipient"** means the person or persons to whom the legal opinion letter is addressed.

(i) **"Other Jurisdiction"** means a jurisdiction (other than the Opining Jurisdiction), the law of which is stipulated to be the governing law with respect to a Document.

(j) **"Personal Property"** means all of the tangible and intangible personal property of Company.

(k) **"Public Authority Documents"** means certificates issued by a governmental office or agency, such as the Secretary of State, or by a private organization having access to and regularly reporting on government files and records, as to a person's property or status.

(l) **"Report"** means this Report on Legal Opinions to Third Parties in Corporate Transactions.

(m) **"Seller"** means the person or persons selling Shares.

(n) **"Shares"** means shares of stock of Company.

(o) **"Transaction"** means the corporate transaction in relation to which the legal opinion letter is given.

Other capitalized terms are defined in the Interpretive Standards.

1.03 Purposes of Third Party Opinion. A stated purpose of the customary legal opinion to third party buyers and lenders is to satisfy a condition of the Agreement. However, any third party opinion also serves significant unstated purposes of the negotiating process. It is helpful to identify these unstated purposes in order to test the value of this Report. Unless these purposes are well served by this Report, it will be of little use.

One of the purposes of any third party opinion is to assist the parties to achieve a mutual, subjective understanding of the meaning and effect of their "agreement." The clarification of meaning arising out of this Report is intended to serve this purpose of achieving a mutual understanding.

A second purpose of any third party opinion is to assure the recipient that a lawyer has placed his reputation and skill behind a process of verification designed to identify legal issues arising out of a specified context, which issues, if unaddressed, might adversely affect the accomplishment of the mutual understanding.[7] We believe that the conclusions we reach regarding the meaning of each model opinion and the procedures we recommend be followed in giving the opinion will assist in providing this assurance and thereby will improve the transaction.[8]

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[7] Cf. Freeman II at 3. ("Most of the rationales probably can be distilled down to the following: a legal opinion is required in a business transaction primarily because it subjects the transaction to the problem-spotting and problem-solving process a lawyer must undertake to render the opinion.")

[8] Field at ¶ 1.03[2], ("The legal opinion does much more than verify. In the process of negotiating and preparing an opinion, legal questions and possible conflicts with other transactions may be seen. These may be eliminated by changes in the documentation and by getting consents of those involved in the other transactions. If this occurs the transaction is actually improved.")

Cf. "Memorandum in Support of Miscellaneous Petition of Certain Members of the Rhode Island Bar for Stay and Reversal of Ethics Advisory Panel Opinion No. 88-1," reprinted in PLI Corporate Law and Practice Course Handbook Series No. 624 (1988) ("[T]he opinion is the vehicle by which lenders assure themselves that borrowers understand that they are bound by the terms of the loan agreement.") The PLI material on the Rhode Island

1.04 Inappropriate Purposes of Third Party Opinion. In stating the purposes of a third party opinion it is helpful to note purposes the Committee believes are not appropriate. A legal opinion should not serve the purpose of generally replicating the client's factual representations and warranties[9] or of shifting to the Opinion Giver the risk of an acknowledged uncertainty.[10] The purpose of representations and warranties is to place the burden of misstatement of facts on those most intimately acquainted with the facts, not on the lawyer. A lawyer's stock in trade is analysis, not fact gathering. "[T]he giving lawyer should not be asked to assume the risks of a disclosed problem . . . ." or be asked to provide "unascertainable certainty."[11] "An opinion cannot change the facts or the state of the law."[12]

An illustration of the confusion of a legal opinion with a representation is the opinion as to a fact, in which the third party attempts in effect to obtain a warranty from the other party's lawyer, e.g., Company is in violation of no law.[13] Compare Section 8.03A. The Model Litigation Confirmation at Section XV, for reasons there stated, is an exception to the effort of this Report to discourage fact representations by lawyers in the guise of an opinion.

If the cost of providing a legal opinion outweighs the benefit of receiving it, the parties should acknowledge no proper purpose is served by insisting that the legal opinion be given. An example in most cases is the opinion that a corporation is qualified to do business in every state in

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proceeding reveals a comic opera. The Ethics Advisory Panel of the Rhode Island Supreme Court issued an advisory opinion that for borrower's counsel to sign an opinion containing the assertion that the documents prepared by lending bank's counsel "are legal, valid, binding and enforceable" would constitute a violation of Ethical Considerations 5-1 [requiring a lawyer to exercise his professional judgment "free of compromising influences and loyalties"] and 5-21 [requiring the lawyer in exercising professional judgment on behalf of his client to "disregard the desires of others that might impair his free judgment"]. Commercial law practitioners in Rhode Island, realizing that if this advisory opinion remained outstanding, non-Rhode Island lawyers would be issuing these opinions at a significantly greater cost to clients than Rhode Island lawyers, who were involved in negotiating and closing the transaction, would likely charge for the opinion, attacked the advisory opinion with such force that the Rhode Island Supreme Court granted a motion to stay its operation and effect.

9 But see ABA Comm. on Corporate Opinions at 2391. ("[T]he institutional investor also requires the opinion because it serves a second purpose. It provides an independent check of the accuracy of the representations and warranties which the issuer furnishes as a condition of the investment.") Others on the panel disputed the suggestion that the opinion served this second purpose.

10 New York I at 1895. ("[I]t seems clear that no opinion should be enlarged to the point where the lawyer becomes generally responsible for the client's factual representations or the legal or business risks inherent in a transaction.")

11 Fuld II at 1301.

12 New York I at 1895.

13 California IV at 2177 ("Such a representation constitutes a legal conclusion that may place an impossible burden on the attorney rendering the opinion.")

which the character or quantity of business done so requires.[14] See Section 14.01. See also Section XIII regarding legal opinions with respect to title to and transfer of personal property.

Another situation to be avoided is where the necessary qualifications to or assumptions in a requested opinion render it so innocuous that the opinion has little if any value, such as certain opinions based on hypothetical facts, particularly dangerous because so prone to induce misunderstanding.[15]

Masquerading as an opinion is the so-called "comfort" opinion, which affirms that the Opinion Giver is

> not aware of any factual information that would lead the Opinion Giver to believe that the Agreement contains an untrue statement of a material fact, or omits to state a fact necessary to make the statements made in the Agreement not misleading.

A statement that someone is not aware of a fact is not a legal opinion. The burden of factual inquiry required to furnish this assertion without qualification is enormous. If the lawyer furnishing such a "comfort" assertion so qualifies his knowledge that he confesses ignorance of the facts, the assertion is at best useless and more likely misleading. If the lawyer does not qualify his knowledge, unless the lawyer's involvement in the facts is as intimate, thorough and rigorous as it would be in a transaction involving a public offering of securities, the lawyer should not sign the quoted assertion. Except where the transaction involves registration of securities to be sold to the public, where public confidence in the markets justifies the cost, the cost of obtaining the requisite knowledge would not justify the assertion.[16]

The model opinion letter contains only categorical opinions, like calling balls and strikes.[17] Not present in the model opinions to third parties is any so-called "reasoned" opinion or "opinion as

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14 FitzGibbon I at 476-480 ("In many instances lawyers will rightly question the recipient's need for an opinion in jurisdictions in which the company is not qualified, and resist giving even these limited versions of the opinion."); Bermant at 186 ("I would hazard the guess that very few interstate corporations have qualified everywhere the local laws require. The costs which would be incurred in verifying specific fact situations and legal principles would be staggering if more than a few states are involved. . . . The lawyer should not be asked to join in a risk which is disclosed to the other party and his lawyer.")

15 See, e.g., First Interstate Bank of Nevada, N.A. v. Chapman & Cutler, 837 F.2d 775 (7th Cir. 1988) involving the issuance of an opinion based on hypothetical facts which were wrong.

16 California IV at 2180; Boston at 10 ("Under such circumstances, counsel is not in a position to pass on the adequacy of the disclosure in such documents, and placement agents ought not to be required to obtain such an opinion in order to establish a due diligence defense."); Fuld II at 1311 n. 6 ("[I]t is not customary for a lawyer to give a ["no reason to believe"] opinion with respect to the truthfulness and completeness of an agreement in a private sale of a business for the reasons mentioned above in the text.")

17 The fact that an opinion is categorical or unqualified does not mean that the risk attendant is less present than in a reasoned opinion. As the New York TriBar Opinion Committee

brief," so fruitful when communicating with one's own client, where the attorney-client privilege supports complete candor. There is no privilege protecting an opinion to third parties and no confidential relationship.[18] The Committee recommends that, in those few instances where a categorical opinion cannot be given and a reasoned opinion is determined appropriate, the Opinion Giver express the reasoned opinion in a section of the opinion letter separate from the categorical opinions and in narrative form.

Finally, it is not appropriate to insist upon any opinion which the requesting lawyer would be unwilling to give in like circumstances. Although the golden rule may be subjective, it is no less prophylactic. A "give and get" dichotomy is now acknowledged as unprofessional. "[A] professional opinion should not depend on which side one represents,"[19] or on which side has the most bargaining power.

1.05 When To Determine The Text of an Opinion. The text of an opinion is no less important than the text of any document upon which closing is conditioned, and therefore should be negotiated at the same time the Agreement is negotiated. There is a danger even then in agreeing to a catch-all requirement to deliver "an opinion upon such other matters as counsel for [lender or buyer] may reasonably request," if such agreement invites the party with the superior bargaining position to use the text of the opinion as a bargaining chip or permits any party to use the text as an excuse to avoid closing. Furthermore, questions regarding the contents of the opinion letter should not distract the Opinion Giver during the period before closing from concentrating upon the closing.[20]

Clients are usually not in a position to understand or appreciate the reason or costs of adversarial skirmishes by lawyers over the text of an opinion letter, particularly those which arise near the closing. If skirmishes must occur, let it be early, before the deal is struck.

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recently stated: "...to posit a dichotomy between reasoned opinions and unqualified opinions as a basis for evaluating risk is unacceptably simplistic... Opinions have a predictive quality, but no third party opinion is ever so strong that the opinion recipient can fairly believe that risk has been eliminated." 46 Bus. Law. 718, 734-735 (1991). Or as Raymond Aron said of Simone Weil -- "Although her opinions might change, they were always...categorical."

18 Bermant at 189 ("The requirement of an argumentative type opinion as a closing condition is little more than attempted liability shifting from the recipient of the opinion to the other party's lawyer. Except in the rarest of cases, I believe this to be unsound and unwarranted.")

19 Fuld II at 1302.

20 California IV at 2181. Cf. ABA Comm. on Corporate Opinions at 2437 ("We usually have a catch-all that the documents and proceedings have to be reasonably satisfactory to us as a condition of the closing, and I suppose we would rely on that if we were really troubled. We don't usually find ourself in that position. I think if the situation was bad enough, we would not close.") [Remarks of counsel for an institutional lender, objecting to negotiating the text of the opinion in the Agreement because "you don't know all the things you would get involved with until you get near the end."]

1.06 Ethical Issues. The State Bar of Georgia has adopted the Code of Professional Responsibility ("CPR"), not the Model Rules of Professional Conduct promulgated by the American Bar Association (ABA) in 1983. None of the canons of ethics under the CPR deals directly with legal opinions to third parties. Canons 6 and 7, requiring a lawyer to represent a client competently and within the bounds of law, are relevant, however. Ethical Consideration 7-3, articulating the distinction between the advocacy and advisory role of service to a client, notes that in the latter role "a lawyer in appropriate circumstances should give his professional opinion as to what the ultimate decisions of the courts would likely be as to the applicable law."

In the area of competency, Ethical Consideration 6-3 states that a lawyer is not to accept employment in any transaction in which the lawyer is not competent, unless with the client's permission the lawyer associates a lawyer who is competent.

Ethical Consideration 9-2 requires a lawyer "fully and promptly [to] inform his client of material developments in the matters being handled for the client." The contractual obligation to deliver an opinion letter to a third party is surely material. The lawyer at the very inception of the transaction in the course of obtaining the client's informed consent to the delivery of the opinion should, therefore, discuss with the client any problems the opinion may identify. The client's informed consent can only be given if the text of the opinion is known, hence the need for an early agreement on the text, as discussed above in Section 1.05.

Although the third party to whom the legal opinion is given is not a client, there is nevertheless a duty to the third party to be competent in preparing the opinion.[21] The scope of the lawyer's responsibility to third parties beyond the question of competency is examined in three ABA sanctioned publications. One is the ABA Statement of Policy Regarding Lawyers Responses To Auditors' Requests for Information, which attempts to reconcile the policies supporting the confidential nature of the lawyer-client relationship and the policies supporting the public confidence in published financial statements. A similar reconciliation is required in connection with the confidential nature of the lawyer-client relationship and the obligations inherent in giving third party legal opinions.

A second publication is ABA Formal Opinion 335 (February 2, 1974), which arose out of the efforts by the SEC to assert sanctions against lawyers and law firms with respect to legal opinions in connection with an underwriting of corporate shares. Opinion 335 deals with a troubling issue, the lawyer's obligation with respect to facts upon which a legal opinion is based.

> [T]he lawyer should, in the first instance, make inquiry of his client as to the relevant facts and receive answers. If any of the alleged facts, or the alleged facts taken as a whole, are incomplete in a material respect; or are suspect; or are inconsistent; or either on their face or on the basis of other known facts are open to question, the lawyer should make further inquiry. The extent of this inquiry will depend in each case upon the circumstances; for example, it would be less where the lawyer's past relationship with the client is sufficient to give him a basis for trusting the client's probity than where the client

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21 See generally, Jennings at 77-80.

has recently engaged the lawyer, and less where the lawyer's inquiries are answered fully than when there appears a reluctance to disclose information.

Where the lawyer concludes that further inquiry of a reasonable nature would not give him sufficient confidence as to all the relevant facts, or for any other reason he does not make the appropriate further inquiries, he should refuse to give an opinion. However, assuming that the alleged facts are not incomplete in a material respect, or suspect, or in any way inherently inconsistent, or on their face or on the basis of other known facts open to question, the lawyer may properly assume that the facts as related to him by his client, and checked by him by reviewing such appropriate documents as are available, are accurate.

The essence of this opinion . . . is that, while a lawyer should make adequate preparation including inquiry into the relevant facts that is consistent with the above guidelines, and while he should not accept as true that which he should not reasonably believe to be true, he does not have the responsibility to "audit" the affairs of his client or to assume, without reasonable cause, that a client's statement of the facts cannot be relied upon.[22]

A third publication regarding the scope of a lawyer's responsibility in giving opinions to third parties is the ABA response to what ultimately was incorporated into Treasury Department Circular No. 230: Regulations Governing the Practice of Attorneys . . . Before the Internal Revenue Service, 49 Fed. Reg. 6,719-24 (1984), dealing with tax opinions in connection with offerings of tax shelter securities. ABA Formal Opinion 346 (January 29, 1982, superseding that dated June 1, 1981) notes that one purpose of the tax opinion is to furnish information to be relied upon by offerees of tax shelter securities.

The lawyer rendering a tax shelter opinion which he knows will be relied upon by third persons, however, functions more as an advisor than as an advocate. See EC 7-3, distinguishing these roles. Since the Model Code was adopted in 1969, the differing functions of the advisor and advocate have become more widely recognized.

The Proposed Model Rules specifically recognize the ethical considerations applicable where a lawyer undertakes an evaluation for the use of third persons other than a client. These third persons have an interest in the integrity of the evaluation. The legal duty of the lawyer therefore "goes beyond the obligations a lawyer normally has to third persons." Proposed Model Rules, supra n.3 at 117; see also ABA Formal Opinion 335 (1974).

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22 For the status of lawyer liability under the federal securities laws, see B.C. Note at 383. ("While during the 1970's the SEC and some courts asserted that opining lawyers could be subjected to judicial or administrative sanctions for mere negligence in issuing an opinion or for failing to disclose a client's fraudulent actions to the SEC, today an opining attorney must knowingly or recklessly render an incorrect legal opinion which substantially aids the federal securities law violations of his client in order to be subject to sanctions or civil liability.")

After quoting the material above-quoted from Formal Opinion 335, Opinion 346 discusses the process of relating law to facts.

> In discussing the legal issues in a tax shelter opinion, the lawyer should relate the law to the actual facts to the extent the facts are ascertainable when the offering materials are being circulated. A lawyer should not issue a tax shelter opinion which disclaims responsibility for inquiring as to the accuracy of the facts, fails to analyze the critical facts or discusses purely hypothetical facts. It is proper, however, to assume facts which are not currently ascertainable, such as the method of conducting future operations of the venture, so long as the factual assumptions are clearly identified as such in the offering materials, and are reasonable and complete.

Opinion 346 concludes with the admonition that if the lawyer cannot reconcile the client's wishes with respect to disclosure with the ethical responsibilities expressed in the Opinion, the lawyer "should withdraw from the employment and not issue an opinion."[23]

The ethical responsibilities articulated in Formal Opinions 335 and 346 are echoed in Interpretive Standard 3 under the title "Unwarranted Reliance." The qualification states that whenever an Opinion Giver has knowledge, as defined in Interpretive Standard 3, or recognizes factors compelling a conclusion, that information or an assumption otherwise appropriate is false, or that reliance on such information or assumption would be unreasonable, Opinion Giver may not rely upon such information or assumption.

The purpose of this limitation on reliance is to inhibit the furnishing of misleading opinions. The same purpose appears in other occasions where an opinion technically accurate under strict construction becomes misleading in a broader light. For example, under the definition of "good standing" adopted in this Report at Section 5.02C, a corporation may remain in good standing until the date a notice of intention to dissolve is filed. If an Opinion Giver knew that Company had formally taken steps to dissolve but had not yet filed the notice of intention, the Committee believes that an accurate presentation of the "good standing" opinion would require disclosure of such steps. It is not possible to suggest all instances in which the concept of an "accurate presentation" is relevant, and it is certain that in many instances the application of the concept will be debatable, but the necessity for acknowledging the concept is obvious. If one subjects to analysis in light of the purposes discussed in Section 1.03 those instances in which the concept of an accurate presentation may, but does not obviously, require action, the answer to the question of disclosure or other action may become clearer. However, the application of this concept of accurate presentation is not subject to a bright line test, and whether the concept applies in a particular case will often be a subject upon which reasonable people disagree.

Both the client and the third party are entitled to assume that each lawyer engaged in giving a legal opinion is exercising and expressing his independent judgment. If the lawyer has some status, such as investor in or director of the client, which affects the lawyer's independent

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[23] For a general discussion of the lawyer's obligation in securities transaction opinions, see Comm. on Securities Transactions.

judgment, the lawyer should determine what, if anything, is the proper step for the lawyer to take under the circumstances. In some circumstances disclosure of the special relationship might be advisable. In other circumstances the lawyer may determine that he should refrain from participating in giving any opinion.

By no means, however, is the duty to the third party co-extensive with the duty to the client. The lawyer, for example, is not obligated to volunteer an answer to a question the third party does not ask or to suggest to the third party areas of inquiry the lawyer would be expected to suggest to a client. The lawyer has a professional obligation to the client which encompasses far more than the duty owed to a third party, although the obligation to be competent is identical.[24]

1.07 Malpractice Issues. Separate from the ethical requirement of competency is the malpractice issue of due care, for competent lawyers can still be careless. Our courts have held that an attorney's duty is

> "to use such skill, prudence and diligence as lawyers of ordinary skill and capacity commonly possess and exercise in the performance of the tasks which they undertake [,]" and that "[a]n attorney ... is bound to reasonable skill and diligence, and the skill has reference to the character of the business he undertakes to do."[25]

Furthermore, as more fully discussed in Section 2.02 of this Report, there is no public policy reason why a lawyer, in an opinion to one or more third parties, may not expressly limit the persons who may rely upon the opinion and the circumstances in which they may rely.[26]

In summary, lawyers are not guarantors of their opinions. The Opinion Recipient is entitled to expect that the opinion is prepared with care, but is entitled only to hope that the opinion is accurate. "Opinions are clearly not guaranties. A lawyer who has acted with due care may be wrong but should not be held liable for it."[27]

1.08 How to Use This Report. Deciding what third party opinions are appropriate, necessary or required in any particular context or corporate transaction is beyond the scope of this Report, since obviously that issue is determined both by the context and by the negotiation process. However, once there is a mutual agreement on the particular opinions to be given, the Committee suggests that the following procedures should serve as a helpful guide in assisting the Opinion

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24 ABA Committee on Corporate Opinions at 2400.

25 Kellos v. Sawilowsky, 254 Ga. 4,5 (1987) (emphasis and citations omitted).

26 ABA Comm. on Corporate Opinions at 2425. ("I see no reasons of public policy why, if a lawyer gives an opinion to a client that is adequately stated to be only for the client's benefit and disclaims a willingness to assume a responsibility to anyone else, the lawyer should be forced to have a responsibility to some third party who subsequently claims to have relied on that opinion despite the clear limitation.") (Comments of Loeber Landau.)

27 Field at § 1.04[1]N.B.; See Greyhound Leasing & Financial Corp. v. Norwest Bank of Jamestown, N.W., 854 F2d. 1122 (8th Cir. 1988) (Lender could not recover from borrower's attorney for negligent opinion where lender's negligence exceeded that of attorney); See also Freeman III and Howe.

Giver to prepare the written opinion and to conduct the due diligence and review procedures necessary to insure the accuracy of the opinions given.

Once it is determined what opinions are to be given (and the Illustrative Opinion included as an Exhibit to this Report may well serve as a helpful checklist), the Opinion Giver should initially draft each individual opinion included in the opinion letter by referring to the corresponding model opinion set forth in the applicable section of this Report. Each model opinion, together with all related interpretations in the Interpretive Standards, should be read carefully in order to determine whether the transaction and context dictate appropriate modifications, particularly with regard to definitions and references to parties.[28]

The Opinion Giver should also review the comments following the model opinion. This will give the Opinion Giver information about the positions and discussions of the Committee concerning the meaning and effect of the model opinion language and related Interpretive Standards.

The Interpretive Standards are intended to state qualifications of general application which are frequently appropriate or necessary to third party opinions given in corporate transactions and are designed to be incorporated in an opinion letter by reference. The Opinion Giver and Opinion Recipient should therefore review the Interpretive Standards in order to determine whether any additional qualifications or opinion coverage are necessary in the particular transaction presented. The Opinion Giver should refrain from inserting in the opinion letter qualifications set forth in the Interpretive Standards in an attempt to confirm by emphasis a particular qualification or statement already incorporated by reference to the Interpretive Standards.

Since the Interpretive Standards are also intended to set forth assumptions generally appropriate or necessary in third party opinions, the Opinion Giver should also review the Interpretive Standards in order to determine the appropriateness of additional assumptions. Again, the Opinion Giver should not insert in the opinion letter assumptions already set forth in the Interpretive Standards.

The Opinion Giver should carefully review in each instance the checklist of procedures recommended by the Committee for an Opinion Giver to undertake in order to give each model opinion. These procedures are set forth in a separate section following each separate model opinion.

Although the Committee believes that the model opinions, the assumptions, qualifications, standards and interpretations set forth in the Interpretive Standards, and the due diligence procedures set forth in the Report are generally appropriate in customary transactions, the Committee reminds the Opinion Giver that they are general in nature and should not be viewed as a

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[28] Cf. Field, § 5.01. ("Third party opinions tend to be brief and to follow a relatively rigid format. There is significant value in maintaining this format.... The lawyer who receives an opinion which includes surplus or atypical language must consider whether the intent or effect of the language used is to limit the opinion.")

substitute for the exercise of reasoned professional judgment, legal analysis and due diligence in the light of the particular transaction at hand.

II. CERTAIN ASPECTS OF OPINION LETTER

2.01 Date of Opinion; Obligation to Update; Future Events. A legal opinion letter is normally dated as of the date of its delivery, typically upon consummation of the Transaction, and is deemed to speak as of that date. See, however, the discussion below in this Section 2.01 regarding certain timing assumptions which may underlie certain opinions, e.g., the Model Remedies Opinion, the Model No Consent Opinion and the Model No Violation Opinion. There is no need to specify the effective date of the opinion letter separately, except in the rare case requiring an effective date other than the date of delivery. Likewise, the Committee believes there is no obligation to update the opinion letter after it is delivered absent an undertaking to do so on the part of the Opinion Giver, even though matters which subsequently occur may affect an analysis or conclusion in the opinion letter. This is confirmed in Interpretative Standard 10.

In some circumstances, for example, where a search of court filings to determine the existence of prior security interests could be made only through a date the court filings were current, it may be necessary for a particular opinion to speak as of a date prior to the date of delivery. In such case, this earlier date should be clearly specified in the opinion.

The Committee believes it proper in certain situations for the Opinion Giver to deliver an opinion letter that bears a later effective date (such as the date on which the Transaction will be closed), with instructions to deliver the opinion letter on the effective date. In such a case, the delivery of the opinion letter at the effective date should be made only upon telephonic, telecopier or other proper authorization of the Opinion Giver. The Committee reminds lawyers so delivering opinion letters with a delayed effective date that their responsibility with respect to the accuracy of the opinions extends through the date of effectiveness.

In some cases, the opinion speaks to future events, such as when "performance" occurring after the date of delivery is addressed by one or more of the opinions expressed. For example, the Model Remedies Opinion constitutes a prediction that the legal system will provide a remedy for nonperformance of an executory contract and therefore involves future conduct.[29] Where an opinion requires consideration not merely of the facts in existence when the opinion is rendered, but also of future factual circumstances, the Opinion Giver is presented with a special problem: if the essence of a legal opinion is the application of legal rules to particular facts, and those facts do not yet exist, how can the Opinion Giver determine with any certainty the facts that are to be subjected to analysis?

Numerous situations routinely found in business transactions demonstrate the importance of future events to the legal rights of Opinion Recipients. The following hypotheticals illustrate the point and the possible dimensions of the task facing an Opinion Giver who undertakes to give a forward-looking opinion:

(i) A bank and Company execute a credit agreement providing for a revolving line of credit with a maximum commitment of $10,000,000 and future advances at Company's request. On the date of execution Company borrows $1,000,000. Would a

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[29] See Field III at 1-2.

remedies opinion rendered to the bank on that date with respect to the credit agreement cover the availability of a remedy for failure to repay additional advances obtained by Company at its discretion at a later time?

(ii) Same facts as hypothetical (i), but the revolving loan bears interest at a floating rate of 2% over the bank's "prime rate" in effect from time to time. Would the remedies opinion cover the availability of a remedy for the failure of Company to pay interest at the agreed rate, where the effective interest rate under the agreement on the day the opinion is rendered is non-usurious, but increases in the "prime rate" after closing cause the effective rate to exceed an applicable usury ceiling?

(iii) An insurance company purchases long term notes of Company pursuant to a note purchase agreement that contains a covenant limiting the other debt of Company to $5,000,000. Would a no violation opinion rendered to the insurance company need to disclose the existence of the $10,000,000 bank credit agreement described in hypothetical (i), if Company had not yet borrowed more than $5,000,000 in funds under the credit agreement?

(iv) Same facts as hypothetical (i), but two weeks before the day the credit agreement is signed and the opinion letter is rendered to the bank, the note purchase agreement described in hypothetical (iii) is signed. The insurance company's debt limitation, on the day the $10,000,000 credit agreement is signed, would allow the incurrence of $1,000,000 in additional debt borrowed on that day. Would a no violation opinion rendered to the bank on that day have to disclose that a future advance of greater than $4,000,000 would breach the insurance company's agreement?

(v) A bank makes a demand loan to Company. Would a remedies opinion with respect to the demand note have to state that the six year statute of limitations of O.C.G.A. § 9-3-24 begins to run from the issuance of the instrument?[30]

(vi) Two shareholders of Company enter into a shareholders voting agreement having no stated term. Must a remedies opinion with respect to the agreement disclose the twenty year term limitation on such agreements contained in O.C.G.A. § 14-2-731? Would the result be different if the agreement expressly provided that it would be effective for thirty years, given that O.C.G.A. § 14-2-731 would expressly validate such an agreement for the first twenty years of its stated term, but make it void thereafter?

(vii) A bank makes a loan to Company secured by inventory. Would an opinion that the bank's security interest has been perfected by the filing of a U.C.C. financing statement be incorrect if it did not disclose the need for the bank to file a continuation statement to extend perfection beyond five years as required by O.C.G.A. § 11-9-403(3)?

After considering these and a variety of other hypotheticals, the Committee was unable to reach a consensus with respect to an abstract principle that would give uniformly satisfactory

30 See, e.g., Woodall v. Hixon, 154 Ga. App. 844, 270 S.E.2d 65 (1980).

results with respect to "future events." The Committee initially proposed in its Discussion Draft No. 1 a so-called "telescoping assumption." This approach would have required that the Opinion Giver analyze the transaction on the hypothetical assumption that all of the Company's obligations would be performed on the date of the opinion, and under the circumstances which then exist. The Committee ultimately concluded that the "telescoping assumption," while potentially helpful in analysis, could provide overly-mechanistic results under certain of the hypothetical situations stated above. For example, under the "telescoping assumption," an opinion rendered in the circumstances of hypothetical (i) above, would have to disclose the effects on the legal conclusions stated in the opinion letter of Company's hypothetical obligations to perform as though it had borrowed the entire $10,000,000 amount of the loan. On the other hand, presumably the Opinion Giver would not need to consider the possibility that an interest rate might fluctuate, or disclose that the Opinion Recipient's obligations could become barred or lost because of the passage of time, since the obligations would be "telescoped" to the date of closing.

The literature on legal opinions contains little guidance on the subject of dealing with future events. The Silverado drafting group in its Exposure Draft has dealt to some extent with this subject, generally establishing the principle that an opinion speaks only as of its date (Silverado Draft, ¶9) and covering other aspects of the predictive nature of opinions in particular rules. See Silverado Draft "Accord" § 4(k); 4(l); 4(m); 9; 15(d). See also Silverado Draft "Commentary" ¶¶4.3(vii); 9.l; 13.1; 15.4; 15.5; 16.5. Nevertheless, the Silverado Draft does not articulate any general, theoretical framework for dealing with future events, instead focusing only on certain specific facets of the problem. Its primary contribution is an assumption that Company will not take "discretionary" action in the future that could create a problem with a legal conclusion reached by the opinion. Silverado Draft § 4(m).[31] See also Silverado Draft § 15(d). The Silverado Draft does not appear to consider expressly the effect of legal principles which, because of the passage of time, could become applicable to the parties and the Documents, the possible consequences of failure of a party to take actions in the future to preserve or extend rights initially arising at the time of the transaction (e.g., filing continuation statements, filing suit within a statute of limitations), or changes in the status of a party.

In a brief discussion of the issue in the context of the remedies opinion, two commentators have proposed a more comprehensive approach, arguing for something akin to a "foreseeability" standard, stating that, in order to give the remedies opinion, the Opinion Giver must "posit situations which might arise during the term of the agreement and which might affect the availability of a remedy. . .[I]t is not enough to take the facts on the date of the opinion as one does in most other opinions.[32] Their approach would require an Opinion Giver to consider whether situations might arise during the term of the Document that could adversely affect the availability to the Opinion Recipient of a remedy for breach of the Document. The difficulty of predicting future events would be ameliorated by eliminating any need for the Opinion Giver to consider the

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31 Using this assumption, an Opinion Giver would not need to be concerned about the effect of future advances under the revolver discussed in hypotheticals (i) and (v), because Company has "discretion" in taking down funds. This result is at variance with the result obtained under the "telescoping assumption" as postulated by the Committee.

32 Field III at 3-4.

possibility of any changes in the status of any party, in the relationship of the parties, or in the agreements involved, or that the parties will not administer them as written.[33]

The Committee believes that a general "foreseeability" standard is overbroad, and agrees with the view that "it goes without saying that no one can certify today what will happen tomorrow."[34] In general, Opinion Givers should not be expected to anticipate future conduct or changes in circumstances that might affect the availability of remedies, even though an Opinion Giver must consider the availability of remedies for nonperformance of obligations that, as expressed in the Documents, Company will be required to perform in the future as provided in the Documents, and should also consider the circumstances that will exist in the future as a result of the Opinion Recipient's exercise of absolute rights explicitly conferred on it in the Documents.

The Committee has concluded that at this time it should merely follow the approach of the Silverado Draft to "future events," leaving for future development general principles covering the issues on which the Silverado Draft is silent. Accordingly, the Interpretive Standards, like the Silverado Draft, reiterate that, in general, an opinion speaks only as of its date and include the Silverado Draft assumption that Company will not take discretionary action that violates law, another agreement or a court order. Based on the Committee's consideration of proposals under consideration by the Silverado drafting group, Interpretive Standard 16 also includes the assumption that all permits, governmental approvals or other actions necessary in the future under applicable law will be obtained or taken by Company. The Interpretive Standards do not otherwise address the forward-looking nature of certain opinions. Although not expressly stated in the Interpretive Standards, the Committee agrees that an Opinion Giver generally need not consider the possibility of changes in the status of any party, in the relationship of the parties, or in the Documents, or that the parties will not administer the Documents as written. While the Committee has not taken a position on the need to refer in an opinion to, for example, the requirement to file U.C.C. continuation statements, Opinion Givers who clearly recognize that an Opinion Recipient may be unaware of its need to comply with applicable legal requirements to preserve its rights may want to consider making appropriate disclosure to eliminate any concerns over an "accurate presentation." See Section 1.06. Any such disclosure should not be considered to imply that the Opinion Giver is assuming a broader obligation with respect to future events than otherwise required by this Report and the Interpretive Standards.

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33 See Id. at 4.

34 Glazer at 347.

In certain cases, e.g., the Model No Consent Opinion, an opinion may refer to "consummation" of the transaction, rather than to "performance." In such cases, the opinion is deemed to refer to what lawyers generally call the "closing", i.e., to consummation of the events required or contemplated to occur on the date of closing and with respect to the consents, approvals, etc. which are required to permit those actions on that day, without regard to consents, approvals, etc., which might be required in the future as to post-closing matters.

2.02 Addressees; Reliance. An opinion letter is normally addressed to the party requesting it, who will be either a specified party to the transaction in an individual capacity, representatives of a larger group or an identified class of persons. Examples of representative recipients and class addressees are, respectively, "XYZ Investment Bankers, as Representatives of the Several Underwriters" and "To all Purchasers of the 8% Subordinated Debentures of ABC Corporation." In any event, the intended Opinion Recipient or Recipients should be specifically identified in the opinion letter.

Unless otherwise acknowledged, the only person or persons who should be entitled to rely upon the opinion letter are the person or persons to whom it is addressed. This position is supported, generally, by the doctrine of privity of contract. Accordingly, in the context of delivery of an opinion, the Opinion Giver who delivers the opinion, whether at the direction or with the consent of the client, should owe no duty to any party not an addressee or identified in the opinion letter as a person entitled to rely if reliance by others is disclaimed. Until comparatively recently, privity was a barrier to third party liability for professional malpractice in Georgia. Hughes v. Malone, 146 GA. App. 341 (1978). Thereafter, the Court of Appeals in Travelers Indemnity Co. v. A. M. Pullen & Co., 161 Ga. App. 784, 786-7 (1982) held that:

> a third party is entitled to recover from an accountant, despite the absence of privity, where the third party is in a limited class of persons known to be relying upon representations of accountants ... Travelers presented evidence, which if believed, would have warranted a conclusion that Pullen was informed by Yaksh that Travelers required financial statements and would rely upon those statements ....

A close reading of Travelers, which dealt with a motion for summary judgment, indicates only that privity is no defense to an action by a third party beneficiary of the contract between the client and the professional. In First Financial S&L Assn. v. Title Ins. Co. of Minn., 557 F. Supp. 654, 660 (1982), the District Court did not read Travelers so narrowly.

> In such circumstances [knowledge that an assignment of loan closing packages would follow] it was clearly foreseeable that direct assignees such as plaintiff would rely on the accuracy of the closing attorneys' certifications. Accordingly, under Georgia law, [the lawyers certifying title] ... had a duty to such assignees to exercise reasonable care in the execution and delivery of such certificates.

Kirby v. Chester, 174 Ga. App. 881, 331 S.E.2d 915 (1985) validates the District Court's interpretation. Although citing third party beneficiary authority as support, the Georgia Court of Appeals also cited First Financial S&L, and noted:

> We agree with the court's statement made there that "under certain circumstances, professionals owe a duty of reasonable care to persons who are not their clients, i.e., not in privity with them".... There is little dispute that Kirby as the lender here relied on Chester's faulty title certification and that Chester knew the purpose of his title search and subsequent certifications was, as in most real estate transactions, to assure the lender of sufficient collateral for the proposed loan. (Id. at 885-6)

In Badische Corporation v. Caylor, 835 F.2d 339 (11th Cir. 1987), the Eleventh Circuit Court of Appeals certified the question of to whom an accountant was liable for negligence in the preparation of audited financial statements. The Georgia Supreme Court responded:

> We specifically reject the plaintiff's argument that the rule established in Robert & Co. [250 Ga. 680, 300 S.E. 2d 503 (1983)] expands professional liability for negligence to an unlimited class of persons whose presence is merely "foreseeable." Rather, professional liability for negligence, including the liability of accountants, extends to those persons, or the limited class of persons, who the professional is actually aware will rely upon the information he prepared.

In a footnote to the above quotation, the Georgia Supreme Court noted that the holding followed the middle ground of Restatement of Torts, 2d, Section 552, between the "unlimited foreseeability rule" and the "narrow privity rule which remains the law in some states and which was formerly the law in this state." 825 F.2d at 341 n. 2.

When the Opinion Giver wishes to assure that reliance on an opinion letter is restricted to the addressees of the opinion letter, the following language should be included in the opinion:

> This opinion letter is provided to you for your exclusive use solely [in connection with the Transaction] [as contemplated by Section __ of the Agreement] and may not be relied upon by any other person or for any other purpose without our prior written consent.

This disclaimer should be effective to prevent reliance upon the opinion by persons other than the addressee. When the Georgia Supreme Court in Robert & Co. v. Rhodes-Haverty Partnership, 250 Ga. 680 (1983), expanded privity by what is called the "limited foreseeability" rule, it noted that

> The additional duty that this rule imposes may be, of course, limited by appropriate disclaimers which would alert those not in privity...that they may rely upon [the opinion] only at their peril. (Id. at 692.)

In certain cases, because of the nature of the transaction, the Opinion Giver knows that the opinion letter is intended to be relied upon by persons other than the addressee. A frequently recurring example is that of bond counsel whose opinion is often printed on the bonds and is intended to be relied on by all purchasers of the bonds. Other examples include an opinion letter given by local counsel in a transaction intended to be relied upon by lawyers principally involved; a

loan transaction where the opinion letter is delivered to the lead bank with knowledge that the loan will be participated in by other banks to whom the loan documentation, including the opinion letter, will be delivered subsequent to closing; and an opinion letter delivered to underwriters in a stock issuance where the transfer agent and registrar for the stock is expected to rely upon the opinion. It is also not uncommon for counsel to the Opinion Recipient to rely upon the opinion with the knowledge and consent of the Opinion Giver. In such cases, the opinion letter should specifically describe who, in addition to the specific addressee, may rely upon the opinion letter, and under what circumstances and to what extent. Interpretive Standard 8 discusses who may rely on an Opinion.

2.03 Description of Transaction and Opinion Giver's Role. The opinion letter should ordinarily commence with a reference to its subject matter. Consider, for example:

> We have acted as counsel to ABC Corporation, a Georgia corporation (the "Company"), in connection with the preparation of the [Agreement and the Documents] and have participated in the closing of the Transaction.

The Opinion Giver may wish to designate further the role which Opinion Giver has played in the Transaction. The Committee believes, however, that references to the Opinion Giver as "general" or "special" counsel have no generally accepted meaning, and therefore should not be viewed as a substitute for an appropriate qualification or limitation on the scope of any opinion stated in the body of the opinion letter.

The Committee is also of the view that the term "general counsel" should ordinarily be used only to designate "inside" general counsel for a corporate client, for the reason that the term "general counsel" may imply, with respect to outside counsel, more familiarity with the corporate client's affairs than the facts support, thereby implying a scope of responsibility beyond that intended or appropriate.

In cases in which the Opinion Giver has not previously represented the client, or has not represented the client on a continuing basis, but has been engaged solely with respect to the Transaction, use of the term "special counsel" does not necessarily advise the Opinion Recipient of that fact. Even if it did, however, in the Committee's view this designation would not imply any limitation upon the Opinion Giver's responsibility for the opinions expressed. The term "special" counsel is ambiguous because it is sometimes used to designate a lawyer's role with respect to a specific part of a Transaction rather than general involvement, and is sometimes used to refer to a lawyer requested to express an opinion as a specialist in a particular field of law, such as title, environmental or tax matters. If "special counsel" is used in the latter case, it is recommended that the particular area of law also be specified.

2.04 Reasons For Opinion. The opinion letter should generally state why it is being given. This is typically accomplished by a simple reference such as,

> This opinion letter is rendered pursuant to Section __ of the Agreement.

The reason why the opinion letter is given may be related to the limitation on its use and disclaimer of reliance by others.

2.05 Definitions. For purposes of brevity and clarity, it is advisable to define certain terms used in the opinion if the terms cannot be defined by reference to definitions contained in the Documents. In any event, absent special requirements, the Committee recommends that terms used in the opinion have the same meanings as appear in the Interpretive Standards or the Agreement, as appropriate. This can be accomplished by language such as:

> Capitalized terms used in this opinion letter [and the attachments hereto] and not otherwise defined herein shall have the meanings assigned to such terms in the [Interpretive Standards and/or the Agreement].

The Committee recommends that the opinion letter use the same terms as are used in the statutory law with respect to the opinion being given. For example, the GBCC refers to "articles of incorporation," "shareholders" and "shares", rather than "certificate of incorporation," "stockholders" and "stock."

2.06 Description of Matters Considered. Whether or not so stated in the opinion letter, the Opinion Giver has the burden of assuring that a proper person has reviewed those facts necessary to support each of the legal conclusions expressed in the opinion letter. In most cases, opinions normally expressed can be supported by the Opinion Giver's examination of documents, either executed original documents or copies identified to the satisfaction of the Opinion Giver, or certificates of public officials or officers of Company where factual matters are concerned. That such factual investigation was made is typically affirmed by the following statement:

> In the capacity described above, we have considered such matters of law and of fact, including the examination of originals or copies, certified or otherwise identified to our satisfaction, of such records and documents of Company, certificates of officers and representatives of Company, certificates of public officials and other documents as we have deemed appropriate as a basis for the opinions hereinafter set forth.

The foregoing language does not identify with particularity the documents examined. In some cases, lawyers have prefaced their opinion letters by reference to a detailed list of such documents and certificates, together either with a statement that they have examined such other documents and made such further legal and factual investigations as they deemed necessary for purposes of rendering the opinion expressed therein, or, alternatively, with a specific disclaimer that they have not made any other examination or factual investigation. If the "laundry list" of documents is used, without specific disclaimer of responsibility for other documents or matters not examined or considered, the following sentence should be added:

> *We have made such further legal and factual examinations and investigations as we deemed necessary for purposes of expressing the following opinions.*

If no specific disclaimer is included, the inclusion of a detailed list of documents does not constitute a limitation on the Opinion Giver's responsibility with respect to the opinions expressed.

If the lawyer intends to limit the scope of his or her examination of facts, the limitation could be expressed as follows:

> *In giving the opinions hereinafter expressed, we have relied only upon our examination of the foregoing documents and certificates, and we have made no independent verification of the factual matters set forth in such documents or certificates and no other investigation or inquiry.*

Such limitation on the scope of the Opinion Giver's investigation and examination with respect to factual matters is unusual, and would ordinarily be expressed only in special circumstances, such as when the Opinion Giver has played an extremely limited role in the Transaction. When the opinion letter as a whole is not to be so limited, but a particular opinion expressed in the opinion letter is the subject of limited investigation or inquiry, such limitation can be expressed by reference to facts and documents disclosed in an officer's certificate. For example:

> *In giving the opinion expressed in paragraph __ above, we have relied solely upon the certificate of _____, as to evidences of indebtedness, agreements and instruments to which Company is a party, and judgments, orders and decrees of any court or arbitrator binding upon Company.*

In any event, unless the Opinion Giver by disclaimer limits the scope of the opinion letter, the Opinion Recipient is entitled to assume that the Opinion Giver has reviewed whatever the Opinion Giver deems necessary to deliver the opinion letter. See generally, Interpretive Standard 5.

2.07 Dealing with Facts Considered or Relied Upon. The Opinion Giver ordinarily is entitled to rely (subject to the qualification as to unwarranted reliance discussed below), without investigation, upon facts established by another person's certificate (or, in appropriate cases, such other person's oral representation), provided:

(i) if not established by a Public Authority Document (as defined in the Interpretive Standards) the facts are not of an ultimate character, stating directly or in practical effect the legal conclusion at issue;

(ii) any person supplying facts is an appropriate source of those facts (e.g., in the case of corporate information, a source who could reasonably be expected to have knowledge of the area of activity in question); and

(iii) if the facts are set forth in a certificate, the Opinion Giver has used reasonable professional judgment as to its form and content. See Interpretive Standard 4.

The Committee recommends that facts on which the Opinion Giver relies but which are provided by another person (e.g., a Company official) be suitably memorialized in a certificate or other written instrument subscribed by such person.

A. Factual Investigation. The essence of the third party legal opinion is analysis of the law applicable to the Transaction in the light of facts relevant to the specific opinion issues. The Opinion Giver must identify the appropriate scope of factual investigation: some facts (typically few in number) will be established by the Opinion Giver, some facts will be provided by other sources or persons upon which or whom the Opinion Giver will rely and other facts will be assumed. Few will question the Opinion Giver's responsibility to become knowledgeable with respect to the Agreement. By the same token, it would be foolish to require the Opinion Giver to verify the validity of actions taken (e.g., due authorization and execution) by the Opinion Recipient. Thus, the appropriate scope of the Opinion Giver's factual investigation must be determined on the basis of sensible and reasonable expectations.

B. Unwarranted Reliance. When facts are not to be established through independent investigation but by assumptions or reliance on others, one encounters the question: "But what if the Opinion Giver knows to the contrary or knows of contradictory information?" As a general and overarching principle, the Opinion Giver may not rely upon information (including certificates or other documentation) or assumptions otherwise appropriate in the circumstances, if the Opinion Giver knows that the information is incorrect or the assumptions are unwarranted. See Section 1.06. Unless otherwise agreed, "Opinion Giver" in the preceding sentence refers to the lawyer in the Opinion Giver's organization (a member of the "primary lawyer group" as defined in Section 3.02B) principally responsible for providing the response concerning the particular opinion issue to which the reliance relates.

"Knowledge" for purposes of determining when reliance on facts furnished by others is justified must be defined with reference to the Model Knowledge Qualification discussed in Section III of this Report.[35] As discussed in that Section, the Model Knowledge Qualification customarily will be used in reference to specific factual questions (such as, are there any writs outstanding, does any litigation exist, or is the Company a party to any agreements that conflict with the Transaction Documents?). Because of the Opinion Giver's relationship to Company, the Opinion Giver may have particular knowledge that will illuminate those issues. Accordingly, the Opinion Recipient is justified in asking the Opinion Giver to conduct the limited inquiry described in Section III. However, when an appropriate corporate officer (or, depending upon the circumstances, another appropriate person on whose representation reliance is placed) represents a fact to be true, burdening the Opinion Giver with any duty of inquiry, other than the limited duty described in Section III, is not justified either from a functional or a cost perspective absent information that causes the Opinion Giver to doubt the

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[35] Glazer at 481.

representation.[36] The Committee therefore believes that reliance on such a certificate (or other statement of a similar nature) is justified without further inquiry as long as the lawyer (or, in some cases, lawyers) in the Opinion Giver's organization principally responsible for providing the response concerning the particular issue with respect to which the information proposed to be relied upon relates is not currently aware of contradictory facts. The Opinion Giver, absent such current knowledge, is not required to collect facts gleaned over the course of the Opinion Giver's representation of Company, examine the interrelationship of all those facts, and draw conclusions as to the potential implications of those facts for the Transaction. Further, the responsible lawyer may not have current knowledge of information contained in the Opinion Giver's files. This standard of current knowledge for reliance purposes is automatically incorporated in an opinion letter by reference to the Interpretive Standards. See Interpretive Standards 3 and 7.

C. Objective and Ultimate Facts. Facts that are normally the subject of assumptions or reliance upon others are those facts that are objective in character and are capable of verification through customary investigative effort (herein, "objective facts"). In contrast, facts that are conclusory or in the nature of the very legal conclusion the Opinion Giver is requested to provide -- sometimes referred to as "ultimate facts" -- are not properly the subject of assumptions or reliance upon others, except in the case of certain facts established by Public Authority Documents. For example, reliance by the Opinion Giver upon a statement in a corporate secretary's certificate that a stated number of directors were present and acting when the board authorized the Transaction would be acceptable, but reliance on a statement in a certificate of a corporate officer that Company was duly organized or the Agreement was duly authorized would not be appropriate to give those very opinions. A third category involves facts that are neither objective nor ultimate, but are subjective in character (e.g., an appraiser's evaluation or an investment banker's opinion). The Committee believes that reliance on this third type of information is acceptable, but in the usual case the Opinion Giver should disclose such reliance in the opinion letter.

D. Reliance on Certificates. In most cases, facts will be established through reliance upon certificates of others, subject to the qualification as to unwarranted reliance (see the discussion at Section 2.07B above). The Opinion Giver may rely upon a certificate, without investigation, if it addresses the facts in question and the Opinion Giver has exercised professional judgment as to the form and content of the certificate and the source of the information.

Opinion letters in business transactions almost always include some legal conclusions concerning the incorporation and existence of the corporate client and its ability to transact business in its state of incorporation and perhaps in other jurisdictions. The principal sources of verification of these matters are certificates issued by public officials in the various jurisdictions involved. See Section V below regarding certificates or verifications available from the Office of the Secretary of State of the State of Georgia.

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[36] Glazer at 476.

In addition to certifications obtainable from the Office of the Secretary of State, the Opinion Giver may also be called upon to confirm information with respect to other jurisdictions. Public officials in other states will furnish similar certificates or advice relating to qualification, good standing and tax delinquencies which can normally be updated by telegram, telephone or telecopier. When certificates are to be so received by the Opinion Giver from public officials in foreign jurisdictions, the lawyer should inquire, well in advance of closing, what procedures exist for obtaining the certificates and confirmations and the amount of time that should be allowed for timely receipt, as well as the latest date through which such information can be obtained.

Since these various Public Authority Documents will normally bear a date prior to the date of delivery of the opinion, the Opinion Giver must decide what additional verification, if any, is necessary for purposes of the opinion. The responsibility is that of the Opinion Giver and additional verification or updating may or may not be necessary, depending upon the circumstances and the Opinion Giver's familiarity with Company. The Committee believes that it is not necessary, in every case, for each Public Authority Document to be updated for purposes of delivering an opinion. Often, as a matter of prudence, the Opinion Giver will state in the opinion letter that reliance is placed upon Public Authority Documents bearing an earlier date and that the Opinion Giver has not undertaken to obtain "bringdown" certificates or telegrams. This is often a question of professional judgment to be resolved by the Opinion Giver. In some cases it may be resolved by negotiation between the Opinion Giver and the Opinion Recipient or by use of an officer's certificate affirming no action since the date of the most recent Public Authority Document.

Officer's certificates are generally obtained for two purposes in business transactions: (a) to verify the authenticity of documents and (b) to furnish or confirm factual information not readily verifiable by the Opinion Giver. A common example of the first type of certificate is one that affirms attachment of a true copy of the bylaws and corporate minutes or resolutions pertaining to the Transaction, which resolutions have not been amended or rescinded. Signatures and capacities of various individuals executing documents on behalf of Company may also be confirmed by an incumbency certificate. Certificates such as these are often delivered to other parties to the Transaction at closing to provide assurance, in addition to the opinion letter, that corporate action has been properly taken.

The second type of officer's certificate relates to factual matters not readily verifiable by the Opinion Giver when preparing the opinion. See the discussion at Section 2.07B regarding when reliance on such a certificate is not warranted.

When certificates of officers of Company are obtained and relied upon, such certificates should be obtained from an appropriate corporate officer. For example, factual matters of a financial nature should be confirmed by a certificate of an appropriate financial officer of Company, not by an executive vice president-manufacturing having little knowledge or responsibility concerning such matters.

Where appropriate, the Opinion Giver may also rely on facts stated by a party to be true in the Documents, e.g., upon the representation and warranties and other statements made by Company (or by one or more Company affiliates). Interpretive Standard 4 requires that when an Opinion Giver relies upon facts set forth in a representation or warranty, the reliance be disclosed in the opinion letter.

2.08 Assumptions. It has become customary to rely in an opinion letter upon a number of factual assumptions. The facts assumed are directly relevant to one or more of the issues typically required to be addressed in the opinion letter. The Committee believes that reliance upon certain assumptions is appropriate since, in most cases, the facts are not readily verifiable or could be verified only by the expenditure of time and effort not usually justified and generally would, upon examination, be found to be true. Examples of such assumptions include those dealing with the authenticity of documents, the existence, good standing and proper authorization of the Transaction by other parties and the post-consummation conduct of the parties. Assumptions upon which Opinion Giver may rely are set forth in Interpretive Standards 12 through 20.

2.09 Presumption of Regularity and Continuity. If Company has been in existence for many years, its corporate records with respect to its organization and its authorization of various corporate transactions may be incomplete or unavailable. If, after diligent investigation, the Opinion Giver finds this to be the case, the Opinion Giver may be entitled to rely upon the presumption of regularity and continuity (see Rogers v. Hill, 289 U.S. 582, 591 (1933)); i.e., where there is no known basis for reaching a different conclusion (other than the fact of incomplete or missing corporate records), reliance upon the presumption of regularity and continuity might be appropriate in the circumstances. For example, direct evidence that Company received payment years ago of the subscription price for its shares may not be available, although its current financial statements reflect such payment in its capital account. The presumption of regularity and continuity might provide a reasonable basis for an opinion that the shares of Company are fully paid and nonassessable. The appropriateness of applying this presumption should be determined by what is reasonable in the circumstances, taking into account the reason for the incomplete or missing corporate records (if known) and the importance of the missing records to the opinion being expressed. The Opinion Giver should consider whether reliance on the presumption of regularity and continuity is sufficiently material to an opinion given in reliance on such presumption to require disclosure in the opinion letter. If such disclosure is warranted, language similar to the following should be used:

> *In connection with our opinion in paragraph ___ below concerning the due organization of the Company, our investigation revealed that certain corporate records concerning [specify] were either missing or incomplete. Accordingly, we have relied upon the presumption of regularity and continuity to the extent necessary to enable us to express such opinion.*

2.10 Signature. Style varies as to the manner in which opinion letters are signed, whether "XYZ by A, a partner", or "A on behalf of XYZ," or simply signed in the name of the firm, "XYZ." If the opinion letter is signed only in the name of the firm, the firm should

maintain a record identifying the signatory. In any event, a partner or authorized person should sign the opinion letter, eliminating any question as to the signatory's authority to bind the firm.

2.11 Practice Procedure Regarding Opinion in General.

As a matter of practice, many firms have adopted an internal review process for the furnishing of opinions, although not all firms have reduced such process to writing. The Committee recommends that Georgia lawyers reduce their own practices to writing and that such practices consist, at a minimum, of keeping a log of lawyers within the firm who prepared, reviewed and signed an opinion. The Committee notes, without making a recommendation on the matter, that many malpractice insurance carriers now require firms to subject opinions, particularly in securities transactions, to a peer review of at least one partner in addition to the signing partner. The Committee also notes that many organizations have developed opinion committees that prescribe standard opinions and require attorneys within the organization issuing non-standard opinions to have such opinions reviewed and approved by one or more opinion committee members. While it believes that the specifics of such practices should be left to individual firms to decide, the Committee nonetheless encourages lawyers to consider these practices in the light of this Report.

III. THE MODEL KNOWLEDGE QUALIFICATION

Whenever any opinion or confirmation of fact set forth in this opinion letter is qualified by the words, 'to our knowledge,' 'known to us' or other words of similar meaning, the quoted words mean the current awareness by lawyers in the primary lawyer group of factual matters such lawyers recognize as being relevant to the opinion or confirmation so qualified. "Primary lawyer group" means the lawyer who signs this opinion letter and, solely as to information relevant to an Opinion or confirmation issue, any lawyer in this law firm who is primarily responsible for providing the response concerning the particular issue.

COMMENT

3.01 Purpose and Background of the Model Knowledge Qualification. This qualification, which appears in Interpretive Standards 6 and 7 and therefor need not be expressed in any opinion letter that incorporates the Interpretive Standards, is an express limitation of the extent to which information known to or possessed by the Opinion Giver or its legal, paralegal or non-legal personnel is imputed to the Opinion Giver.[37] By establishing the scope of the knowledge imputed to the Opinion Giver, the qualification also implicitly defines the Opinion Giver's internal due diligence obligations.

3.02 Elements of the Model Knowledge Qualification. The Model Knowledge Qualification establishes that the Opinion Giver's responsibility for the statement so qualified is limited to determining that no member of the primary lawyer group (as defined below) is currently aware of additional or contradictory facts that would render the statement inaccurate. "Awareness" is a subjective matter, and an Opinion Giver is not made aware of information just because that information is contained in any of its files (including its billing or time records as well as its client files).[38] Further, in making a statement that is subject to the knowledge qualification, the Opinion Giver is not required to take a poll of its entire staff of legal, paralegal or non-legal personnel, contact other professional advisors to the client, examine records maintained by the Company, or examine public records. Such steps generally involve fact gathering rather than legal analysis and, more importantly, are usually not warranted from a cost/benefit perspective. Any agreement between the Opinion Recipient and Opinion Giver for the latter to take any such additional steps should be justified from a cost/benefit perspective.

A. Current Awareness; Clear Recognition. The term "current awareness" qualifies the Opinion Giver's responsibility for factual matters from the perspective of time.[39] It recognizes, for example, that a credit agreement negotiated several years ago by the Opinion Giver on behalf of the Company may not be within the current awareness of the primary lawyer group, particularly if

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37 "Primary lawyer group," as defined in Interpretive Standard 7, may consist of one lawyer if the Opinion Giver is a sole practitioner or in the unusual case in which only one lawyer in an organization represents Company. In those instances, the term "primary lawyer" may be substituted for "primary lawyer group."

38 Field II at 19; Fitzgibbon X at 446.

39 Glazer at 486.

the Company has not borrowed under that agreement until recently and its recent borrowing was not brought to the primary lawyer group's attention. The Committee considers the term "current awareness" synonymous with similar terms adopted by other commentators, including "conscious awareness," "actual knowledge," "present recollection," and "current consciousness."

Similarly, the term "recognizes" (used in the Model Knowledge Qualification and in Interpretive Standard 3, which establishes a standard for unwarranted reliance) is defined in Interpretive Standard 3 to mean the current awareness of facts by any lawyer in the primary lawyer group.

B. "Primary Lawyer Group". Opinion Givers and Opinion Recipients have long debated which lawyers in an organization have knowledge relevant to a statement expressly qualified as to knowledge. Opinion Givers have drawn distinctions between so-called special counsel and general counsel relationships and relationships that exist somewhere between those two relationships and attempted to factor such distinctions into the express knowledge qualification. The Committee rejects a format that would impute to counsel engaged only to close the Transaction the knowledge of attorneys "who provided legal services to the Company in connection with this Transaction" and to outside general counsel (in addition to the above) the knowledge of attorneys "who regularly devote substantive attention to the legal affairs of Company in substantive areas of the law that, in our judgment, are reasonably likely to bear upon the opinions expressed herein." In its stead, the Committee has adopted what it believes is the more precise concept of the "primary lawyer group."

The Committee defines the "primary lawyer group" as the lawyer in Opinion Giver's organization who signs the opinion letter and, solely as to information relevant to an opinion or confirmation issue, any lawyer in Opinion Giver's organization who is primarily responsible for providing the response concerning the particular issue. See Interpretive Standard 7. Thus, it is the responsibility of the lawyer principally responsible for the Transaction prudently to define the primary lawyer group. The Committee believes that the primary lawyer group will normally consist of the lawyer principally responsible for the Transaction, the lawyer having supervisory responsibility for the organization's relationship with Company, and the lawyers principally responsible for the provision of services to the Company in each practice area relevant to a particular opinion or confirmation issue included in the opinion letter. For example, in a typical business combination transaction involving the acquisition of Company in which the Opinion Giver is required to render the Model No Violation Opinion, the third category would normally include, among others, the lawyer principally responsible for negotiating credit agreements on behalf of the Company and the lawyer principally responsible for negotiating leases on behalf of the Company, because any of such agreements might contain change of control provisions affecting the opinion given.

As with many other aspects of the model opinion letter addressed in this Report, the universe of lawyers whose knowledge is imputed to the Opinion Giver is subject to negotiation in specific instances. The Opinion Recipient may properly request that the universe of lawyers be expanded where the benefit justifies the cost.

3.03 Additional Notes Regarding the Model Knowledge Qualification.

A. Incorporation into Opinion. Incorporation of the Interpretive Standards into the opinion by reference is sufficient to incorporate the Model Knowledge Qualification. The Committee recognizes, however, that the "primary lawyer group" represents a concept not previously used in Georgia. As such, the Committee cautions practitioners who desire to use the concept in their opinions, but who do not otherwise incorporate by reference the Interpretive Standards, specifically to include the text of the Model Knowledge Qualification in such opinions.

B. Other Forms of the Qualification. The Committee is aware that a variety of phrases is used in expressing the knowledge qualification. The Committee has chosen the "to our knowledge" and "known to us" expressions advisedly, and wishes to address specifically its reasons for rejecting the other phrases discussed below:

(i) *"To the best of our knowledge"* - The Committee believes this phrase is equivalent to the phrase "to our knowledge," but recommends the use of the latter to avoid an impression that the Opinion Giver has taken all conceivable steps to verify a factual representation when in fact such steps were not taken and are not recommended by this Report.[40] For example, in furnishing a "no litigation" confirmation the Opinion Giver could, but usually does not, conduct a statewide docket search. See Section XV of this Report.

(ii) *"Insofar as is known to us"* - One Georgia commentator recommends that this phrase be used to avoid a possible implication that the "to our knowledge" phrase suggests that counsel has knowledge that a fact does not exist.[41] While the Committee finds the "insofar as is known to us" phrase acceptable, it does not read the "to our knowledge" phrase to affirm the absence of a fact, and has selected the latter phrase because it is less cumbersome.

(iii) *"Nothing has come to our attention"* - The Committee believes that this phrase should be avoided because it suggests reliance on coincidence.[42]

(iv) *"After due inquiry"* or *"after reasonable investigation"* - Unless appropriate in a particular instance in light of inquiries actually made, Opinion Givers should avoid these phrases because they may imply more diligence than may be customarily performed in support of a factual statement.[43]

(v) *"Without independent investigation"* - The Committee also discourages use of this phrase because of the ambiguity caused by the word "independent." Certainly Opinion Givers undertake an inquiry of at least some lawyers (e.g., the primary lawyer group) in almost all instances. Accordingly, to say that the Opinion Giver

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40 Fuld at 922.

41 Howard at N-16 n.18.

42 Fuld at 922; New York at 1919. This phrase may have merit in securities transactions as "negative comfort" as to the Company's satisfaction of its disclosure obligations.

43 Garrett at 26; Lochner at 119.

has not conducted any independent investigation in such a case is potentially misleading, if not incorrect.

C. Distinguishing the Use of the Term "Knowledge" in Different Contexts. A subtle distinction exists between the use of the term "knowledge" in the context of the Model Knowledge Qualification and the use of the term in the context of unwarranted reliance discussed at Section 2.07.B above. The Model Knowledge Qualification customarily qualifies a specific, fact-based statement that Opinion Giver has been asked to make, usually because the Opinion Giver is presumed to be a reliable repository of information concerning the Company's legal affairs or to have superior access to information about the Company of a legal nature. Accordingly, affirmative due diligence obligations of a limited nature are imposed on the Opinion Giver employing the Model Knowledge Qualification. On the other hand, reliance on a certificate provided by an appropriate officer of the Company is not unwarranted as long as the lawyers in the primary lawyer group, in relying on that certificate without any further investigation, have no knowledge that such information is false or that reliance on such information would be unreasonable. In that case, no due diligence obligation is imposed because an Opinion Giver is entitled to rely upon factual information provided by an officer who is an appropriate source. See Interpretive Standard 4.

D. Inappropriate Use of the Model Knowledge Qualification; "Comprehensive Legal Compliance". The Committee emphasizes that the Model Knowledge Qualification relates to factual matters and should not be used as a substitute for focused analysis of specific legal issues. The Committee is aware that from time to time Opinion Recipients request that the Opinion Giver opine that, "To our knowledge, the Company is in compliance in all material respects with all applicable federal [or state] laws and regulations [or its Articles of Incorporation and Bylaws]" or otherwise suggest that the Opinion Giver could furnish an overly broad legal conclusion if the conclusion is qualified by the Opinion Giver's knowledge. In these instances, the knowledge qualification is proffered by the Opinion Recipient as a means of relieving the Opinion Giver of an otherwise insurmountable due diligence inquiry, in essence requiring "only" disclosure of clearly known violations. The Committee believes that such a request for an opinion as to "comprehensive legal compliance" is inappropriate. First, depending on the form of knowledge qualification used, the Opinion Giver's knowledge of the client's affairs might go beyond clearly known violations. Second, absent the client's informed consent and depending upon the nature of the information involved, the client may be entitled to non-disclosure of instances of material non-compliance with some law as a client confidence or secret.[44] The Committee believes that the better approach is for the Opinion Recipient to identify its concerns more particularly and request one or more specific opinions of a more limited nature. See also Sections 1.04 and 1.06.

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44 See Rules and Regulations for the Organization and Government of the State Bar of Georgia, Rule 3-104, Directory Rule 4-101; Rule 4-102, Standard 28.

IV. LIMITATIONS ON OPINIONS AS TO LAWS AND IMPLICATIONS

4.01 Limitation on Laws Covered by Opinion. Generally, an Opinion Giver should not be required to render an opinion about the law of a jurisdiction in which the lawyers primarily responsible for preparing the opinion are not licensed to practice.[45] Interpretive Standard 1 suggests that an opinion letter should be limited expressly to the law of described jurisdiction(s). The following model language expressly limits all opinions included in the opinion letter to the laws of the jurisdiction for which the Opinion Giver has agreed to assume responsibility and applicable federal laws:

> *The opinions set forth herein are limited to the laws of the State of [the Opining Jurisdiction] and applicable federal laws.*

Having so limited the opinion, the Opinion Giver must then be careful not to express an opinion that would be deemed to conflict with the limitation, such as, for example, an opinion as to the corporate status of a corporation incorporated under the laws of a state other than the Opining Jurisdiction.

The positions of the Silverado drafting group indicate that the practice of attempting to limit the opinion letter to the laws of one or more jurisdictions by a statement of the jurisdictions in which the Opinion Giver is admitted to practice should be discouraged. Instead, an express limitation substantially in the form set forth above should be used.

4.02 Duty When Giving Opinion on Laws of Other Jurisdiction. The Committee recognizes that business transactions often involve matters governed by the laws of foreign jurisdictions, and that an Opinion Giver may find it necessary to give or obtain an opinion involving the laws of a jurisdiction in which the lawyers primarily responsible for preparing the opinion are not admitted to practice. The Opinion Giver should exercise extreme caution in giving any such opinion. Where an Opinion Giver assumes responsibility for a matter involving the laws of a jurisdiction in which the lawyers primarily responsible for preparing the opinion are not admitted to practice, the Opinion Giver may be held to the same standards with regard to such opinion as one licensed to practice in the jurisdiction whose laws are involved.[46] The Opinion Giver may not simply claim ignorance of the laws of that jurisdiction, but may be, instead, under an affirmative duty to acquire knowledge of the laws upon which the opinion is based.

Some Opinion Givers attempt to mitigate the risk inherent in giving an opinion involving foreign laws by the qualification that the Opinion Giver has relied only on "published general compilations" of the applicable laws (e.g., the applicable corporate code) of the foreign jurisdiction. The Committee believes that such attempts to qualify or limit such opinion may be ineffective. An Opinion Giver who agrees to give an opinion involving foreign laws must accept the possibility of being responsible for achieving the requisite level of knowledge and

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45 See CPR, Ethical Consideration 6-3.

46 Degan v. Steinbrink, 202 App. Div. 477, 195 N.Y.S. 810 (App. Div. 1922), aff'd, 236 N.Y. 669 (1923); ReKeweg v. Federated Mutual Insurance Co., 27 F.R.D. 431 (N.D. Ind. 1961), aff'd, 324 F.2d 150 (1963), cert. denied, 376 U.S. 943 (1964).

understanding of the general body of law of the foreign jurisdiction relating to the matters on which the opinion is rendered.

4.03 Retaining Local Counsel. Where the Opinion Giver declines to give an opinion involving the laws of another jurisdiction, the Opinion Recipient may still require such opinion and request that the Opinion Giver retain local counsel in the foreign jurisdiction to render such opinion. There are at least three different ways in which the opinion of such local counsel may be communicated to the Opinion Recipient, each of which poses its own set of considerations as to the responsibility of the Opinion Giver for the opinions rendered by local counsel.

First, the Opinion Giver may request that local counsel address the requested opinion only to the Opinion Giver, and the Opinion Giver, in turn, renders its opinion based solely on the opinion of local counsel. In such case, the general limitation set forth above in Section 4.01 should refer to the laws of the foreign jurisdiction, but language in substantially the following form should be added to the general limitation:

> *As to the opinions expressed in paragraph(s) _____, which involve matters arising under the laws of the State of _____, we have relied [solely] on the opinion of [local counsel], who is admitted to practice law in that State, and we have made no independent examination of the laws of that State.*

Where the Opinion Giver merely relies on the opinion of local counsel, without expressing concurrence, no independent verification by the Opinion Giver of the substance of local counsel's opinion is implied. A statement by the Opinion Giver of such reliance does, however, mean that the Opinion Giver believes that (i) based upon local counsel's professional reputation, local counsel is competent to render such opinion, and (ii) such opinion on its face appears to address the matters upon which Opinion Giver places reliance.

Second, the Opinion Giver may request that local counsel address the requested opinion to the Opinion Giver, the Opinion Recipient, or both, and the Opinion Giver, in turn, delivers the opinion of local counsel to the Opinion Recipient with the statement that the Opinion Giver "concurs" in the opinion of the local counsel. Alternatively, the Opinion Giver may request that local counsel address the opinion only to the Opinion Giver who re-makes the opinion of local counsel as the opinion of the Opinion Giver. The Committee believes that expressing concurrence with the opinion of local counsel or re-making such opinion may imply that the Opinion Giver has verified the accuracy of local counsel's opinion by independent examination of the laws of the foreign jurisdiction.

If an opinion letter incorporating the Interpretive Standards does not expressly state concurrence in local counsel's opinion, no such concurrence is implied.

Third, the Opinion Giver may require that the opinion of local counsel be addressed and delivered directly to the Opinion Recipient without the Opinion Giver concurring in or re-making the opinion of local counsel. In such case, the Committee believes the Opinion Giver has no responsibility for errors in the local counsel's opinion. The Opinion Giver may be requested to advise the Opinion Recipient that the Opinion Giver believes the Opinion Recipient is justified in

relying on local counsel's opinion. Such advice means that Opinion Giver believes that, based upon Other Counsel's professional reputation, it is competent to render its opinion. See generally with respect to other counsel Interpretive Standard 9.

Opinion Givers selecting local counsel in connection with legal opinions involving the laws of a foreign jurisdiction must act with due care in making that selection.[47] Additionally, certain cases have suggested that the Opinion Giver has a duty to supervise local counsel in the preparation of local counsel's opinion.[48] However, the Committee believes that, assuming that the Opinion Giver has acted with due care in selecting local counsel, there is no duty to supervise the work of local counsel beyond seeing that local counsel is apprised of those facts local counsel believes necessary for local counsel to know in giving local counsel's opinion and furnishing local counsel copies of the Transaction Documents and related materials which local counsel requests or which the Opinion Giver believes necessary for local counsel to receive in order to be fully apprised of the matters upon which local counsel is requested to opine.

4.04 No Implied Opinions on Certain Matters. The Documents should specify in reasonable detail the issues upon which legal opinions are to be given, and the Opinion Recipient has the burden of requesting the specific legal opinions that the Opinion Recipient deems significant. Except for implications essential to the conclusion reached in an expressed opinion and reasonable in the circumstances, the Opinion Recipient may not assume that other legal opinions are included by implication in any opinion. The Committee believes that opinions on the following issues, which are sometimes believed implied in other expressed opinions, are of such importance or are so often unsuitable for conclusory treatment under Georgia law that they should be specifically identified in the Documents if they are to be given and, unless so identified, are not to be deemed included by implication in any opinions expressed in opinion letters incorporating the Interpretive Standards:

(a) Local law.

(b) Law relating to permissible rates, computation, or disclosure of interest, e.g., usury.

(c) Anti-trust and unfair competition law.

(d) Securities law.

(e) Fiduciary obligations.

(f) Pension and employee benefit law, e.g., ERISA.

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47 See, e.g., Wildermann v. Wachtel, 149 Misc. 623, 267 N.Y.S. 840 (Sup. Ct. 1933).

48 In Re Roel, 3 N.Y. 2d 224, 165 N.Y.S. 2d 31 (1957), appeal dismissed, 355 U.S.604 (1958); Tormo v. Youak, 398 F.Supp. 1159 (D. N.J. 1975); Bluestein v. State Bar of California, 13 Cal. 3d 162, 529 P.2d 599, 118 Cal. Rptr. 175 (1974).

(g) Regulations G, T, U and K of the Board of Governors of the Federal Reserve System.

(h) Fraudulent transfer law.

(i) Environmental law.

(j) Land use and subdivision law.

(k) Except with respect to the No Consent Opinion, Hart-Scott-Rodino, Exon-Florio and other laws relating to filing requirements, other than charter-related filing requirements, such as requirements for filing articles of merger.

(l) Except with respect to the No Violation Opinion, law concerning creation, attachment, perfection or priority of a security interest in any Assets.

(m) Bulk transfer law.

(n) Tax law.

(o) Patent, copyright, trademark and other intellectual property law.

(p) Racketeering law, e.g., RICO.

(q) Criminal statutes of general application, e.g., mail fraud and wire fraud.

(r) Health and safety law, e.g., OSHA.

(s) Labor law.

(t) Law concerning national or local emergency.

Other legal opinions covered by this Report and the Interpretive Standards specifically exclude possible implications which, unless specifically identified for coverage, are not deemed implied in such opinions. See, e.g., Section X below and the portions of the Interpretive Standards relating to the Model Remedies Opinion for a listing of exceptions from the Remedies Opinion given in an opinion letter incorporating the Interpretive Standards.

V. THE MODEL CORPORATE STATUS OPINION

Company was duly organized as a corporation, and is existing and in good standing, under the laws of the State of Georgia.

[or]

Company is a corporation in good standing under the laws of the State of Georgia.

COMMENT

5.01 Purpose and Background of the Model Corporate Status Opinion. Participants in a corporate transaction have legitimate concerns about whether or not a purported corporation is a corporation and its standing with the state authorities through which it was created.[49] The form of organization will determine the formalities required to conduct business generally and to engage in a particular transaction, and the assets that can be reached in the event of a default. If an entity is not properly organized as a corporation, actions taken by or on behalf of the entity may be void as lacking corporate authority, its creditors may be able to reach its owners' assets and creditors of its owners may be able to reach its assets.[50] A corporation's standing with the relevant state regulatory authorities will affect its ability to conduct business and enter into contracts, as well as the ability of a third party to pursue claims against the corporation.

Two alternative Model Corporate Status Opinions are discussed in Sections 5.02 and 5.03. The traditional Corporate Status Opinion (which is stated first in the Model) consists of three primary elements: (A) due organization, (B) continuing existence and (C) good standing. For reasons discussed more fully in Section 5.03, it may be inappropriate under a cost/benefit analysis for the Opinion Giver to be required to provide the traditional opinion for a particular corporation (for example, for certain corporations incorporated under predecessors of the GBCC).[51] Under

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49 See generally Field, FitzGibbon I, Lochner and Wilson.

50 See, e.g., Miller v. Berman, 94 Ga. App. 457, 95 S.E.2d 319 (1956). See also FitzGibbon I at 463.

51 The procedure for incorporation under Georgia's 1933 Code serves to illustrate the difficulty of determining whether an entity was properly incorporated under predecessors of the GBCC. The procedure required clearance of the corporate name by the Secretary of State, the filing of a petition for charter with the Superior Court of the county in which the incorporators desired to transact business, approval by a Superior Court judge, recording of the petition and the order by the Court clerk, filing with the Secretary of State, and publication of the petition for four weeks in the public newspaper nearest to the proposed place of business. See Cohn and Leavell, Georgia's Corporation Law: Is it Adequate? 2 Ga. St. B.J. 153 (1965). Article III, Section VII, Paragraph XVII of the Georgia Constitution of 1877 provided that the General Assembly could confer authority to grant corporate powers and privileges to ordinary private corporations (as distinguished from banking, insurance, railroad, canal, navigation, express and telegraph companies) only upon Superior Court judges. It was only after a 1976 constitutional amendment that the

such circumstances, the alternative "is a corporation" opinion may be used instead, subject to the caution expressed below in Section 5.03.

5.02 Elements of the Traditional Corporate Status Opinion.

A. Due Organization. The phrase "was duly organized as a corporation" means that Company (i) properly complied with Georgia's statutory requirements for incorporation and (ii) thereafter, properly complied with Georgia's statutory requirements for organization.[52] Such compliance must be evaluated by reference to the statutory requirements in effect at the time of organization. The following is an analysis of the requirements for "incorporation" and "organization" under the GBCC, as in effect at the time of this Report. Though this analysis would not be directly applicable to corporations formed under predecessors of the GBCC, an Opinion Giver would employ a similar analysis under predecessor corporate laws, or under the corporate laws of other jurisdictions.

Under Section 203(a) of the GBCC, unless a delayed effective date is specified, corporate existence begins when the articles of incorporation are filed. Section 202(a) of the GBCC lists the five items that must be set forth in the articles[53] and Section 120 of the GBCC, which standardizes the filing requirements for all documents filed with the Secretary of State, adds requirements as to format, execution and delivery of the articles.[54]

Section 203(b) of the GBCC states that the filing by the Secretary of State of articles of incorporation is conclusive proof that the incorporators satisfied all conditions precedent to incorporation, except in proceedings by the state to cancel or revoke the incorporation or to involuntarily dissolve the corporation. Section 203(b) of the GBCC raises the question whether the Opinion Giver may rely exclusively upon filing of the articles of incorporation by the Secretary of State in establishing the "due incorporation" element of the "duly organized" opinion. In the absence of any cases, the only discussion of the question has been by commentators. Field at 6-3 states that "[o]rdinarily there is a need to investigate whether incorporation was proper" because

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Georgia Code was amended to provide for filings of articles of incorporation directly with the Secretary of State.

52 Because "due incorporation" is a required component of "due organization," it is useful to analyze the elements of incorporation prior to considering the remaining elements required for organization.

53 These five items are (1) a corporate name satisfying the requirements of Section 401 of the GBCC, (2) the number of authorized shares, (3) the address and county of the corporation's initial registered office and the name of its initial registered agent at that office, (4) the name and address of each incorporator and (5) the mailing address of the corporation's initial principal office.

54 Section 120 requires that articles be (1) typewritten or printed, (2) in the English language, (3) executed by an incorporator (with an appropriate indication of the person's name and capacity) and (4) delivered to the Secretary of State for filing, accompanied by (a) an exact or conformed copy, (b) the correct filing fee and (c) a certificate as to publication of a notice of intent to file articles.

the presumption of validity obtained from a certificate is "usually a rebuttable one." New York I suggests that:

> Reliance upon a certificate... is ordinarily not justified because such official has not verified that the certificate [of incorporation] met the statutory incorporation requirements on the filing date. Nevertheless, if a historical reconstruction of statutory materials is unduly burdensome or impossible, such certificate [of the Secretary of State] may provide the only available basis for an opinion and it may be possible to rely solely on the certificate with appropriate disclosure. See N.Y.-BCL § 403 which gives the Attorney General power to contest incorporation. 34 Bus. Law at 1905, note 19.

On the other hand, California IV, discussing a statute like Georgia's in which filing of the articles of incorporation is conclusive evidence of formation and prima facie evidence of existence (except in the case of action by the Attorney General), suggests that a certificate of the Secretary of State "typically gives lawyers satisfactory assurance with respect to the corporation's due incorporation." 44 Bus Law at 2202. Wilson at 7-8 suggests that the ability of the state to challenge the incorporation under Section 203(b) of the GBCC should not affect the ability of counsel to give an "is a corporation" opinion because the opinion would be correct when given even if incorporation were subsequently cancelled.

Close analysis of Georgia law suggests that exclusive reliance on a certificate without a further corporate records examination should be acceptable in Georgia, even though questionable in other states, because of the extremely limited basis for the state to challenge incorporation in Georgia. Section 203(b) of the GBCC is derived from Model Act Section 2.03, which contains the sole exception to conclusive proof of filing for state action "to cancel or revoke the incorporation or involuntarily dissolve the corporation." The comment to Model Act Section 2.03 and its predecessors, Section 50 of the 1950 and 1960 Model Acts and Section 56 of the 1969 Model Act, suggest that the exception for state action to cancel or revoke was required by the "inherent powers of the Attorney General or powers usually conferred on his office under general statutes not restricted to corporations." Fletcher, Corporations, § 2331, discusses quo warranto as the appropriate remedy for a state to question persons who

> associate or assume to act as a corporate body...under a constitutional statute without having substantially complied with all conditions precedent prescribed by the statute.

A footnote to the quoted words cites cases in thirteen states, not including Georgia, where a quo warranto proceeding lay to challenge incorporation.

However, in Georgia quo warranto is limited to two explicit events. One is the forfeiture of the articles of incorporation of financial institutions for grounds specified in the Georgia Code. O.C.G.A. § 7-1-92. The other is an inquiry into the right of any person to public office. O.C.G.A. § 9-6-60. Furthermore, Georgia limits by statute the authority of the Attorney General. O.C.G.A. § 45-15-3. Unless the authority of the Attorney General "to cancel or revoke the incorporation" is expressed by statute, no such authority exists. This was affirmed in Walker ex rel. Mason v. Georgia Ry & Power Co., 146 Ga. 655 (1917), holding that the Attorney General was without authority to institute an equitable action in the name of the state to enjoin a domestic corporation

from doing acts alleged to be ultra vires. The only statutory references found under Georgia law which would appear to authorize any inquiry by the state into incorporation are GBCC Section 1420, authorizing administrative dissolution for post-incorporation failures to file, pay, publish or maintain an office or agent, and GBCC Section 1430 for judicial dissolution in a proceeding by the Attorney General. Section 1430 provides for judicial dissolution only if:

(A) the corporation obtained its articles of incorporation through fraud; or

(B) the corporation has continued to exceed or abuse the authority conferred upon it by law.

It would seem unlikely that in Georgia there is any avenue by which the state could seek "to cancel or revoke the incorporation" for failure to satisfy conditions precedent to incorporation, except pursuant to GBCC Section 1430 because the "corporation obtained its articles of incorporation through fraud." Any procedural irregularity or failure to comply with a condition precedent in the incorporation other than fraud would not appear to authorize a state challenge. Stated another way, it is difficult to see how the state would have standing to challenge any failure to satisfy a condition to incorporation in the absence of statutory authority and in the face of a statute which limits the authority to dissolve the corporation to the grounds of fraud and the abuse of authority. If this analysis is correct, it means that in Georgia no inquiry by Opinion Giver into the question of whether the incorporation was proper is necessary, because the state has no grounds for attacking the incorporation for procedural impropriety short of fraud and it is difficult to envision how an inquiry by the Opinion Giver could expose fraud in the incorporation, particularly since the state has never attacked an incorporation for fraud. Consequently, it would appear that in Georgia an Opinion Giver should be entitled to rely exclusively on a certificate of the Secretary of State and review of the certified articles to support an opinion that an entity was duly incorporated, absent knowledge that the incorporation was fraudulently obtained.

For a corporation formed under the GBCC, the traditional "duly organized" Corporate Status Opinion confirms (i) that the form and content of the corporation's articles, on their face and based on the assumptions otherwise permitted under this Report[55], satisfy the requirements of Sections 120 and 202(a) and (ii) that such articles were filed in accordance with the procedural requirements of Section 120. The manner in which the Opinion Giver should examine Company's articles is described below in Section 5.05. The statutory presumption contained in Section 203(b) of the Code provides a sufficient basis for the opinion as to filing described in clause (ii) of the first

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55 These qualifications - that the Opinion Giver's examination of the articles is limited "to their face" and may be based on the type of assumptions otherwise appropriate - limit the scope of the required examination. For example, the Opinion Giver may conclude that the corporate name satisfies the requirements of GBCC Section 401 without having to consider whether the name is distinguishable from the names of all other corporations incorporated or transacting business in Georgia. The Opinion Giver may rely on assumptions discussed in Section II of this Report and the Interpretive Standards as to the genuineness of the incorporator's signatures and the accuracy of the required addresses.

sentence of this paragraph, unless the Opinion Giver knows of facts that would allow the Secretary of State to rebut the presumption.[56]

"Due organization" begins with the requirement that the corporation be duly incorporated, but requires that additional actions be taken after the incorporation is completed. The Comment to Section 205 of the GBCC indicates that "organization" must be completed so that the new corporation may engage in business.[57] Although the commentators have taken varying positions as to what constitutes "due organization," much of this controversy may arise from the fact that state statutes impose varying requirements for commencing corporate activity. The situation is further complicated by the fact that the requirements for organization in a particular state may be scattered throughout its corporate code.[58]

Against this background, Section 205 of the GBCC provides a clear statement of the steps required for a Georgia corporation to be properly organized. A corporation has been "duly organized" under the GBCC if, after proper incorporation: (i) initial directors were either named in the articles or elected by the incorporators at an organizational meeting; (ii) a duly called organizational meeting of directors or incorporators (as applicable) was held (or a unanimous written consent was executed by the incorporators or directors); and (iii) at the organizational meeting (or by the written consent), officers were appointed, bylaws were adopted and whatever other business was brought before the meeting was transacted.[59] The Corporate Status Opinion confirms that each of these requirements was satisfied.[60]

An opinion as to "due organization" need not refer specifically to Section 205 of the GBCC, as there is no implication that the Opinion Giver has examined other elements that may be a part of "organization" in other jurisdictions (for example, issuing stock, opening bank accounts or adopting a seal). If any of these elements is important to the Opinion Recipient, that element should be addressed by a more specific opinion.

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56 Under Section 127 of the GBCC, a copy of the articles of incorporation certified by the Secretary of State is prima-facie evidence of the filing of the original with the Secretary of State. The GBCC departed from the Model Act (which made the certificate conclusive evidence of filing) to allow for the possibility of fraud or collusion between an employee of the Secretary of State and the person obtaining the certified articles. See Comment to Section 128.

57 See also Miller v. Berman, 94 Ga. App. 457, 95 S.E.2d 319 (1959), Ward-Truitt Co. v. Bryan & Lamb, 144 Ga. 769, 87 S.E. 1037 (1915), Brooke v. Day, 129 Ga. 694, 59 S.E. 769 (1907), Rau v. Union Paper Mill Co., 95 Ga. 208, 22 S.E. 146 (1894) and Michael Bros. Co. v. Davidson, 3 Ga. App. 752, 60 S.E. 362 (1907).

58 See Field at 6-4 (discussing the requirements for organization under New York law).

59 See GBCC Section 840 regarding required officers and Section 206 regarding the content of bylaws. While a corporation is required to have bylaws, the GBCC does not impose requirements as to their contents.

60 While the Comment to Section 205 suggests that the "raising of equity capital by the issuance of shares" is usually required to organize a corporation, the Committee has determined that this is not an element of organization required under Section 205.

Where the Opinion Giver is unable to satisfactorily confirm the organizational process, the "due organization" form of the Corporate Status Opinion may be given, in appropriate circumstances, based upon reliance by the Opinion Giver on the presumption of regularity and continuity with respect to the due organization of Company. See Section 2.09 above.

B. Continuing Existence. The second element of the traditional Corporate Status Opinion is that the Company "is existing." This phrase indicates that Company continues to exist as a corporation as of the date of the opinion.[61] The following discussion is also relevant where the "is a corporation" form of opinion is used.

Under the GBCC, there are only four occurrences that could cause a Georgia corporation to cease to exist. These events are: (i) expiration of any period of duration stated in its articles of incorporation[62], (ii) merger into another corporation[63], (iii) voluntary dissolution (either prior to issuing shares and commencing business under Section 1401 or thereafter under Section 1408(b)), or (iv) involuntary dissolution (either administrative dissolution under Section 1421(c) or judicial dissolution under Section 1433(c)). Accordingly, either the traditional "duly organized" or the "is a corporation" Corporate Status Opinion confirms that none of these four events has occurred.

C. Good Standing. The GBCC does not use the term "good standing." As described above, a Georgia corporation may cease to exist as a result of either voluntary or involuntary dissolution proceedings or at the expiration of any term indicated in its articles. Although a corporation's legal "existence" will continue while voluntary or involuntary dissolution proceedings are pending[64], at a certain point in each type of proceeding, the GBCC imposes limits on the power of the corporation to continue to conduct business.[65] Lacking a codified definition of "good

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61 In many instances, Opinion Recipients request an opinion that a corporation is "validly existing." The Committee has concluded that, in this context, the word "valid" is used only for emphasis, since a corporation that exists also validly exists. Use of "valid" does not, therefore, imply any change in the scope of the Opinion Giver's investigation. Accordingly, the Committee has omitted the term from the model opinion.

62 See Section 1409 of the GBCC. A corporation organized under the GBCC will have perpetual duration, unless a limited period of duration is stated in its articles. See GBCC Section 302.

63 See Section 1106(a)(1) of the GBCC.

64 Although counsel could render the "is existing" or "is a corporation" opinion while there are grounds for involuntary dissolution or after the commencement of dissolution proceedings, an accurate presentation of either opinion may require disclosure of any such grounds or proceedings known to the Opinion Giver. See Field at 6-5 and Section 1.06.

65 The procedure for voluntary dissolution would typically involve (1) recommendation of dissolution by the board of directors, (2) approval of dissolution by the shareholders, (3) publication of a notice of intent to dissolve, (4) delivery of this notice to the Secretary of State (after which the corporation is considered to be "in dissolution"), (5) the corporation winding up and liquidating its business and affairs, and (6) after the debts and obligations of the corporation have been paid or provided for, delivery of articles of dissolution to the Secretary of State for filing. See GBCC Sections 1402 through 1408. The corporation's ability to conduct business is limited upon filing the notice of intent to

standing" or any use of the term in the GBCC, the Committee has determined that when such limits are imposed, the corporation should not be considered to be "in good standing."

Accordingly, an opinion that a Georgia corporation is in "good standing" means that (i) the corporation has not filed a notice of intent to dissolve under GBCC Section 1403, (ii) the Secretary of State has not signed a certificate of dissolution with respect to the corporation, and (iii) the Superior Court of the county in which the registered office of the corporation is located has not entered a decree ordering the corporation dissolved. If any of these events has occurred, the corporation would be considered to be "in dissolution." While the corporation's legal "existence" would continue until the conclusion of such proceedings, and counsel who was unaware of such

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dissolve (step 4) and its ceases to exist upon filing articles of dissolution (step 6). The Committee has concluded that the corporation should not be considered to be in good standing during this interim period, i.e. while it is "in dissolution."

The Secretary of State may commence administrative dissolution proceedings if (1) the corporation has failed to file a license or occupation tax return and pay such taxes for a specified period, as certified by the state revenue commissioner, (2) the corporation has not delivered its annual registration and fees to the Secretary of State, (3) the corporation has been without a registered agent or office in Georgia, (4) the corporation has failed to notify the Secretary of State of changes in its registered agent or office, or (5) the corporation has failed to publish certain required notices. See GBCC Section 1420. Such proceedings require (1) written notice to the corporation (specifying the grounds for dissolution) by first-class mail, (2) a 60 day period for the corporation to correct any problem or challenge the grounds alleged and (3) the signing of a certificate of dissolution by the Secretary of State. Upon the signing of this certificate, the entity's corporate existence continues, but its ability to conduct business is limited. The Committee has concluded that the corporation should not be considered to be in good standing after the certificate of dissolution is signed, but remains in good standing until that time.

Proceedings for judicial dissolution may be brought by (1) the state Attorney General, (2) a shareholder, (3) a creditor or (4) after a corporation has commenced voluntary dissolution proceedings, by the corporation itself. See GBCC Section 1430 which sets forth different grounds for each category of plaintiff. Such proceedings would typically involve (1) the commencement of an action by a proper plaintiff, (2) the corporation seeking a stay while contesting the alleged grounds, (3) in the court's discretion, the appointment of receivers or custodians to wind up or manage the corporation's affairs, (4) the court's entering a decree ordering the corporation dissolved, with the decree delivered to and filed by the Secretary of State, (5) the winding up and liquidation of the corporation, under the court's direction and (6) the court's entering a decree of dissolution, with the decree filed with the Secretary of State. The decree ordering dissolution (step 4) has the same effect as a notice of intent to dissolve (so that the corporation's ability to conduct business is limited), and the decree of dissolution (step 6) has the same effect as articles of dissolution (so that the corporation then ceases to exist). The Committee has concluded that the corporation should not be considered to be in good standing after the court enters a decree ordering the corporation dissolved.

proceedings could render the "is existing" or "is a corporation" opinion, the corporation's ability to conduct business would be limited and the GBCC would impose special requirements for suits by its creditors.

While the Committee has concluded that a corporation would continue to be "in good standing" after its board or shareholders has taken steps toward dissolution (but prior to the filing of a notice of intent to dissolve) or while involuntary dissolution proceedings are pending (but not final), the Opinion Giver should not render the "good standing" opinion if any such steps or proceedings are known to the Opinion Giver. On the other hand, the Opinion Recipient should not view the "good standing" opinion as confirming the absence of such matters.

As described in the second paragraph of footnote 65 above, a corporation's failure to file a license or occupation tax return and to pay such taxes or its failure to satisfy annual registration and fee requirements would constitute grounds for the Secretary of State to commence dissolution proceedings. While the mere existence of such grounds would not limit the corporation's power to conduct its business, it has become traditional for counsel to inquire into these matters in rendering the "good standing" opinion. Such inquiries are relatively easy to conduct. Because of this tradition, the Committee has determined that the opinion that a Georgia corporation is in "good standing" should serve to confirm that the corporation has satisfied the tax and annual registration requirements described in Section 1420 of the GBCC.

5.03 Elements of the Alternative "Is A Corporation" Corporation Status Opinion. Because corporate records documenting the organizational process may be unavailable or incomplete, or because of difficulties in confirming the completion of the organizational process under a predecessor of the GBCC, the Opinion Giver may be unable or unwilling to give the "due organization" form of the Corporate Status Opinion. In other cases, requiring an opinion on due organization, as opposed to an opinion addressing only the existence in good standing of Company, may be unnecessary in the context of the particular transaction or may, due to the costs of examination of the incorporation process, burden the transaction with unwarranted expense. Therefore, the Committee has concluded that, in these and comparable situations, the Opinion Giver, as an alternative to giving the traditional Corporate Status Opinion with respect to the "due organization" of Company, may render the alternative "is a corporation" Model Corporate Status Opinion based solely on a review of articles of incorporation certified by the Secretary of State and by confirmation that Company's existence has not ceased (as described in Section 5.02B). This opinion serves to confirm that the State of Georgia recognizes the existence of Company as of the date of the opinion and is limited in its ability to challenge the incorporation. More importantly, the opinion provides comfort that third parties (other than the state) may not challenge the incorporation. Where the Opinion Recipient has questions or concerns about a particular aspect of the incorporation process, the Opinion Recipient may request an additional opinion as to that aspect.

Participants in a transaction should always consider whether it is sufficient for the Opinion Giver to give the alternative "is a corporation" Model Corporate Status Opinion in lieu of the traditional "duly organized" opinion. The following factors should be considered in determining whether "is a corporation" opinion should be substituted for the "duly organized" opinion: (i) whether Company was formed under the GBCC or under a predecessor statute, (ii) whether the

Opinion Giver participated in the organization process, (iii) whether Company's records are adequate to reconstruct the incorporation process, and (iv) whether any particular aspects of the Transaction require that the entire incorporation process be examined.

5.04 Additional Notes Regarding the Model Corporate Status Opinion.

A. Alternative Corporate Status Opinion. The discussion of Sections 5.02 B and C is equally relevant and applicable to the "is a corporation" opinion.

B. Type of Corporation. The phrase "duly organized as a corporation" or "is a corporation" serves to confirm that Company is not organized under a statute other than the GBCC, such as a nonprofit corporation, a Secretary of State corporation or a professional corporation.[66]

C. Status for Other Purposes. Unless otherwise expressly indicated, either the traditional or the alternate Corporate Status Opinion refers only to the status of Company under the GBCC, and does not refer to Company's status for tax, regulatory or other purposes.[67] For example, the opinion does not address the issue of whether the "corporate veil" would be recognized or pierced.

D. Notice of Intent to File Articles. Under Section 201.1(b) of the GBCC, prior to filing the articles of incorporation, the incorporator must deliver a notice indicating the intent to incorporate to an appropriate newspaper. When the incorporator delivers the articles to the Secretary of State for filing, the incorporator must also deliver a certificate verifying that the appropriate request for publication of this notice has been made. Section 201.1(b) provides that the failure of the incorporator to deliver the notice to the newspaper or the failure of the newspaper to properly publish the notice will not invalidate the incorporation or the filing of the articles of the corporation. Accordingly, for a corporation formed under the GBCC, the Opinion Giver need not verify that the incorporator requested publication or that the notice was published, although the opinion should make reference to any deficiency that it is known to the Opinion Giver.[68]

E. Continuing Corporate "Housekeeping". The Opinion Giver should express the "duly organized" opinion in the past tense to indicate clearly that it does not relate to operational matters occurring after the initial organization of Company. By rendering either the traditional or the alternate Model Corporate Status Opinion, the Opinion Giver is not obligated to monitor organizational elements (such as elections of officers or bylaw amendments) after the initial organization of Company.

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66 Nonprofit corporations are formed under the Georgia Nonprofit Corporation Code (Title 14, Chapter 3 of the Georgia Code); Secretary of State corporations are formed under various statutes which have been recompiled in Title 14, Chapter 4 of the Georgia Code; and professional corporations are created under the Georgia Professional Corporation Act (Title 14, Chapter 7 of the Georgia Code).

67 See FitzGibbon I at 463; Lochner at 32-33.

68 See, e.g., n. 64 and n. 65.

5.05 Practice Procedure for Either Model Corporate Status Opinion. In order to render the traditional Model Corporate Status Opinion the Opinion Giver must examine three elements: (A) due organization, (B) continuing existence and (C) good standing. In order to deliver the alternative "is a corporation" Model Corporate Status Opinion, the Opinion Giver may rely on a certificate of the Secretary of State and review of the articles as to incorporation, but must examine the latter two elements.

A. Due Organization. The Committee recommends that in rendering an opinion that an entity "was duly organized as a corporation," the Opinion Giver should:

(i) Obtain a copy of the business corporation code in effect at the time of organization.

(ii) Obtain a certified copy of the articles of incorporation from the Secretary of State.

(iii) Examine the certified articles of incorporation to ensure that the five items required by Section 202(a) (or corresponding items of any predecessor to the GBCC) are included and that the articles are otherwise in proper form for filing.

(iv) Examine Company's minute book or other appropriate evidence of corporate action to confirm that a proper organizational meeting was held.

(v) Obtain the Officer's Certificate described in Section 5.05C(v) below or other evidence of the facts stated therein.

B. Continuing Existence or "Is a Corporation". The Committee recommends that in rendering an opinion that an entity "is existing" or "is a corporation," the Opinion Giver should:

(i) Obtain a certified copy of the articles of incorporation and all amendments from the Secretary of State, and examine the certified articles to ensure that no term of duration is stated, that any stated term has not expired or that the articles provide for perpetual duration.[69]

(ii) Obtain a Certificate of Existence from the Secretary of State.

(iii) Examine Company's minute book for evidence of merger or dissolution proceedings or otherwise establish the absence thereof.

(iv) Obtain the Officer's Certificate described in Section 5.05C(v) below.

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69 Various predecessors of the 1968 Code provided that corporations would have limited durations ranging from 14 years (under the 1861 Code) to 35 years (under the 1933 Code). Under Section 202(a)(2) of the 1968 Code, all Georgia corporations in existence on the effective date of that Code were deemed to have perpetual existence, despite any contrary provisions in their charters.

C. Good Standing. The Committee recommends that in rendering an opinion that a corporation is "in good standing," the Opinion Giver should:

(i) Obtain and examine a certified copy of the articles of incorporation and all amendments, and examine them as provided in the preceding paragraph.

(ii) Obtain a Certificate of Existence from the Secretary of State to confirm (i) compliance with annual filing and registration requirements and (ii) that articles of dissolution have not been filed.

(iii) Obtain a Tax Clearance Certificate from the State Department of Revenue with respect to the payment of license and occupation taxes. It will be necessary to have Company write a letter to the Department of Revenue authorizing the release of a Tax Clearance Certificate.

(iv) Examine Company's minute book for evidence of merger or dissolution proceedings or otherwise establish the absence thereof.

(v) Obtain an Officers' Certificate to the effect that:

Company has not received any notice from the Secretary of State of a determination that any grounds exist for administratively dissolving Company and Company has not received notice of the commencement of any action to judicially dissolve Company. Neither the board of directors nor the shareholders of Company have taken any action with respect to the dissolution of Company, and Company has not filed any notice of intent to dissolve with the State of Georgia.

VI. THE MODEL CORPORATE POWERS OPINION.

Company has the corporate power to execute and deliver the Documents, to perform its obligations under the Documents, to own and use its Assets and to conduct its business.

COMMENT

6.01 Purpose and Background of the Model Corporate Powers Opinion. The purpose of the Model Corporate Powers Opinion is to provide assurance to the Opinion Recipient that the Company's performance of its obligations in the Transaction, ownership and use of its Assets and conduct of its business are not *ultra vires*.

6.02 Elements of the Model Corporate Powers Opinion. The Model Corporate Powers Opinion means that, pursuant to the GBCC and Company's articles of incorporation, Company's corporate purposes and powers are such that it can (A) enter into binding contractual obligations by executing and delivering the Documents; (B) perform all of its obligations under the Documents; (C) own, lease or license and use its assets as they currently are owned, leased or licensed and used by Company; and (D) conduct its business as it is currently being conducted.

A. Assumed Opinions. The Model Corporate Powers Opinion is based on an assumption that the traditional Corporate Status Opinion could also be given. The Opinion Giver may rely on this assumption subject to the standards of unwarranted reliance. See Interpretive Standard 3 and Sections 1.06 and 2.07B. In circumstances where reliance on this assumption is unwarranted, the Opinion Giver should consider what disclosure may be appropriate under the circumstances in order to give an accurate presentation of the Model Corporate Powers Opinion. See Section 1.06.

The Committee believes that a persuasive interpretation of Section 205 of the GBCC requires that the corporation must be "duly organized" before it has the power to act. Accordingly, the ability to give the Model Corporate Powers Opinion may be impaired if the traditional Corporate Status Opinion cannot be given and only the alternative "is a corporation" opinion can be given because of the inability to give an opinion as to "due organization" of the Company. See discussion at Section 7.02.

B. "Execute and Deliver" vs. "Enter Into". The phrases "execute and deliver" and "enter into" are often used interchangeably in giving a corporate powers opinion. These phrases are synonymous in this context. The Committee has used the phrase "execute and deliver" to specify the corporate acts to be taken by Company.

C. Performance of Obligations. The Model Corporate Powers Opinion extends to all obligations to be performed by Company under the Documents. However, the Opinion Recipient may request that the Opinion Giver refer specifically to certain obligations of Company deemed critical to consummation of the Transaction. Delineation of such obligations does not mean that obligations not specifically listed are not covered by the opinion or are less material than those

listed. Performance, based on the principles discussed at Section 2.01, means performance on the date of the Opinion Letter and under the circumstances then presented.

D. Ownership and Use of Assets. The words "own and use" in the Model Corporate Powers Opinion should not be interpreted to limit the scope of the opinion to Assets owned by Company. The Corporate Powers Opinion should be interpreted to address every manner in which Company has rights in its Assets, including, without limitation, by ownership, lease or license, and every manner in which Company uses its Assets.

E. Current Conduct of Business and Ownership of Assets. Current conduct of the business of Company and the Assets currently owned, leased or licensed and used by Company are all that can be verified factually at the time the Corporate Powers Opinion is given. It is appropriate to address new businesses and assets in the Corporate Powers Opinion only as each opportunity to enter into a new business or to own, lease or license and use new assets arises. For example, in connection with the acquisition of a new business or new assets in the Transaction, it is appropriate to address Company's power to conduct such new business and to own and use such new assets.

F. Conduct of Lawful Business; Properly Incorporated. The Model Corporate Powers Opinion is based on the assumption that Company is engaged in a lawful business. Further, the Model Corporate Powers Opinion is based on the assumption that the Company is not required by any state law to be incorporated under any statute other than the GBCC, such as the statutes providing for incorporation as a Secretary of State corporation (such as banks and insurance companies) or as a professional corporation. The Opinion Giver may rely on these assumptions absent current knowledge of the Opinion Giver which makes reliance unwarranted under Section 2.07B.

G. Corporate Power. The Model Corporate Powers Opinion includes the phrase "corporate power" to clarify the limited scope of the opinion. The words "power" and "authority" are often used together or interchangeably in giving the Corporate Powers Opinion. However, the Committee has used the word "power" in the Model Corporate Power Opinion because it is used in the GBCC and because use of the word "authority" may imply that the opinion addresses other sources of or limitations on Company's corporate powers. Use of the word "power" rather than "authority" in this context avoids the possibility of a misunderstanding. The Model Corporate Acts Opinion (Section VII) and the Model No Consent Opinion (Section IX) address questions of corporate authority.

Many versions of the Corporate Powers Opinion make reference to "full" or "requisite" or "necessary" in describing corporate power. The terms "requisite" or "necessary" add nothing in this context, but use of either word should not create any undesirable implications. However, the Committee recommends that the word "full" not be used because its use in this context may imply that the opinion addresses corporate power granted or limited by laws other than the GBCC.[70] To avoid the possibility of a misunderstanding, the word "full" should not be used in this context.

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70 See New York I at 1913.

6.03 Matters Not Covered by the Model Corporate Powers Opinion.

Certain matters not covered by the Model Corporate Powers Opinion are addressed by other opinions discussed elsewhere in this Report.

The Model Corporate Powers Opinion does not mean that the Company's performance of its obligations in the Transaction will withstand all challenges from all parties, other than challenges by parties having the right under the GBCC to make such a challenge on the grounds that the Company's actions are *ultra vires*. Opinions as to these other matters should be addressed, if at all, by the Model No Violation Opinion (Section VIII) and the Model Remedies Opinion (Section X).

The Model Corporate Powers Opinion does not mean that Company has obtained any consent, license, authorization or approval from its shareholders or directors, or from any third parties (including governmental or regulatory entities or parties to any of Company's agreements). Opinions as to these matters should be addressed, if at all, by the Model Corporate Status Opinion (Section V), the Model Corporate Acts Opinion (Section VII) and the Model No Consent Opinion (Section IX.

Also, the Model Corporate Powers Opinion does not mean that Company's corporate actions taken in connection with the Transaction will not result in any breach of or default under any agreements to which Company is a party or by which its Assets are bound, or in any violation of any constitution, statute, law, regulation, rule, order or similar legal requirement promulgated under statutory authority, other than the GBCC. Opinions as to these matters should be addressed, if at all, in the Model No Violation Opinion (Section VIII).

The Model Corporate Powers Opinion does not address the effect on Company's purposes or powers of any laws other than the GBCC, including, without limitation: (i) the laws relating to the incorporation of private and public corporate entities other than business corporations incorporated under the GBCC[71]; (ii) the laws of any jurisdiction in which Company is or should be qualified to do business as a foreign corporation; or (iii) any other laws that could create or restrict the exercise of corporate powers or purposes, such as the Glass-Steagall Act of 1932, the Federal Bank Holding Company Act of 1956, or the Hart-Scott-Rodino Antitrust Improvements Act of 1976. Further, the Model Corporate Powers Opinion does not address any limitations on Company's purposes or powers set forth in any document other than its articles of incorporation. Opinions as to these matters, including the effect of limitations set forth in Company's bylaws, corporate resolutions and agreements, should be addressed, if at all, in the Model No Violation Opinion (Section VIII) or the Model No Consent Opinion (Section IX).[72]

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71 See Sections 6.04D and 6.04E.

72 See Babb at 560 (Babb contemplates a broader concept of this opinion to include an opinion as to all laws "purporting to limit or define its corporate powers and capacities" such as the Glass-Steagall Act; and suggests that the matters addressed in the fourth paragraph of Section 6.03 should be addressed by the Corporate Powers Opinion); and Jacobs at 1-3 and 7-1 through 7-2 (opinion could be construed to address corporate power

6.04 Additional Notes Regarding the Model Corporate Powers Opinion.

A. Historical Overview. The Opinion Recipient has a legitimate need to verify that the Transaction will not be enjoined or otherwise challenged by Company or third parties on the ground that the actions taken by Company in connection with the Transaction were *ultra vires*, i.e. beyond Company's statutory and charter powers.

Historically, corporations in the United States have been regarded as having only the powers specifically granted to them by statute because they were entities created by the state. Typically, these corporations could be formed only for specific business purposes and had powers limited solely to such purposes.[73] Thus, dealing with corporations presented a risk that corporate acts might be deemed ineffective, which risk was not an issue when dealing with individuals. Today, however, corporations are regarded as entities created by contract among the shareholders and, thus, their powers are limited only by agreement among the shareholders.[74]

Business corporations incorporated in the State of Georgia derive their corporate purposes and powers from Sections 301 and 302 of the GBCC. Section 301 provides that:

> Every corporation incorporated under this chapter has the purpose of engaging in any lawful business unless a more limited purpose is set forth in the articles of incorporation.

Section 302 provides that:

> Unless its articles of incorporation provide otherwise, every corporation . . . has the same powers as an individual to do all things necessary or convenient to carry out its business and affairs . . . .

Section 302 also sets forth a nonexclusive list of specific powers contemplated to be included in the grant of power. Because Sections 301 and 302 provide that the only means by which a

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from all sources and to opine that no law, statute, rule or regulation prohibits the activities).

73 See Model Business Corp. Act Annotated, §§ 3.01 and 3.02 (cited as "Model Act").

74 As noted in the commentary to Section 302 of the GBCC:

> "The law of corporations has always proceeded on the fundamental assumption that corporations are creations with limited power; such an assumption was articulated by the United States Supreme Court as early as 1804, Head & Armory v. Providence Insurance Co., 6 U.S. (2 Cranch) 127, 169 (1804), and appears never to have been seriously questioned as a judicial matter. It is clear that narrow and limited power clauses are undesirable: they encourage litigation by bringing into question reasonable transactions that further the business and interests of the corporation and to the extent transactions are unauthorized, may defeat valid and reasonable expectations. Modern corporation law tends to view the corporation as a creature of contract, rather than as a creature of a state that zealously guards its powers through narrow grants to corporate entities."

corporation's statutory purposes or powers can be limited is in its articles of incorporation, any limitations set forth in its bylaws, corporate resolutions or in any other document will not prevent the Opinion Giver from delivering the Model Corporate Powers Opinion. Any such restrictions in other documents should be addressed in the Model No Violation Opinion. (Section VIII)

B. Ultra Vires Acts. The common law theory of limited corporate capacity provided that attempts by a corporation to engage in transactions that exceeded its corporate powers (i.e., *ultra vires* acts) were ineffective in most cases.[75] However, Section 304 of the GBCC provides that actions to challenge the validity of corporate acts on the grounds that the acts were *ultra vires* may be brought only (a) by shareholders to enjoin or set aside the *ultra vires* acts, (b) by the corporation against an incumbent or former director, officer, employee or agent with respect to such *ultra vires* acts, or (c) by the Attorney General of the State of Georgia in a proceeding for dissolution.[76]

Unless a corporation's articles of incorporation limit its corporate purposes, there are no limits under the GBCC on a corporation's statutory purposes unless it is engaged in an unlawful business, and there are no limits under the GBCC on the exercise of a corporation's powers other than those limitations on the powers of an individual. As noted by the commentary to Section 302 of the GBCC:

> The general philosophy of Section 14-2-302 is that corporations formed under the Code provisions should be automatically authorized to engage in all acts and have all powers that an individual may have.
>
> The powers of a corporation under the Code exist independently of whether a corporation has a broad or narrow purpose clause.

Thus, by equating the powers of a corporation as closely as possible with those of an individual, the GBCC has narrowed the issues to be addressed by the Model Corporate Powers Opinion to the causes of action that may be brought under Section 304 of the GBCC.

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75 See Model Act § 3.04.

76 The comment to Section 304 clarifies the limited nature of the *ultra vires* cause of action:

> "The basic purpose of Section 14-2-304 is to eliminate all vestiges of the doctrine of inherent incapacity of corporations. Under this section it is unnecessary for persons dealing with a corporation to inquire into limitations on its purposes or powers that may appear in its articles of incorporation. A person who is unaware of these limitations when dealing with a corporation is not bound by them."

See also Babb at 563 (acknowledging that a limited corporate powers opinion can be given in uncertain circumstances where business corporation laws restrict actions to those by shareholders and the state and where the shareholders have approved the transaction, in which case an opinion could be given by acknowledging that such a suit is barred as to the shareholders but not as to the state). See Sections 5.02A and C regarding dissolution proceedings.

C. Unlawful Businesses. One area of uncertainty with respect to the issue of *ultra vires* acts is the effect on corporate powers of the restrictive phrase "engaging in any lawful business" in Section 301 of the GBCC. Clearly, conduct of an unlawful business would be an *ultra vires* act. However, neither the GBCC, the Model Act nor the comments thereto provide any guidance as to what would constitute an unlawful business for these purposes. In particular, it is not clear whether the plain language of the GBCC was intended to include as unlawful businesses those specifically reserved to corporations that are required by constitution and statute to be incorporated under statutory provisions other than the GBCC.[77] Because of the scope of the due diligence that would be necessary to give an opinion that no segment of Company's business is unlawful so as to restrict the exercise of Company's powers, the Committee has determined that a specific assumption that Company is engaged in a lawful business is necessary for purposes of giving the Model Corporate Acts Opinion, subject only to any current knowledge of the Opinion Giver that would make reliance on the assumption unwarranted.

Absent such an assumption, it would be necessary for the Opinion Giver to determine, in each instance, whether Company was engaged in any unlawful business and whether the conduct of the unlawful business limited the exercise of corporate powers by Company with respect to the Transaction. The Committee has concluded that the Model Corporate Powers Opinion is not the appropriate context for addressing these matters because of the conclusory treatment such matters would be given. Absent specific limitation in Company's Articles of Incorporation, Company would have the same power as any individual to engage in any business to the extent that it is not unlawful and any restriction on Company's power to engage in its business would be as a result of its conduct of a particular segment of its business being in violation of a law. If the Opinion Recipient deems it material to the Transaction to receive an opinion addressing whether any designated segment of Company's business is unlawful, the Opinion Recipient should request a separate opinion that the conduct by Company of an identified segment of its business is not in violation of an identified law so as to restrict the exercise of Company's power. To request a blanket opinion that Company is in violation of no law is considered inappropriate. See Section 3.03D.

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[77] Section 14-2-20 of the prior version of the Georgia Business Corporation Code provided more specifically:

> Corporations for profit may be organized under this chapter for any lawful purpose or purposes not specifically prohibited to corporations under other laws of this state, except that, when the purpose for which a corporation is to be organized requires that such organization take place under another statute of this state, the corporation shall not be organized under this chapter.

The Official Comment to Section 3.01 of the Model Act states merely that:

> The specification of an "any lawful business" clause has become so nearly universal in states that permit the clause that no reason exists for treating it otherwise than as the norm for the "standard" corporation.

Model Act at 176.

D. Secretary of State Corporations. Business corporations incorporated under the GBCC are not the only private corporations that may be granted corporate powers and privileges under Georgia law. The Georgia Constitution grants to the Georgia legislature the power to provide by general law the manner in which private corporate powers and privileges may be granted.[78] Section 14-5-2 of the Official Code of Georgia Annotated provides that:

> "All corporate powers and privileges of banking, trust, insurance, railroad, canal, navigation, express, and telegraph companies shall be issued and granted by the Secretary of State. Corporate powers and privileges of all other private companies shall be granted only as provided in Chapters 2 and 3 of this title."

Corporate entities in the former category are generally referred to as Secretary of State corporations. There are both general and specific provisions of Georgia constitutional and statutory law addressing incorporation of Secretary of State corporations and the powers and privileges of each that reserve to the entities the right to conduct specific businesses. As discussed in subsection C above, it is not clear whether the plain language of Section 301 of the GBCC limiting corporate purposes to "any lawful business" was intended to exclude any business reserved to Secretary of State corporations. The Committee hopes that Section 301 of the GBCC will not be interpreted in this manner. It is clear, however, that the GBCC was not intended to be applicable to such entities absent specific action by the legislature to make the provisions of the GBCC applicable, whether outright or as a supplement to the existing statutory provisions.[79] Because of

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78 Constitution of the State of Georgia, Article 3, Section 6, Paragraph 5(a).

79 Section 301 of the GBCC is based on Section 3.01 of the Model Act. However, Section 3.01(b) of the Model Act also provides:

> (b) A Corporation engaging in a business that is subject to regulation under another statute of this state may incorporate under this Act only if permitted by, and subject to all limitations of, the other statute."

The Comments to Section 301 of the GBCC acknowledges that subsection 3.01(b) of the Model Act was deleted and cross-references Article 17 of the GBCC, where in Section 1701(b) the GBCC provides that:

> (b) This chapter shall not apply:
>
> (1) To corporations organized under a statute of this state other than either of this chapter or any prior general corporation law, except to the extent that the former general corporation law or any of its provisions or this chapter or any of its provisions specifically have been or shall be made applicable to those corporations;

The Comment to Section 1701 explains:

the scope of the due diligence that would be necessary to give an opinion that Company's business does not require incorporation as a Secretary of State corporation, the Committee has determined that a specific assumption that Company is not required by any state law to be incorporated under any statute other than the GBCC is necessary for purposes of giving the Model Corporate Powers Opinion. Absent such an assumption, it would be necessary for the Opinion Giver to determine, in each instance, whether incorporation under the GBCC was appropriate for the business conducted by Company. If an opinion as to these matters is deemed material to the Transaction, the Opinion Recipient should request a separate opinion that the conduct of a particular segment of Company's business does not require Company to be incorporated as a Secretary of State corporation.[80]

E. Professional Corporations. Similarly, the Model Corporate Powers Opinion does not address whether Company is required to be incorporated as a professional corporation. If the business of Company is one that would permit it to be incorporated as a professional corporation, such as law or architecture, the laws and ethical standards applicable to the business may require that, if corporate status is desired, the business must be incorporated as a professional corporation.[81] If an opinion as to such matters is deemed material to the Transaction, the Opinion Recipient should request a separate opinion that the conduct of a particular segment of Company's business does not require Company to be incorporated as a professional corporation.[82]

F. Limitation of Purposes and Powers; Describing the Assets and the Business. If Company has the full benefit of Sections 301 and 302 of the GBCC, the Opinion Giver need not analyze the nature of Company's business. Limitation of the opinion to specific Assets and segments of the business is unnecessary in such instances. On the other hand, if Company's articles of incorporation limit Company's purposes and powers, the Model Corporate Powers Opinion should address only Company's Assets and the segments of its business that are material to the Transaction. The Committee recommends that the opinion make reference to a list prepared by an appropriate officer of Company for purposes of disclosure to the Opinion Recipient, such as an attachment to the Documents. In order to eliminate the need for materiality concepts, where possible, the Opinion Recipient and the Opinion Giver should agree upon objective standards. However, if a materiality standard is necessary, the opinion could be tailored to include a definition of material Assets and material segments of the Company's business in a manner similar to the Model No Violation Opinion, upon which definition the Opinion Recipient and the Opinion Giver should agree. See Section 8.02D.[83]

Where Company's powers are limited, a detailed description of Company's business and Assets will be necessary. The Assets to be addressed by the Model Corporate Powers Opinion,

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Subsection (b) preserves the language of prior law, recognizing that the Code cannot constitutionally apply to certain corporations.

80 The form of such an opinion is beyond the scope of this Report.

81 See, e.g., O.C.G.A. §§ 14-7-1 through 7.

82 The form of such an opinion is beyond the scope of this Report.

83 See Babb at 560 (preferable to limit opinion by reference to objective facts elicited from officers; entitled to rely on certificates, assuming criteria are not manifestly unreasonable, in which case lawyer need not search files; negative assurances are given by the opinion that the opining lawyer has no actual knowledge that the certificate is unreasonable).

under most circumstances, can easily be listed in an exhibit to the opinion or as part of a separate disclosure document. However, it would be necessary to prepare a description of the business to be addressed that is similar to the description required in a registration statement filed in accordance with the Securities Act of 1933, as amended, or a periodic report filed in accordance with the Exchange Act of 1934, as amended. The cost of preparing such a description could be prohibitively costly if not otherwise required as part of the Transaction. The expense that the Opinion Giver and Company would incur to conduct the due diligence necessary to support a broader opinion would be disproportionate to the importance of the opinion to the Opinion Recipient, except, perhaps, when given by inside general counsel to Company.

If the Transaction requires the preparation of such a detailed description of Company's business or if the parties determine that, regardless of the expense, such an opinion is necessary, the Model Corporate Powers Opinion could be given as follows:

> *Company has the corporate power to execute and deliver the Documents and perform its obligations thereunder and to own and use the Assets identified on Exhibit A hereto and to conduct the business identified on Exhibit B hereto.*

If given in this form, the Model Corporate Powers Opinion should not include any reference to an agreed upon materiality standard or any other factual basis for compiling the list of Assets or the description of the business. However, this version of the Model Corporate Powers Opinion does not address the factual accuracy of the list or the adequacy of any materiality standard applied in preparing the list and description. Thus, it is not necessary for the Opinion Giver to assume the factual accuracy of the list of Assets and the description of the business or the adequacy of the materiality standard applied in preparing the list and description.

6.05 Practice Procedure for the Model Corporate Powers Opinion. The Committee recommends that the Opinion Giver complete the following due diligence procedures prior to giving the Model Corporate Powers Opinion:

(A) review Company's articles of incorporation, as amended, certified by the Secretary of State;

(B) review the GBCC limited solely to the relationship of such laws to Company's business purposes and powers; and

(C) if necessary, because Company has limited corporate powers, review certificates, dated the date of the opinion, delivered by Company's appropriate officers (A) listing Company's material Assets and adequately describing the material segments of Company's business (or cross-referencing such a list or description in the Documents) and clearly defining the materiality standard, (B) listing the jurisdictions in which such Assets and business segments are located and conducted and (C) providing factual assurance that Company's activities that are to be

opined upon are within its powers under the GBCC and Company's articles of incorporation.[84]

Company's articles of incorporation may have been drafted to parallel more restrictive corporate powers provisions of Georgia corporation law that was in effect at the time of adoption, thus specifically limiting the broader powers granted by more modern provisions.[85] Alternatively, the articles of incorporation may reflect an intent on the part of the shareholders or directors to limit such broad powers. Articles of incorporation that limit the grant of such broad powers by the GBCC may present a problem to the Opinion Giver where the activity addressed in the opinion is not specifically contemplated in the restrictive provisions.

While the Model Corporate Powers Opinion is typically noncontroversial, in certain extraordinary transactions[86] special problems may arise. The GBCC imposes restrictions on the exercise of corporate power under such circumstances. Satisfaction of these restrictions may require (a) specific factual certifications by an appropriate officer of Company to the Opinion Giver or (b) specific director or shareholder approval. These issues should be addressed on a case by case basis in completing the due diligence for the Corporate Powers Opinion. The Opinion Giver should consider whether any problems arising from any special requirements should be addressed prior to delivering the opinion letter or should be disclosed in the letter in order to give an accurate presentation of the opinion.

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84 See Jacobs at 1-19 through 1-33, 7-17 through 7-20.4 and 7-43 through 7-60.

85 O.C.G.A. § 14-2-1701 provides that the Georgia Business Corporation Code applies to all corporations existing on or formed after July 1, 1989. However, if Company's articles of incorporation and bylaws do not grant to Company the full powers granted by law, but rather quote provisions in effect when adopted, the benefits of this provision may not be available.

86 Extraordinary transactions that may make the Model Corporate Powers Opinion difficult:

a. fiduciary agreements
b. guaranties
c. merger: O.C.G.A. Title 14 Chapter 2 Article 11
d. sale of substantially all assets: O.C.G.A. Title 14 Chapter 2 Article 12
e. investment activities
f. professional activities
g. banking activities: O.C.C.A. Title 7 Chapter 1
h. purchase or redemption of shares: O.C.G.A. Title 14 Chapter 2 Article 6 Part 3
i. dividends: O.C.G.A. Title 14 Chapter 2 Article 6 Part 4

See Babb at 562 (guaranties); FitzGibbon at 661 and note 8 (guaranties); Maryland at 734-35 (fiduciary or guaranty activities or the repurchase or redemption of securities); see also, e.g., merger transactions (O.C.G.A. Title 14 Chapter 2 Article 11) and the sale of substantially all of a corporation's assets (O.C.G.A. Title 14 Chapter 2 Article 12) which require shareholder approval.

VII. THE MODEL CORPORATE ACTS OPINION.

Company has duly authorized the execution and delivery of the Documents and all performance by Company thereunder and has duly executed and delivered the Documents.

7.01 Purpose and Background of the Model Corporate Acts Opinion. The Model Corporate Acts Opinion provides assurances to the Opinion Recipient that Company has taken all corporate action necessary, in accordance with the GBCC, its articles of incorporation, its bylaws and its corporate resolutions, to approve or ratify the execution and delivery of the Documents and all performance by Company under the Documents.

7.02 Elements of the Model Corporate Acts Opinion. The Model Corporate Acts Opinion means that:

(A) Company's shareholders, directors, committees of the Board of Directors and officers have taken all corporate action necessary to approve the execution and delivery of the Documents and all performance by Company of its obligations thereunder, on the assumption of performance on the date of the opinion as discussed in Section 2.01, all to the extent and in the manner required pursuant to (i) the GBCC, (ii) Company's articles of incorporation and bylaws, and (iii) if applicable, Company's established policies and practices for delegation of authority adopted by resolutions of Company's Board of Directors or shareholders;[87]

(B) Company's officers were duly authorized to execute and deliver the Documents, in order to cause Company to enter into the Documents, and to perform its obligations under the Documents, which opinion affirms that the relevant corporate resolutions were adopted in accordance with the procedural requirements of Company's articles of incorporation and bylaws and the GBCC;

(C) authorized Company officers have executed and delivered the Documents; and

(D) the execution and delivery of the Documents were, and Company's performance of its obligations under the Documents if performed in

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87 An example of such delegation would be the delegation of authority to the Company's President to authorize the execution by other officers of debt instruments over $5,000 only if the delegation is made in writing. Any further action taken in accordance with the delegation of authority must comply with the terms of the delegation and all such policies and practices must comply with the Georgia Business Corporation Code and the Company's articles of incorporation and bylaws.

accordance with the Documents as written will be, in accordance with that authority.[88]

The Model Corporate Acts Opinion implicitly addresses matters of agency law because the GBCC does not specifically address what is necessary to create actual authority in a corporation's officers to act on its behalf.[89]

The Model Corporate Acts Opinion is based on the assumption that the traditional Model Corporate Status Opinion and the Model Corporate Powers Opinion could also be given. The Opinion Giver may rely on this assumption subject to the standards of unwarranted reliance. See Interpretive Standard 3 and Sections 1.06 and 2.07B. In circumstances where reliance on this assumption is unwarranted, the Opinion Giver should consider what disclosure may be appropriate under the circumstances to give an accurate presentation of the Model Corporate Acts Opinion. See Section 1.06.

In light of the Georgia cases mentioned in footnote 57 above concluding that a corporation must be organized in order to conduct business, it would appear that no Corporate Acts Opinion could be given unless the Opinion Giver had concluded that Company had been organized. In this connection, the question arises as to what can be done if the facts do not exist which would prove "due organization" under the law as it existed at the time of the purported organization. The following discussion from a Maryland case involving just that absence of facts may give some comfort to Opinion Recipients in those circumstances where an Opinion Giver is unable to give the traditional form of Corporate Status Opinion or does give it in reliance upon the presumption of regularity and continuity discussed at Section 2.09.

> Those practicing in the field are aware that instances have been known of closely held corporations where minutes of organizational meetings and bylaws adopted at such meetings cannot be found, being misplaced, lost, strayed, or stolen. This circumstance no doubt accounts for some of our holdings. See, e.g., H. Brune, Maryland Corporation Law and Practice § 339, at 406 (rev. ed. 1953), citing Long v. Baltimore & O.R.R., 155 Md. 265, 141 A. 504 (1928) and stating, "After the expiration of a long period of time a presumption of regularity attends corporate proceedings." At 407 Brune further states, citing Forst's Lessee v. Frostburg Coal Co., 65 U.S. (24 How.) 278, 16 L.Ed. 637 (1860), Bartlett v. Wilbur, 53 Md. 485 (1880), Laflin & Rand P. Co. v. Sinsheimer, 46 Md. 315 (1877), and Franz v. Teutonia Build. Asso., 24 Md. 259 (1866), '[T]here have been a number of cases in which those dealing with a reputed corporation as such have been denied the right to question its existence as a corporation." Brune also asserts: "Though ordinarily a vote of shareholders or directors is necessary to elect or appoint officers, it has been held that the appointment of an officer may be 'inferred'. Persons acting as officers are presumed to be such and rightfully in office in the absence of proof to the contrary." Id. § 231, at 230.

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88 See Section 2.01.

89 See Babb at 563; FitzGibbon II at 666.

8 W. Fletcher, Cyclopedia of the Law of Private Corporations § 3737, at 9 (rev. ed. Wolf 1966), states, "The maxim that all things shall be presumed to have been rightly and correctly done, until the contrary is proved, extends to the organization proceedings, and hence the corporation will be presumed to have been duly organized where it proceeds to act as a corporation." See also 2 F. O'Neil, Close Corporations § 8.02 (2d ed. 1971), discussing the disregard of corporate ritual and the neglect of paperwork by close corporations. Freestate Land Corp. v. Bostetter, 292 Md. 570, 578-580, 440 A.2d 380, 385 (1982).

The Committee has concluded that, where the traditional form of the Corporate Status Opinion cannot be given or where the traditional form of such opinion is given based on Opinion Giver's reliance on the presumption of regularity and continuity, the facts may be sufficient to permit the Corporate Acts Opinion to be given based upon reliance on the presumption of regularity and continuity, the inference of appointment and the presumption of actions being rightly and correctly done discussed in Freeport Land Corp. v. Bostetter. If the Opinion Giver determines that reliance on these presumptions is sufficiently material to the Corporate Acts Opinion, such reliance should be disclosed in the opinion letter, together with a brief statement of the reason why reliance on these presumptions is necessary (e.g. missing or incomplete records documenting the organizational process) and, if requested by the Opinion Recipient, the facts relied upon to establish such presumptions. The language suggested at Section 2.09 above may be used, with appropriate modification to reflect that such presumptions are being relied upon in rendering the Corporate Acts Opinion.

7.03 Matters Not Covered by the Model Corporate Acts Opinion.

The Model Corporate Acts Opinion does not address any laws other than the GBCC and the laws of agency, as discussed above.[90] Such other laws should be addressed, if at all, only in the Model No Violation Opinion (Section VIII).

The Model Corporate Acts Opinion does not address whether the Documents are legal, valid, binding or enforceable or whether any consent, license, authorization or approval by any third parties (including governmental or regulatory entities or parties to any of Company's agreements) is required or has been given. These matters should be addressed, if at all, in the Model Remedies Opinion (Section X) and the Model No Consent Opinion (Section IX). This opinion also does not address whether Company's directors and officers were in compliance with their statutory duties in granting and exercising the requisite authority addressed by the opinion.

7.04 Additional Notes Regarding the Model Corporate Acts Opinion.

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90 See Babb at 563; Fuld at 927-28; Jacobs at page 6-2 (does not address governmental or third party consents); but see FitzGibbon at 664-65 (does address compliance with obligations under instruments, including indenture covenant restrictions); Jacobs at 6-1 through 6-2 and 7-2 (may also include opinion that action cannot be attacked on the grounds of violation of any law or any agreement).

A. Corporate Authority. The GBCC and Company's articles of incorporation and bylaws establish general principles (and with respect to certain extraordinary transactions specific rules[91]) addressing the circumstances in which shareholder and director authorization is required for corporate action that is to be taken within the scope of the corporation's powers and the manner in which the shareholders and directors may delegate the responsibility to authorize such actions to committees of Company's Board of Directors and to Company's officers.

B. Agency. The Model Corporate Acts Opinion addresses only matters of actual authority rather than those of apparent authority. A Corporate Acts Opinion that addresses only apparent authority is not an opinion that the Opinion Recipient should request or upon which the Opinion Recipient should rely. Failure to obtain assurances as to actual authority would require the Opinion Recipient to be content with the factual uncertainties associated with apparent authority.[92]

C. Incumbency. Incumbency of officers and directors and the status of shareholders taking any corporate action in connection with the Transaction should be established by a certificate of the corporate secretary.

D. Enforceability. The Model Corporate Acts Opinion does not address whether the Documents are valid, binding or enforceable. The Model Corporate Acts Opinion, however, is integrally related to the Remedies Opinion, and establishes that certain actions were taken so that a further determination can be made in the Remedies Opinion that the actions taken were sufficient to create binding contractual obligations. See Section X.

E. "Execute and Deliver" vs. "Enter Into". See the discussion at Section 6.02B.

7.05 Practice Procedure for the Model Corporate Acts Opinion. The Model Corporate Acts Opinion requires substantial due diligence.[93] The Committee recommends that the Opinion Giver complete the following due diligence procedures:

A. review Company's articles of incorporation, certified by the Secretary of State, and bylaws, certified by Company's secretary;

B. review:

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91 See, e.g., merger transactions (O.C.G.A. Title 14 Chapter 2 Article 11) and the sale of substantially all of a corporation's assets (O.C.G.A. Title 14 Chapter 2 Article 12) which require shareholder approval. See FitzGibbon II at 661-62.

92 The existence of authority and its effect on the enforceability of corporate acts when analyzed from an apparent authority perspective will depend on facts known to the Opinion Recipient and apparent to all third parties. See, e.g., FitzGibbon II at 666, New York I at 1912-13.

93 See, e.g., Jacobs at 6-8 through 6-35, 7-17 through 7-20.4 and 7-43 through 7-60.

(i) any Company resolutions specifically authorizing execution and delivery of the Documents and all performance by Company under the Documents;

(ii) to the extent not covered by the secretary's certificate discussed below in section C(ii), any Company resolutions adopted after the date of adoption of the original authorizing resolutions that may amend or revoke the authority granted in the original authorizing resolutions, and

(iii) Company resolutions addressing any delegation of power generally;

C. review a certificate, dated the date of the opinion, of Company's corporate secretary or other appropriate officer certifying that:

(i) copies of Company's articles of incorporation and bylaws reviewed and relied upon by the Opinion Giver are true, complete and correct copies and have not been amended, revoked or otherwise changed since the date adopted;

(ii) copies of any Company resolutions reviewed and relied upon by the Opinion Giver are true, complete and correct, the resolutions have not been amended or revoked since the date adopted and are the only resolutions relating to the matters that are the subject matter of the opinion;

(iii) Company's relevant corporate resolutions were adopted in compliance with any procedural requirements of Company's articles of incorporation and bylaws and the GBCC, such as:

(a) the manner in which notice of the meeting was given or waived; and

(b) the number of directors or shareholders present at the meeting when convened and when the relevant votes were taken; and

(iv) incumbency of officers and directors and the status of shareholders, such as:

(a) that both the directors voting on the relevant resolutions and the officers acting on behalf of Company in the Transaction were duly appointed and incumbent in their offices at the time of all relevant corporate action and at all relevant times thereafter, and

(b) that any shareholders voting on the relevant resolutions were shareholders of record at the time of such relevant corporate action and entitled to vote;

D. review the GBCC and agency law as to corporate authority; and

E. review the final execution copy of the Documents.

One due diligence issue that often arises with respect to the Model Corporate Acts Opinion is the question whether a delegation of authority is proper. The Committee recommends that the Opinion Giver evaluate whether any authority delegated by Company's Board of Directors to a committee or Company's officers may be delegated. Often corporate resolutions provide for a broad delegation of authority, such as the authority to enter into guaranties or an agreement to sell Company, in either case on any terms deemed by the officers in their sole discretion to be appropriate.[94] The Board may also have authorized the officers to make changes in their discretion to approved forms of the Documents. If it is feasible to have the Board of Directors approve and ratify the final or a near-final version of the Documents and any other related action taken by the officers pursuant to the broad delegation of authority the Opinion Giver should obtain such approval. Ratification should remove any doubts as to the propriety of the delegation of authority.[95]

Reliance on a certificate of Company's corporate secretary as to the procedures actually followed in the call of a meeting and whether a quorum was present will permit the Opinion Giver to have a basis for the Model Corporate Acts Opinion.[96]

The Committee recommends that the Opinion Giver determine by observation who executes the Documents on behalf of Company.[97] In the absence of observation, the Opinion Giver must rely on an incumbency certificate and an assumption of the genuineness of the signatures on the Documents.[98]

The Committee recommends that the Opinion Giver also confirm that the mechanics of delivery of the Documents were sufficient to create a binding contractual obligation, i.e., that Company put a duly executed agreement out of its possession or custody with the express or (unless the Opinion Recipient knows to the contrary) apparent intent to create an immediately

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94 See New York I at 1914.

95 See FitzGibbon II at 663-64 and 666 (power to delegate not unlimited, particularly with respect to changing terms of an agreement; advisable to have action ratified).

96 See Babb at 563 (counsel need not investigate such matters, except procedural matters as to which doubts are raised by the minutes); FitzGibbon II at 663 (absent knowledge to the contrary, you may rely on recitals in the minutes or on an officers certificate; when concerned, lawyers often review the minutes for confirmation); but see California IV (review of corporate minute books is necessary).

97 See Jacobs 7-20.4 through 7-32 and 7-43 through 7-60.

98 See Babb at 563.

binding contractual obligation. If the Opinion Giver is not present at the actual delivery, certain assumptions will have to be made with respect to, or certificates will have to be delivered describing, the circumstances of the delivery. Generally, there is consent by the parties at the closing that the closing lawyer will deliver all executed Documents to Company and the Opinion Recipient and that delivery by Company to the closing lawyer constitutes delivery to the Opinion Recipient. In such circumstances it may be necessary to determine if a written escrow or bailment agreement is necessary, or if an oral agreement is sufficient, to give the closing lawyer the fiduciary responsibilities of an agent or bailee.[99] The Committee recommends that the Opinion Giver also determine whether the parties authorized release of the Documents by the closing lawyer. While the Opinion Giver could assume the facts of the execution and delivery of the Documents if the Opinion Giver does not witness execution and delivery, the Opinion Recipient ordinarily is entitled to receive an opinion based solely on a certificate from Company's officers addressing the facts of the execution and delivery of the Documents.

99 See Babb at 563.

VIII. THE MODEL NO VIOLATION OPINION

The execution and delivery by Company of the Documents do not, and if Company were now to perform its obligations under the Documents such performance would not, result in any:

(i) violation of Company's articles of incorporation or bylaws;

(ii) violation of any existing federal or state constitution, statute, regulation, rule, order, or law to which Company or the Assets are subject;

(iii) breach of or default under any material written agreements to which, to our knowledge, Company is a party or by which, to our knowledge, Company or the Assets are bound;

(iv) creation or imposition of a contractual lien or security interest in, on or against the Assets under any material written agreements to which, to our knowledge, Company is a party or by which, to our knowledge, Company or the Assets are bound; or

(v) violation of any judicial or administrative decree, writ, judgment or order to which, to our knowledge, Company or the Assets are subject.

With your permission we have assumed that the term "material written agreements" used in clauses (iii) and (iv) above includes only [description of "material written agreements"].

The Opinion Giver may describe "material written agreements" either by reference to a limited group of written agreements (e.g. agreements involving borrowings by Company in excess of $100,000) or by reference to a listing of the specific agreements which the Opinion Giver reviewed for purposes of rendering the No Violation Opinion. Where reference to a specific list of reviewed written agreements is used, the knowledge qualifications in clauses (iii) and (iv) of the model opinion language are inappropriate and should be deleted.

COMMENT

8.01 Purpose and Background of the Model No Violation Opinion. The purpose of the Model No Violation Opinion is to provide assurances to the Opinion Recipient that the steps to be taken by Company in performing the Transaction will not result in either the violation of or default under, as applicable, certain governing documents, laws, agreements and judgments or the creation or imposition of a contractual lien or security interest.[100] The opinion is regularly requested in corporate transactions.[101] At the earliest stage possible, the Opinion Giver and the Opinion Recipient must establish the concerns of the Opinion Recipient which will be addressed by this

100 See generally Babb at 565; California I; and Sterba at 79.

101 FitzGibbon VIII at 376.

opinion and the scope of the Opinion Giver's inquiry in supporting this opinion.[102] In the discussion below, the appropriateness of knowledge qualifications and reliance on officer's certificates with respect to the No Violation Opinion are addressed. For a more detailed discussion on the general use of officer's certificates and knowledge qualifications, see Sections 2.07D and III.

8.02 Elements of the Model No Violation Opinion.

A. Company Actions Covered. The lead-in phrase of this opinion defines the actions of Company with regard to which the Opinion Giver will give the Model No Violation Opinion. First, this opinion addresses the execution and delivery of the Documents by Company. Second, Company's performance under the Documents is evaluated. Since the opinion will typically be rendered at the time of the execution and delivery of the Documents but the opinion addresses future performance obligations, the exclusive use of the present tense is inappropriate.[103] As discussed in Section 2.01, however, the opinion addresses only the facts and the law as they exist as of the date of the opinion. Therefore, this opinion addresses itself only to conflicts that are clear, present and apparent from the face of the Documents. This opinion does not address actions which are permitted but not required under the Documents,[104] and does not address actions which may be contemplated or inferred from the Documents, but which are not specifically set forth.[105] Unless otherwise specifically provided in this opinion, the Opinion Giver is permitted to assume that discretionary action(s) taken by Company pursuant to the Documents will not create a violation, breach, default or security interest with respect to this opinion. See Interpretive Standards 14 and 16.

Care should be taken in using the terms "violation," "breach" or "default" in connection with each of the parts of the Model No Violation Opinion. It would not appear that a corporation could be "in default" under its articles of incorporation or bylaws, but actions taken by a corporation could result in a "violation" of articles or bylaws. Further, use of the terms "breach" or "default" have established legal meanings in connection with a corporation's agreements whereas the use of such terms is unclear with respect to laws or decrees.

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102 "If such an opinion is requested, the lawyer should establish an understanding early in the transaction as to the scope of his or her investigation. Will the recipient of the opinion permit the lawyer to rely on an officer's certificate that identifies all relevant agreements? Will the lawyer's "knowledge" be limited to the knowledge of lawyers in the firm working on the instant transaction or does it include anyone who might once have worked for the client? In many transactions, it may be more appropriate to address the issue in the form of representations and warranties by the borrower rather than by an opinion of its counsel. Nevertheless, there may be a legitimate purpose to be served in asking for this opinion, particularly if the parties are concerned about a specific problem in a contract or agreement, such as a due-on-encumbrance clause in a senior deed of trust or a leasehold mortgage provision in a lease. Too often, however, the requirement for the opinion merely results in an almost endless attempt to "prove the negative," which produces very little in the way of useful information. Accordingly, in most transactions, some narrowing of the scope of the opinion is appropriate." California II at 1189.

103 Sterba at 79.

104 Id. at 84.

105 FitzGibbon VIII at 385.

Historically, the term "conflict" has been used in the Model No Violation Opinion in conjunction with or in lieu of the terms "violation, " "breach" or "default." This established practice creates an ambiguity. The legal significance of the term "conflict" is not as well established as the terms "violation," "breach" or "default. For example, use of the term "conflict" in connection with a reference to Company's agreements could be interpreted to be an opinion that the actions taken by Company do not generate adverse consequences, i.e., consequences which do not reach the level of a breach or default of such agreement.[106] Therefore, the Committee recommends the term "conflict" not be used in connection with this Opinion. However, if the Opinion Giver does elect to use the term "conflict," its use should be defined so that it has the equivalent meaning of the terms "violation," "breach" or "default."

B. Articles and Bylaws. The phrase "violation of Company's articles of incorporation or bylaws" is substantially similar to the Model Corporate Acts Opinion. It is clear that the Model Corporate Acts Opinion could not be given if, in fact, consummation of the Transaction would result in a violation of Company's articles or bylaws. It is possible that the Opinion Recipient will not require this duplicative opinion. However, since it is customary to give this opinion in corporate transactions, the Committee believes that there is little risk in giving this portion of the opinion if the Opinion Recipient insists.[107]

A recent change in the GBCC deserves special attention by both Opinion Givers and Opinion Recipients in connection with the Model No Violation Opinion concerning Articles of Incorporation. If the Company has established preemptive rights for its shareholders, the issuance of the Company's stock as part of the Transaction in contravention of the shareholders' preemptive rights would result in a violation of the Company's Articles of Incorporation. Previously, the Georgia Corporate Code provided that this type of stock issuance would also cause the stock not to be validly issued.[108] However, under the GBCC stock issued in contravention of preemptive rights is validly issued even though it violated the Articles of Incorporation.[109] Therefore, while it would be possible to give the Model Capitalization Opinion with respect to stock issued in the Transaction violating preemptive rights, it would not be possible to give the Model No Violation Opinion with respect to that Transaction.

C. Laws. Clause (ii) of the Model No Violation Opinion focuses on the possibility of violations of laws. This portion of the opinion is occasionally resisted by the Opinion Giver due to its broad nature. However, this opinion is an important complement to the Model Remedies Opinion. The Committee believes that this subject is one upon which the Opinion Giver should be

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106 However, if the Opinion Giver is aware of adverse consequences arising under other agreements as a result of the proposed transaction, it is appropriate for the Opinion Giver to disclose such consequences in the opinion in order to give an accurate presentation of the Model No Violation Opinion. See Section 1.06 and FitzGibbon at 387.

107 Id. at 377 (However, FitzGibbon does raise the possibility that in seeking to avoid a redundant construction a court may interpret this language as broader than the subject matter covered by the "duly authorized" opinion); Sterba at 82.

108 O.C.G.A. § 14-2-111 (repealed).

109 O.C.G.A. § 14-2-630.

able to opine, subject to certain qualifications. As provided in the Interpretive Standard 27, this opinion applies only to those laws which would either prohibit performance by Company under the Documents or subject Company to a fine, forfeiture, punishment or other penalty. Further, the Model No Violation Opinion is not meant to address every law of possible application. Generally, it is not practical or economically feasible to provide such an all-inclusive opinion. The Opinion Recipient should essentially be concerned with areas of law which normally are recognized as being applicable to the Transaction and Company's performance under the Documents. If the application of specialized areas of law are of concern to the Opinion Recipient, then such laws should be specifically negotiated as being included in this opinion. Otherwise, Interpretive Standard 27 provides that the laws applicable to this opinion are those which a lawyer would determine apply after utilizing customary professional diligence. The suggested language provided in the Model Opinion limiting the opinion to laws of the Opining Jurisdiction and federal law and provided in Interpretive Standard 2 with respect to Scope of the Opinion is meant to narrow the focus of this opinion.

The suggested language and Interpretive Standard 2 exclude any opinion concerning city or county ordinances, codes, rules or regulations. This exclusion is necessary because such local laws are frequently difficult to obtain in their complete or up-to-date form.[110] However, the Opinion Giver may consider including in the opinion specific local laws which are relevant to the proposed transaction if and to the extent such inclusion is requested by the Opinion Recipient. In certain circumstances, it may be appropriate specifically to exclude other statutory or regulatory matters depending on the nature of Company's business.[111] For example, Company may be subject to certain federal or state regulations peculiar to its industry, compliance with which are handled by legal counsel outside of the Opinion Giver's firm.

D. Breach of Agreements. Clause (iii) of the Model No Violation Opinion, together with the stated assumption regarding the definition of "material written agreements," addresses the Opinion Recipient's desire to confirm that the Documents do not breach or cause defaults under the terms and provisions of Company's pre-existing agreements.[112]

It should be noted that unless otherwise specified, the opinion as to whether performance under the Document will cause breaches of, or defaults under other agreements does address limitations on aggregate indebtedness and covenants regarding maintenance of financial ratios. Once the Opinion Giver has identified the presence of such financial covenants it is appropriate for the Opinion Giver to rely on an officer's certificate concerning compliance with these covenants in order to give this opinion.

E. Creation of Liens. The purpose of clause (iv) of the Model No Violation Opinion is to provide the Opinion Recipient assurance that the Transaction will not trigger a provision in any of Company's material written agreements that conveys a security interest in or lien on the Assets to a creditor of Company.[113] Interpretive Standard 27 specifically excludes liens and

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110 Long at 25.

111 Sterba at 84.

112 New York II at 1918.

113 FitzGibbon VIII at 334-335.

security interests created by, or in favor of, Opinion Recipient and those created under the Documents because the Opinion Recipient should be aware of these liens and security interests.

Liens arising by operation of law are also expressly excluded from the Model No Violation Opinion in Interpretive Standard 27 because identifying all of the ways in which such a lien could arise proves difficult for counsel.[114] For example, a joint venture agreement could result in Company's becoming subject to a wage-earner's lien in favor of employees of the joint venture.[115] If the Opinion Recipient is especially concerned about a specific area of the law, a specific opinion in such limited area, such as sales tax, could be requested.[116]

F. Material Written Agreements. It is not reasonable to expect the Opinion Giver to be familiar with or to have reviewed all agreements of Company. Therefore, some qualification is necessary. The model language contained in clauses (iii) and (iv) of the Model No Violation Opinion limits the opinion to "material written agreements," which term must be defined. The materiality standard used to determine the agreements to be covered by this opinion would be established by the mutual agreement of the Opinion Giver and the Opinion Recipient. The compilation of the material agreements should be performed by an appropriate officer of Company or, in some cases, may be derived from a previously prepared exhibit to one of the Documents. In either event, the list should be provided to the Opinion Giver pursuant to an officer's certificate. Regardless of the way in which "materiality" is defined, since this opinion is a factual one, it is appropriate for the Opinion Giver's opinion on this subject to be limited to knowledge.

An alternative to formulating a materiality standard for this opinion is for the Opinion Giver and the Opinion Recipient to devise a list of agreements to which this opinion would apply. This alternative may be feasible where the Opinion Recipient is very familiar with the business of Company or where the Opinion Recipient has conducted an extensive investigation of Company.

Using the suggested language accomplishes two goals: first, it permits the Opinion Giver reasonably to narrow the scope of the investigation necessary to give this opinion and, second, it requires the Opinion Recipient to focus on those written agreements which Opinion Recipient acknowledges are important to the Transaction, so that the Opinion Giver can perform a meaningful review of those agreements.

G. Violation of Decrees. Clause (v) of the Model No Violation Opinion, like the "no breach of agreements" clause of the Model No Violation Opinion, involves a factual element. It would be impractical for the Opinion Giver to search the docket records in every jurisdiction to identify applicable decrees, judgments and other orders. Therefore, it is appropriate for the Opinion Giver to employ a knowledge qualification here.

In the event that the Opinion Recipient expresses concern about certain courts or governmental agencies, the Opinion Giver might specifically agree to search the appropriate dockets and expressly include the results of this search in the opinion. The scope of any such

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114 Id.

115 Id. at 335.

116 Id.

examination should be specifically set forth, and the assumptions made (e.g., accuracy of court's index) in any such examination should be expressed.

8.03 Additional Notes Regarding the Model No Violation Opinion.

A. Alternative Terms. Frequently, the Opinion Giver will be requested to opine as to "any indenture, contract, agreement or other undertaking to which Company is a party or to which Company is bound." It is the Committee's position that use of such a provision in the Model No Violation Opinion is entirely too broad.

First, the No Violation Opinion should be limited to written agreements of Company. It is impossible for the Opinion Giver to make a proper examination of any agreement unless it is in writing. The reference either to "indenture, contract, agreement" appears to be repetitive and would be adequately covered by making reference to either "agreement" or "contract." Next, reference should not be made to "undertakings" of Company. The term "undertaking" is ambiguous in this context; it could be construed to include verbal agreements or a practice of Company that is not the subject of a contractual arrangement. If an "undertaking" is meant to be an "agreement" or a "contract" it should be covered by those references.

B. Assumptions in Review. In connection with reviewing "material written agreements" in order to give the No Violation Opinion, the Opinion Giver will often find that such agreements provide by their terms to be governed by the laws of Other Jurisdictions. In such situations the Opinion Giver should assume that the agreement governed by the laws of the Other Jurisdiction will be enforced as written. See Interpretive Standard 17. Based on that assumption, the Opinion Giver would evaluate that particular agreement to see if the Transaction created a breach or default. If in evaluating an agreement a question of legal construction arises, but such agreement is governed by the laws of an Other Jurisdiction, then the Opinion Giver should evaluate the construction of that agreement based on the law of the Opining Jurisdiction. See Interpretive Standard 27. Should the Opinion Recipient require an opinion regarding the application of the law of an Other Jurisdiction to a material agreement, then such an opinion should be specifically requested by the Opinion Recipient and specifically addressed by an opinion of Other Counsel.

8.04 Practice Procedure For the Model No Violation Opinion.

In giving the Model No Violation Opinion, the Committee recommends that Opinion Giver examine the type and extent of documentation necessary to support the various opinions stated above, obtain a certified copy of Company's articles of incorporation and have an appropriate officer of Company certify that the bylaws provided to the Opinion Giver are the most recent version of the bylaws and are unamended. With respect to "material written agreements," the Opinion Giver should obtain copies of each of these agreements, and obtain an officer's certificate stating that the list of agreements attached is a complete and accurate list of all agreements which meet the materiality standard established between the Opinion Giver and the Opinion Recipient. In rendering this opinion, the Opinion Giver should consult with the primary lawyer group in the firm. (See Section 3.02B concerning primary lawyer group).

The same procedures should be used with respect to any writs or judgments known to the Opinion Giver. The Committee recommends that the Opinion Giver obtain copies of relevant writs or judgments from the appropriate court or regulatory authority and review their contents, obtain from officers of Company a certificate containing a list and description of all applicable judgments as set forth in Section XV (Model Litigation Confirmation) and consult with the primary lawyer group.

IX. THE MODEL NO CONSENT OPINION

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

COMMENT

9.01 Purpose and Background of the Model No Consent Opinion. The purpose of the Model No Consent Opinion is to give the Opinion Recipient assurance that there is no required governmental consent, approval, authorization or filing the absence of which would prohibit performance by Company of its obligations under the Document or would subject Company to a fine, penalty or other similar sanction.[117] See Interpretive Standard 28.

9.02 Elements of the Model No Consent Opinion.

A. Express Exceptions. The Opinion Giver should expressly exclude from the opinion any required consents and approvals known to the Opinion Giver and specify whether such consents and approvals have been obtained. See Section 1.06.

B. Post-Closing Matters Excluded. The Model No Consent Opinion encompasses only those consents, approvals, authorizations, filings or other actions that must be obtained, made or taken on or before the execution and delivery of the Documents and the consummation of the Transaction. See Section 2.01. The Committee recognizes, however, that in certain circumstances an opinion regarding post-closing obligations to obtain certain consents, approvals or authorizations, make filings or take other actions required to perform Company's obligations under the Agreement may be necessary or appropriate. The Committee recommends that, in such cases, the parties to the Transaction negotiate and resolve whether the Opinion Giver will give such an opinion, based upon, among other considerations, the cost to Company of obtaining the opinion. In the absence of any such agreement, see the assumptions at Interpretive Standard 14.

C. Local Governments. The Model No Consent Opinion does not include consents and approvals from, or filings with, any governmental authority of a political subdivision of a state, such as a county or municipality.[118] See Interpretive Standard 2 and Section 8.02C. When requested by the Opinion Recipient, concerns about compliance with such laws and regulations may be specifically identified and addressed in the opinion.

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117 Consents and approvals of non-governmental authorities are included within the scope of the Model Corporate Acts Opinion (corporate) and Model No Violation Opinion (third party) addressed in Sections VII and VIII of this Report. Consents and approvals relating to environmental matters are not addressed in this Report. See Interpretive Standard 2.

118 Garrett at 16-17; Green at 20; Hardin at 27; Jacobs at 10-2, 10-5-10-6; New York I at 1921; see also Blackman at 560; Howard at 7; but see Babb at 566; Omnibus I at 112-13; Omnibus II at 205-06; Wander at 582.

D. Jurisdictions Covered. Although it is common practice not to limit this opinion to specific jurisdictions,[119] the Committee believes that it may be preferable to identify those jurisdictions (in the Model No Consent Opinion, the United States and the State of Georgia), even when the entire opinion is limited by its terms to specific jurisdictions. See Sections 4.01 and 4.02.

9.03 Additional Notes Regarding the Model No Consent Opinion.

A. All Company Consents. Sometimes the Opinion Recipient will request an opinion that Company has obtained all governmental consents, approvals, permits and licenses necessary to conduct its business. It is often difficult, expensive and time-consuming for the Opinion Giver to determine whether Company has obtained every permit required to operate its business. The Committee recommends that in most cases the Opinion Recipient obtain assurances about such consents, approvals, permits and licenses from Company's representations and warranties, since the costs incurred to give a legal opinion may not be justified by any benefit the Opinion Recipient may receive from the opinion.[120] The Committee recognizes, however, that there may be circumstances in which it is appropriate for the Opinion Giver to opine that Company has obtained specific consents necessary to operate its business, in order to address particular concerns of the Opinion Recipient; for example, where Company's business is in a highly regulated industry (such as telecommunications), the opinion may be critical to the Opinion Recipient.[121] The Committee recommends that, when giving such an opinion, the Opinion Giver expressly rely on Company's description of its business (contained in a certificate) in order to determine which laws and regulations are applicable.

The opinion with respect to consents and approvals required to conduct Company's business should not be confused with an opinion that Company is not in violation of (i) any law, regulation or administrative ruling or (ii) the terms and conditions of any of Company's permits and licenses, which the Committee believes are inappropriate opinions to request or give. See Section 1.04. Such opinions are peripheral to the Transaction and are too broad and too fact-intensive for the Opinion Giver to verify their accuracy. The Opinion Recipient's concerns about Company's compliance with laws, regulations, administrative rulings and the terms of its permits and licenses should be addressed in Company's representations and warranties.[122]

B. Knowledge. Some commentators suggest the Opinion Giver limit the Model No Consent Opinion to the Opinion Giver's knowledge.[123] The Committee believes that it is inappropriate to place such a limitation on the No Consent Opinion, since the Opinion Giver, after gaining familiarity with the facts in the manner described below, should be able to examine the laws and regulations applicable to the Transaction and determine whether consents or approvals

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119 Language suggested by only three of the commentators listed in the Bibliography contains jurisdictional limitations: Blackman at 560; Garrett at 16; Howard at 7.

120 California I at 1008-09; Maryland at 763-64.

121 Maryland at 765.

122 California I at 1008; Hawaii at 132; Wander at 582-83.

123 Blackman at 550, 560; Jacobs at 10-1, 10-12.

are required in order for Company to execute and deliver the Documents and to consummate the Transaction.[124]

C. Materiality. One commentator suggests that the Opinion Giver consider including a materiality limitation in the No Consent Opinion[125], which could be accomplished by adding to the end of the opinion the following language: ", except those consents and approvals the failure to obtain which would not have a material adverse affect on Company or its business." The Committee believes that the materiality limitation is imprecise and recommends that the Opinion Giver not rely on a materiality limitation in most instances, since the Committee believes that lawyers are not usually in the best position to make determinations of materiality.[126] However, if such a materiality limitation is necessary, the Committee recommends that the opinion contain a definition of "materiality" agreed upon by the Opinion Giver and the Opinion Recipient. See Section 8.02F.

9.04 Practice Procedure For the Model No Consent Opinion.

The Committee recommends that in order to give this opinion, the Opinion Giver complete the following due diligence:

A. Obtain from the appropriate officer of Company a certificate:

(i) containing a brief, general description of the type of business in which Company and its subsidiaries (if appropriate) are engaged and the jurisdictions in which their business(es) are conducted,

(ii) specifying those federal or state governmental agencies or authorities with which Company or any of its subsidiaries deals, those to which Company or any of its subsidiaries reports and those that regulate Company or any of its subsidiaries or any of their businesses or assets, and

(iii) stating whether the certifying officer is aware of any filings that must be made or consents or approvals that must be obtained in connection with the Transaction.

B. If the opinion relates to specific consents, approvals, permits and licenses necessary to the conduct of Company's business (or any of its subsidiaries' businesses, if appropriate), the certificate described in Section 9.04A should include a detailed description of the business, at least as detailed as that required in a registration statement or a periodic report filed with the Securities and Exchange Commission.

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124 California I at 1009; Green at 19-20; New York I at 1921; see Hardin at 28; Wander at 582.

125 See Blackman at 550, 560.

126 See Garrett at 15, 17.

C. Research applicable federal and state laws, rules and regulations to determine what consents or approvals may be required, in light of the information contained in the above-described certificate.

If Company conducts its business in one or more jurisdictions or in a specialized industry the laws of which are not familiar to the Opinion Giver, the Opinion Giver should consider obtaining an opinion of local counsel or counsel that practices in that industry. The Committee suggests that the Opinion Giver discuss with Company the necessity for an opinion of such local or special counsel in light of the importance of the out-of-state or specialized operations to the Transaction or Company's business as a whole. Counsel and the parties to the Transaction may determine that the opinion is not sufficiently important to the Opinion Recipient to justify the cost of engaging separate counsel to give the opinion.

X. THE MODEL REMEDIES OPINION

Each Document is enforceable against Company.

COMMENT

10.01 Purpose and Background of the Model Remedies Opinion. The opinion regarding the validity and enforceability of agreements or instruments, known as the "enforceability" or "remedies" opinion, is the heart of most legal opinions in business transactions. The general purpose of the opinion is to confirm to the Opinion Recipient that the courts will honor the undertakings in its favor set forth in the Agreement and will assist the Opinion Recipient in obtaining the benefit of those undertakings by making an appropriate judicial remedy available. The Model Remedies Opinion, following the current proposal of the Silverado drafting group, is a simplified, non-traditional wording of the opinion.[127]

While certain of the opinions addressed in the preceding sections of this Report cover some issues that do not have to be addressed to give a Remedies Opinion, the Remedies Opinion subsumes many aspects of those opinions.[128] The Committee has concluded that it is desirable to separate certain of the model opinions to facilitate the giving of local counsel and other opinions that focus on specific features of the Transaction. Accordingly, the Opinion Giver may give the Model Remedies Opinion in an opinion letter that incorporates the Interpretive Standards without giving or addressing the issues covered by the Model Corporate Status, Model Corporate Powers and Model Corporate Acts Opinions. The Opinion Giver may assume that these opinions could be given to the extent the Model Remedies Opinion involves issues covered by those opinions.[129] The Opinion Giver would remain responsible for other issues within the scope of the opinion as discussed below, even if those issues are also covered by another opinion in the opinion letter or by another model opinion.

10.02 Elements of the Model Remedies Opinion. The Model Remedies Opinion has the meaning described below and is subject to the exceptions and scope limitations set forth below when used in an opinion letter that incorporates the Interpretive Standards by reference.

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127 See Silverado Draft at 40. A traditional wording of the Remedies Opinion in its broadest form would read "Each Document is a legal, valid, and binding obligation of Company, enforceable against Company in accordance with its terms."

128 See generally Field at § 2.13.

129 The comment at Section 10.02B omits the following two elements that would be included in the absence of the assumption noted in the text:

(i) Company has the legal capacity or power to enter into the Document and to perform its obligations thereunder.

(ii) The creation of each obligation imposed by the Document on Company, and each right, benefit and remedy conferred by Company therein, has been duly authorized, and Company has duly executed and delivered the Document.

A. General Meaning. The Model Remedies Opinion means, with respect to each referenced Document, that:

(i) a contract has been formed under the law of contracts of the applicable jurisdiction;

(ii) under laws applying to contracts generally, and laws normally applicable to contracts like the Document, to parties like Company, and to transactions like the Transaction, each obligation imposed by the Document on Company, each agreement made by Company therein, and each right, benefit and remedy conferred by Company therein, will be given effect as stated in the Document.[130]

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130 Expressions of meaning of the Remedies Opinion by other commentators:

(A) California VII at 2209:

"1. The parties to the agreement have the legal capacity or power to enter into the agreement.

2. The agreement has been duly authorized, executed and delivered by both parties.

3. An effective contract has been formed under the law of the applicable jurisdiction. The entire agreement is not invalid by reason of a specific statutory prohibition or the public policy of the jurisdiction.

4. Contractual defenses to the entire agreement, such as the statute of frauds, are not available.

5. Some remedy is available if a party to the contract does not materially comply with its terms. This does not imply that any particular type of remedy is available, or that every provision in the agreement, such as the right to accelerate indebtedness in the event of a default, will be upheld or enforced by a court under all circumstances."

(B) New York I at 1914: "if there is a default in performance of an obligation [contained in the agreement], (1) if a failure to pay or other damages can be shown and (2) if the defaulting party can be brought into a court which will hear the case and apply the governing law, then, subject to the availability of defenses and exceptions stated in the opinion, the court will provide a money damage (or perhaps injunctive or specific performance) remedy."

(C) Silverado Draft, § 10, at 18-19:

"(a) A contract has come into existence under the law of contracts and neither the agreement nor any of its provisions will be unenforceable against the

B. Existence of Contract. Section 10.02(A)(i) requires the Opinion Giver to conclude that:

(i) All legal requirements under contract law for the formation of a contract effective against Company of the type involved, other than those covered by the Model Corporate Status, the Model Corporate Powers and the Model Corporate Acts Opinions are met, such as necessary formalities (including compliance with any applicable statute of frauds), consideration (where necessary), definiteness, and the inclusion of essential terms.

(ii) The Document does not violate a law as to formation of contracts that would prevent a court presented with the Document from enforcing it.

(iii) Company does not presently have available any contractual defenses to the Document such as the statute of limitations.

C. Materiality of Obligation and of Breach. The Model Remedies Opinion when given subject to the Interpretive Standards follows the "absolutist" approach, covering the

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Client under the law of contracts or other laws normally applicable to transactions or contracts of the sort with which the Remedies Opinion deals or to parties of the sort against whom the opinion states the agreement to be enforceable.

(b) Each obligation imposed by the agreement on the Client, each agreement made by the Client therein, and each right, benefit and remedy conferred by the Client therein, will be given effect as stated in the agreement insofar as governed by the laws which are applicable pursuant to subsection (a). It is not necessary for the Remedies Opinion to state that it applies to each provision of the agreement."

(D) Arizona, § 7:

"(1) The documents constitute effective contracts under applicable law, and none of them is invalid by reason of a statute, rule, reported court decision, or "public policy."

(2) Absolute contractual defenses to the documents, such as the statute of frauds, are not available to the subject entity.

(3) The documents are sufficient to create the interests, rights, and obligations they purport to create.

(4) Except to the extent otherwise qualified in the opinion, each term and provision of the documents is binding upon and may legally be enforced against the subject entity."

effectiveness in court of each and every right, benefit and remedy conferred by the Agreement, regardless of its materiality to the Opinion Recipient. See discussion in Section 10.05.

The Model Remedies Opinion addresses only the availability of a remedy for material nonperformance of the obligations imposed on Company by the Documents. Material nonperformance in this context includes the concept that remedies may not be available if Company "substantially" complies with the Document covered by the Opinion.[131] See discussion in Section 10.05.

The approach regarding rights, benefits and remedies and the concept of "material" breach follow the approach taken by the Silverado drafting group.[132]

D. Predictive Nature of Opinion and Future Events. The Model Remedies Opinion requires only that the Opinion Giver analyze the availability of remedies for nonperformance of obligations that, as expressed in the referenced Document, Company will be required to perform in the future, and should also consider the circumstances that will exist in the future as a result of the Opinion Recipient's exercise of absolute rights explicitly conferred on it by the Document. The Opinion Giver may assume that the Company will not take any discretionary action that could result in a violation of law or breach of any other agreement or court order, and will obtain all permits and government approvals and take other actions necessary in the future under applicable law.[133] See discussion in Section 2.01.

E. Factors Affecting Opinion Recipient. Unless expressly provided in the opinion letter, by giving the Model Remedies Opinion subject to the Interpretive Standards, an Opinion Giver does not cover matters pertaining to parties to the Transaction other than Company. To the extent any element of the Model Remedies Opinion involves consideration of such matters, all relevant legal requirements that uniquely affect other parties to the Transaction are treated as satisfied. See Section 2.07 and Interpretive Standards 12 and 13. Such matters include but are not limited to, "whether the agreement has been duly authorized, executed and delivered by the recipient, whether the recipient has complied (or as a result of the transaction may be required to comply) with any applicable "doing business" or similar laws, whether the recipient or its officers or employees are required to qualify, register or obtain any license or permit, whether a loan complies with applicable legal investment laws, and whether payment of interest is subject to withholding or other taxes."[134]

F. Implied Opinions and Related Questions of Scope. Many lawyers have expressed concern over the possible coverage within the Remedies Opinion of "implied" or "implicit" opinions, or "opinions by implication." The question is frequently asked, for example, whether an opinion that a merger agreement is enforceable "implies" that it is not subject to challenge on the ground that it violates antitrust laws.[135] Some lawyers expressly exclude from the Remedies

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131 See generally O.C.G.A. § 13-4-20 (1982).

132 See Silverado Draft § 10(b), at 18; id., §13(e), at 23.

133 See Interpretive Standard 16.

134 California VII at 2220. See also Glazer at 13-8; Silverado Draft § 4(c), at 8.

135 Field III at 11; FitzGibbon VII.

Opinion on a case-by-case basis the effect of antitrust, securities, and other laws not generally appropriate for unqualified, conclusory treatment. Others consider such matters as implied exceptions and make no reference to them. Still others make oblique reference to the absence of "implied opinions." Efforts to articulate a rationale for exclusion of certain legal concepts from the Remedies Opinion include statements that the implied opinions are only those "necessary" to the conclusion reached[136] and that the implied opinions are only those "both necessary and reasonable in the circumstances."[137] Other possible approaches include drawing a distinction between laws that "a lawyer acting reasonably would recognize as being applicable to the transaction," which would be covered by the opinion, and all other laws.[138] Finally, suggestions have been made that the proper approach may involve application of a standard of "fair presentation."[139]

A statement that the Remedies Opinion does not include an "implied opinion" that an agreement is safe from challenge on antitrust grounds is simply another way of saying that an implied exception exists for invalidity or enforceability based on the effect of antitrust law, or that the scope of the opinion does not include the effects of that law. Issues of contract law generally, including, in appropriate cases, the Uniform Commercial Code and other laws applicable to particular classes or categories of contracts, are the natural focus of the Remedies Opinion, and would normally be covered by the Opinion Giver in the absence of express qualification or exception. As noted above, laws uniquely affecting the Opinion Recipient, such as legal investment laws or laws regulating industries in which the Opinion Recipient operates, are excluded from coverage. Other laws are covered only to the extent they are normally applicable to transactions like the Transaction, to contracts like the Documents, or to parties like Company. In this context, "normally applicable" laws refers, as indicated by proposals under consideration by the Silverado drafting group, to those laws that a lawyer exercising customary professional diligence would reasonably recognize to be directly applicable to the Company, the Transaction, or both.

It is in this last category that questions regarding "implied opinions" or, conversely, "implied exceptions," frequently arise. The conventions adopted by this Report allow for implied exceptions to the Model Remedies Opinion and related opinions for matters of law potentially within the literal scope of the opinion but not generally considered by reasonable lawyers to be suitable for conclusory legal judgments. Examples include the matters specifically identified in numbered paragraphs (3) through (5) of Interpretive Standard 2, as generally outside the scope of the opinion letter unless specifically addressed.[140] The conventions adopted by this Report do not resolve all questions relating to "implied opinions," but do attempt to address specifically those identified by the Committee as likely to appear with some frequency. After considering the views noted above, as well as the views of members of the Silverado drafting group, the Committee has adopted the test of "essential to the conclusion reached" and "reasonable in the circumstances" for purposes of any unanticipated coverage questions. See Interpretive Standard 2.

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136 Field III at 11.

137 Id. See also Silverado Draft § 19 and ¶19.1 and 35-36.

138 See FitzGibbon VII at 199-200.

139 Field at 1-8; Speer at 22.

140 See Field III at 12.

10.03 Implied Exceptions to the Model Remedies Opinion. Almost every Remedies Opinion rendered in business transactions is made subject to qualifications expressly set forth in the opinion letter. Some lawyers set forth a limited number of general qualifications (or even none) in reliance on implied limitations to the Remedies Opinion. Others include a "laundry list" outlining all conceivable qualifications.[141] The Committee concurs with the view that it is impossible to set forth a complete "laundry list" identifying all possible qualifications and exceptions and that to attempt to do so in an opinion letter may imply that there are no other possible exceptions and thereby mislead an Opinion Recipient. Furthermore, lengthy recitations of boilerplate exceptions applicable to contracts generally tend to obscure those that should call to the attention of the Opinion Recipient problems unique to the Documents covered by the opinion.

The Committee has adopted the approach that the Model Remedies Opinion should be included in opinion letters that adopt the conventions of the Interpretive Standards with no stated qualifications or exceptions other than those which the Opinion Giver properly finds to be specific to the Documents covered by the opinion. A Remedies Opinion normally should not regurgitate as express qualifications and exceptions legal principles affecting the performance and enforcement of contracts generally and commonly recognized as such, such as concepts of modification and waiver. These qualifications and exceptions should be considered implied. Various other qualifications and exceptions frequently made do not meet this standard, but are based on principles that apply to business transactions with sufficient regularity to justify the conclusion that they should be considered implied, or at least suitable for adoption by convention as customary qualifications and exceptions. A final group of qualifications and exceptions involves issues generally not considered appropriate for conclusory treatment by Georgia lawyers, including certain issues that might otherwise be covered by an "implied opinion," as discussed above.

The Committee has identified its own "laundry list" of qualifications and exceptions in these categories, drawing freely not only from commentators and state bar association projects, but also from legal opinions rendered by experienced Georgia lawyers in recent transactions of various types and from the ongoing efforts of the Silverado drafting group. Accordingly, any Remedies Opinion that incorporates the conventions of this Report as reflected in the Interpretive Standards will be deemed to include and be subject to the following implied exceptions:

(1) The effect of bankruptcy, insolvency, reorganization, moratorium or other similar laws affecting the rights and remedies of creditors. This includes the effect of the Federal Bankruptcy Code in its entirety, including matters of contract rejection, fraudulent conveyance and obligation, turn-over, preference, equitable subordination, automatic stay, conversion of a non-recourse obligation into a recourse obligation, and substantive consolidation. It also includes state laws regarding fraudulent transfers, obligations, and conveyances, including O.C.G.A. § 18-2-20, et seq., and state receivership laws.[142] See discussion at Section 10.05A.

(2) The effect of general principles of equity, whether applied by a court of law or equity. This includes the following concepts: (a) principles governing the availability of specific

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141 See California VII at 2194-96.

142 See Silverado Draft § 12.

performance, injunctive relief or other traditional equitable remedies; (b) principles affording traditional equitable defenses (e.g., waiver, laches and estoppel); (c) good faith and fair dealing; (d) reasonableness; (e) materiality of the breach; (f) impracticability or impossibility of performance;[143] *(g) the effect of obstruction or failure to perform or otherwise act in accordance with an agreement by any person other than Company;*[144] *(h) the effect of Section 1-102(3) of the Uniform Commercial Code, and (i) unconscionability.* See discussion at Section 10.05B.

(3) The validity or effect of contractual provisions providing for choice of governing law. See discussion at Section 10.05H.

(4) The possible unenforceability of provisions purporting to waive certain rights of guarantors. See discussion at Section 10.05D.

(5) The possible unenforceability of provisions requiring indemnification for, or providing exculpation, release, or exemption from liability for, action or inaction, to the extent such action or inaction involves negligence or willful misconduct or to the extent otherwise contrary to public policy. See discussion at Section 10.05E.

(6) The possible unenforceability of provisions purporting to require arbitration of disputes. See discussion at Section 10.05F.

(7) The possible unenforceability of provisions prohibiting competition, the solicitation or acceptance of customers, of business relationships, or of employees, the use or disclosure of information, or other activities in restraint of trade. See discussion at Section 10.05G.

(8) The possible unenforceability of provisions imposing increased interest rates or late payment charges upon delinquency in payment or default or providing for liquidated damages or for premiums on prepayment, acceleration, redemption, cancellation, or termination, to the extent any such provisions are deemed to be penalties or forfeitures. [145]

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143 See O.C.G.A. § 13-4-23 (1982); Silverado Draft § 13(f).

144 See, e.g., O.C.G.A. § 11-2-615 (1982).

145 See, e.g., O.C.G.A. § 13-6-7 (1982); 1987 Fla. Laws, c. 87-351, § 1 (conditions to enforceability of prepayment charges and charges on acceleration) repealed by 1988 Fla. Laws, c. 88-7, § 1 (current version at Fla. Stat. Ann. § 697.06 (Supp. 1991)); Cal. Civ. Code § 2954.10 (prepayment premium collectable on acceleration only in certain circumstances). See also Clark, Austin & Smith v. Kay, 26 Ga 403 (1858); Krupp Realty Co. v. Joel, 168 Ga. App. 480, 309 S.E.2d 641 (1983). See generally Southeastern Land Fund, Inc. v. Real Estate World, Inc., 237 Ga. 227, 227 S.E.2d 340 (1976); Adams v. D & D Leasing Co., 191 Ga. App. 121, 381 S.E.2d 94, cert. denied, 191 Ga. App. 921 (1989). Cf. O.C.G.A. § 7-1-2(b)(2)(1989) (no prepayment penalty unless stipulated in the contract).

(9) The possible unenforceability of waivers or advance consents that have the effect of waiving statutes of limitation, marshalling of assets or similar requirements, or as to the jurisdiction of courts, the venue of actions, the right to jury trial or, in certain cases, notices.[146]

(10) The possible unenforceability of provisions that waivers or consents by a party may not be given effect unless in writing or in compliance with particular requirements or that a person's course of dealing, course of performance, or the like or failure or delay in taking action may not constitute a waiver of related rights or provisions or that one or more waivers may not under certain circumstances constitute a waiver of other matters of the same kind.[147]

(11) The effect of course of dealing, course of performance, or the like, that would modify the terms of an agreement or the respective rights or obligations of the parties under an agreement.[148]

(12) The possible unenforceability of provisions that enumerated remedies are not exclusive or that a party has the right to pursue multiple remedies without regard to other remedies elected or that all remedies are cumulative.[149]

(13) The effect of O.C.G.A. § 13-1-11 (1982) on provisions relating to attorneys fees.

(14) The possible unenforceability of provisions that determinations by a party or a party's designee are conclusive.

(15) The possible unenforceability of provisions permitting modifications of an agreement only in writing.[150]

(16) The possible unenforceability of provisions that the provisions of an agreement are severable.[151]

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146 For example, exclusive choice of forum clauses are invalid in Georgia as contrary to Georgia public policy. Cartridge Rental Network v. Video Entertainment, Inc., 132 Ga. App. 748, 209 S.E.2d 132 (1974); Fidelity & Deposit Co. v. Gainesville Iron Works, Inc., 125 Ga. App. 829, 189 S.E.2d 130 (1972). On the other hand, O.C.G.A. § 11-2-725 (1982) permits agreements shortening the 4-year statute of limitations on actions for breach of contract for sale. See also O.C.G.A. § 13-1-11 (1982) relating to demand before enforcement of provisions relating to attorneys fees.

147 See O.C.G.A. § 13-4-4 (1982) and cases cited discussing effect of departures from contract terms. See also O.C.G.A. § 11-2-209 (1982).

148 See O.C.G.A. §§ 11-1-205, 11-2-208 (1982). See also cases cited at O.C.G.A. § 13-2-1 (1982) and § 13-2-2 (1982) regarding parol evidence and other agreements.

149 See O.C.G.A. § 9-2-4. See also Overstreet v. Georgia Farm Bureau Mut. Ins. Co., 182 Ga. App. 415, 355 S.E.2d 744 (1989).

150 See O.C.G.A. § 13-4-4 (1982); cf. O.C.G.A. § 11-2-209 (1982).

151 See Jones v. Clark, 147 Ga. App. 657, 249 S.E.2d 619 (1978); Pave Way Constr. Co. v. Parrish, 187 Ga. App. 428, 370 S.E.2d 495 cert. denied, 187 Ga. App. 908 (1988), for discussion of principles of severability.

(17) The effect of laws requiring mitigation of damages.[152]

(18) The possible unenforceability of provisions permitting the exercise, under certain circumstances, of rights without notice or without providing opportunity to cure failures to perform.

(19) The effect of agreements as to rights of set off otherwise than in accordance with the applicable law.[153]

10.04 Matters Not Constituting Implied Exceptions.

A. General. The opinion letter should expressly set forth any exceptions to the Model Remedies Opinion not comprehended by the exceptions listed in Section 10.03 that apply to particular provisions of the Documents.

B. Matters of Public Policy. Some commentators have contended that, since all statutes and decisions arguably embody "public policy," a general exception as to matters of "public policy," even if stated expressly, could neuter the entire Remedies Opinion.[154] The Committee has adopted the approach that, if a matter of public policy[155] could vitiate a contractual provision, a specific exception is necessary.

10.05 Additional Notes Regarding the Model Remedies Opinion. Much has been written about the meaning of the Model Remedies Opinion wording and its variations. As lawyers' concerns have heightened over potential liability for the rendering of "incorrect" opinions, experienced lawyers have focused their attention on the breadth of the literal language of the opinion and have sought an understanding of its scope. Even those lawyers who have developed what is, in effect, a new sub-specialty in legal opinions have found it difficult to reach consensus on the coverage of the Remedies Opinion in its various forms. Controversy has recently developed over such issues as whether the terms "binding" and "enforceable" in the traditional formulations of the opinion[156] have different meanings, whether "enforceable" used alone is different from "enforceable in accordance with its terms," and whether various limitations on the scope of the opinion (e.g., the "bankruptcy exception") should be expressly stated in the opinion letter or can be deemed implied. For example, experienced counsel have identified possible meanings of the word "enforceable" as used in the traditional Remedies Opinion ranging from one that "enforceable" has meaning only when the agreement provides for obligations to do more than pay money, to one that

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152 Cf. Florence Wagon Works v. Salmon, 8 Ga.App. 197, 68 S.E. 866 (1910).

153 See O.C.G.A. § 13-7-1, et seq. (1982). See also Atlantic Coast Line R.R. Co. v. U.S. Fidelity & Guar. Co., 52 F. Supp. 177 (M.D. Ga. 1943).

154 See, e.g. New York VI at 325.

155 See O.C.G.A. § 13-8-2 (1982 and Supp. 1990).

156 See n. 127.

"enforceable" relates only to those provisions of an agreement which themselves relate to enforcement, such as an arbitration clause.[157]

Debate over the meaning of particular words contained in the traditional Remedies Opinion has contributed to the general air of uncertainty regarding the responsibility of lawyers rendering legal opinions, has encouraged conservative lawyers to take the approach of spelling out in each opinion letter a "laundry list" of qualifications and exceptions to the Remedies Opinion, and has fostered excessive negotiations over the form of the Remedies Opinion in particular transactions. Many attempts to establish clear rules for the interpretation of the Remedies Opinion and to provide consistent guidelines for the analysis required to be performed by a lawyer in rendering the opinion have preceded this Report. These efforts have faced considerable hurdles, not the least of which is the difficulty of reconciling the traditional "lore" of opinions with the literal language commonly used. For example, it is difficult to express a logical, universal principle that explains why the Remedies Opinion covers issues of usury law, which it is generally said to do,[158] but does not cover issues of antitrust law, which it is generally said not to do.

The Committee has concluded that attempts to discern differences in meaning between the different variations of the Remedies Opinion in current use may be helpful in interpreting opinions that do not incorporate the Interpretive Standards of this Report, but are unnecessary for the purpose of adopting a Model Remedies Opinion and a convention for its use. An essential element of the approach taken with respect to the Model Remedies Opinion is that the meaning and scope of any Remedies Opinion language used previously or in the future in an opinion letter that does not incorporate the Interpretive Standards, whether or not the language is identical or similar to the model opinion, and whether or not it is used with or without express assumptions, qualifications or exceptions, should be interpreted without reliance on the conventions set forth in this Report and the Interpretive Standards. The conventions adopted by this Report represent in many respects the reconciliation of conflicting views rather than the codification of existing "lore."

The Committee deliberately has avoided any attempt to define the meaning of particular words used in the traditional formulations of the Remedies Opinion. The Model Remedies Opinion deliberately breaks from tradition in its wording, primarily to emphasize that it derives its meaning, as well as its limitations, largely from the Interpretive Standards. It is intended to be used only with the Interpretative Standards. Where specific, recurring issues regarding coverage of the opinion as a whole were identified, as in the case of the effects of securities and antitrust laws, the Committee resolved the issues somewhat arbitrarily and addressed them in the Interpretive Standards.

Perhaps the most significant debate regarding the scope and meaning of the Remedies Opinion is symbolized by the divergent positions taken in the New York Report and in California I, summarized as follows by two knowledgeable commentators:

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157 See Fuld & Field at 280-81; FitzGibbon VII at 201-204. See generally New York VI at 3-4.

158 Compare California I at 1038 (usury not generally covered), with California VII at note 99 and accompanying text (usury implicitly covered).

> A preliminary and important question is whether the opinion relates to every obligation of Company contained in the agreement or instrument or only to material obligations. Some lawyers take the absolutist position that the opinion cannot be given unless every obligation of Company is legal, valid and binding in all respects .... The absolutist view is intended to force lawyers to do their homework by examining each clause of the agreement or instrument with a view to identifying any possible defense or excuse Company could advance for nonperformance. Leading participants in the preparation of the New York Report ... are strong advocates of the absolutist view. The California [I] Report ... takes the opposite view, maintaining that an opinion does not mean that all provisions of the agreement are effective' or that every provision in the agreement ... will be upheld by a court.' The California [I] Report, unfortunately, does not explain which provisions are covered and which are not. Absolutists have been heard to state that they would not accept the opinion of a California lawyer who subscribed to the position taken in the California [I] Report.
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> A possible middle ground takes into account the fact that all clauses are not of equal importance and all legal problems are not of equal significance to opinion recipients. For example, a shareholder in an acquired corporation is not likely to be concerned that a covenant in the merger agreement giving it the right to inspect books and records of the merger Company is limited by Department of Defense confidentiality rules restricting access to classified engineering data. The stockholder, however, would expect to be able to rely on that covenant to obtain financial statements that he would need to confirm the adequacy of payments to him under an earnout clause. Under the middle ground approach, the opinion would apply to material violations of the material obligations in an agreement, with materiality being measured in each case in terms of the needs of opinion recipients at the time the opinion is rendered. Although a test that looks to materiality has much to commend it, it affords little practical help to a lawyer preparing an opinion. In many instances the opining lawyer does not represent the opinion recipient and is in no position to assess what it might and might not regard as material. Thus, the safest course, and the one followed by many if not most lawyers, is to act as though the absolutist position were the correct one and to analyze the 'legal, valid and binding' status of each clause in the agreement. FitzGibbon II at 667, 668. [Footnotes omitted].

Other commentators have criticized, without detailed discussion, the use of a materiality standard in determining whether the Remedies Opinion covers a particular obligation in an agreement. See Fuld & Field at 287-88. The New York TriBar Opinion Committee has prepared a draft of a special report on the Remedies Opinion that would put this influential group squarely behind the "absolutist" approach with respect to the identification of obligations (including remedies) covered by the Remedies Opinion. See New York VI at § 18-19. In 1989, the Committee on Corporations of the Business Law Section of the State Bar of California originally proposed the adoption of a report that would have moved from the position of California I to the middle ground materiality standard. California IV at 53. See also Babb at 564. An August, 1989, revision to the California committee report was not entirely clear, but appeared to adopt the absolutist approach. Draft California VII, at note 98 and accompanying text. The final report as issued by the California Committee takes an alternative middle ground approach, coupling with the disclaimer that the opinion does not cover the enforceability of every provision, the statement that

the Remedies Opinion includes compliance with any California law that would invalidate "any essential provision" of the agreement. California VII at 2209. See also Speer at 5 ("principal" legal obligations). The Silverado drafting group has adopted the absolutist approach in its December 31, 1990 Exposure Draft. Silverado Draft, § 10(b).

The Committee has adopted, after considerable discussion, the "absolutist" approach for purposes of this Report, notwithstanding the continuing debate regarding its scope. The Committee considered the possibility that the absolutist approach could create a trap for the unwary and could increase the cost of legal opinions by forcing detailed examination and analysis of even the most routine boilerplate provisions. One purpose of the conventions contained in this Report is to make the giving of formal legal opinions simpler and cheaper. The Remedies Opinion is generally considered the most difficult opinion to give because of its breadth, and because to at least some degree it speaks to future events. See generally Field III at 1-2. The Committee's decision to adopt the absolutist approach reflects its view that the corresponding adoption of the extensive list of implied exceptions contained in Section 10.03, the other express limitations on the scope of the opinion, discussed in Section 10.02, and the broad assumptions contained in the Interpretive Standards, substantially narrow or even eliminate the practical effects of the differences between the various approaches in most routine corporate transactions. In some cases, the cost of requiring the Opinion Giver to make a professional prediction about the availability of remedies for each and every "right, benefit and remedy" contained in a written agreement will still outweigh any corresponding benefit to the Opinion Recipient. In such cases an Opinion Giver should be permitted to limit his or her opinion.

The Committee's views also reflect a conclusion that a third party opinion constitutes only an expression of professional and somewhat academic judgment, not a warranty that courts will in all cases act in the predicted manner,[159] or that the Opinion Recipient will always obtain the benefit of its bargain. A third party opinion should not generally serve as a substitute for review by a party's own counsel. In many situations, such as routine loan transactions, the lawyer for the Opinion Recipient will have prepared the documents covered by the opinion and is in a far better position to analyze each provision, regardless of apparent importance, to determine whether it "works." If in any particular situation the Opinion Recipient wants to obtain the Opinion Giver's views about a particular clause, it and its lawyer may request that the Opinion Giver specifically address the provision.

It should be noted that even the absolutists agree that a Remedies Opinion does not indicate that a remedy is available for non-material breaches. See Silverado Draft, § 13(e); Field III at 12; California VII at note 98 and accompanying text. See generally O.C.G.A. § 13-4-20 (1982) (only "substantial" compliance required). This Report acknowledges this approach. See Section 10.02C and paragraph 2 of Section 10.03B.

The issues raised in connection with the "absolutist" versus "California" debate are also raised by the so-called "practical realization" exception. This is a qualification most frequently

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159 For an example of an unpredictable decision, see Patel v. Gringrey Assoc. 196 Ga.App. 203, 395 S.E.2d 595 (1990) (holding an agreement "not to unreasonably withhold" approval to a sale too vague to be enforceable).

found in opinion letters dealing with secured financings. The New York TriBar Opinion Committee has identified in a draft report the following as an example of the form of the qualification:

> Certain of the remedial provisions in the Agreement may be further limited or rendered unenforceable by applicable law, but such law does not, in our opinion, make the remedies afforded by the Agreement inadequate for the practical realization of the benefits intended [or purported] to be provided thereby.[160]

The TriBar Committee report would not support the use of this language, based in part on its lack of specificity, but would "accept" it for the limited purposes of leveraged lease and secured financing transactions using complex documents setting forth many specific remedies, some of which may be unenforceable exactly as written or mutually inconsistent but stated to be non-exclusive.[161] On the other hand, the Arizona bar committee reporting on legal opinion practice has affirmatively endorsed general use of a broader form of the "practical realization" qualification in lieu of identifying specific exceptions to a Remedies Opinion.[162] The Arizona form would reach beyond remedial provisions to "other" provisions.[163]

The stated aim of the qualification in any of its forms is to avoid detailed analysis of particular provisions and the necessity for a lengthy list of specific exceptions.[164] This Report's use of a detailed list of exceptions in the Interpretive Standards, as well as the exclusion of opinions involving security interests and real estate from its coverage, make it unnecessary to consider adopting a "practical realization" approach for general use with the Model Remedies Opinion. Opinion Givers and Opinion Recipients may consider use of the qualification in transactions outside the scope of this Report to eliminate the burden and related cost of detailing numerous exceptions to the Remedies Opinion. The commentators have pointed out, however, the risk of using "practical realization" language not tied strictly to a separate "catch-all" exception, but instead to override other, specific exceptions to the Remedies Opinion. Such broader formulations can, inadvertently, broaden rather than narrow the scope of the Remedies Opinion.[165]

A. The Bankruptcy Exception. The most significant issue regarding the interpretation of the bankruptcy exception has been whether the exception is intended to exclude from the coverage of the Remedies Opinion the effect of fraudulent transfer laws, the possibility of equitable subordination or preference avoidance in bankruptcy proceedings, and similar concerns. See generally California VII at 2211 n.104 and accompanying text. These issues have received significant attention in transactions involving leveraged buyouts and recapitalizations, upstream and cross-stream guaranties, and structured finance. The Committee agrees with the growing

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160 New York VI at 327.

161 Id. at 328-29.

162 Arizona at 592-594.

163 Id. at 592.

164 Id. at 593; New York VI at 328.

165 Id. at 329; Arizona at 595-96; Field & Weise, Remedies Opinions and Exceptions, at 25 (reprinted in ABA National Institute on Third Party Opinions, October-November, 1990). See also Maryland at 739-40.

consensus that these issues, which turn primarily on complex business and financial questions, are generally not susceptible to conclusive legal analysis and should be considered to be outside the scope of the Remedies Opinion. The Committee also agrees with those commentators who have concluded that the traditional bankruptcy exception excludes these issues from the Remedies Opinion, whether or not a specific reference is made in the exception. See, e.g., New York IV at 57l. The bankruptcy exception set forth in Section 10.03(1) resolves any lingering doubts on this question. If in a particular situation an Opinion Recipient desires opinions regarding insolvency or bankruptcy issues, those opinions should be specifically requested.

Issues have sometimes arisen with respect to whether it is appropriate to delete from the phrase "other similar laws affecting the rights of creditors generally" in the bankruptcy exception the words "similar" or "generally." Some lawyers object to the use of the standard phrase without use of the word "similar" on the grounds that the exception could be deemed to exclude from the Remedies Opinion usury laws (see FitzGibbon II at 689 n.112) or many other laws of general application, such as the Uniform Commercial Code, laws governing liquidated damages and consumer credit legislation. See, e.g., Field III at 5. The bankruptcy exception set forth above responds to these concerns by retaining the word "similar."

Some lawyers have voiced objections to the deletion of the qualifier "generally" from the bankruptcy exception on the ground that the bankruptcy exception would then exclude from the Remedies Opinion the effect of insolvency laws applicable to only one industry. Examples given include the Securities Investor Protection Act and the Financial Institution Reform, Recovery and Enforcement Act of 1989. The Silverado drafting group would leave the word "generally" in the wording of the bankruptcy exception, but would exclude "laws which have reference to or affect (generally) only creditors of specific debtors." Silverado Draft § 12. It is widely understood that the present or future insolvency or financial distress of a party to an agreement may have a drastic effect on the rights and remedies of the other parties. The Committee has therefore concluded that there is no need to exclude from the bankruptcy exception single industry insolvency laws and accordingly has deleted the term "generally" from the wording of the exception.

Another issue for debate and negotiation among Opinion Givers and Opinion Recipients is whether the bankruptcy exception as contained in an opinion letter using a traditional formulation of the Remedies Opinion.[166] may modify merely the "enforceability" of the Agreement or also "validity." See, e.g., New York IV at 430. Consistent with the approach stated above, as well as the use of a simplified form for the Model Remedies Opinion, with the meaning established by this Report, the bankruptcy exception as stated above would apply to all aspects of the Remedies Opinion. See California VII at n.102A; FitzGibbon II at 692 n.124; New York I at 430. While not expressly stated in the Interpretive Standards, it should be obvious that the bankruptcy exception is not intended to provide a "back-door" exception to enforceability under nonbankruptcy laws that would be given effect under bankruptcy law. See Silverado Draft, ¶ 12.1

B. The Equitable Principles Exception. Many, if not most lawyers, rendering a Remedies Opinion make an express exception for the effect of "equitable principles," and those

166 See n. 127, supra.

lawyers who do not do so uniformly assert that such an exception is implied. This exception comes in many versions. The one contained in the New York Report is illustrative:

> The enforceability of the corporation's obligations under the Agreement . . . is subject to general principles of equity (regardless of whether such enforceability is considered in a proceeding in equity or at law). Id. at 1918.

It seems universally agreed that the equitable principles exception conveys to the Opinion Recipient the uncontroversial idea that the availability of "equitable" remedies, such as specific performance or injunctive relief, will be subject to the judicial discretion commonly applied by courts in determining whether to grant such remedies. See generally O.C.G.A. Title 23. This is consistent with the general scope of the opinion. By giving a Remedies Opinion, a lawyer does not opine that any particular remedy will be available to the recipient,[167] nor even that the remedy will be adequate. The Remedies Opinion merely indicates that some legal remedy will be available. Field III at 2-3.

It has also been stated that the equitable principles exception may cover many other limitations on the availability of remedies, including such concepts as waiver, estoppel, laches, mistake, duress, impossibility, impracticability of performance, implied covenants of good faith and fair dealing, and other principles pursuant to which courts decline to hold parties to the literal terms of their contracts. See First Silverado Draft ¶ 2(b); New York IV at 564; Field III at 6; California VII at 2212-13. Implicit in this approach is the adoption of the theory that the Remedies Opinion contemplates the effect of future conduct and future situations. See Field III at 6-8. The Model Remedies Opinion, when given pursuant to the Interpretive Standards, adopts that approach, subject to the principles and limitations discussed in Section 2.01.

The Silverado drafting group would specifically include within the equitable principles exception the concepts of "good faith and fair dealing," "reasonableness," "materiality of the breach," "impossibility" and "unconscionability." Although one might question the semantics of including these doctrines within the term "equitable principles," the equitable principles exception set forth in the Interpretive Standards does so in the interests of consistency with the approach being considered by the Silverado drafting group. Silverado Draft § 13.

Silverado Draft's wording of the exception would arguably be narrower than that contained in the Interpretive Standards, because it would emphasize that the exception is limited to future conduct only. Id at ¶ 13.1. Thus, the Opinion Giver could not rely on this "broad form" equitable principles exception to give a "clean" opinion where, for example, a provision of the agreement under consideration could be deemed "unconscionable" at the time of execution. The wording of the exception in the Interpretive Standard is not expressly limited to future conduct. The differences in approach may be more apparent than real. The commentary to Silverado Draft suggests that an express exception resulting from the possible present application of one of the equitable "principles" is required only where the Opinion Giver is consciously aware of the

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167 Unless the remedy is an express one contained in the Agreement and not excluded from coverage by the exceptions set forth above. See Section 10.02A. See generally New York VI at 326-327.

existence of facts calling enforceability into question. Silverado Draft ¶¶ 13.1; 6.2(iv). See also Field III at 6-8, 9-11. The Committee has concluded that in light of the admonitions contained in Section 1.06 against technically correct but misleading opinions, it is unnecessary to draw a distinction between present and future facts for purposes of this exception. The equitable principles exception would not permit the Opinion Giver to give an unqualified Remedies Opinion, where the Opinion Giver consciously recognizes that facts existing at the time the opinion is rendered provide a defense to the contract. See Section 1.06.

Courts and legislatures may in the future develop or practitioners may identify principles similar to those expressly referred to in paragraph 2 of Section 10.03, grounded on principles of equity and fairness, that govern generally the performance and enforcement of contracts. These general principles would become implied exceptions to the Model Remedies Opinion, or any other opinion to which this exception applies, if their application becomes widespread and generally accepted as pervasive legal principles. Amendment of this Report or the Interpretive Standards would not be necessary.

(1) Good Faith and Fair Dealing. An exception to the Model Remedies Opinion, subsumed within the general equitable principles exception under the approach taken by this Report, is the effect of any implied covenants of good faith and fair dealing. Such covenants are founded on O.C.G.A. § 11-1-203 for agreements governed by Georgia's version of the Uniform Commercial Code, and on general contract law principles for other agreements. Kleiner v. First Nat'l Bank of Atlanta, 581 F.Supp. 955 (N.D. Ga. 1984), vacated in part on other grounds, 751 F.2d 1193 (11th Cir. 1985). See Restatement (Second) of Contracts § 205 (1981). See generally New York IV at 564-66; K.M.C. Co. v. Irving Trust Co., 757 F.2d 752, 759 (6th Cir. 1985). The Georgia courts generally have not been receptive to use of the implied covenants of good faith and fair dealing to contradict or give relief from the express terms of commercial agreements. See Interstate Security Police, Inc. v. Citizens & Southern Emory Bank, 237 Ga. 37, 226 S.E.2d 583 (1976); Fulton Nat'l Bank v. Willis Denny Ford Co., 154 Ga. App. 846, 269 S.E.2d 916 (1980). Nevertheless, by giving the Model Remedies Opinion a lawyer does not opine that a court may not deviate on these grounds from the literal contract language. As subsumed in the equitable principles exception as set forth above, the concept of good faith and fair dealing also includes the limitations imposed by U.C.C. § 1-208 (O.C.G.A. § 11-1-208) on "insecurity" clauses. See First Nat'l Bank vs. Appalachian Indus., 146 Ga. App. 630, 247 S.E.2d 422 (1978).

(2) Unconscionability. Georgia has adopted § 2-302 of the Uniform Commercial Code, which allows courts to refuse to enforce contracts for the sale of goods or clauses therein that are unconscionable at the time made or to limit their enforceability to avoid any unconscionable result. O.C.G.A. § 11-2-302 (1982). See Jacobs v. Metro Chrysler-Plymouth, Inc., 125 Ga. App. 462, 188 S.E.2d 250 (1972) (limitation of remedy in all events would be unconscionable). See also Interstate Security Police, Inc. v. Citizens & Southern Emory Bank, 237 Ga. 37, 226 S.E.2d 583 (1976); O.C.G.A. § 11-2-719 (1982). In non-U.C.C. settings, the Georgia courts have also adopted narrow concepts of unconscionability. Martin v. Approved Bancredit Corp., 224 Ga. 550, 163 S.E.2d 885 (1968); Hall v. Wingate, 159 Ga. 630, 126 S.E. 796 (1924) (An unconscionable contract is such an agreement "as no sane man not acting under a delusion would make and that no honest man would take advantage of.").

The basic equitable principles exception set forth above does not require a lawyer giving a Remedies Opinion to determine whether an agreement is presently unconscionable or one of adhesion. However, as noted above, if the Opinion Giver consciously recognizes that unconscionability or one of the other doctrines covered by the exception presently affects a contract provision, the lawyer should specifically except that provision from the coverage of his or her opinion.

(3) Reasonableness. The equitable principles exception includes the effect of any applicable legal principles that take into consideration the reasonableness of the Opinion Recipient's conduct or of enforcing any provision of the Agreement as written in light of then existing circumstances. See generally O.C.G.A. § 11-1-102 (1982). Compliance with all duties of reasonableness is assumed.

(4) Materiality of Breach. See discussion at Sections 10.02C and 10.05B.

C. The General Usury Exception. Interpretive Standard 2 excludes from any opinion given pursuant to the Interpretive Standards any implied opinion as to matters involving laws relating to permissible rates, computations or disclosures of interest (e.g., usury). Although the Remedies Opinion has generally been said to cover usury laws, at least where an extension of credit is an important component of the Documents, the Model Remedies Opinion given pursuant to the Interpretive Standards excludes the effect of usury unless usury is expressly addressed, even in loan transactions.

A usury opinion may be given, if requested, subject to any necessary assumptions or qualifications derived from the requirements of the Georgia usury statutes. The effect of Georgia's usury laws is frequently less clear than that of the usury laws of other states. Because the factual analysis necessary to render a Remedies Opinion with respect to Georgia usury laws may not be merited in all transactions, assumptions and qualifications are frequently seen in Georgia opinions addressing the application of O.C.G.A. § 7-4-2(a)(1)(B) (legal rate of interest allowable on loans based on dollar amount), O.C.G.A. § 7-4-2(b)(1) (rebates on acceleration in certain cases), O.C.G.A. § 7-4-17 (prohibition against interest on interest except in loans secured by first lien on real estate) and O.C.G.A. § 7-4-18 (5% per month criminal interest prohibition). Each transaction must be reviewed with respect to the specific application of the usury laws in that situation, but if the Opinion Giver concludes that the opinion may be given, any necessary assumptions or qualifications should be set forth in the opinion letter, and the following form of opinion could be used:

> The amounts contracted to be received by you and any other holder of the [Note] under the [Note], the Agreement and each of the other Documents, which are or which may be deemed to be interest or other charges for the use of money, constitute lawful interest and charges and are not usurious or illegal under Georgia law.

Choice of law provisions, discussed in Section 10.05H, could be considered in determining whether a need exists to scrutinize the Documents under Georgia law. See O.C.G.A. § 7-4-13

(1989). See generally Commercial Credit Plan, Inc. v. Parker, 152 Ga. App. 409, 416, 263 S.E.2d 220, 224 (1979); Restatement (Second) of Conflicts of Law § 203 (1971).

The assumption frequently found in Georgia usury opinions to the effect that the documents covered by the opinion contain all agreements and understandings between the parties regarding interest and charges is subsumed by Interpretive Standard 18. An Opinion Giver rendering a Remedies Opinion not subject to the Interpretive Standards should consider whether such an express assumption is required, unless usury is expressly excepted from the opinion as it is in the Interpretive Standards.

Additionally, certain transactions are subject to special usury-type statutes in Georgia which will control over the general usury laws. These include, among others, the Georgia Industrial Loan Act (O.C.G.A. § 7-3-1, et seq. (1989)), the Credit Card and Credit Card Bank Act (O.C.G.A. § 7-5-1, et seq. (1989)), and the Motor Vehicle Sales Finance Act (O.C.G.A. § 10-1-30 (1989)). The terms of variable interest rates and "gross up" provisions will also be scrutinized by Georgia courts to ensure that they are not illusory or indefinite in nature. See Stewart v. Nat'l Bank, 174 Ga. App. 892, 332 S.E.2d 19 (1985).

D. The Exception for Rights of Guarantors. An assessment of the enforceability of guaranties given by a subsidiary for the benefit of its parent ("up-stream" guaranties) would require an analysis of the adequacy of the consideration for the guaranty as well as the solvency of the guarantor following the transaction to determine whether fraudulent conveyance laws could be applied to invalidate the guaranty. (See United States v. Tabor Court Realty Corp., 803 F.2d 1288 (3d Cir. 1986), cert. denied sub nom. McClellan Realty Co. v. United States, 483 U.S. 1005 (1987) (also known as the Gleneagles case)). Since the bankruptcy exception includes the effect of state and federal fraudulent transfer laws, a specific exception for up-stream guaranties and other such guaranties is not necessary.

If Company is incorporated under the GBCC, such guaranties should not under current law present a corporate authority issue. See O.C.G.A. § 14-2-302 (Supp. 1990); see also O.C.G.A. § 14-2-21 (1982) repealed effective July 1, 1989 (pre-1989 Code). Other corporations, including Georgia banks and business corporations incorporated under the laws of other states may not have authority to guarantee, or may have authority to guarantee only where a direct benefit to the corporation can be shown. See, e.g., O.C.G.A. § 7-1-290 (1989). Issues of contractual consideration would also need to be addressed.

Statutory and common law rights of guarantors may impede enforcement of a guaranty or, in some cases, permit the discharge of the guarantor. Among the actions which may result in the discharge of a guarantor are novation,[168] an act by the creditor which increases the guarantor's risk,[169] refusal by the creditor to allow the guarantor to enforce the obligation against the debtor

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168 O.C.G.A. § 10-7-21. See Brunswick Nursing & Convalescent Center, Inc. v. Great Am. Ins. Co., 308 F.Supp. 297 (S.D. Ga. 1970).

169 O.C.G.A. § 10-7-22. See Dunlap v. Citizens & Southern DeKalb Bank, 134 Ga. App. 893, 216 S.E.2d 651 (1975). But see White v. Phillips, 679 F.2d 373 (1982).

directly,[170] failure by the creditor to proceed directly against the debtor after demand by the guarantor,[171] release or "compounding"[172] by the creditor with one guarantor on an obligation which has multiple guarantors,[173] and invalidity of the underlying obligation.[174] Additionally, a guarantor may be permitted to terminate a guaranty, in the absence of express restrictions in the guaranty agreement, if the guaranty is considered to be "divisible and separable,"[175] but then only as to obligations incurred after notice of termination to the creditor.

The enforceability of provisions purporting to waive these and other rights by the guarantor are a critical issue in reviewing the enforceability of a guaranty. Waivers of certain statutory rights for guarantors, such as the right to require that the holder of the guaranty proceed first against the principal debtor (O.C.G.A. § 10-7-24 (1989)), have been held to be waivable by the guarantor. See J.R. Watkins Co. v. Fricks, 210 Ga. 83, 78 S.E.2d 2 (1953). To the extent any of these waivers are potentially unenforceable under applicable law and are not qualified by language such as "to the extent allowed by law," then a Remedies Opinion not subject to this Report or the Interpretive Standards should be expressly qualified or a specific exception noted. The Model Remedies Opinion adopting the Interpretive Standards would instead rely on the implied exception set forth in paragraph (4) of Section 10.03.

E. The Exception for Indemnification or Exculpation Provisions. It is widely recognized that indemnification agreements in business transactions may be subject to significant limitations on their enforceability because of considerations of public policy. Perhaps best known are questions regarding limitations on enforceability of such provisions in connection with

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170 O.C.G.A. § 10-7-23. See Hall v. First National Bank of Atlanta, 145 Ga. App. 267, 243 S.E.2d 569 (1978).

171 O.C.G.A. § 10-7-24. See A.J. Kellos Construction Co. v. Balboa Ins. Co., 661 F2d 402 (5th Cir. 1981).

172 "Compounding" is defined as a compromise whereby a creditor discharges his debtor on payment of a smaller sum than is owing. Williams-Thompson Co. v. Williams, 10 Ga. App. 251, 73 SE 409 (1912).

173 O.C.G.A. § 10-7-20. See Overcash v. First National Bank of Atlanta, 115 Ga. App. 449, 155 S.E.2d 32 (1967). But see Hall v. First National Bank of ATlanta, 145 Ga. App. 267, 243 S.E.2d 569 (1978) (provision in agreement permitting creditor to discharge one or more guarantors without discharging all guarantors would be given effect).

174 O.C.G.A. § 10-7-2. This section does not include extinguishment of the underlying obligation by operation of law, bankruptcy, operation of the statute of limitations or the like, but rather, is intended to address extinguishment by actions of the creditor. Phillips v. Solomon, 42 Ga. 192, 519 (1871); Franklin v. Mobley, 202 Ga. 212, 42 S.E.2d 755 (1947). Invalidity of the underlying obligation by reason of the disability of the debtor, if known to the guarantor, will not, however, discharge the guarantor. O.C.G.A. § 10-7-2; Weldon v. Colquitt, 62 Ga. 449 (1879).

175 Guaranties have been held to be "divisible and separable" if they relate both to present indebtedness as well as to future obligations which may arise from consideration yet to be given by the creditor. See Haynie v. First National Bank, 117 Ga. App. 766, 162 S.E.2d 27 (1968); Walter E. Heller & Co. v. Aetna Business Credit, Inc., 158 Ga. App. 249, 280 S.E.2d 144 (1981).

violations of the federal securities laws. See Globus v. Law Research Serv., Inc., 287 F. Supp 188 (S.D.N.Y.) (an underwriter may not be indemnified by an issuer for liabilities growing out of statements in an offering circular of which the underwriter has knowledge), rev'd as to other matters, 418 F.2d 1276 (2d Cir. 1969), cert. denied, 397 U.S. 913 (1970); Laventhol, Krekstein, Horwath & Horwath v. Horwitch, 637 F.2d 672 (9th Cir. 1980) (indemnification of underwriters who prepared misleading statements in offering circular would undermine statutory purpose of Securities Act of 1933 of assuring diligent performance of duty and deterring negligence; indemnity claims properly dismissed), cert. denied, 452 U.S. 963 (1981). Public policy limits may also arise in other contexts. See, e.g., Koster v. Warren, 297 F.2d 418 (9th Cir. 1961) (antitrust); Sovereign Camp W.O.W. v. Heflin, 188 Ga. 234, 3 S.E.2d 559 (1939) (fraud); Brady v. Glosson, 87 Ga. App. 476, 74 S.E.2d 253 (1953) (willful or reckless acts amounting to intentional acts).

The Georgia cases on the enforceability of indemnity and exculpation provisions generally cite and rely upon O.C.G.A. § 13-8-2 (1982 and Supp. 1990), the Code provision which provides that contracts which contravene public policy are generally unenforceable. See, e.g., Porubiansky v. Emory University, 156 Ga. App. 602, 275 S.E.2d 163 (1980) (dentist not permitted to exculpate negligence liability to patients), aff'd 248 Ga. 391, 232 S.E.2d 903 (1981).

An extended line of cases specifically recognizes Georgia public policy limitations on an entity's ability to be indemnified against its own negligence. See United States v. Seckinger, 408 F.2d 146 (5th Cir. 1969), rev'd, 397 U.S. 203 (1970), reh'g denied, 397 U.S. 1031 (1970); McMichael v. Robinson, 162 Ga. App. 67, 290 S.E.2d 168 (1982); Brown v. Seaboard Coast Line Ry. Co., 554 F.2d 1299 (5th Cir.), reh'g denied, 559 F.2d 29 (5th Cir.), cert. denied, 434 U.S. 975 (1977); Molly Pitcher Canning Co. v. Central of Georgia Ry. Co., 149 Ga. App. 5, 253 S.E.2d 392 (1979), Southern Ry. Co. v. Brunswick Pulp & Paper Co., 376 F. Supp. 96 (S.D. Ga. 1974); Carlton v. Hoskins, 134 Ga. App. 558, 215 S.E.2d 321 (1975). In addition, O.C.G.A. § 13-8-2 (1982 and Supp. 1990) specifically prohibits such indemnification and hold harmless provisions in construction, building repair, and related contracts.

The Georgia Code also contains other specific limits on indemnification. See, e.g., O.C.G.A. § 14-2-851 (1989) (limits on corporate authority to indemnify directors); O.C.G.A. § 14-9-108 (1989) (limits on indemnification of partners).

Release law in Georgia is not generally subject to peculiarities of enforcement such as those contained in California Civil Code Section 1542, although factual questions involving the intended scope of the release, particularly when such a release is anticipatory, can arise.

F. The Exception for Arbitration Provisions. Federal law has long provided for enforceability of arbitration clauses (9 U.S.C. § 1 et seq. (1988)), and the courts have been solicitous to the statutory policies. Historically, however, there have been certain types of claims, particularly in the areas of securities, patent, copyright, and antitrust laws, with respect to which the courts have sometimes held that public policy precludes arbitration. See American Safety Equip. Corp. v. J.P. Maguire & Co., 391 F.2d 821 (2d Cir. 1968); Foster Wheeler Corp. v. Babcock & Wilcox Co., 440 F. Supp. 897 (S.D.N.Y. 1977); but see Shearson/American Express, Inc. v. McMahon, 482 U.S. 220 (1987); Saturday Evening Post Co. v. Rumbleseat Press, 816

F.2d 1191 (7th Cir. 1987); Rodriguez de Quijas v. Shearson/American Express, Inc., 490 U.S. 477 (1989).

Until the enactment of the Georgia Arbitration Code (O.C.G.A. § 9-9-1 et seq. (Supp. 1990)) effective July 1, 1988, the enforceability of arbitration clauses in Georgia was subject to many exceptions and the clauses were often overridden. See Note, Commercial Arbitration in Georgia, 12 Ga. L. Rev. 323 (1978). Under the new Arbitration Code, however, commercial arbitration clauses appear generally enforceable, subject to a number of important exceptions, under either the federal or state statutes. Nevertheless, the Committee has concluded that the Model Remedies Opinion should not cover the enforceability of arbitration clauses unless such an opinion is specifically addressed. This position, a departure from the position taken by some commentators and the Silverado drafting group, is based on the possible significance of exceptions and the desire to focus both the Opinion Giver and Opinion Recipient on the issues involved. In many situations, this opinion can be given after review of the facts of the Transaction. In giving an express Remedies Opinion on an arbitration clause, or on all provisions of an agreement other than an agreed arbitration clause, the Opinion should not be read as predicting that the arbitral process will result in enforcement of the agreement equivalent to the enforcement available if the Opinion Recipient could pursue court proceedings instead of arbitration, nor is the Opinion Giver required to describe differences in possible result or in procedure between court proceedings and arbitration.

G. The Exception for Restrictive Covenants. Georgia law has historically been hostile to non-competition agreements and related restrictive covenants, such as covenants not to solicit customers. The Georgia Constitution provides that "any contract or agreement which may have the effect of or which is intended to have the effect of defeating or lessening competition ... [is] unlawful and void." Art. 3, § 6, ¶ 5(c) (Supp. 1990). However, Georgia law distinguishes between contracts in general restraint of trade and contracts in partial restraint of trade (O.C.G.A. § 13-8-2 (Supp. 1990)), and a contract containing a non-competition or non-solicitation clause may be upheld "if the restraint is reasonable and the contract is valid in other respects." Shanco Int'l v. Digital Controls, Inc., 169 Ga. App. 184, 186, 312 S.E.2d 150, 153 (1983).

Whether any such restraint is reasonable is a question of law for the court, but if the contract is not void on its face, reasonableness is tested in light of the specific facts. See, e.g., Rollins Protective Servs. Co. v. Palermo, 249 Ga. 138, 139, 287 S.E. 2d 546, 548 (1982). Consequently, "the area of non-compete clauses is one in which similar clauses beget dissimilar results and each case must be considered on its own particular facts ...." Colquitt v. Network Rental, Inc., 195 Ga. App. 244, 393 S.E.2d 28, 30 (1990), cert. denied, 195 Ga. App. 897 (1990).

The Georgia General Assembly enacted a new statute governing restrictive covenants, O.C.G.A. § 13-8-2.1, which became effective July 1, 1990. However, in Jackson & Coker, Inc. v. Hart, 261 Ga. 371, 405 S.E.2d 253, the Georgia Supreme Court ruled that the new statute, which provided for the enforcement of contracts in partial restraint of trade by judicial "blue pencilling," was unconstitutional. This holding appears to invalidate the entire statute. In Jackson & Coker, the Supreme Court ordered the case remanded to determine "whether the restrictive covenants in question are enforceable under the law as it existed prior to the enactment of O.C.G.A. § 13-8-2.1." Id. at 373, 405 S.E.2d at 255.

Problems also arise in connection with contractual restrictions on the use or disclosure of information. Traditionally, Georgia law has distinguished between "trade secrets" and "confidential information" not constituting a trade secret. See, e.g., Howard Schultz & Assoc. v. Broniec, 239 Ga. 181, 187, 236 S.E.2d 265, 270 (1977). Although "trade secrets" always have been protectable regardless of the existence of a contract, "confidential information" generally is protectable only if there is a written contract with a restriction of limited duration. E.g., Durham v. Stand-By Labor of Georgia, Inc., 230 Ga. 558, 564, 198 S.E.2d 145, 149-50 (1973). Moreover, the enforceability of nondisclosure clauses also traditionally depended on a finding of reasonableness, which "turns on factors of time and the nature of the business interest sought to be protected." Id.

Georgia recently adopted a version of the Uniform Trade Secrets Act of 1990, O.C.G.A. § 10-1-760, which became effective July 1, 1990. The law provides a broad definition of "trade secret," which includes many types of business information, and explicitly provides that contractual nondisclosure provisions "shall not be deemed void or unenforceable solely for lack of a durational ... limitation on the duty." O.C.G.A. § 10-1-767 (b)(1) (Supp. 1990). However, the definition of "trade secret" requires that the claimed "trade secret" be "the subject of efforts that are reasonable under the circumstances to maintain its secrecy," and consequently, decisions about enforceability will remain essentially factual questions.

Because of the legal uncertainties involved in determining under Georgia law that particular restrictive covenants are enforceable, the Committee has concluded that conclusory opinions should not normally be given on these provisions. See Howard at note 25; California VII at 2215.

H. Choice of Law. Issues involving conflicts of law and contractual choice of law frequently arise in corporate transactions. An Opinion Giver may face any of three situations in analyzing a Document in connection with a request to give a Remedies Opinion: (i) the Document may be silent with respect to the governing law, (ii) the Document may specify that the substantive law of the Opining Jurisdiction will apply, or (iii) the Document may specify that the substantive law of an Other Jurisdiction will apply.

Each of these situations presents a threshold issue of the interpretation of a Remedies Opinion that purports to cover the Document generally, but does not specifically address governing law issues. For example, where the Document specifies that the law of an Other Jurisdiction will apply, one could argue that a Remedies Opinion means that a court, whether in the Opining Jurisdiction or any Other Jurisdiction, will honor the governing law clause in all respects and apply the specified law, even if it conflicts to some degree with the law of the forum jurisdiction or would lead to results contrary to the public policy of the forum, and that under the law of the Other Jurisdiction the court would give effect to the agreement as indicated by the Remedies Opinion. An express opinion to that effect would necessarily require the Opinion Giver to reach conclusions regarding both the law of conflicts of law of one or possibly more Other Jurisdictions, and the substantive law of those Other Jurisdictions. An implied opinion to that effect is generally not intended. The Opinion Giver does not make the meaning of the Remedies Opinion in this situation completely clear by stating that the opinion is limited to the laws of the Opining Jurisdiction. Since the Document in question specifies the laws of an Other Jurisdiction, one could then read the

Remedies Opinion as giving no opinion at all, an absurd result, or as implying that, under the law of the Opining Jurisdiction, in all circumstances a court would find the choice of law clause invalid. Similar if less troubling issues of interpretation may be posed by a Document that contains no governing law clause or a clause that specifies the Opining Jurisdiction.

The Committee has addressed these interpretation issues by adopting Interpretive Standard 22. Together with paragraph (iii) of Interpretive Standard 23, it sets forth rules for the interpretation of the Remedies Opinion when given subject to the Interpretive Standards in each of the three situations identified above. In the most troublesome situation, the rendering of a Remedies Opinion with respect to a Document that specifies that the law of an Other Jurisdiction will govern, the Interpretive Standards make it clear that the Opinion Giver is not opining on whether under the laws of conflicts of law of the Opining Jurisdiction a court will apply the substantive law specified in the contract. The Interpretive Standards then adopt an assumption that, notwithstanding the contractual governing law clause, if Company is brought before a court of the Opining Jurisdiction, the court will apply the substantive law of the Opining Jurisdiction. Using that assumption, the Opinion Giver in effect must render the Remedies Opinion using the same analysis that would apply if the Document specified that the law of the Opining Jurisdiction were to govern and if no possibility existed that the law of any other jurisdiction could apply.[176]

The Committee recognizes that this assumption regarding the application of the Opining Jurisdiction's substantive law is purely arbitrary and, under the example discussed, inconsistent with the agreement of the parties. Accordingly, this assumption is not subject to the unwarranted reliance limitations of Interpretive Standard 3, and its use does not imply that a governing law clause will not be given effect under the conflicts of law rules of the Opining Jurisdiction. Its adoption reflects the conclusions that in most situations involving the contractual choice of an Other Jurisdiction's law, the effectiveness of a governing law clause will remain subject to at least some level of residual uncertainty and that therefore the Opinion Recipient has a legitimate interest in obtaining "comfort" from the Opinion Giver with respect to the legal effects of the Document if, contrary to the choice of governing law in the agreement, the substantive law of the Opining Jurisdiction were to be applied.

In opinions not subject to the Interpretive Standards, similar assurances could be given based on a stated assumption as follows:

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176 Although the Georgia courts apparently have not addressed the issue, counsel cannot assume that a Georgia court will automatically apply Georgia substantive law to all matters relating to an agreement that chooses Georgia law, even where an appropriate relationship to Georgia exists. A Georgia court in such circumstances undoubtedly would decline to apply Georgia law in the face of a mandatory Georgia choice of law rule, such as those found in the U.C.C. See generally Gruson-Columbia at 379-82, 409-411; Beveridge, The Internal Affairs Doctrine, 44 Bus. Law 693 (1989). Other limitations may also exist. See Gruson-Columbia at 379-382 (possibility of giving effect to fundamental policy of a state with materially greater interest than the chosen state). But see New England Mortgage Security Company v. McLaughlin, 87 Ga. 1, 13 S.E. 81 (1891) (Georgia choice of law provision valid even though interest rate to be paid by Georgia borrower to New York lender usurious under New York law.)

At your request, for the purpose of the opinions expressed below we have assumed that, contrary to their terms, the Documents will be governed by the substantive laws of the State of [Georgia].

Alternatively, the Opinion Giver may give the requested assurances based on a stated assumption that the governing laws specified in the Document are the same as those of the Opining Jurisdiction.[177] The Opinion Giver should not be deemed under either express assumption or under the assumption reflected in the Interpretive Standards to have expressed an opinion regarding the content or effect of the law of any Other Jurisdiction, or an opinion regarding the effectiveness of the governing law clause under the laws of conflicts of law of the Opining Jurisdiction.

In certain cases the Opinion Recipient may request the Opinion Giver to go further and opine with respect to the treatment of a governing law clause under the conflicts of law rules of the Opining Jurisdiction. Unfortunately, this task may prove difficult in Georgia because the Georgia courts have not developed choice of law rules as extensively as courts in some jurisdictions. As a first step in rendering an opinion on choice of law issues, the Opinion Giver should consider whether the U.C.C. applies. Under Section 1-105 of Georgia's version of the U.C.C., the parties have the right to agree to the law that will govern a transaction, provided that the transaction bears a "reasonable relation" to the jurisdiction chosen. This right of contract is further limited by specific U.C.C. conflicts principles in particular situations. See O.C.G.A. §§ 11-2-402, 11-4-102, 11-6-102, 11-8-106, and 11-9-103 (1982). Moreover, general public policy limitations may apply. See Gulf Collateral, Inc. v. Morgan, 415 F.Supp. 319 (S.D. Ga. 1976) (repeal of conflict of law rules by U.C.C. does not modify rule against applying another state's law in the face of Georgia public policy; Nevada gambling contract).

Outside the U.C.C. context, the Georgia courts, while generally affirming the right of parties contractually to agree to the application of a particular jurisdiction's law, have also noted the existence of public policy limits on this right. "Under Georgia conflicts law, the parties agreement as to choice of substantive law will be given effect unless the foreign law selected conflicts with the public policy of Georgia." Missouri State Life Ins. Co. v. Lovelace, 1 Ga. App. 446, 58 S.E. 93 (1907). See also Carr v. Kupfer, 250 Ga. 106, 296 S.E.2d 560 (1982); Nasco, Inc. v. Gimbert, 239 Ga. 675, 238 S.E.2d 368, 369 (1977); Manderson & Assoc., Inc. v. Gore, 193 Ga. App. 723, 725, 389 S.E.2d 251 (1989); Emerson v. Fireman's Fund Am. Co. Life Ins. Co., 524 F. Supp. 1262, 1265 (N.D. Ga. 1981), aff'd, 691 F.2d 510 (11th Cir. 1982); O.C.G.A. § 7-4-13 (1989) (choice of law regarding interest). See generally Restatement (Second) of Conflicts of Law § 187 (1971); Figueroa, Choice-of-Law of Contracts: A Summary Reference to the Situation In Georgia, 21 Mercer L. Rev. 389 (1970). The parameters of this general rule remain unclear. Georgia authority on contractual choice of law is limited. Nor have the Georgia courts, unlike many courts, explicitly adopted the provisions of or the comments to the contractual choice of law principles of the Restatement (Second) of Conflicts of Law (1971). Section 187 of the Restatement has been cited with approval, however (see Carr v. Kupfer, 250 Ga. 106, 296 S.E. 2d 560, 562 (1982); Nasco, Inc. v. Gimbert, 239 Ga. 675, 238 S.E. 2d 368, 369 (1977); Ryder Truck

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177 The Committee prefers the assumption that the Documents are governed by Georgia law, on the ground it more accurately describes the desired assurance.

Lines, Inc. v. Goren Equipment Co., 576 F.Supp. 1348, 1354 (N.D. Ga. 1983)), and it is generally believed that Georgia courts will follow its basic principles, applying the substantive law chosen by the parties "except where the chosen state has no substantial relationship to the parties or the transaction, or the result obtained from the applicability of the law of the chosen state would be contrary to Georgia's public policy." Ryder Truck Lines, Inc. v. Goren Equipment Co., 576 F.Supp. 1348 1354 (N.D. Ga. 1983) (Georgia law applied to issues of fraud, duress, and liquidated damages on public policy grounds; contractually chosen law applied to issues of interest and attorneys fees). Nevertheless, as under the U.C.C., the power of the parties to choose a particular jurisdiction's substantive law may be limited not only by public policy and the need for a relationship with the chosen jurisdiction, but also by mandatory choice of law rules, or possibly even by the existence of more substantial relations with a foreign jurisdiction whose public policy would be offended by the application of Georgia law. See note 176, supra. The Model Remedies Opinion rendered pursuant to the Interpretive Standards would not address the possibility that a Georgia court might override a contractual choice of Georgia law because of mandatory choice of law rules or the public policy of another jurisdiction. See Interpretive Standard 22.

It should be noted that a governing law clause choosing the law of a particular state may be interpreted to include federal law applicable in that state. See Atkinson v. General Electric Credit Corp., 866 F.2d 396, 398 (11th Cir. 1989).

The Committee has concluded that, because the effectiveness of a governing law clause will often be subject to some uncertainty based on the foregoing issues, the Model Remedies Opinion should not universally include an opinion as to the effectiveness of choice of law provisions. Where an Opinion Recipient requests a specific opinion on a governing law clause, the following form could be used:

> *Each of the Documents provides that it shall be construed and enforced in accordance with the substantive laws of the State of [Other Jurisdiction]. We believe that under applicable Georgia case law a Georgia court or a federal court sitting in Georgia as the forum state and applying Georgia conflict of law rules (in either case a "Georgia Court") should give effect to the designation by the parties of [Other Jurisdiction] law as the governing law with respect to each Document unless it were to determine that (i) the State of [Other Jurisdiction] has no substantial relationship to the parties or the transaction or (ii) the result obtained from applying [Other Jurisdiction] law would be contrary to Georgia public policy. Because choice of law issues are decided on a case-by-case basis, depending on the facts of the particular transaction, we are unable to conclude with certainty that a Georgia Court would give effect to those provisions of each Document designating [Other Jurisdiction] law as the governing law. Nevertheless, based on Georgia case law and on the facts of this transaction [(including the facts that [e.g.: the Documents have been executed and delivered by all parties thereto in [Other Jurisdiction], that your principal office is in [Other Jurisdiction], that you are organized under the laws of [Other Jurisdiction], that payments under the Note are required to be made to you in [Other Jurisdiction], and that negotiations regarding the transaction have occurred in [Other Jurisdiction])], we believe that a Georgia court should conclude that [Other Jurisdiction] has a substantial relationship to the parties and the transaction. We are aware of no Georgia laws or current Georgia cases which*

indicate that giving effect to the provisions of the Documents designating [Other Jurisdiction] law [(including, without limitation, the usury laws of [Other Jurisdiction] as the governing law)] would violate Georgia public policy, except that we express no opinion as to those provisions of the Documents excluded from coverage of the opinion set forth in paragraph ___ above [the Remedies Opinion] by Interpretive Standard 23..

Any exceptions to the Remedies Opinion or any separate usury or other opinion expressly set forth in the opinion letter should also be considered in connection with any choice of law opinion. Mandatory choice of law rules should also be considered.

10.06 Practice Procedures Regarding the Model Remedies Opinion. Rendering the Model Remedies Opinion requires a lawyer to analyze each Document in light of the issues described in Section 10.02. Particular attention should be given to any regulatory laws, such as, for example, the Public Utility Holding Company Act, that may apply to the party against which the Document is to be enforceable. Additionally, the following exceptions are not in the list of implied exceptions included in the Interpretive Standards because they principally apply to transactions involving security interests or real property, which are outside the scope of this Report. These exceptions have been included here to emphasize that additional exceptions may be appropriate in many transactions and because of their possible applicability to corporate transactions tangentially involving these types of transactions. Any Opinion Giver preparing a Remedies Opinion for a secured transaction or real property transaction should keep in mind that this Report does not address these types of transactions and that he or she may need to consider numerous other exceptions to the Remedies Opinion in such instances or request that the Opinion Recipient consider accepting a "practical realization" exception or other generalized limitation on the opinion.[178]

(a) Self-help and non-judicial remedies, such as a right, without judicial process, to enter upon, to take possession of, to collect, retain, use and enjoy rents, issues and profits from property, or to manage property.[179]

(b) The effect of provisions respecting sale or disposal of collateral or property otherwise than in compliance with applicable law.[180]

(c) The effect of provisions with respect to a party's right to collect a deficiency except upon compliance with applicable law.[181]

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178 See text at n. 160-165.

179 See O.C.G.A. § 11-9-503; Silverado Draft, § 14(c).

180 See, e.g., O.C.G.A. § 11-9-501(3) which prohibits waivers of provisions respecting sale of disposal of collateral otherwise than in compliance with applicable law. See Silverado Draft § 14(d).

181 See, e.g., O.C.G.A. § 11-9-501 et seq. (1982), and particularly O.C.G.A. § 11-9-504 (1982) and cases cited; cf. O.C.G.A. 44-14-161 (1982) as to real estate foreclosure. See Silverado Draft § 14(d).

(d) The effect of provisions purporting to entitle a party, as a matter of right and without court approval after required showings, to the appointment of a receiver.

XI. THE MODEL CAPITALIZATION OPINION

Company's authorized shares consist of _____ common shares [and _____ preferred shares], of which _____ common shares [and _____ preferred shares] are outstanding. The outstanding shares have been duly authorized and validly issued and are fully paid and nonassessable.

[or]

The shares to be issued upon consummation of the Transaction have been duly authorized and, when issued in accordance with the Agreement, will be validly issued, fully paid and nonassessable.

COMMENT

11.01 Purpose and Background of the Model Capitalization Opinion. The purpose of the Model Capitalization Opinion is to provide assurance to the Opinion Recipient that the shares entitle the holder to all the rights of a shareholder to the extent provided by Company's articles of incorporation and that the shares will continue to have such status until otherwise changed by corporate action, charter provisions or operation of law.[182] The opinion also tells the Opinion Recipient the number and types of shares authorized for issuance and the number and types of shares that have been issued.

11.02 Elements of the Model Capitalization Opinion.

A. Authorized and Outstanding Shares. The phrase "authorized shares consist of _____ common shares, of which _____ are outstanding" addresses two issues. The first clause is a statement of the number and types of shares authorized for issuance under Company's articles of incorporation.[183] The second clause is a statement as to shares the corporate records indicate are held by Company's shareholders.

Some commentators believe that, because the issue is primarily factual, lawyers are justified in refusing to include this statement as part of a capitalization opinion.[184] However, the Committee believes that, in addition to inclusion by reason of historical practice and acceptance, this statement also contains legal conclusions as to the number of outstanding shares; therefore, the statement can be included in the Model Capitalization Opinion.

In determining whether shares were "authorized," the Committee adopts the approach of commentators who believe that "minor defects" in proceedings with respect to the adoption or amendment of Company's articles of incorporation should not prevent the Opinion Giver from giving the opinion.[185] This belief based upon a presumption of regularity and continuity in

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182 See generally Fitzgibbon III

183 Whether the shares are "duly authorized" is covered in Section B below.

184 Fitzgibbon III, at 894.

185 See, e.g., Fuld.

connection with corporate proceedings which is stronger with age. Rogers v. Hill, 289 U.S. 582, 591 (1933). See Section 2.09. It may be impractical in some instances (lost or missing records) for the Opinion Giver to determine whether Company took all proper steps to adopt Company's articles of incorporation; in such a case, an appropriate exception or reference to the presumption may be taken in the interest of an accurate presentation.

B. Duly Authorized. The opinion that the outstanding shares have been "duly authorized" means that:

(i) Company had the power under the GBCC or other corporation law then in effect (the "Corporate Code") and under its articles of incorporation to create the shares;[186]

(ii) The board of directors and/or the shareholders of Company took the necessary corporate action to create or ratify the creation of the shares out of Company's authorized shares; and

(iii) Company's shares have the rights and attributes to the extent then required by the Corporate Code, and the rights and attributes of the shares were permitted under the Corporate Code, are now permitted under the GBCC and are permitted by the Company's articles and bylaws.[187]

The "duly authorized" opinion does not mean that:

(i) The creation of the shares complied with agreements by which Company is bound;[188]

(ii) The creation of the shares complied with the fiduciary duties of the directors; or

(iii) The creation of the shares complied with any law other than the GBCC, e.g. complied with federal or state securities laws.[189]

C. Validly Issued. The opinion that the shares were "validly issued"[190] means that:

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186 The more fundamental question of the Company status as a corporation is handled in the Model Corporate Status Opinion. See Section V, infra.

187 The Corporate Code or Company's articles of incorporation may, for example, have prohibited the issuance of a preferred class with rights senior to an existing class of preferred shares.

188 The Committee, however, notes that if the creation and issuance of shares violated shareholder or other agreements binding on the Company, the Opinion Giver would not be able to give the Model No Violation Opinion. See, Section VIII, infra.

189 The Committee notes that most commentators agree that unless the proxy materials are the subject of specific litigation or are otherwise called to the lawyer's attention, the "due authorization" opinion is not an opinion that the proxy materials contain no material misstatements or omissions. Cal. IV, at 72; New York I, at 1910.

(i) The shares were issued in accordance with the Corporate Code as then in effect, Company's articles of incorporation and bylaws, and any further requirements contained in the resolutions of Company's shareholders or directors;

(ii) At the time of issuance of the shares, Company had sufficient authorized and unissued shares of that class available to be issued;

(iii) Company has taken the necessary steps to vest shareholder status in the recipients of the shares; and

(iv) Company has not taken any steps to deprive the shares of the "validly issued" status.

The "validly issued" opinion does not mean that:

(i) The issuance of the shares avoided all legal prohibitions; rather, the opinion extends only to those legal prohibitions that make the issuance of the shares void or voidable;[191]

(ii) The issuance of the shares complied with laws other than the Corporate Code or with the directors' fiduciary duties to Company;[192] or

(iii) The issuance of the shares complied, or did not conflict, with agreements by which Company is bound.[193]

Shares are not validly issued if they are issued in violation of the provisions of the Corporate Code as then in effect; for example, shares issued as a dividend are not validly issued if they are issued in violation of Section 623(b) of the GBCC.[194] Similarly, shares are not validly

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190 The Committee notes that a question has arisen whether there is any substantive difference between an opinion that shares are "validly issued" or "legally issued." See, e.g., Cal. IV, at 73-74. For example, in the context of a Securities Act of 1933 filing, the attorney's opinion must indicate whether the securities will, when sold, be "legally issued, fully paid and non-assessable . . ." Reg. S-K, Section 601(b). The Committee notes, as have other commentators, that many such opinions state that shares are "validly issued" rather than stating shares are "legally issued." See, Cal. IV, at 74. Other commentators have noted that the words "validly" and "legally" indicate that either the terms have similar meanings or that lawyers are more comfortable with the meaning of the word "validly" Id. The Committee believes the terms have the same meaning and has chosen the phrase "validly issued" because of its widespread use and acceptance.

191 See, accord, Cal. IV, at 72 and New York I, at 1910-11. Violation of federal and state securities laws does not make the issuance of shares void or voidable, but rather give the purchaser the right to rescind the purchase or to sue for damages.

192 See, accord, Fitzgibbon III, at 877.

193 See the Model No Violation Opinion at Section VIII, infra.

194 O.C.G.A. § 14-2-623(b); cf. prior O.C.G.A. Section 14-2-84(e) and 90.

issued if they are issued without proper authorization by the board of directors and/or the shareholders, as appropriate.

The Committee notes the different treatment of preemptive rights after the 1989 revision to the Corporate Code.[195] Section 630(e) of the GBCC provides that "shares that are otherwise validly issued and outstanding shall not be affected by reason of any violation of preemptive rights with respect to their issuance." Presumably, the Opinion Giver could give a "validly issued" opinion where, after the 1989 revisions to the GBCC, shares have been issued in violation of preemptive rights provisions, since the issuance of such shares does not appear to be void or voidable; but the Opinion Giver would not be able to give the Model No Violations Opinion. See Section 9.02B.

There are several occurrences, such as a merger or share repurchase, that could cause shares to lose their "validly issued" status. Absent such occurrences, shares will remain validly issued. Shares acquired by Company constitute authorized but unissued shares, unless the articles of incorporation provide that such shares become treasury shares or prohibit their reissuance.[196] In giving the "validity issued" opinion with respect to the subsequent issuance of repurchased shares, the Opinion Giver is opining that Company's directors have made the appropriate determinations that any such repurchase satisfied then applicable standards for share repurchases and distributions.[197] The Opinion Giver's review should be limited to an examination of Company's minutes. The Opinion Giver is not, however, opining that the board's determinations were correct or that Company in fact met such standards.

D. Fully Paid and Nonassessable. The opinion that the shares are "fully paid and nonassessable" means that:

(i) The kind or type of consideration received or to be received in connection with the issuance was legally sufficient when the shares were issued;

(ii) The amount of consideration received satisfied the requirements set forth in the Corporate Code as then in effect, Company's articles and bylaws, the resolutions of its directors and shareholders;

(iii) Any required determination, e.g., as to value of property or services, was made by the directors or shareholders, as applicable; and

(iv) The required consideration to be received was in fact received.

The "fully paid and nonassessable" opinion does not mean that:

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195 O.C.G.A. § 14-2-630; prior O.C.G.A. Section 14-2-111.

196 O.C.G.A. § 14-2-631. Prior to the 1989 revision to the Corporate Code, repurchased shares became treasury shares unless cancelled by board resolution; see prior O.C.G.A. §§ 14-2-92 and 94.

197 See O.C.G.A. § 14-2-640; prior O.C.G.A. §§ 14-2-90, 91, 92(e) and 154(c).

(i) The consideration received or to be received was adequate as a matter of fairness to Company and its shareholders;

(ii) The shareholders are immune from other types of liabilities, such as liability for distributions in violation of Section 640 of the GBCC, or under the "piercing the corporate veil" theory;[198]

(iii) The directors have not breached any fiduciary duty to Company or the directors have not unfairly diluted the investment value of existing shareholders;[199] or

(iv) The consideration received by the Company complied with agreements by which the Company was bound.

In opining that shares are "fully paid and nonassessable," the opinion relates the time of the issuance of the shares to the consideration received for the shares. For example, under the GBCC, a corporation can now but could not formerly issue shares in consideration of promissory notes or (with respect to the minimum capital necessary under the corporation's articles of incorporation) contracts for services to be performed.[200]

When Company receives the consideration the directors authorized for issuance of the shares, the shares are "fully paid and nonassessable" and the owner of the shares is not obligated to make further payments to Company.[201] However, the quoted phrase does not mean that Company has received sufficient consideration as a matter of fairness to Company and its shareholders. A lawyer could not opine that shares were "fully paid and nonassessable" even though Company received the minimum statutory paid in capital under the prior Corporate Code if the directors' resolutions required more consideration than the minimum. The Opinion Giver should also recognize the effect of the GBCC with respect to the elimination of par value; the Opinion Giver should be satisfied that share dividends were also lawfully payable.[202]

Whether the consideration received for the shares is adequate is a factual matter,[203] and the Opinion Giver should rely on the certificate of a corporate officer. In some instances, particularly with older companies, it may be impossible for Company (or the Opinion Giver) accurately to determine whether the appropriate consideration was received. In such cases, the Opinion Giver should make an appropriate exception. See Section 1.06 and Section 2.09.

11.03 Additional Notes Regarding the Model Capitalization Opinion.

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198 O.C.G.A. § 14-2-640. See, accord, Fitzgibbon III, at 889.

199 See Official Comment to O.C.G.A. Section 7-2-621.

200 O.C.G.A. § 14-2-621; prior O.C.G.A. §§ 14-2-84 and 85 prohibited notes and contracts for services as payment.

201 O.C.G.A. § 14-2-621.

202 See, e.g., prior O.C.G.A. § 14-2-84(a).

203 O.C.G.A. § 14-2-621. See prior O.C.G.A. § 14-2-84. See, accord, FitzGibbon III, at 889.

A. Lost Certificates. Most commentators agree that in determining whether Company has sufficient authorized and unissued shares of the class available to be issued, if the number of shares represented by the replacement of lost certificates is de minimis, the problem created by lost certificates (that a bona fide purchaser in fact acquired the allegedly lost certificate) can be ignored. Otherwise, an exception can be noted in the opinion.[204] The Committee adopts this approach and further notes that even if the number of lost shares was more than de minimis, the Opinion Giver may still give the opinion without exception in reliance on appropriate certifications from the shareholders of the lost shares in accordance with Company's bylaws.

B. Rights, Options, Etc. The Committee notes that a Georgia corporation under the GBCC may now issue rights, options or warrants with respect to its shares whether or not it has sufficient authorized and unissued shares to satisfy such rights, options or warrants.[205] The date shares are issued pursuant to such rights, options and warrants is determinative of whether such shares are "duly authorized." Furthermore, a corporation may issue shares or other securities exchangeable for or convertible into shares of another class even if the corporation, when it issued such convertible or exchangeable shares, did not have sufficient authorized and unissued shares to satisfy the rights if and when exercised.[206]

C. Uncertificated Shares. The GBCC now permits a corporation to issue uncertificated shares.[207] If the Opinion Giver determines that uncertificated shares may be issued pursuant to Company's articles of incorporation, bylaws and authorizing resolutions, and the issuance of the shares is otherwise valid, the Opinion Giver can opine that the shares are "validly issued." See Section 12.01 and 12.04C.

11.04 Practice Procedure Regarding the Model Capitalization Opinion. In order to render the Model Capitalization Opinion with respect to a Georgia corporation, the Committee recommends that the following steps be taken:

A. Review relevant provisions of the Corporate Code in effect at the time the shares were issued.

B. Review Company's articles of incorporation, including all amendments, as certified by the Secretary of State.

C. Review Company's bylaws as certified by an appropriate officer, in effect on all relevant dates.

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204 See, e.g., Fuld, at 933, FitzGibbon III, at 870, and Cal. IV, at 71.

205 O.C.G.A § 14-2-624(b).

206 O.C.G.A. § 14-2-601(d). However, prior to the 1989 revision to the Corporate Code, no options could be issued unless there were sufficient authorized but unissued shares or treasury shares reserved at the time of issuance. Prior O.C.G.A. § 14-2-86(a). In addition, convertible securities could not be "duly authorized" unless a sufficient number of authorized but unissued or treasury shares were reserved by the board of directors for issuance in satisfaction of the conversion rights. Prior O.C.G.A. § 14-2-80(b)(5).

207 See, O.C.G.A. § 14-2-626.

D. Review actions of the board of directors as to call, notice and quorum and minutes of the board (and, if appropriate, the executive committee of the board), to determine procedural and substantive compliance with the then existing provisions of the Corporate Code, Company's articles of incorporation and bylaws.

E. If shareholder action is relevant, review shareholders' actions as to call, notice, quorum and directors' vote recommending shareholder action, and shareholders' resolutions for the same purpose as stated in D above.

F. Obtain certificates from corporate officers as to factual matters, e.g., documents and minutes, officers' signatures, delivery of shares pursuant to authorizing resolutions, and receipt of required consideration.

In determining Company's authorized shares, the Committee recommends that the Opinion Giver review Company's articles of incorporation and records to confirm that any amendments to Company's articles of incorporation with respect to the number and types of shares were properly adopted. In stating the number of presently outstanding shares, the Opinion Giver may, since this statement includes matters of fact, rely on a certificate of a corporate officer of a privately held company or the share transfer agent of a publicly held company; with a privately held company, the Opinion Giver should review Company's share records.[208]

With respect to the question of "duly authorized," the Model Capitalization Opinion assumes that the Model Corporate Status Opinion could also be given. See Sections 2.09 and 7.02 above.

The Opinion Giver should also confirm that shares have the attributes and rights required under the Corporate Code.[209] Generally, the Opinion Giver should confirm that (i) the directors took all appropriate action in setting preferences, limitations and relative rights of classes and series, (ii) each series of a class has a distinguishing designation, and (iii) the shares of a series have identical preferences, limitations, and relative rights.[210]

The Opinion Giver should confirm that Company's resolutions with respect to the authorization and issuance of shares are or were still in effect at the time the shares were issued and that the issuance of the shares conformed with their terms, e.g., kind, number and price.

The vesting of shares is typically accomplished through delivery of the share certificates. The Committee recommends that Opinion Giver confirm that the certificates for outstanding shares

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208 Cal. IV, at 72; Babb, at 568.

209 See generally O.C.G.A. §§ 14-2-601 through 604; prior O.C.G.A. §§ 14-2-80, 81 and 88.

210 O.C.G.A. § 14-2-602; prior § 14-2-81. Prior to the 1989 revision, the Corporate Code prohibited the issuance of shares with priority over dividends, or priority with respect to assets at liquidation, over any currently outstanding class entitled to such priority. Prior O.C.G.A. § 14-2-80(b)(3). The 1989 revision to the GBCC also eliminated the concept of par value. Prior O.C.G.A. § 14-2-80.

are in the proper form required by the Corporate Code,[211] represent the proper number of shares, were executed by the appropriate corporate officers and were in fact delivered. Since delivery of share certificates is a factual matter, the Opinion Giver may properly rely on a certificate of a corporate officer as to the delivery. Furthermore, absent facts to the contrary, the Opinion Giver may properly rely on the Company's stock ledger as to the delivery of shares and the number of shares delivered.

To opine that the shares are "fully paid and nonassessable," the Committee recommends that Opinion Giver determine whether the board of directors of Company made a determination that the consideration received was adequate. The determination by the board is conclusive with respect to the question of the adequacy of consideration for the issuance of shares, which question is part of the larger question of whether the shares are fully paid and nonassessable.[212] The Model Capitalization Opinion does not go to the adequacy of the consideration, but only to whether the board of directors made the required determination.

The Committee notes that elements of the Model Capitalization Opinion can impose heavy due diligence burdens on the Opinion Giver, particularly in light of the issues raised by lost or incomplete corporate records. The Opinion Recipient should recognize that the expense of such an investigation may far outweigh its value to the Opinion Recipient. Consequently, absent facts to the contrary, the Opinion Giver may be able to give the Model Capitalization Opinion, despite such incomplete records, based on a presumption of regularity relating to the shares. See Section 2.09. However, the Opinion Giver should consider the extent of the disclosure necessary under the circumstances to give an accurate presentation of the basis of the Model Capitalization Opinion under standards discussed at Section 1.06.

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211 See, O.C.G.A. § 14-2-625; prior O.C.G.A. Section 14-2-87.

212 O.C.G.A. § 14-2-621; prior O.C.G.A. § 14-2-84.

XII. THE MODEL SHARE TRANSFER OPINION

Immediately prior to the consummation of the Transaction, Seller was the sole registered owner of the Shares. Opinion Recipient is now the registered owner of the Shares and, assuming Opinion Recipient has purchased the Shares in good faith and without notice of any adverse claim, has acquired all the rights of Seller in the Shares free of any adverse claim, any lien in favor of Company, and any restrictions on transfer imposed by Company. The owner of the Shares, if other than Seller, is precluded from asserting against Opinion Recipient the ineffectiveness of any unauthorized endorsement.

COMMENT

12.01 Purpose and Background of the Model Share Transfer Opinion. The purpose of the Model Share Transfer Opinion is to provide assurance to the Opinion Recipient, as the purchaser of Shares of Company, that Seller is the owner of the Shares and that the Opinion Recipient is acquiring all of Seller's rights in the Shares free of any restriction on transfer and adverse claims.[213] The Model Share Transfer Opinion would be given in connection with "secondary sales" of Company's Shares, such as the sale of Shares by (i) a shareholder to a purchaser effected outside of a national securities exchange or securities quotation system;[214] (ii) shareholders in an underwritten public offering; or (iii) all shareholders of a corporation in connection with the sale of the corporate business. The Model Share Transfer Opinion should be given only in connection with secondary sales of certificated securities; the transfer of uncertificated securities presents special problems that require the Opinion Giver to have a thorough understanding of the relevant provisions of Article 8 of the Uniform Commercial Code, and more particularly of the 1978 Official Text, as of 1991 not adopted in Georgia.[215]

The Model Share Transfer Opinion requires reference to both the GBCC and Article 8 of the Uniform Commercial Code.[216] Article 8 governs the rights acquired by a purchaser of

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213 See generally, FitzGibbon IV.

214 See O.C.G.A. § 14-2-140(16) (Supp. 1991).

215 See Section 12.04-C infra. Article 8 does not authorize or compel the issuance of uncertificated securities -- that is a function of state corporation law. The GBCC expressly authorizes the issuance of uncertificated shares. O.C.G.A. § 14-2-626 (1989).

216 U.C.C. §§ 8-101 et seq. (1978). Unless otherwise indicated, references in this Section XII to Article 8 relate to the 1978 Official Text and not to the laws of any specific state. Georgia has not adopted the 1978 Official Text; however, another committee of the Section of Corporate and Banking Law is currently preparing a comprehensive revision to the Georgia Uniform Commercial Code (O.C.G.A. §§ 11-1-101 et seq. (1982 & Supp. 1991)) for consideration by the Section and, if approved, by the General Assembly. The principal differences between Article 8 of the Georgia Uniform Commercial Code and Article 8 of the 1978 Official Text relate to uncertificated shares -- the Georgia version of Article 8, as well as prior versions of the Official Text, do not specifically address uncertificated securities. See Section 12.04-C infra. However, with limited exceptions the 1978 Official Text does not change the law with respect to certificated securities.

securities[217] and provides that a "bona fide purchaser" acquires the rights in the security which its transferor had, free of any adverse claim, lien in favor of the issuer and restriction on transfer imposed by the issuer.[218] The transferor's rights in the security derive from the GBCC. Under the GBCC, the person shown on the corporation's share records to be the owner is entitled to be treated as a shareholder for all purposes, including voting and receipt of notices and distributions, unless the corporation has established a procedure by which the beneficial owner of Shares registered in the name of a nominee is recognized as the "shareholder."[219] In that case the beneficial owner is deemed to be the "shareholder" to the extent of the rights granted by a "nominee certificate" on file with the corporation.[220]

A share transfer opinion may involve the laws of several jurisdictions.[221] The validity, transferability and rights in Shares issued by a Georgia corporation will be governed by the GBCC. However, matters relating to Article 8 and the rights acquired by the Opinion Recipient may be governed by the law of a jurisdiction other than Georgia, such as, for example, a jurisdiction selected by the parties in the Agreement. In addition, matters relating to corporate or fiduciary Seller's authority to sell its Shares will involve the laws of the jurisdiction of incorporation or the jurisdiction governing the fiduciary estate, as the case may be. See Section 12.02H.

12.02 Elements of the Model Share Transfer Opinion.

A. Existence of Shares. The Model Share Transfer Opinion is based on the assumption that the Shares have been duly authorized and validly issued and are fully paid and nonassessable,

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Differences between the 1978 Official Text and the Georgia version of Article 8 will be noted.

217 Comment 2 to U.C.C. § 8-102 states that shares of closely-held corporations are intended to come within the definition of "security" for purposes of Article 8. See Grossman v. Glass, 239 Ga. 319 (1977). The Committee notes that in some states shares of a closely-held corporation have been held not to constitute securities under Article 8. See Rhode Island Hospital v. Collins, 368 A.2d 1225 (R.I. 1977); Blasingame v. American Metals, Inc., 654 SW.2d 659 (Tenn. 1983).

218 See U.C.C. §§ 8-103, -301 and -302. "Bona fide purchaser" is defined as "a purchaser for value in good faith and without notice of any adverse claim who takes delivery of a certificated security in bearer form or in registered form issued or endorsed to him in blank." U.C.C. § 8-302(1)(a). See U.C.C. § 1-201 for definitions of "delivery," "good faith," "notice" and "value."

219 O.C.G.A § 14-2-140(25) (Supp. 1991). See U.C.C. § 8-207(1) (issuer entitled to treat registered owner as the person exclusively entitled to vote, receive notifications and otherwise to exercise all the rights and powers of an owner); O.C.G.A. § 11-8-207(1) (1982).

220 The Committee notes the inconsistency between the GBCC, which permits the beneficial owner of shares registered in nominee name to exercise the rights of a shareholder, and Article 8, which authorizes the Company to treat the registered owner as the person exclusively entitled to exercise the rights and powers of an owner.

221 See FitzGibbon IV at n. 13.

or, in other words, that the Model Capitalization Opinion could be given.[222] In the typical case, the Opinion Giver would have elsewhere in the opinion rendered the Model Capitalization Opinion. See Section XI. However, if the Opinion Giver represents only Seller and not Company, the Opinion Giver would need to assume the facts subsumed by the Model Capitalization Opinion. If the Opinion Recipient needs an opinion on these matters, it should be given separately. In circumstances where reliance on this assumption would be unwarranted, the Opinion Giver should consider what disclosure may be appropriate under the circumstances to give an accurate presentation of the Model Share Transfer Opinion in light of such circumstances. See Sections 1.06 and 2.07B; Interpretive Standard 3.

B. Opinion Recipient's and the Seller's Authority. The Model Share Transfer Opinion also assumes the legal authority of the Opinion Recipient and a corporate or fiduciary seller. The Interpretive Standards assume Opinion Recipient's legal authority. The Opinion Giver will typically have opined elsewhere as to Seller's legal authority with respect to the sale. However, even an unauthorized endorsement would be effective to transfer shares under Article 8 if the Opinion Recipient is a bona fide purchaser and obtains a new certificate upon registration of transfer.[223] In addition, the fact that Shares are registered in the name of a fiduciary does not, in and of itself, create a duty of inquiry into the rightfulness of the transfer or constitute constructive notice of adverse claims.[224]

C. Ability to Exercise Rights. The Model Share Transfer Opinion confirms that no provision of the GBCC, Article 8 or Company's articles of incorporation or bylaws prohibits the Opinion Recipient from acquiring or holding the Shares. For example, an unqualified Model Share Transfer Opinion should not be given in the case of a sale of Shares of a professional corporation or if the bylaws of an S corporation prohibit transfer of Shares to a person who is not a qualified S corporation shareholder. In such cases, the Opinion Giver should either qualify the Model Share Transfer Opinion or expressly assume that the Opinion Recipient is authorized to be a shareholder of the professional corporation[225] or is a qualified S corporation shareholder.

The Model Share Transfer Opinion also confirms that no provision of the GBCC, Article 8 or Company's articles of incorporation or bylaws prevents the Opinion Recipient from exercising the normal rights of a holder of the Shares, including voting, receipt of notice of meetings and rights to receive distributions. Of particular concern are any Company adopted anti-takeover provisions contained in Article 11 of the GBCC.[226] If Company has adopted either the fair price requirements or the interested shareholder business combination provisions contained in the GBCC, and if the Shares constitute more than 10% of the issued and outstanding Shares, the Shares may have diminished rights in the hands of the Opinion Recipient.[227] In that case, the Opinion Giver

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222 See U.C.C. § 8-104 (the provisions of Article 8 that validate a security or compel its issue or reissue do not apply to the extent that validation, issue or reissue would result in over-issue); O.C.G.A. § 11-8-104 (1982).

223 U.C.C. § 8-311. See O.C.G.A. § 11-8-311 (1982).

224 U.C.C. § 8-304(3). See O.C.G.A. § 11-8-304(2) (1982).

225 See O.C.G.A. § 14-7-5(a) (1989).

226 See O.C.G.A. §§ 14-2-1110 to -1133 (1989 & Supp. 1991).

227 See O.C.G.A. §§ 14-2-1113(c) and -1132(a) (1989 & Supp. 1991).

should note in the opinion the limitations on the Opinion Recipient's rights in the Shares. In addition, if Company has adopted either of the foregoing statutory anti-takeover provisions and if the Shares constitute less than 10% of the issued and outstanding shares, the Opinion Giver should state in the opinion an assumption that the Opinion Recipient will not, upon purchase of the Shares, "beneficially own"[228] 10% or more of the outstanding shares. Similarly, the Opinion Giver should carefully review Company's articles of incorporation for other provisions, such as "poison pill" warrants, that may be triggered by factors peculiar to the Opinion Recipient.[229]

D. Record Ownership and Absence of Transfer Restrictions and Adverse Claims. The Model Share Transfer Opinion confirms that Seller is the sole registered owner of the Shares, free of any transfer restrictions imposed by Company, liens in favor of Company and adverse claims as defined in Article 8 of the Uniform Commercial Code.

E. Sale. The Model Share Transfer Opinion confirms that the transaction was a sale, that the sale conformed to the terms of the Agreement and that it conveyed to the Opinion Recipient all of Seller's rights in the Shares. The Model Share Transfer Opinion confirms that the Opinion Recipient purchased the Shares "for value," i.e., the Opinion Recipient has given consideration sufficient to support a simple contract.[230] While the Model Share Transfer Opinion confirms that the consideration delivered by the Opinion Recipient is sufficient to support a simple contract, it does not otherwise address the adequacy of the consideration delivered. The Opinion Giver must qualify the opinion if Seller retains or reserves any right in the Shares, such as a right of first refusal upon subsequent transfer or a security interest.

F. Transfer. The Model Share Transfer Opinion confirms that the transfer of the Shares from Seller to the Opinion Recipient has been completed.

G. Opinion Recipient as Registered Owner. The Model Share Transfer Opinion confirms that the Opinion Recipient has been entered on the share records of Company as the sole registered owner of the Shares and that Company has delivered to the Opinion Recipient a new share certificate, registered in the Opinion Recipient's name without any restrictive legend or other notation of adverse claims.

The Committee recommends that Opinion Giver require Seller to deliver at closing a new share certificate issued in the name of the Opinion Recipient rather than delivering the Seller's share certificate endorsed in blank or accompanied by a separate transfer power.[231] However, if it is not possible to register the Shares in the Opinion Recipient's name, the second sentence of the Share Transfer Opinion should be modified as follows:

> "*Upon registration of the Shares in the Opinion Recipient's name in the share records of Company, the Opinion Recipient will, assuming the Opinion Recipient*

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228 See O.C.G.A. §§ 14-2-1110(4) and -1131(1) (1989 & Supp. 1991).

229 See O.C.G.A. § 14-2-601(a) (1989) (rights, preferences, limitations and restrictions of or on the shares or the holders may be made dependent upon facts ascertainable outside the articles of incorporation, e.g., duration of ownership).

230 U.C.C. § 1-201(44); O.C.G.A. § 11-1-201(44) (Supp. 1991).

231 See FitzGibbon IV at 32-33; Fuld.

has purchased the Shares in good faith and without notice of any adverse claim, have acquired all rights of Seller in the Shares free of any adverse claim, any lien in favor of Company, and any restriction on transfer imposed by Company."[232]

In the event of such modification, the final sentence of the Model Share Transfer Opinion should be omitted.

H. Governing Law. The Model Share Transfer Opinion addresses only the GBCC (with respect to the validity, transferability and rights in the Shares issued by the Company, a Georgia corporation) and the version of Article 8 of the Uniform Commercial Code in effect in the Opinion Jurisdiction (with respect to the rights in the Shares acquired by the Opinion Recipient). The Model Share Transfer Opinion does not extend to the content or effect of any law in any jurisdiction other than the Opinion Jurisdiction.

The Committee recommends that the Opinion Giver consider whether an opinion of local counsel will be necessary if the parties have sufficient contacts with jurisdictions other than the Opinion Jurisdiction or if the Documents contain governing law provisions which name a jurisdiction other than the Opinion Jurisdiction.

12.03 Matters Not Covered By the Model Share Transfer Opinion. The Model Share Transfer Opinion does not include the following opinions:

A. Compliance with All Laws. The Model Share Transfer Opinion does not constitute an opinion that the Transaction does not violate or give rise to an adverse claim under laws other than the provisions of Article 8 and the GBCC. If such matters are important to the Opinion Recipient, they should be addressed by the Model No Violation Opinion (See Section VIII) or by an opinion addressing compliance with specified statutes. Common examples of such opinions are opinions regarding compliance with the notice provisions of the Hart-Scott-Rodino Antitrust Improvements Act of 1976 and regarding exemptions from the registration provisions of federal and state securities laws.

B. Free of All Claims. The Model Share Transfer Opinion does not affirm that the Shares in the hands of the Opinion Recipient will be free of all adverse claims. The Opinion Recipient's rights in Shares depend not only on Article 8 and the GBCC but also on laws governing property rights generally, such as community property laws, and on contractual obligations and other matters peculiar to the Opinion Recipient, such as financing arrangements and tax liens. The Share Transfer Opinion passes only on the rights in the Shares the Opinion Recipient acquires from the Seller under Article 8 and the GBCC and does not address liens that are not cut off under Article 8. The Committee recommends that no such opinion be rendered because of the uncertain factual basis for the opinion.

C. Nonpossessory or Unfiled Liens. The Model Share Transfer Opinion does not affirm that the Shares are not subject to liens (other than UCC security interests) that may be

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232 See FitzGibbon IV at n. 12.

perfected without filing or possession of the share certificate.[233] For example, the Internal Revenue Code provides for special liens for estate and gift taxes which attach without filing and can extend for a period of up to ten years.[234] The Committee notes that liens that may be perfected without filing or possession, such as the special liens for estate and gift taxes, often permit purchase free of the lien based on the concept of a "bona fide" purchase. However, the underlying precepts of a "bona fide" purchase in these cases--delivery, good faith, notice and value--may differ from the Article 8 analogues. If the Opinion Recipient requests an opinion with respect to a specific type of lien that may be perfected without filing or possession and that may be released under certain circumstances by an innocent purchaser, the Model Remedies Opinion could be amended to address specifically the lien so long as the assumptions are supplemented (without altering the current assumptions) to account for such a release of the lien.

12.04 Additional Notes Regarding the Model Share Transfer Opinion.

A. Basis for Transfer Opinion. Unlike other portions of the Model Opinion, few commentators have addressed the formulation of a share transfer opinion in secondary sales of Shares, and the few commentators who have addressed the topic have not adopted a uniform approach.[235] A frequently used formulation provides that the Opinion Recipient is acquiring "good and valid title" or "marketable title" to the Shares being purchased, free of liens, encumbrances and other restrictions on transfer. The terms "good and valid title" and "marketable title," however, are not used in the GBCC or in Article 8. Furthermore, use of the term "marketable" may imply that the Shares may be freely sold under the federal and applicable state securities laws. The Committee has determined that the Model Share Transfer Opinion should use the same terms and concepts as are embodied in Article 8 and the GBCC and focus on the rights acquired by the Opinion Recipient and not Seller's "title" to the Shares; accordingly, the Committee has rejected formulations using the terms "good and valid title" or "marketable title."[236]

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233 It is possible under Article 8 for a secured party to have a perfected security interest in certificated shares without possession of the share certificate. U.C.C. §§ 8-321(2) and 8-321(4). In such cases, the security interest remains perfected only for a period of 21 days, during which time the secured party must take possession of the certificate (or take other permitted action) to continue perfection. However, a bona fide purchaser of shares subject to such a perfected, non-possessory UCC security interest would take the shares free of any such security interest. U.C.C. § 9-309. The same result occurs under the Georgia version of the Uniform Commercial code. O.C.G.A. §§ 11-9-304 and -309 (1982).

234 I.R.C. § 6324. If the required tax is not paid (and the tax does not become unenforceable by reason of lapse of time) a transferee, other than a "purchaser" without "actual notice or knowledge" of the lien, who receives property directly form the estate or the donor will be personally liable for the tax to the extent of the value of property at the date of death or gift. If a person purchases securities directly from an estate, the purchaser takes the securities free of the tax lien if the purchaser did not have actual notice or knowledge of the lien. I.R.C. §6323(b)(1).

235 See FitzGibbon IV; Fuld, at 934-936; and Sterba at § 3.27.

236 See FitzGibbon IV, Cal. IV at 2227.

B. Alternative Approaches. James Fuld considered whether the Opinion Giver should examine the historical title to the Shares to be acquired and discussed four alternative approaches that may be taken by the Opinion Giver: (i) make no inquiry regarding prior transfers; (ii) examine the chain of title from the most recent bona fide purchaser; (iii) examine the entire chain of title and correct all defects; and (iv) adopt the language of the Uniform Commercial Code and do not examine Seller's title.[237]

Each of the first three approaches has significant shortcomings. The first approach -- that the Opinion Giver make no inquiry regarding prior transfers -- relies on the notion that the less the Opinion Recipient knows, the better. Specifically, if the Opinion Recipient and its counsel do not know and are not advised of irregularities, the Opinion Recipient presumably will have purchased in good faith, acquiring the Shares under Article 8 free of any adverse claim. Fuld acknowledges the inadequacy of this approach by suggesting two exceptions,[238] and others note the apparent risk to the Opinion Giver of litigation concerning whether the Opinion Recipient was a bona fide purchaser without notice.[239]

The second and third approaches focus on the chain of title and have a common shortcoming -- each requires the Opinion Giver to draw a factual conclusion whether prior transferees were bona fide purchasers. The third approach, where the Opinion Giver examines the entire chain of title and attempts to correct all defects, may require a significant amount of time and effort and result in the discovery of uncorrectable (and otherwise unknown) defects. Adherence to the third approach may often result in a situation where the cost of providing the opinion greatly outweighs the benefit to the Opinion Recipient in receiving it. Indeed, as one commentator has noted, requesting the Opinion Giver for an opinion regarding the Seller's title "is simply added insurance."[240]

The Model Share Transfer Opinion approach adopted by the Committee follows the concept of Fuld's fourth approach and focuses not on the Seller's title but on the rights acquired by the Opinion Recipient. This approach has been criticized by one commentator because it "assumes all the interesting and difficult questions which go to the purchaser's status."[241] Such comments reveal the fundamental flaw embodied in share transfer opinions based upon the Seller's "title" to the Shares -- such opinions require factual determinations that verify the Seller's representations and warranties and seek to shift the risk of misstatement to the Opinion Giver. These are not recognized purposes of the third party opinion. See Section I. The Opinion Giver should neither rely on assumptions where reliance would be unwarranted (See Section 2.07B) nor deliver an opinion in the face of known, unwaived adverse claims. On the other hand, the Model Share Transfer Opinion adopted by the Committee furthers recognized purposes of the third party opinion: (i) it identifies legal issues which if not addressed might adversely affect the Opinion

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237 Fuld at 935.

238 Id. (The Opinion Giver should ask the Seller how the Seller acquired the shares and should review any prior transfer where the Opinion Giver has actual knowledge of a problem).

239 See Sterba at 107.

240 Id. at 108.

241 Id. at 109.

Recipient's rights in the Shares and (ii) places greater emphasis on legal analysis than on fact gathering.

C. Uncertificated Shares. The GBCC expressly authorizes a corporation to issue uncertificated shares;[242] however, the Georgia version of the Uniform Commercial Code does not currently address the transfer or pledge of uncertificated shares. Since the transfer or pledge of shares under the Georgia version of Article 8 is based upon the physical transfer of certificates, the existing Georgia version of the Uniform Commercial Code is inadequate to regulate an ownership system based on uncertificated shares. Given this anomaly, it is highly unlikely that a Georgia corporation located in Georgia would issue uncertificated shares. Even more unlikely would be a thoughtful practitioner giving a share transfer opinion with respect to uncertificated shares under Georgia law.

Under Article 8 of the 1978 Official Text of the Uniform Commercial Code (not adopted in Georgia), the transfer and pledge of uncertificated shares is effected by registration with the issuer.[243] Upon registration of transfer or pledge or release from pledge the issuer is required to send an initial transaction statement ("ITS") to the transferor and the transferee.[244] In addition to serving as evidence of proper registration, the ITS serves as notice of any lien, restriction or claim to which the uncertificated shares may be subject at the time of transfer. The ITS speaks only as of the date of transfer or pledge and should not be relied upon as evidence of the named transferee's continued ownership or rights in the uncertificated shares.[245] Delivery of a share transfer opinion in connection with the sale of uncertificated shares in a transaction governed by Article 8 would require a thorough understanding of the 1978 Official Text of Article 8.

12.05 Practice Procedures Regarding the Model Share Transfer Opinion. The Committee recommends that Opinion Giver review the following in preparation of the Model Share Transfer Opinion:

A. Georgia Business Corporation Code. The rights in the Shares which Seller is transferring to the Opinion Recipient derive from the GBCC, as modified by the issuer's articles of incorporation or bylaws, or by an agreement among the issuer and its shareholders. The Opinion Giver should pay particular attention to anti-takeover provisions that may limit the Opinion Recipient's right to vote or engage in certain business combinations.[246] The Opinion Giver should also determine whether the issuer has established a procedure to allow beneficial owners of Shares registered in nominee name to be recognized as "shareholders."[247]

B. Articles of Incorporation, Bylaws and Agreements. Similarly, the Opinion Giver should review the Company's articles of incorporation and bylaws, and any agreement among the

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242 O.C.G.A. § 14-2-626 (1989).
243 U.C.C. § 8-313.
244 U.C.C. § 8-408.
245 See U.C.C. § 8-408(a).
246 See O.C.G.A. §§ 14-2-1110 to -1133 (1989 & Supp. 1991).
247 See O.C.G.A. § 14-2-723 (1989).

Company and its shareholders, for transfer restrictions, transfer procedures and other matters affecting Seller's rights in the Shares.

C. Share Certificates. The Opinion Giver should examine the new and old share certificates and any related endorsement or separate transfer power to ascertain that:

(i) The Shares are registered in Seller's name;

(ii) The certificates are in Seller's possession and therefore not subject to a perfected possessory security interest[248];

(iii) The certificates do not set forth any restrictive legend or notice of a shareholder's agreement; and

(iv) The certificates and any endorsement or separate transfer power are in proper form.

D. Article 8 of Uniform Commercial Code. The Opinion Giver should review Article 8 as enacted in the jurisdiction which governs the transaction for variations from the Official Text of the Uniform Commercial Code.

E. Other Matters. The Opinion Giver should consider the laws of the applicable jurisdiction with respect to Seller's authority to act (in the case of corporations and fiduciaries). The Opinion Giver should also consider applicable laws governing property rights generally, especially community property laws.

F. Certificates. The Opinion Giver should obtain a certificate from Seller and Company (and its transfer agent, if appropriate) covering the following factual matters:

(i) Seller's Certificate. Seller's certificate should set forth:

a. Any matter relating to Seller's capacity or authority to act, such as copies of resolutions of Board of Directors or shareholders, trust instruments or testamentary instruments;

b. That Seller has not granted a security interest in the Shares; and

c. That Seller is the sole registered owner and beneficial owner of the Shares and that the Shares are not subject to any restriction on transfer or to any adverse claim.[249]

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248 See n. 219.

249 If Company has established a procedure by which a beneficial owner of shares registered in nominee name is recognized as a shareholder, the Committee recommends that Seller's certificate state that no "nominee certificate" has been filed with respect to the shares. O.C.G.A. § 14-2-723 (1989)

(ii) Issuing Corporation's Certificate. Company's (and the transfer agent's, if applicable) certificate should set forth that:

a. Seller is the sole registered owner of the Shares;

b. There are no transfer or other restrictions noted in the share records and that the issuing corporation has not received a request to transfer the Shares;

c. Company has not established a procedure by which the beneficial owners of shares registered in nominee name are recognized by Company as shareholders or, if Company has established such a procedure, that the Shares are not subject to a nominee certificate; and

d. The Opinion Recipient has been entered on the share records as the sole registered owner of the Shares without notation of restrictions on transfer or of other adverse claims.

G. Transaction Agreement. The Committee recommends that Opinion Giver confirm that all material contractual obligations required to be performed by the Opinion Recipient prior to closing have been satisfied, otherwise Seller may have a claim not cut off by Article 8. This requires the Opinion Giver to confirm by observation, certificate of appropriate person or express assumption that Seller has received the purchase price and that the Seller has delivered a share certificate for the Shares in proper form and properly endorsed for transfer. The Committee recommends that Opinion Giver examine the new share certificate, because the issuance and delivery of a new share certificate registered in the Opinion Recipient's name are necessary conditions to any opinion that "the owner of the Shares, if other than the Seller, is precluded from asserting against the Opinion Recipient the ineffectiveness of any unauthorized endorsement."[250]

250 See U.C.C § 8-311; O.C.G.A. § 11-8-311 (1982).

XIII.MODEL PERSONAL PROPERTY TRANSFER OPINION

Company has transferred to the Opinion Recipient all of Company's right, title and interest in and to the Personal Property.

COMMENT

13.01 Purpose and Background of the Model Personal Property Transfer Opinion. If an important part of the Transaction entails a transfer of Personal Property from Company to the Opinion Recipient, the Opinion Giver is frequently asked to opine that the execution and delivery of the Documents have the legal effect of transferring the requisite Personal Property to the Opinion Recipient. In rendering such an opinion, however, the Opinion Giver should be careful not to phrase the opinion in such a way as to constitute an opinion as to the title to the Personal Property and should also be aware of each element of the opinion.

13.02 Elements of the Model Personal Property Transfer Opinion.

A. Quitclaim Language. The Model Personal Property Transfer Opinion only opines that "Company has transferred all of its right, title and interest in and to the Personal Property" rather than opining that "Company has transferred the Personal Property," since for the latter version to be accurate, Company must possess title to the Personal Property purportedly being transferred. Determining whether Company does in fact have title to the Personal Property to be transferred is difficult for the Opinion Giver since, unlike real property, (1) ownership of most personal property is not centrally recorded, and (2) registration or recordation of the transfer documents of personal property (e.g., bills of sale, assignments or purchase agreements) is generally neither required nor permitted, except for certain specialized types of personal property, such as patents, trademarks, airplanes and certain ships. Unless the items of Personal Property consist solely of specialized personal property for which registration of ownership is required, the Opinion Giver has no factual foundation on which to base such an opinion, especially since neither possession[251] nor adverse possession[252] provides adequate support for the opinion. Accordingly,

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251 Although possession of personal property alone gives rise to a presumption of ownership, possession is not conclusive of ownership of personal property. Sellers v. Sellers, 76 Ga. App. 410, 46 S.E.2d 205 (1948). Additionally, defects in an owner's chain of title to personal property, such as theft, may destroy the validity of the owner's title. General Fire & Casualty Co. v. Kuffrey, 115 Ga. App. 121, 153 S.E.2d 590 (1967).

252 O.C.G.A. § 44-5-177 confers title to personal property by prescription if adverse possession of such property continues for four (4) years and otherwise conforms with the requirements of the statute governing adverse possession of real property and if the property is not concealed, removed from the state or otherwise subject to reclamation. In order for mere possession to ripen into title, however, it must, among other requirements, "be public, continuous, exclusive, uninterrupted, and peaceable" and "not have originated in fraud." O.C.G.A. § 44-5-161. However, such a requirement requires factual determinations or examinations which are, at least to a certain extent, subjective in nature and therefore difficult for the Opinion Giver to make with any reasonable degree of certainty. In addition, the statute's requirement that possession "not have originated in

the Committee believes that an opinion as to the title of Personal Property is generally not appropriate, and Interpretive Standard 31 confirms this position by expressly disclaiming any opinion as to title. By the use of "quitclaim" language, the Opinion Giver avoids giving an opinion as to Company's title to the Personal Property while still providing a legal conclusion that Company has transferred whatever interest it has in the Personal Property to the Opinion Recipient.[253]

B. Components. The Model Personal Property Transfer Opinion necessarily contains two underlying ingredients: (1) that the Documents are sufficient in form to transfer effectively the Personal Property (hereinafter, the "Sufficiency Component"), and (2) that the Documents are enforceable against Company (hereinafter, the "Enforceability Component"). If the Opinion Giver is not in a position, for whatever reason (e.g., in a local counsel situation), to give a Remedies Opinion with respect to the Documents, the Model Personal Property Transfer Opinion should be restricted to the Sufficiency Component, i.e., the sufficiency of the form of the Documents under Georgia law. Such an opinion might read as follows:

> *The respective forms of the Documents are sufficient to transfer to the Opinion Recipient all of Company's right, title and interest in and to the Personal Property, except that we express no opinion as to the applicability or effect of applicable laws relating to bulk transfers or fraudulent conveyances.*

This opinion may be specifically requested if counsel for the Opinion Recipient is unfamiliar with Georgia law.

C. Exceptions and Qualifications to the Model Personal Property Transfer Opinion.

(1) Bulk Sales Laws. An exclusion from coverage under Interpretive Standard 2, and thus to the Model Personal Property Transfer Opinion, is the applicability and effect of bulk transfer laws since, under the Georgia bulk transfer law (which is found in Article 6 of the Georgia Uniform Commercial Code), if the law is applicable and the parties do not comply with its requirements, the transfer is ineffective against any creditor of the transferor.[254] While it is not clear under Article 6 whether a failure to comply with the provisions of Article 6 with respect to one creditor renders the transfer ineffective against all creditors of the transferor,[255] it is clear that the transferor's trustee in bankruptcy can, by asserting a claim of non-compliance available to a single creditor, avoid the entire transfer if complete avoidance is necessary to pay the creditors of

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fraud" creates difficulty, since it might preclude application of the statute as a result of the fraud of the entity from whom the Company obtained color of title. Owing to the difficult factual inquiry which must be made even to determine its applicability, and the impossibility of completely eliminating the chance of fraud somewhere in the chain of title, the prescriptive title statute does not, in the Committee's judgment, provide an adequate basis for reliance in rendering legal opinions regarding title to Personal Property.

253 Cal. IV, at 8, 2233; Sterba at 125.

254 O.C.G.A. § 11-6-104(1).

255 See Brines.

the transferor.[256] Therefore, such an exception is necessary unless the Opinion Giver is prepared to opine either as to the inapplicability of the bulk transfer provisions of the UCC to the Transaction or as to the sufficiency of the compliance with those laws.

Opinions as to the applicability of or compliance with Article 6 are difficult because of the fact that there is substantial legal uncertainty over the scope and operation of Article 6. The uncertainties about the businesses subject to Article 6,[257] the size and type of transfer subject to Article 6[258] and the choice of law rules applicable to bulk transfers[259] make an opinion as to the applicability of

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256 11 U.S.C.A. § 544(b); Moore v. Bay, 284 U.S. 4 (1931).

257 Businesses subject to Article 6 are "all those whose principal business is the sale of merchandise from stock, including those who manufacture what they sell." O.C.G.A. § 11-6-102(3). The drafters of Article 6 indicated in their Official Comments that neither "farming nor contracting nor professional services, nor such things as cleaning shops, barber shops, pool halls, hotels, restaurants, and the like whose principal business is the sale not of merchandise but of services" are subject to Article 6. UCC §6-102, Official Comment 2. Unfortunately, the distinction between businesses engaged in the sale of goods and those engaged in the rendition of services is often difficult to apply in practice, since many businesses deal in a combination of goods and services. In such instances, whether the principal business relates to goods or services is, in Georgia, a question for the jury. Marlick Construction Company, Inc. v. T. Lynn Davis Realty & Auction Company, Inc., 140 Ga. App. 867, 232 S.E.2d 147 (1977) (where transferor's business consisted of assembling and selling premanufactured housing unit packages).

258 Article 6 defines a bulk sale as "any transfer in bulk and not in the ordinary course of the transferor's business of a major part of the materials, supplies, merchandise, or other inventory . . . of [a business] subject to this article." O.C.G.A. § 11-6-102(1). A sale of a substantial part of the equipment of the business or enterprise is a bulk sale only if it is made in conjunction with a bulk sale of inventory. It has been generally held that to constitute a "major part" of the materials, supplies, merchandise, or other inventory of the transferor, the transfer must involve at least fifty percent of the inventory of the transferor located in the United States. In re Albany Brick Company, 12 U.C.C. Rep. Serv. 165 (M.D. Ga. 1972). Obviously, if the Transaction involves a transfer of substantially all of the Personal Property of Company, the "major part" requirement will be met. In other instances, unless the value of the transferred inventory and the value of the remaining inventory can be readily determined through appraisals or the financial statements of Company, determining whether the transfer involves more than fifty percent of the inventory of Company may involve difficult questions of fact for the Opinion Giver. If there is a bulk transfer of inventory and some equipment is also involved, the Opinion Giver should be aware that a "substantial part" of the equipment may be a lesser standard for the existence of a bulk transfer than the "major part" standard applicable to inventory. If equipment is involved, the valuation of the Personal Property also becomes more difficult since Company's financial statements will reflect the book value of the equipment and not its market value.

259 Specifically, Article 6 of the Georgia UCC applies to all bulk transfers of goods located in Georgia. Accordingly, if any of the Personal Property being transferred is located outside the State of Georgia, the bulk transfer laws of the State where Personal Property is located

Article 6 generally inappropriate. In addition, legal and factual uncertainties inherent in compliance with Article 6 also make an opinion as to compliance inappropriate.[260]

Moreover, since the burden of compliance with Article 6, including the notice requirement, falls primarily on the Opinion Recipient as the purchaser, not on Company, it is inappropriate for the Opinion Giver, who represents Company, to give an opinion on the Opinion Recipient's compliance with Article 6.[261]

(2) Fraudulent Conveyance Law. Interpretive Standard 2 affirms that no opinion is given about fraudulent conveyance law.

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will govern that portion of the transfer. As a result, an opinion would represent an opinion as to the law of a foreign jurisdiction. See Section IV.

260 Compliance with Article 6 requires that Company prepare a list of all creditors of Company, showing the names, business addresses and the amount owed, if known. Creditors include all persons asserting claims against Company, even if Company disputes the claim. O.C.G.A. § 11-6-104. Both parties must also prepare a list of the Personal Property being transferred sufficient to identify it, and the Opinion Recipient must retain both the list of creditors and the list of assets and make them available to Company's creditors for up to six months following the transfer. Id. Finally, the Opinion Recipient must notify the creditors shown on the list and any other person known by the Opinion Recipient to hold a claim against Company at least ten days before the Opinion Recipient either pays for the Personal Property or takes possession of the Personal Property, whichever first occurs. O.C.G.A. § 11-6-105.

Substantial uncertainty exists as to several matters relative to the compliance with these requirements. Among these uncertainties is when the notice to creditors must be given. If the Opinion Recipient has paid any earnest money to Company in connection with the Transaction, it is unclear whether payment of such earnest money constitutes payment for the Personal Property. If the earnest money does constitute payment for the Personal Property, notice sent after that payment is ineffective. Brines at 61. Another uncertainty concerns what rights are accorded a person who becomes a creditor of the transferor after the list of creditors is prepared but before the notice is sent out. Brines at 57. Also, the definition of the creditors to whom notice must be sent is extremely broad and includes persons holding contingent or disputed claims. O.C.G.A. §11-6-109; O.C.G.A. §11-1-201(12); Brines at 54. As a result, ensuring that all appropriate creditors have been notified becomes extremely difficult for the Opinion Giver.

261 The only burden placed solely on Company is the preparation of the list of creditors. While counsel for the Opinion Recipient may request an opinion as to the sufficiency of the list, the Opinion Giver has no factual basis on which to render such an opinion, and such an opinion is in any event unnecessary since the transfer is not rendered ineffective by errors or omissions in the list unless the Opinion Recipient is shown to have had actual knowledge of the error or omission. O.C.G.A. § 11-6-104(3); O.C.G.A. § 11-1-201(25)("knowledge" means actual knowledge).

13.03 Practice Procedure Regarding the Model Personal Property Transfer Opinion. In giving a Model Personal Property Transfer Opinion, the Committee believes the Opinion Giver should, since the Model Personal Property Transfer Opinion includes the Enforceability Component, undertake the same due diligence required for any Remedies Opinion. The Opinion Giver may need to undertake additional due diligence in connection with the Sufficiency Component of the Model Personal Property Transfer Opinion. Before giving the Sufficiency Component of the Model Personal Property Transfer Opinion, the Opinion Giver must be knowledgeable as to the types of Personal Property being transferred and whether those types of Personal Property have special procedures which must be followed in order to transfer them. For example, transfer of motor vehicles requires the issuance of new certificates of title; transfer of an airplane requires filing with the Federal Aviation Administration; and transfer of certain intellectual property rights may require filing with the United States Patent and Trademark Office or the Registrar of Copyrights.[262] Only after determining the nature of the Personal Property being transferred and the steps which must be taken in order to transfer the Personal Property can the Opinion Giver examine the form of the Documents to determine whether those Documents are sufficient to fulfill the requirements for transferring such Personal Property. If the Personal Property includes contracts, Company and the Opinion Recipient may be required under the terms of such contracts to obtain the consent to such assignment of the third parties to the contracts. If the appropriate consents are not obtained, the transfer may, depending on the terms of the contract, be invalid. Therefore, prior to rendering any Model Personal Property Transfer Opinion, the Opinion Giver may wish to review the characteristics of the Personal Property carefully for any special qualifications, documentation or requirements.

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262 See, e.g., O.C.G.A. § 40-3-32 (regarding motor vehicle certificates of title); 49 U.S.C.A. §1403(c) (airplanes); 35 U.S.C.A. § 261 (patents); 15 U.S.C.A. § 1057 (trademarks); and 17 U.S.C.A. § 204 (copyrights).

XIV.THE MODEL FOREIGN QUALIFICATION CONFIRMATION

Company is qualified to transact business as a foreign corporation in the states of _____ and _____. The foregoing statement is based solely upon certificates provided by agencies of those states, copies of which Company has delivered to you at the closing of the Transaction, and is limited to the meaning ascribed to such certificates by each applicable state agency.

COMMENT

14.01 Purpose and Background of the Model Foreign Qualification Confirmation. If a corporation fails to register or qualify to do business in a foreign jurisdiction[263], the corporation may be prohibited from bringing suit in the courts of that jurisdiction.[264] In addition, the corporation may be subject to fines, and its directors, officers, employees and agents may be exposed to personal liability, as well as fines or criminal charges. Accordingly, the Opinion Recipient will often seek to confirm that Company is qualified to transact business in all jurisdictions in which such qualification is required. Rather than hiring local counsel in numerous jurisdictions, the Opinion Recipient may often seek to have such an opinion included with the Model Corporate Status Opinion discussed in Section V.

Notwithstanding the convenience of having the Opinion Giver provide an opinion of such universal foreign qualification, the Committee has concluded that it is normally inappropriate for the Opinion Recipient to request this opinion.[265] Lawyers face several difficulties in providing an opinion as to the qualification requirements of states in which they do not practice. First, events that will trigger qualification requirements vary considerably among the states, and such requirements have often developed from court decisions rather than statutes. State statutes often contain non-exclusive lists of activities that will not constitute "transacting business,"[266] but these statutes do not include a comprehensive definition of that term. Factors that are often considered include (a) whether the corporation is doing intrastate or interstate business in the foreign jurisdiction, (b) whether the corporation owns property in the foreign jurisdiction and the purpose for which any property is held, and (c) whether the corporation has had only isolated transactions or a series of ongoing

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263 Various states require the filing of differing forms of notices and applications or the receipt of certificates of authority for a foreign corporation to be qualified to "transact business" or "do business" or to be "in good standing." All such procedures and requirements are referred to in this Report as "foreign qualification."

264 While most states allow the corporation to bring suit after a curative qualification filing, a few states, including Alabama, would bar any suit with respect to events occurring while the corporation is in violation of the foreign qualification statute.

265 See Field at 6-5 (that the terms "qualified to do business" and "good standing" have no accepted meaning apart from the state certificates issued to evidence such status; that lawyers' opinions on these questions are usually based solely upon obtaining the appropriate state certificate; and that the opinion means no more than that the state agency involved has not determined that the corporation is so delinquent that it will refuse to issue the certificate in question).

266 See, e.g., Section 15.01 of the Revised Model Business Corporation Act.

transactions in the jurisdiction. Many state statutes do not provide any definition of the phrase "transacting business." Foreign qualification procedures also vary according to the type of contact with the state.

In the ordinary case, the Opinion Recipient should make its own judgment as to (a) those states where qualification may be important (based on the representations of Company in the Documents and its own "due diligence") and (b) the authorities in those states that should provide certificates regarding the standing of Company.[267] The Company would then obtain the required certificates from the designated state officials and deliver them to the Opinion Recipient at the closing of the Transaction. The Opinion Giver generally does not need to be involved in obtaining or interpreting such certificates. The Committee recognizes, however, that there may be situations in which the Opinion Giver agrees to review foreign qualification certificates. In these situations the Model Foreign Qualification Confirmation is appropriate.

14.02 Elements of the Model Foreign Qualification Confirmation. The Model Foreign Qualification Confirmation is intended to serve as a means through which the Company will deliver foreign qualification certificates to the Opinion Recipient and the Opinion Giver will review the certificates to confirm that the certificates, on their face, indicate that Company is properly qualified to transact business. In responding in this form, the Opinion Giver is not providing any confirmation that certificates have been obtained from all jurisdictions in which Company is required to be qualified. The Opinion Giver is also not passing on the question of whether the certificates delivered by Company have been obtained from the appropriate state authorities.

14.03 Additional Notes Regarding the Model Foreign Qualification Confirmation. In order to place the Model Foreign Qualification Confirmation into context, it is helpful to consider four other formulations related to qualification to do business in foreign states. The Committee has considered each of these alternative approaches but determined that the approach taken in this Section XIV is generally more appropriate.

(A) Company is qualified to transact business as a foreign corporation in each jurisdiction in which such qualification is required.

This alternative represents the broadest formulation of the foreign qualification opinion. In order to render this opinion, the Opinion Giver would need to have a complete knowledge of the business and properties of Company as well as the qualification requirements of each jurisdiction with which there is even the slightest contact. Because the opinion is concerned entirely with factual matters and the laws of foreign jurisdictions in which the Opinion Giver may not be admitted to

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267 A difficult aspect of the Model Foreign Qualification Confirmation is the question of which participant in the Transaction should determine the state authorities from whom certificates should be obtained. Without a knowledge of foreign law, the Opinion Giver is not in a position to determine the identity of the appropriate state authorities. Accordingly, the Committee has determined that the Opinion Recipient should determine the state authorities from whom certificates will be obtained.

practice law, commentators consider this formulation to be inappropriate.[268] The Committee concurs in this conclusion.

> *(B) The Company is qualified to transact business as a foreign corporation in each jurisdiction in which such qualification is required and in which the failure to so qualify would have a material adverse affect on the business or properties of the Company.*

This second alternative follows the approach of the first alternative, but is considered a narrower opinion in that the Opinion Giver enjoys the presumed benefit of a "materiality" limitation. In order to determine the jurisdictions in which a failure to qualify could have a material adverse affect on the Company, however, the Opinion Giver must have knowledge of the business and properties of Company and of those foreign statutes that would impose stringent sanctions and then assess the likely impact of those sanctions on Company. Such an assessment would be difficult and would involve factual rather than legal analysis.

> *(C) Company is qualified to transact business as a foreign corporation in each jurisdiction in which it conducts material business or owns material properties.*

The difficulty of this commonly used formulation is that it would typically be based on facts set forth in a certificate of Company officials identifying those states in which Company conducts material business or owns material properties. The Committee has concluded that it is difficult to formulate an appropriate frame of reference that Company officials may employ in assessing "materiality" for these purposes. It is more appropriate for the Opinion Recipient to identify those jurisdictions which it considers to be "material," based upon the Company's representations and warranties and its own "due diligence" activities. The Company may then obtain foreign qualification certificates and the Opinion Giver would give the Model Foreign Qualification Confirmation.

> *(D) Company is qualified to transact business as a foreign corporation in each jurisdiction in which it conducted business producing revenues in excess of $_____ for its most recent fiscal year or in which it owned properties having a value in excess of $_____ as of the end of its most recent fiscal year.*

This alternative attempts to remedy the problem of defining "materiality" by stating dollar amounts that will define the scope of the Opinion Giver's inquiry. The Opinion Giver would rely on a certificate of Company officials to identify those jurisdictions in which the minimum dollar amounts are met, and then obtain appropriate certificates from officials in those jurisdictions. The Committee has concluded that this approach is inappropriate in most instances, in that (i) the Opinion Giver seems to be lending authority to a dollar test that may or may not be relevant, (ii) the Opinion Giver may be viewed as representing to the Opinion Recipient or confirming the Company's representations regarding the amount of business conducted in various jurisdictions and (iii) without knowledge of foreign laws, there is no appropriate basis for the parties to negotiate the amounts that will be inserted in the blanks.

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[268] See, e.g., Field at 6-5 and 6-6.

14.04. Practice Procedure. In employing the approach suggested by the Model Foreign Qualification Confirmation, the Committee has concluded that the Opinion Giver should review the certificates that have been procured to determine that they do not, on their face, indicate any failure of Company to be properly qualified in the foreign jurisdiction. The Opinion Giver need not examine the law of the subject jurisdiction or otherwise convey to the Opinion Recipient the meaning of the certificates.

XV.THE MODEL LITIGATION CONFIRMATION

To our knowledge, except as set forth on Exhibit __ to the Agreement, no litigation or other proceeding against Company or any of its properties is pending or overtly threatened by a written communication to Company.

COMMENT

15.01 Purpose and Background of the Model Litigation Confirmation. The Litigation Confirmation is not a legal opinion, but is a statement of fact as to whether actions are pending or threatened and involves little or no legal analysis.[269] For this reason, this Report refers to the "Litigation Confirmation" rather than the "Litigation Opinion," and the Committee recommends that the Opinion Giver put this and other confirmations in a separate paragraph of the opinion letter set forth apart from the opinions with the introductory language: "Based upon and subject to the foregoing and to the matters stated below, we confirm to you that...."[270]

Opinion Givers commonly give this confirmation, despite the general rule that attorneys should not opine as to matters of fact.[271] Opinion Recipients seek assurance that they are not buying lawsuits and ask for the confirmation, in addition to representations in the Agreement, because of an assumption that the Opinion Giver representing Company in a business transaction has a special awareness of pending or threatened actions, a special ability to verify their existence or nonexistence through client records, or a special ability to ask the right questions of the appropriate people to determine that the certificate provided by the officers of Company includes and appropriately describes all pending actions.[272] This assumption is not necessarily true, of course, particularly for counsel employed only for purposes of the Transaction or in the case of a large Company that uses a number of different law firms to handle its litigation.[273] Accordingly, Opinion Givers often advise Opinion Recipients whether the Opinion Giver has been employed by Company only for a limited purpose or purposes.

15.02 Elements of the Model Litigation Confirmation.

A. Knowledge Limitation. The Model Litigation Confirmation includes a knowledge limitation because it is primarily factual.[274] See discussion of knowledge and its relationship to the scope of due diligence at Section 2.07 and Section III.

B. Materiality and the Litigation Exhibit. The Model Litigation Confirmation refers to an exhibit listing pending and threatened litigation and proceedings. The referenced exhibit is usually an exhibit to the Agreement; but, in the event of different approaches to disclosure, a

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269 FitzGibbon X at 438; Field II at 22; California I at 1057.

270 FitzGibbon X at 442.

271 California IV at 12; FitzGibbon X at 442; California I at 1057-58; Field at § 6.02[2][a].

272 Field II at 23; California IV at 12; FitzGibbon X at 437; Field at § 6.02[2][a]; California I at 1057-58.

273 FitzGibbon X at 438.

274 Babb at 561; Field at § 6.02[2].

separate exhibit to the opinion may be appropriate. The Committee recommends, whenever feasible, that the Opinion Giver list all known litigation and proceedings on this exhibit in order to avoid the issue of materiality.

In some cases it is impractical for the exhibit of litigation and proceedings to include all known litigation and proceedings, and some limitation on the basis of materiality is essential. If the Opinion Giver excludes actions on the basis of materiality, the Committee recommends that the Opinion Giver and the Opinion Recipient agree on and explicitly establish in the confirmation a specific standard of materiality.[275] The Opinion Giver can then express this standard by an addition to the model language such as the following:

> *"With your permission we have assumed that all litigation and proceedings seeking only monetary damages of less than $_____ are immaterial."*

Alternatively, the confirmation may incorporate the materiality standard used in the Agreement by expanding the exception phrase in the model language above to read as follows:

> *"except as set forth on Exhibit ____ to the Agreement or as exempted from disclosure pursuant to Section ___ of the Agreement ...."*

The Committee believes that inclusion of an undefined materiality standard in the language of the Model Litigation Confirmation is inappropriate. See also Sections 6.04F and 8.02D. Unless the confirmation defines materiality, the Opinion Giver must evaluate the probable outcome of litigation, the range of loss possible and what level of loss would have a material effect on Company. This raises problems similar to those incurred in responding to audit letters and is contrary to the intent of the ABA Policy Statement to limit an attorney's evaluation of litigation. Although at least one commentator has suggested that inclusion of a materiality standard when the Opinion Giver is listing all known litigation on the litigation exhibit may provide protection against minor litigation inadvertently overlooked,[276] the Committee believes that such a limitation is unnecessary in light of the definition of knowledge set forth in this Report and may be misleading because it may suggest that the Opinion Giver is evaluating the materiality of the litigation when this is not the case.

C. Litigation or Other Proceedings. The Committee believes that the phrase "litigation or other proceedings" includes mediation, arbitration and other alternative dispute resolution proceedings as well as any adversarial or sanction-oriented proceedings before governmental agencies and self-regulatory organizations.[277] Language such as "before any court, governmental agency, self-regulatory organization or arbitrator, at law or in equity" is therefore unnecessary. The Model Litigation Confirmation should not include broader language such as "investigations,"

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275 Howard at N-10 n.31; Field at § 6.02[2][b]; Lochner at 117; but cf. Babb at 561 (apply definition of materiality counsel reasonably establishes in light of the transaction at hand).

276 FitzGibbon X at 449.

277 Maryland at 42; FitzGibbon X at 443-44.

"inquiries" or "claims" because of the difficulty of determining what constitutes an investigation, inquiry or claim.[278]

The Committee also believes that reference to litigation "affecting" or "in respect of" Company or its properties is inappropriate because it is virtually impossible to identify all litigation that might affect Company or its properties through its precedential effect or otherwise. If the Opinion Recipient is concerned about specific litigation against another party, such as a guarantor, parent, customer, or supplier, the Model Litigation Confirmation could specifically address that type of litigation.[279]

D. Pending. The Committee has determined that "pending" litigation includes only litigation in which the claimant has taken some formal step to commence the action, such as the filing of a complaint.[280]

E. Threatened. The Committee has determined that "threatened" litigation includes only action overtly threatened in writing by a potential claimant,[281] and only those threats meeting the standard established by the ABA Policy Statement.[282] According to the ABA Policy Statement, threatened litigation means "that a potential claimant has manifested to the client an awareness of and present intention to assert a possible claim or assessment unless the likelihood of litigation (or of settlement when litigation would normally be avoided) is considered remote."[283] Only threats made in writing to Company are threatened within the meaning of the opinion.[284]

F. Evaluation of Litigation. The Committee believes that it is inappropriate to ask the Opinion Giver to evaluate the possible outcome of litigation as part of the standard corporate opinion letter.[285] If, under unique circumstances, the Opinion Recipient must have an evaluation of litigation, the Opinion Giver should address this issue in the manner and within the limitations set by the ABA Policy Statement.[286]

15.03 Additional Notes Regarding the Model Litigation Confirmation. A Georgia lawyer may give the Model Litigation Confirmation even if litigation and proceedings are pending or threatened in states other than Georgia because the Model Litigation Confirmation is primarily a statement of fact as to whether suits are pending, rather than a legal opinion. Language normally used in the introduction to the opinion limiting the opinion to laws of particular jurisdictions does

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278 Garrett at 25; Lochner at 113-14.

279 Maryland at 42; Lochner at 115.

280 FitzGibbon X at 444.

281 Babb at 561; Field at § 6.02[2]; Garrett at 28; FitzGibbon X at 445.

282 ABA Policy Statement.

283 ABA Policy Statement at 1712-15, 1719-24; Garrett at 28; FitzGibbon X at 444-45; Maryland at 42.

284 Garrett at 28; FitzGibbon X at 445.

285 Garrett at 26; Lochner at 117 (if audit opinions are available to the other party in a transaction, there should be no need for a lawyer to opine on such matters).

286 Garrett at 26.

not limit the scope of this confirmation, because the language excludes the laws of other states, not facts, whether or not occurring in other states.[287]

15.04 Practice Procedures Regarding the Model Litigation Confirmation. The Committee recommends that the Opinion Giver complete the following due diligence procedures prior to giving the Model Litigation Confirmation:

A. Obtain from one or more appropriate and knowledgeable officers of Company and review a list and description of all actions pending or threatened (orally or in writing) against Company or its properties.[288] Officers' certificate should state: "The following **[**or "Exhibit ___ to the Agreement"**]** is a complete and accurate list of all litigation and other proceedings (including, without limitation, mediation, arbitration, other alternative dispute resolution proceedings, and any adversarial or sanction-oriented proceedings before governmental agencies and self-regulatory organizations) pending or, to our knowledge, threatened against Company or its properties." Amend this language appropriately if the referenced exhibit will list only litigation or proceedings meeting an established standard of materiality.

B. If the Opinion Giver represents Company in matters of litigation, check with the lawyers who are in charge of litigation for Company to determine whether they are aware of any litigation or proceeding not shown on the officers' certificate.[289] If the attorney in charge of litigation for Company does not have an overview of all litigation the Opinion Giver is handling for Company, the Opinion Giver should check with other lawyers in the Primary Lawyer Group.[290]

The Committee believes that the two steps set forth above are sufficient to support the Model Litigation Confirmation. The second step requires the Opinion Giver to go beyond reliance on the officers' certificate. Relying solely on the officers' certificate is inappropriate for the Model Litigation Confirmation if there has been a historical relationship between Company and the lawyers of the Opinion Giver who have handled its litigation. The purpose of the Opinion Recipient in requesting the Model Litigation Confirmation is to elicit some investigation of factual matters by the Opinion Giver.[291] The confirmation would lose much of its significance if only the knowledge of the lawyers working on the transaction (who may have little knowledge of litigation the Opinion Giver is handling) is imputed to the Opinion Giver.[292] See Section III. More extensive investigation than the two steps set forth above, however, is normally not expected by the Opinion Recipient, is not in accordance with current practice in most law firms, and would be both impractical (under the time pressures of most transactions) and expensive.[293] If an Opinion Recipient desires more extensive investigation, the Opinion Recipient should request the extra investigation at an early stage of the transaction, the parties should specifically negotiate the cost

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287 Field at § 3.05[5]; FitzGibbon X at 452 n.10.

288 Babb at 561-62; Cohen at 9; Green at 24; Field at § 6.02[2][a]; California I at 1058; California IV at 85; Field II at 19.

289 Maryland at 42; Field II at 19; Jacobs at 11-5.

290 Jacobs at 11-5; Maryland at 42; FitzGibbon X at 446.

291 Glazer at 492.

292 Glazer at 492.

293 Glazer at 491.

of the additional investigation, and the confirmation should specifically set forth the extent of the additional investigation. As indicated below, checking the opining firm's litigation docket or billing records is not required. If these records are computerized, however, and in a form that makes identification of pending litigation against Company readily identifiable, the Opinion Giver may wish to check these records as a matter of prudence.

In the absence of explicit agreement to the contrary, the Committee believes the Opinion Giver is not required to take any of the following steps in order to support the Model Litigation Confirmation:

1. Examine court records to determine whether litigation is pending.[294]

2. Poll attorneys or other employees of the firm, except the Primary Lawyer Group as set forth in step B above.[295]

3. Review firm files.[296]

4. Review firm billing or time records.

5. Review Company files in which Company would normally record pending or threatened litigation, such as Company's representation letters to auditors, responses of inside and outside counsel to auditors, correspondence between Company and its insurers or customer complaint files.[297]

6. Contact other firms that have handled litigation for Company.

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294 Babb at 562; Green at 24; Cohen at 9; California IV at 85; FitzGibbon X at 446-47.

295 Jacobs at 11-7; Field II at 19; but cf. California IV at 86; Jacobs at 11-7; Babb at 561.

296 Field II at 19; FitzGibbon X at 446.

297 Green at 24; Cohen at 9.

INTERPRETIVE STANDARDS

APPLICABLE TO CERTAIN LEGAL OPINIONS
TO THIRD PARTIES IN CORPORATE TRANSACTIONS

Effective January 1, 1992

Purpose and Scope of Interpretive Standards

The purpose of these Interpretive Standards is to explain the meaning of Opinion Letters (which incorporate these Interpretive Standards by reference) addressed to non-client third parties in connection with corporate acquisition or financing transactions. Included in these Interpretive Standards are general qualifications to legal opinions, common assumptions as to fact and law, standards governing an opinion that an agreement is "enforceable" and interpretations of certain recurring legal opinions and confirmations of fact. Incorporation in an Opinion Letter of these Interpretive Standards is intended to shorten the content of the letter while expanding the mutual understanding of its meaning. Any part of these Interpretive Standards, however, may be overridden by a specific statement in an Opinion Letter which supersedes a contrary Interpretive Standard.

Definitions of Terms Used in Interpretive Standards

The following capitalized terms have the following meanings when used in these Interpretive Standards:

Agreement means the primary legal document which evidences the Transaction.

Assets means all of the tangible and intangible real and personal property of Company.

Company means the entity which is the client of Opinion Giver and on whose behalf the Opinion Letter is given.

Documents means the Agreement, together with any other document identified in the Opinion Letter, which contains one or more obligations of Company related to the Transaction.

GBCC means the Georgia Business Corporation Code in effect on the date of the Opinion Letter.

Law(s), whether or not a capitalized term, means the constitution, statutes, judicial and administrative decisions, and rules and regulations of governmental agencies of the Opining Jurisdiction and, unless otherwise specified, federal law.

Local Law means the statutes, administrative decisions, and rules and regulations of any county, municipality or subdivision, whether created at the federal, state or regional level.
Opining Jurisdiction means a jurisdiction, the law of which Opinion Giver addresses.

Opinion means a legal opinion contained in an Opinion Letter.

Opinion Giver means the law firm or lawyer giving an Opinion.

Opinion Letter means the letter containing one or more Opinions or confirmations of fact by Opinion Giver.

Opinion Recipient means the person or persons to whom the Opinion Letter is addressed.

Other Agreements mean documents (other than the Documents) to which Company is a party or by which Company is bound.

Other Counsel means counsel (other than Opinion Giver) providing a legal opinion or confirmation of fact on aspects of the Transaction directed to Opinion Recipient or Opinion Giver or both.

Other Jurisdiction means any jurisdiction (other than the Opining Jurisdiction) the law of which is stipulated to be the governing law.

Personal Property means all of the tangible and intangible personal property of Company.

Primary Lawyer Group has the meaning discussed in Interpretive Standard 7.

Public Authority Documents means certificates issued by a governmental office or agency, such as the Secretary of State, or by a private organization having access to and regularly reporting on government files and records, as to a person's property or status.

Remedies Opinion means an Opinion dealing with the enforceability against Company of one or more Documents.

Transaction means the transaction with respect to which the Opinion Letter is given.

Qualifications To Each Opinion

1. Law Addressed by Opinion.

If an Opinion Letter is expressly limited to the Law of one or more specified jurisdictions or to one or more discrete laws within one or more jurisdictions, an Opinion with respect to any other law, or the effect of any other law, is disclaimed.

2. Scope of Opinion.

An Opinion covers only those matters both essential to the conclusion stated by the Opinion and, based upon prevailing norms and expectations found among experienced legal practitioners in the Opining Jurisdiction, reasonable in the circumstances. Other matters are not included in an Opinion by implication. The following matters, including their effects and the effects of

noncompliance, are not covered by implication or otherwise in any Opinion, unless coverage is specifically addressed in the Opinion Letter as provided by Interpretive Standard 11:

(1) Local Law
(2) Law relating to permissible rates, computation or disclosure of interest, e.g., usury
(3) Antitrust and unfair competition law
(4) Securities law
(5) Fiduciary obligations
(6) Pension and employee benefit law, e.g., ERISA
(7) Regulations G, T, U and X of the Board of Governors of the Federal Reserve System
(8) Fraudulent transfer law
(9) Environmental law
(10) Land use and subdivision law
(11) Except with respect to a No Consent Opinion (Interpretive Standard 28), Hart-Scott-Rodino, Exon-Florio and other laws related to filing requirements, other than charter-related filing requirements, such as requirements for filing articles of merger
(12) Except with respect to a No Violation Opinion (Interpretive Standard 27), law concerning creation, attachment, perfection or priority of a security interest in any Assets
(13) Bulk transfer law
(14) Tax law
(15) Patent, copyright, trademark and other intellectual property law
(16) Racketeering law, e.g., RICO
(17) Criminal statutes of general application, e.g., mail fraud and wire fraud
(18) Health and safety law, e.g., OSHA
(19) Labor law
(20) Law concerning national or local emergency

3. Unwarranted Reliance.

Opinion Giver may not rely for purposes of the Opinion Letter upon information, whether or not in a Public Authority Document, or (except in the case of arbitrary or hypothetical assumptions contained in an overriding agreement referred to in Interpretive Standard 11 or as stated in Interpretive Standard 22 with respect to choice of law) upon an assumption otherwise appropriate, if Opinion Giver has knowledge that such information or assumption is false, or recognizes factors that compel the conclusion that reliance upon such information or assumption would be unreasonable. "Knowledge" or "recognizes" for purposes of the foregoing sentence and wherever used in these Interpretive Standards means the current awareness of information by any lawyer in the Primary Lawyer Group.

4. Reliance on Other Sources of Information.

Subject to Interpretive Standard 3, Opinion Giver may rely, without investigation, upon facts established by a Public Authority Document, facts provided by an agent of Company or others

and, if disclosed in the Opinion Letter, facts asserted by a party to the Transaction in a representation or warranty embodied in the Documents, provided:

(1) if not established by a Public Authority Document, the facts do not constitute a statement, directly or in practical effect, of the legal conclusion in question;

(2) the person providing facts is, in Opinion Giver's professional judgment, an appropriate source; and

(3) if the facts are set forth in a certificate, Opinion Giver has used reasonable professional judgment as to its form and content.

5. Scope of Opinion Giver's Inquiry.

Opinion Giver is presumed to have reviewed such documents and given consideration to such matters of law and fact as Opinion Giver deemed appropriate in order to give an Opinion or confirmation of fact, unless Opinion Giver has expressly limited the scope of inquiry in the Opinion Letter. A recital of specific documents reviewed or specific procedures followed, without more, is not a limitation on the scope of Opinion Giver's inquiry for purposes of the foregoing presumption.

6. Opinion or Confirmation Qualified by Knowledge of Opinion Giver.

Whenever an Opinion Letter qualifies an Opinion or confirmation of fact by the words "to our knowledge," known to us" or words of similar meaning, the quoted words mean the current awareness by lawyers in the Primary Lawyer Group of information such lawyers recognize as relevant to the Opinion or confirmation so qualified. The quoted words do not include within what is "known" information not within such current awareness that might be revealed if a canvass of lawyers outside the Primary Lawyer Group were made, if the Opinion Giver's files were searched or if any other investigation were made.

7. "Primary Lawyer Group."

"Primary Lawyer Group" means that lawyer in Opinion Giver's organization who signs the Opinion Letter and, solely as to information relevant to an Opinion or confirmation issue, any lawyer in Opinion Giver's organization who is primarily responsible for providing the response concerning the particular issue.

8. Who May Rely On Opinion.

Opinion Recipient and designated principals of Opinion Recipient, if Opinion Recipient is identified in the Opinion Letter as an agent for designated principals, are the only persons entitled to rely upon any Opinion or confirmation of fact contained in the Opinion Letter, and then only for purposes of the Transaction.

9. Other Counsel.

Opinion Giver's responsibility for the opinion of Other Counsel depends upon what is stated in the Opinion Letter. A statement that Opinion Giver has relied on an opinion of Other Counsel means only that Opinion Giver believes that (i) based upon Other Counsel's professional reputation, it is competent to render such opinion, and (ii) such opinion on its face appears to address the matters upon which Opinion Giver places reliance. A statement that Opinion Giver believes that Opinion Recipient is justified in relying on an opinion of Other Counsel means only that Opinion Giver believes that, based upon Other Counsel's professional reputation, it is competent to render such opinion. A statement that Opinion Giver concurs in an opinion of Other Counsel means that Opinion Giver has assumed the responsibility for verifying the accuracy of the opinion of Other Counsel. If no concurrence by Opinion Giver is expressed, no concurrence is implied. If Opinion Giver merely identifies or remains silent with respect to the opinion of Other Counsel, Opinion Giver assumes no responsibility for Other Counsel's opinion, and Opinion Recipient may not assume that Opinion Giver has relied upon Other Counsel's opinion.

10. Updating.

An Opinion Letter speaks as of the date of its delivery, and Opinion Giver has no obligation to advise Opinion Recipient or anyone else of any matter of fact or law thereafter occurring, whether or not brought to the attention of Opinion Giver, even though that matter affects any analysis or conclusion in the Opinion Letter.

11. Overriding Agreement.

Opinion Giver and Opinion Recipient may agree upon arbitrary or hypothetical assumptions that may not be true and upon qualifications, standards or interpretations inconsistent with these Interpretive Standards. Any such agreement with respect to such assumptions, qualifications, standards or interpretations, when described with reasonable particularity in the Opinion Letter, will supersede any contrary provision of these Interpretive Standards.

Assumptions

12. Assumptions As To Parties Other Than Company.

Opinion Recipient in the Transaction has acted in good faith and without notice of any defense against enforcement of rights created by, or adverse claim to any property transferred as part of, the Transaction. Each party to the Transaction other than Company has complied with all laws applicable to it that affect the Transaction.

13. Assumptions As To Natural Persons and Documents.

Each natural person acting on behalf of any party to the Transaction has sufficient legal competency to carry out such person's role in the Transaction. Each document submitted to Opinion Giver for review is accurate and complete, each document purporting to be original is authentic, each document purporting to be a copy conforms to an authentic original, and each signature on a document is genuine.

14. Assumptions As To Transaction.

The Transaction complies with any test required by law of good faith or fairness. Each party will act in accordance with the terms and conditions of the Documents.

15. Assumption As To Accessibility of Laws.

Each Law for which Opinion Giver is deemed to be responsible is published, accessible and generally available to lawyers practicing in the Opining Jurisdiction.

16. Assumptions As To Company.

No discretionary act of Company or on its behalf will be taken after the date of the Transaction if such act might result in a violation of law or breach or default under any agreement, decree, writ, judgment or court order. Company will obtain all permits and governmental approvals and take all other actions which are both (i) relevant to performance of the Documents or consummation of the Transaction, and (ii) required in the future under applicable law. Company holds requisite title and rights to its Assets.

17. Assumptions As To Other Agreement.

Any Other Agreement will be enforced as written.

18. Assumption As To Understandings.

There is no understanding or agreement not embodied in a Document among parties to the Transaction that would modify any term of a Document or any right or obligation of a party.

19. Assumption As To Absence of Mistake or Fraud.

With respect to the Transaction and the Documents, there has been no mutual mistake of fact and there exists no fraud or duress.

20. Assumption As To Invalidity.

No issue of unconstitutionality or invalidity of a relevant Law exists unless a reported case has so held.

Remedies Opinion Standards

21. Meaning of Remedies Opinion.

A. General Meaning. The Remedies Opinion, with respect to any referenced Document, and subject to the limitations contained in these Interpretive Standards and in the Opinion Letter, means that:

(i) a contract has been formed under the law of contracts of the jurisdiction applicable under Interpretive Standard 22; and

(ii) under laws normally applicable to contracts like the Document, to parties like the Company and to transactions like the Transaction, each obligation imposed on Company by the Document, each agreement made by Company in the Document, and each right, benefit and remedy conferred by Company in the Document, will be given effect as stated in the Document.

B. Existence of Contract. The professional judgment reflected in subparagraph A(i) above requires the Opinion Giver to conclude that:

(i) All legal requirements under contract law for the formation of a contract of the type involved in the referenced Document effective against Company (other than requirements that would be covered by a Corporate Status Opinion, a Corporate Powers Opinion and a Corporate Acts Opinion discussed at Interpretive Standards 24, 25 and 26) are met, such as necessary formalities (including compliance with any applicable statute of frauds), consideration (where necessary), definiteness, and the inclusion of essential terms.

(ii) The Document does not violate a law as to formation of contracts that would prevent a court presented with the Document from enforcing it.

(iii) Company does not presently have available any contractual defense to the Document, such as the statute of limitations.

22. Choice of Law in Remedies Opinion.

If a Document covered by the Remedies Opinion contains no governing law provision, or contains a governing law provision which names the Opining Jurisdiction, the Remedies Opinion means that if Company is brought before a proper court of the Opining Jurisdiction to enforce rights under the Document, and if such court applies the substantive law of the Opining Jurisdiction, the result will be as stated in the Opinion and these Interpretive Standards.

If the Document contains a governing law provision which names a jurisdiction other than the Opining Jurisdiction, the Remedies Opinion does not opine whether any court of any jurisdiction will give effect to the governing law provision in the Agreement, but assumes that if Company is brought before a proper court of the Opining Jurisdiction to enforce rights under the Document, such court will apply the substantive law of the Opining Jurisdiction, notwithstanding the governing law provision in the Document, and based upon such assumption the result will be as stated in the Opinion and these Interpretive Standards.

The Remedies Opinion does not extend to the content or effect of any law other than the law of the Opining Jurisdiction and federal law.

23. Exceptions To The Remedies Opinion.

Any Remedies Opinion contained in an Opinion Letter which incorporates these Interpretive Standards by reference will be deemed not to address the matters excluded in Interpretive Standard 2 and subject to the following exceptions:

(i) The effect of bankruptcy, insolvency, reorganization, moratorium and other similar laws affecting the rights and remedies of creditors. This includes the effect of the Federal Bankruptcy Code in its entirety, including matters of contract rejection, fraudulent conveyance and obligation, turn-over, preference, equitable subordination, automatic stay, conversion of a non-recourse obligation into a recourse obligation, and substantive consolidation. This also includes state laws regarding fraudulent transfers, obligations, and conveyances, including O.C.G.A. § 18-2-20, et seq., and state receivership laws.

(ii) The effect of general principles of equity, whether applied by a court of law or equity. This includes the following concepts: (a) principles governing the availability of specific performance, injunctive relief or other traditional equitable remedies; (b) principles affording traditional equitable defenses (e.g., waiver, laches and estoppel); (c) good faith and fair dealing; (d) reasonableness; (e) materiality of the breach; (f) impracticability or impossibility of performance; (g) the effect of obstruction, failure to perform or otherwise to act in accordance with an agreement by any person other than Company; (h) the effect of Section 1-102(3) of the Uniform Commercial Code; and (i) unconscionability.

(iii) The effect and possible unenforceability of contractual provisions providing for choice of governing law.

(iv) The possible unenforceability of provisions purporting to waive certain rights of guarantors.

(v) The possible unenforceability of provisions requiring indemnification for, or providing exculpation, release or exemption from liability for, action or inaction, to the extent such action or inaction involves negligence or willful misconduct or to the extent otherwise contrary to public policy.

(vi) The possible unenforceability of provisions purporting to require arbitration of disputes.

(vii) The possible unenforceability of provisions prohibiting competition, the solicitation or acceptance of customers, of business relationships or of employees, the use or disclosure of information, or other activities in restraint of trade.

(viii) The possible unenforceability of provisions imposing increased interest rates or late payment charges upon delinquency in payment or default or providing for liquidated damages, or for premiums on prepayment, acceleration,

redemption, cancellation, or termination, to the extent any such provisions are deemed to be penalties or forfeitures.

(ix) The possible unenforceability of waivers or advance consents that have the effect of waiving statutes of limitation, marshalling of assets or similar requirements, or as to the jurisdiction of courts, the venue of actions, the right to jury trial or, in certain cases, notice.

(x) The possible unenforceability of provisions that waivers or consents by a party may not be given effect unless in writing or in compliance with particular requirements or that a person's course of dealing, course of performance, or the like or failure or delay in taking actions may not constitute a waiver of related rights or provisions or that one or more waivers may not under certain circumstances constitute a waiver of other matters of the same kind.

(xi) The effect of course of dealing, course of performance, or the like, that would modify the terms of an agreement or the respective rights or obligations of the parties under an agreement.

(xii) The possible unenforceability of provisions that enumerated remedies are not exclusive or that a party has the right to pursue multiple remedies without regard to other remedies elected or that all remedies are cumulative.

(xiii) The effect of O.C.G.A. § 13-1-11 on provisions relating to attorneys fees.

(xiv) The possible unenforceability of provisions that determinations by a party or a party's designee are conclusive.

(xv) The possible unenforceability of provisions permitting modifications of an agreement only in writing.

(xvi) The possible unenforceability of provisions that the provisions of an agreement are severable.

(xvii) The effect of laws requiring mitigation of damages.

(xviii) The possible unenforceability of provisions permitting the exercise, under certain circumstances, of rights without notice or without providing opportunity to cure failures to perform.

(xix) The effect of agreements as to rights of set off otherwise than in accordance with the applicable law.

Interpretations

24. Corporate Status Opinion.

An Opinion to the effect that Company was duly organized as a corporation and is existing in good standing under the laws of the State of Georgia (Corporate Status Opinion) is subject to the following understandings:

(1) "duly organized" means that Company (i) properly complied with the Georgia statutory requirements for incorporation, and (ii) thereafter properly complied with the Georgia statutory requirements for organization;

(2) "is existing" means that Company is a corporation which has not ceased to exist under the GBCC;

(3) the Opinion refers to the status of Company only for purposes of and under the GBCC; and

(4) "good standing" has no official meaning under the GBCC, and for purposes of any Opinion with respect to a corporation subject to the GBCC means:

(i) Company has filed no notice of intent to dissolve under Section 1403 of the GBCC;

(ii) the Secretary of State has signed no certificate of dissolution with respect to Company;

(iii) the Superior Court of the county of Company's registered office has entered no decree ordering Company dissolved; and

(iv) Company has satisfied its tax and annual registration requirements under Section 1420 of the GBCC.

An Opinion limited to the conclusion that the Company "is a corporation" means that third parties may not challenge Company's corporate existence, the State of Georgia recognizes such existence, and the state may challenge Company's incorporation only under the circumstances described in Section 203(b) of the GBCC.

25. Corporate Powers Opinion.

An Opinion to the effect that Company has the corporate power to execute and deliver a Document, to perform its obligations under a Document, to own and use its Assets and to conduct its business (Corporate Powers Opinion) is subject to the following understandings:

(1) the Opinion refers only to the GBCC and Company's articles of incorporation as sources of corporate power;

(2) "power" refers only to whether the acts referenced in the Opinion are ultra vires;

(3) the Opinion is built upon an assumption that the Corporate Status Opinion could also be given;

(4) "own and use" refers to every right Company has in the Assets;

(5) the Opinion refers to Assets owned and used and business conducted on the date of the Opinion, and not those contemplated for future ownership, use or conduct except to the extent the acquisition of the Assets or conduct of the business is concurrent with, and recognized by Opinion Giver as constituting part of, the consummation of the Transaction; and

(6) the Opinion does not affirm that Company is engaged in no unlawful business and in no business which Georgia law would not permit to be conducted by a corporation incorporated under the GBCC.

26. Corporate Acts Opinion.

An Opinion to the effect that Company has duly authorized the execution and delivery of, and performance by Company under, the Documents and has duly executed and delivered the Documents (Corporate Acts Opinion) is subject to the following understandings:

(1) the Opinion affirms compliance with all corporate action necessary under the GBCC, Company's articles of incorporation and bylaws and, if applicable, Company's duly adopted policies and practices for delegation of authority in order to authorize the execution and delivery of, and performance under, the Documents;

(2) the Opinion affirms that the execution and delivery of the Documents was, and Company's performance of its obligations under the Documents in accordance with the Documents as written will be, in accordance with the authorization;

(3) the Opinion is built upon an assumption that the Corporate Status Opinion and the Corporate Powers Opinion could also be given;

(4) the Opinion addresses no law other than the GBCC and applicable law of agency.

27. No Violation Opinion.

An Opinion to the effect that Company's execution and delivery of the Documents do not, and if Company were now to perform its obligations under the Documents such performance would not, result in (i) a violation of Company's articles of incorporation, bylaws or any law to which Company or its Assets are subject, or (ii) a breach of or default under described agreements, or (iii)

a creation or imposition of contractual liens or security interests arising out of described agreements, or (iv) a violation of any known judicial or administrative decree, writ, judgment or order to which Company or its Assets are subject (No Violation Opinion) is subject to the following understandings:

(1) a "violation" or "breach or default" means any act or omission that, by itself or upon notice or the passage of time or both, would constitute a violation, breach or default giving rise to a remedy under the document or law in question;

(2) the Opinion addresses only the relevant facts and law as they exist on the date of the Opinion Letter;

(3) "agreements" refers to agreements, indentures, documents and other instruments in writing, identified in the Opinion Letter;

(4) references to any law or to "decree, writ, judgment or order" or the like include only those (i) which either prohibit performance by Company under the Documents or subject Company to a fine, penalty or other similar sanction, and (ii) which a lawyer, using customary professional diligence, would reasonably recognize as applicable to Company and the Transaction;

(5) the Opinion addresses only whether the specific terms of the relevant Document violate law or cause a breach of or default under the specific terms of an obligation created by a described Other Agreement, taking into account information provided in accordance with Interpretive Standard 4 and other facts known to Opinion Giver;

(6) the Opinion does not address acts permitted or contemplated but not required, or inferred but not set forth, by the relevant Document, except to the extent such acts are concurrent with, and recognized by Opinion Giver as constituting part of, the consummation of the Transaction;

(7) to the extent the interpretation of words in described agreements requires resort to law, the law is that of the Opining Jurisdiction; and

(8) the Opinion does not address liens or security interests created by or in favor of Opinion Recipient, created under a Document or arising by operation of law.

28. No Consent Opinion.

An Opinion to the effect that no consent, approval, authorization or other action by, or filing with, any governmental authority is required for Company's execution and delivery of the Documents and consummation of the Transaction (No Consent Opinion) is subject to the understandings set forth in Interpretive Standards 2 and 27(2) and (4). "Required" means that there is no governmental consent, approval, authorization or filing, the absence of which would either prohibit performance by Company of its obligations under the Documents or subject Company to a fine, penalty or other similar sanction.

29. Capitalization Opinion.

An Opinion to the effect that described shares have been duly authorized and are, or upon issuance will be, validly issued, fully paid and nonassessable (Capitalization Opinion) is subject to the following understandings:

(1) the Opinion affirms compliance with all corporate action necessary to create and issue the shares under the Georgia corporate law in effect at the time of such creation and issuance ("Corporate Code") and Company's articles of incorporation and bylaws;

(2) "duly authorized" means Company had the corporate power to create the shares, the shares so created have the rights and attributes required by the Corporate Code, and the rights and attributes of the shares so created were permitted by the Corporate Code and are permitted by the GBCC and Company's articles of incorporation and bylaws;

(3) "validly issued" means that at the time of issuance Company had sufficient authorized and unissued shares to permit the shares to be issued, Company took the steps necessary to accord shareholder status to the persons to whom the shares were issued and Company has taken no step to deprive the shares of the "validly issued" status;

(4) "fully paid and nonassessable" means that the consideration received upon issuance of the shares (i) was legally sufficient, (ii) satisfied the requirements of the Corporate Code, Company's articles of incorporation and bylaws, and relevant corporate resolutions, (iii) was approved (e.g., as to value of property or services) by the directors or shareholders, as required, and (iv) was in fact received, subject to paragraph (1) above; and

(5) the Opinion is based upon the assumption that the Corporate Status Opinion could also be given.

30. Share Transfer Opinion.

The only laws addressed in any Opinion as to the rights of a seller in shares of Company acquired by any purchaser are the GBCC and Article 8 of the UCC, and no Opinion is given regarding liens (other than UCC security interests) that may be perfected without filing or possession of the share certificate. The Opinion is based upon the assumption that the Capitalization Opinion could also be given.

31. Personal Property Transfer Opinion.

An Opinion as to Company's transfer of Personal Property expresses no opinion as to Company's title. See Interpretive Standard 16.

32. Foreign Qualification Confirmation.

A confirmation to the effect that Company is qualified to transact business as a foreign corporation in any one or more named jurisdictions is not a legal opinion, but a statement which may be based solely upon one or more certificates referenced in the Opinion Letter and limited in meaning to the words of each certificate. No implication arises from such confirmation that certificates have been acquired from all jurisdictions in which Company is required to be qualified, or that certificates obtained are from the appropriate public officials in the jurisdictions referenced.

33. Litigation Confirmation.

A confirmation regarding litigation pending or threatened in writing against Company or any Assets derives from Opinion Giver's knowledge as defined at Interpretive Standard 6 and certificate reliance discussed at Interpretive Standard 4, but not from any reviews of public or court records or files of Opinion Giver or others.

Incorporation by Reference Accord

34. These Interpretive Standards may be incorporated by reference in the Opinion Letter by a statement similar to the following:

> This Opinion Letter is limited by, and is in accordance with, the January 1, 1992 edition of the Interpretive Standards applicable to Legal Opinions to Third Parties in Corporate Transactions adopted by the Legal Opinion Committee of the Corporate and Banking Law Section of the State Bar of Georgia, which Interpretive Standards are incorporated in this Opinion Letter by this reference.

ILLUSTRATIVE OPINION

_____, 19__

Opinion Recipient
123 Main Street
Atlanta, GA 30303

Ladies and Gentlemen:

We have acted as counsel to ABC Corporation, a Georgia corporation (the "Company"), in connection with the preparation of the [describe Transaction Document] (the "Agreement") and have participated in the closing of the [describe the transaction provided for in the Agreement] (the "Transaction"). This opinion letter is rendered pursuant to Section ___ of the Agreement.

This opinion letter is limited by, and is in accordance with, the January 1, 1992 edition of the Interpretive Standards applicable to Legal Opinions to Third Parties in Corporate Transactions adopted by the Legal Opinion Committee of the Corporate and Banking Law Section of the State Bar of Georgia, which Interpretative Standards are incorporated in this opinion letter by this reference. Capitalized terms used in this opinion letter [and the attachments hereto] and not otherwise defined herein shall have the meanings assigned to such terms in the Interpretive Standards [and/or the Agreement].

In the capacity described above, we have considered such matters of law and of fact, including the examination of originals or copies, certified or otherwise identified to our satisfaction, of such records and documents of the Company, certificates of officers and representatives of the Company, certificates of public officials and such other documents as we have deemed appropriate as a basis for the opinions hereinafter set forth.

The opinions set forth herein are limited to the laws of the State of Georgia and applicable federal laws.

Based upon the foregoing, it is our opinion that:

(1) Company was duly organized as a corporation, and is existing and in good standing, under the laws of the State of Georgia.

(2) Company has the corporate power to execute and deliver the Agreement, to perform its obligations thereunder, to own and use its Assets and to conduct its business.

(3) Company has duly authorized the execution and delivery of the Agreement and all performance by Company thereunder and has duly executed and delivered the Agreement.

(4) The execution and delivery by Company of the Agreement do not, and if Company were now to perform its obligations under the Agreement such performance would not, result in any:

(i) violation of Company's articles of incorporation or bylaws;

(ii) violation of any existing federal or state constitution, statute, regulation, rule, order, or law to which Company or the Assets are subject;

(iii) breach of or default under any material written agreements;

(iv) creation or imposition of a contractual lien or security interest in, on or against the Assets under any material written agreements; or

(v) violation of any judicial or administrative decree, writ, judgment or order to which, to our knowledge, Company or the Assets are subject.

With your permission we have assumed that the term "material written agreements" used in clauses (iii) and (iv) above includes only those agreements listed on Exhibit ___ to the Agreement.

(5) No consent, approval, authorization or other action by, or filing with, any governmental authority of the United States or the State of Georgia is required for Company's execution and delivery of the Agreement and consummation of the Transaction.

(6) The Agreement is enforceable against Company.

(7) Company's authorized shares consist of _____ common shares, of which _____ common shares are outstanding. The outstanding shares have been duly authorized and validly issued and are fully paid and nonassessable.

(8) Immediately prior to the consummation of the Transaction, Seller was the sole registered owner of the Shares. Opinion Recipient is now the registered owner of the Shares and, assuming Opinion Recipient has purchased the Shares, in good faith and without notice of any adverse claim, has acquired all the rights of Seller in the Shares free of any adverse claim, any lien in favor of Company, and any restrictions on transfer imposed by Company. The owner of the Shares, if other than Seller, is precluded from asserting against Opinion Recipient the ineffectiveness of any unauthorized endorsement.

(9) Company has transferred to the Opinion Recipient all of Company's right, title and interest in and to the Personal Property.

Based upon the limitations and qualifications set forth above, we confirm to you that:

(1) To our knowledge, except as set forth on Exhibit ___ to the Agreement, no litigation or other proceeding against Company or any of its properties is pending or overtly threatened by a written communication to Company.

(2) Company is qualified to transact business as a foreign corporation in the states of _____ and _____. The foregoing statement is based solely upon certificates provided by agencies of those states, copies of which Company has delivered to you at the closing of the Transaction, and is limited to the meaning ascribed to such certificates by each applicable state agency.

This opinion letter is provided to you for your exclusive use solely in connection with the Transaction, and may not be relied upon by any other person or for any other purpose without our prior written consent.

Very truly yours,

[Signature of the Lawyer/Law Firm
Representing the Company]

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