REPORT OF THE
MICHIGAN AD HOC COMMITTEE
ON LEGAL OPINIONS

State Bar of Michigan
Business Law Section

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## CONTENTS

**BACKGROUND OF THIS REPORT** .......................................................... 1  
**SECTION I: THE NATIONAL LITERATURE** .............................................. 4  
  **AMERICAN BAR ASSOCIATION SECTION OF BUSINESS LAW** ................. 4  
    Third-Party Legal Opinion Report, Including the Legal Opinion Accord .................. 4  
    Legal Opinion Principles ........................................................................... 5  
    Guidelines for the Preparation of Closing Opinions ....................................... 5  
    Statement on the Role of Customary Practice in the Preparation and Understanding of  
    Third-Party Legal Opinions ....................................................................... 6  
    Closing Opinions of Inside Counsel .............................................................. 6  
    Negative Assurance in Securities Offerings (2008 Revision) .............................. 7  
    Legal Opinions in SEC Filings .................................................................... 7  
    No Registration Opinions .......................................................................... 8  
    Law Office Opinion Practices .................................................................... 8  
  **TRIBAR OPINION COMMITTEE** ............................................................... 9  
    U.C.C. Security Interest Opinions—Revised Article 9 Report .............................. 10  
    The Remedies Opinion—Deciding When to Include Exceptions and Assumptions .......... 10  
    Third-Party Closing Opinions: Limited Liability Companies ............................ 11  
    Special Report of the TriBar Opinion Committee: Duly Authorized Opinions on Preferred  
    Stock .......................................................................................................... 12  
**SECTION II: STATE AND LOCAL REPORTS** ........................................... 13  
**SECTION III: UPDATES TO SPECIFIC DISCUSSIONS IN THE 1991 REPORT** .......... 16  
**REVIEW OF THE 1991 REPORT** ............................................................. 16  
**PART I OF THE 1991 REPORT** ............................................................... 16  
**INTRODUCTION** ..................................................................................... 16  
**PRELIMINARY MATTERS** ....................................................................... 16  
  Purpose of Opinions ...................................................................................... 16  
  Opinion Review Procedures .......................................................................... 17  
  Standard of Care Applicable to Preparation and Delivery of Opinions ...................... 17  
**INTRODUCTORY OPINION PARAGRAPHS** .......................................... 18  
  Date ............................................................................................................. 18  
  Addressee ................................................................................................... 18  
  Preparation of the Agreement ....................................................................... 18  
    Local Counsel Opinion ........................................................................... 18  
**SUBSTANTIVE OPINION CLAUSES** ..................................................... 19  
  Opinions Concerning Corporate Status ........................................................... 19  
  Opinions Concerning Capital Stock ................................................................ 20  
  The Enforceability Opinion .......................................................................... 20  
  The Bankruptcy Exception ............................................................................ 21  
  "No Conflict" Opinions ............................................................................... 22  
**PART II OF THE 1991 REPORT** .............................................................. 22  
  **SECTION A** ......................................................................................... 23  
  **SECTION B** ......................................................................................... 23
SECTION IV: MICHIGAN-SPECIFIC LEGAL ISSUES AFFECTING OPINIONS ............ 24
Qualification to Do Business ............................................................. 24
Guaranties .......................................................................................... 25
Distributions by a Corporation or Limited Liability Company ................. 27
Specific Contractual Provisions and Issues ........................................... 28
  Choice of law ............................................................................... 28
  Forum Selection ......................................................................... 28
  Venue Selection ........................................................................ 29
  Waiver of Jury Trial ................................................................. 29
Usury ................................................................................................. 30
Indemnification for Negligence .......................................................... 31
  Implied Covenant of Good Faith and Fair Dealing ......................... 31
Enforcement of Foreign Judgments ..................................................... 33
Waiver of Statute of Limitations .......................................................... 34
Liquidated Damages ........................................................................ 35
Covenants Not to Compete ................................................................ 36

APPENDIX A - MEMBERS OF THE MICHIGAN AD HOC COMMITTEE
  ON LEGAL OPINIONS

APPENDIX B - REPORT OF THE AD HOC COMMITTEE OF THE BUSINESS LAW
  SECTION OF THE STATE BAR OF MICHIGAN ON STANDARDIZED LEGAL
  OPINIONS IN BUSINESS TRANSACTIONS, DATED AUGUST 1, 1991
BACKGROUND OF THIS REPORT

The Michigan Ad Hoc Committee on Legal Opinions (the “Committee”) was originally constituted in 1989 under the name of the Ad Hoc Committee of the Business Law Section of the State Bar of Michigan on Standardized Legal Opinions in Business Transactions. We issued a report, entitled the Report of the Ad Hoc Committee of the Business Law Section of the State Bar of Michigan on Standardized Legal Opinions in Business Transactions, dated August 1, 1991 (the “1991 Report”).1 For ease of reference, we have attached a copy of the 1991 Report as Appendix B to this Report.

We issued the 1991 Report in the context of widespread activity at the time among state and local bar associations as well as the national “Silverado” project. These activities involved study and reporting on the forms and meanings of legal opinion letters typically delivered at the closing of business transactions. Commentators expressed significant sentiment, first crystallized in a 1973 article by James J. Fuld,2 that while such opinion letters tended to follow fairly routine forms, there was no consensus among practitioners as to the specific meanings of key provisions included in the letters, the level of investigation and responsibility attached to delivering those opinions or the appropriateness of requesting various specific opinions.

At the time we released the 1991 Report, the ABA Legal Opinion Accord (the “Accord”)3 had been published in draft form. Promulgated by the ABA Legal Opinions Committee, the Accord was an ambitious undertaking arising from the Silverado project. It comprehensively discussed opinion issues and practices and the meaning of customary language, with the goal that opinion givers and recipients would routinely incorporate it by reference into transaction opinions. This, it was hoped, would standardize both the form and interpretation of opinions as well as streamline them by allowing elimination of many assumptions and qualifications that counsel incorporated into opinions as a matter of customary practice.

The 1991 Report consisted of Part I, a 30-page discussion of issues arising in connection with transaction opinions, and Part II, a 3-page set of interpretive guidelines intended to be incorporated by reference into opinions. Part II was designed to be used in tandem with incorporation of the Accord or on a stand-alone basis.

For a variety of reasons, the Accord never achieved widespread acceptance as a document to be incorporated by reference into legal opinions. It has been, however, a significant influence on the continuing development of opinion practice and has continued to be consulted as a resource by opinion givers and recipients. Incorporation by reference of the much-shorter Part II of the 1991 Report did gain some acceptance in the 1990’s, but it is no longer used in that fashion.

Since the release of the 1991 Report, there have been numerous other efforts to inform lawyers regarding practices and interpretations applicable to legal opinions in business transactions. The ABA Legal Opinions Committee has grown into quite a large and active body and has published several documents relating to opinion practice. Chief among these have been the opinion principles, the opinion guidelines and the statement on customary practice. These documents have been much shorter statements of general applicability to opinion practice. They have noted the existence and importance of the customary practice of lawyers involved in the giving and receipt of transaction opinions in interpreting the meaning of opinion language, and in defining the traditional scope of opinions and the work that opinion givers are expected to perform in preparing opinions. Also particularly significant in this area have been the reports generated by the so-called “Tri-Bar Committee,” whose 1998 report relating to opinion practice is considered one of the most influential reports among the outstanding literature.

State and local bar organizations have also continued to study legal opinion issues since the issuance of the 1991 Report and have published numerous reports and supplements in the intervening years (some quite recently), many of which are quite comprehensive and lengthy. A good source for these reports is the ABA Legal Opinion Resource Center web site, http://www.abanet.org/buslaw/tribar/.

In addition, the Working Group on Legal Opinions (“WGLO”) was formed in 2007 as a “big tent” organization devoted to matters related to legal opinions in business transactions. As described on its web site, the mission of the WGLO is “to provide a national forum for the discussion of important issues relating to closing opinions. Participants in the WGLO include opinion givers, opinion recipients, the ABA, State and local bars as well as rating agencies and law firm malpractice insurers.” The WGLO aims to promote national standards for opinion practice and help identify customary practice as in use in various jurisdictions.

The Committee was reconstituted in early 2009 and issued a Background Statement detailing its intended activities. The Background Statement noted that we did not intend to create a comprehensive update or new report. We felt that any new comprehensive report that we might issue would either agree with existing literature on most points and therefore not add usefully to the considerable resources already available, or would diverge from the existing literature and defeat the goal of normalization of approaches.

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6 http://www.abanet.org/buslaw/wglo/home.shtml

7 A list of Committee Members is attached as Appendix A.
There is, however, a role for state and local input. There are opinion practices that are unique to state law, and it is useful to have a source that identifies and describes these distinctions for the benefit of practitioners in those jurisdictions and opinion recipients receiving opinions from those practitioners.

We have developed this Report to be a resource for Michigan lawyers. In this report, we have identified existing opinion literature that is helpful in analyzing opinion issues and problems, interpreting the meaning of common opinion language and evaluating the procedures undertaken to enable them to issue certain types of opinions. This Report also identifies portions of the 1991 Report that may have been rendered obsolete or inaccurate because of subsequent developments and adds references to statutes and case law from the intervening years that affect specific areas of Michigan law discussed in the 1991 Report. Finally, this report discusses some specific issues that Michigan lawyers may encounter in rendering transaction opinions and Michigan statutes and decisions that influence the evaluation of those issues.

Consistent with the 1991 Report, we do not in this Report address opinion matters specific to real estate transactions or issues relating to the creation and perfection of security interests in secured lending transactions.
SECTION I: THE NATIONAL LITERATURE

Two significant sources of literature on opinion practice are the TriBar Opinion Committee and the ABA Section of Business Law. Over the last two decades these organizations have issued various reports that have significantly influenced opinion practice and understanding and that this Committee recommends as resources for Michigan lawyers involved in delivering or receiving opinions in transactions. This section briefly describes some of these reports. With the few exceptions noted, the Committee believes that they are consistent with prevailing customary practice in Michigan and commends these reports to Michigan practitioners as valuable sources of discussion and analysis regarding transaction opinions.

AMERICAN BAR ASSOCIATION SECTION OF BUSINESS LAW

Third-Party Legal Opinion Report, Including the Legal Opinion Accord

Sometimes referred to as the “Silverado report,” this was a comprehensive attempt to standardize and codify U.S. third-party opinion practice. The report consists of three main parts: the Legal Opinion Accord, an Illustrative Opinion Letter, and Certain Guidelines for the Negotiation and Preparation of Third-Party Legal Opinions. The drafters envisioned that an opinion letter would incorporate the Accord by reference. This would then result in a very short letter without all the standard assumptions, limitations, and qualifications contained in traditional opinion letters while at the same time standardizing the meanings of these common opinions. The Illustrative Opinion Letter included in the report is an example of such a letter.

Acceptance of the report in this manner met resistance from many recipients, due in part to its length. While the report did not achieve this purpose, it nevertheless contains a wealth of useful information and ideas and continues to be worthy of study by those who practice in this area.

The Accord is a highly detailed description, including definitions and standard assumptions, limitations, and qualifications of each of the four most common closing opinions:

- that an agreement is enforceable;
- that the agreement does not result in breaches of other agreements or court orders;
- that the agreement does not violate any law; and

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8 The TriBar Opinion Committee originally consisted of designees of the bars of the city, county, and state of New York. See its original report, Legal Opinions to Third Parties: An Easier Path, 34 BUS LAW 1891 (1979). It has expanded to include representatives of bar associations of other cities and states, the District of Columbia, and the province of Ontario. See, e.g., Special Report of the TriBar Opinion Committee: Duly Authorized Opinions on Preferred Stock, 63 BUS LAW 921 (2008), App. D.

9 Some of the reports were published by the Section of Business Law itself and others by assorted committees, subcommittees, and task forces, most notably the Committee on Legal Opinions.

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

11 The nickname derives from the report’s origins at a 1989 conference held in Silverado, California. Id. at 169.
• except as disclosed, that no litigation of specified types is pending or threatened against the lawyer’s client (a confirmation of fact rather than a true legal opinion).

While the Accord itself never gained wide acceptance, its Certain Guidelines for the Negotiation and Preparation of Third-Party Legal Opinions did. In 1998, these guidelines were supplemented by publication of the Legal Opinion Principles, and in 2002 an updated version of them was promulgated as the Guidelines for the Preparation of Closing Opinions, both discussed below.

**Legal Opinion Principles**

Consisting of 15 brief paragraphs in outline form, the Legal Opinion Principles supplemented the guidelines contained in the earlier Accord “to provide further guidance regarding the application of customary practice to third-party ‘closing’ opinions.” They include principles relating to:

- scope of and reliance on legal opinions;
- applicable law;
- facts, factual inquiries, and factual representations; and
- the opinion’s date.

**Guidelines for the Preparation of Closing Opinions**

The Guidelines for the Preparation of Closing Opinions, which include the Legal Opinion Principles discussed above as an appendix, replace the guidelines contained in the original Legal Opinion Report. They include guidelines relating to:

- focus, scope, and reliance, including purpose, coverage, and the inappropriateness of asserting that a given opinion is “market”;
- process, including procedures for making and responding to an opinion request, seeking opinions from other counsel when appropriate, the lawyer’s financial interest in or other relationship with the client, and obtaining the client’s consent if the opinion discloses confidential information;
- content, including the “golden rule,” materiality standards, the presumption of regularity, the phrase “to our knowledge,” and “explained” (sometimes called “reasoned”) opinions; and

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13 Id.
15 The golden rule of opinion practice essentially states that counsel for an opinion recipient should not request an opinion that he or she would be unwilling to give in similar circumstances. Guidelines § 3.1; D. Glazer, S. FitzGibbon & S. Weise, Glazer & FitzGibbon on Legal Opinions § 1.8 (3d ed. 2008).
• specific opinions, including foreign qualification and good standing, outstanding equity securities, comprehensive legal or contractual compliance, lack of knowledge of particular factual matters, negative assurance, fraudulent transfer, litigation evaluation, matters of public policy, and when the law covered by an opinion and the law selected to govern an agreement are different.

Section 4.3, Comprehensive Legal or Contractual Compliance, and Section 4.4, Lack of Knowledge of Particular Factual Matters, each note that an opinion giver should not be asked for particular opinions. Specifically, an opinion giver should not be asked for an opinion that the client possesses all necessary licenses and permits or has obtained all approvals and made all filings required for the conduct of the client’s business, or that the client is not in violation of any applicable laws or regulations or in default under contractual obligations (Section 4.3). (This is different than an opinion that the particular transactions involved in the opinion do not violate applicable laws or violate applicable contract provisions.) Section 4.4 states that the opinion giver should not be asked to state that it lacks knowledge of particular factual matters. Michigan practitioners requested to give these opinions generally should decline to do so.

Statement on the Role of Customary Practice in the Preparation and Understanding of Third-Party Legal Opinions16

This brief statement was developed by the Committee on Legal Opinions and approved by the Legal Opinions in Real Estate Transactions Committee of the Real Property, Trust and Estate Law Sections of the American Bar Association, the TriBar Opinion Committee, and 25 other national, state, and local bar associations and lawyer groups, including the State Bar of Michigan Business Law Section. It acknowledges the role of customary practice in providing common understandings between opinion givers and recipients so as to eliminate the need for descriptions of procedures, definitions, assumptions, limitations, and exceptions in each opinion letter.

The Committee believes that Michigan lawyers who deliver transaction opinions should understand the importance of customary practice in shaping opinion practices as well as opinion language and should appreciate that customary practice is not static but evolves over time.

Closing Opinions of Inside Counsel17

This report focuses on special considerations that apply when inside counsel deliver third-party closing opinions. Among other things, it discusses the applicable duty of care as compared with the duty owed by outside counsel, the inside lawyer’s responsibility for work of others, procedures for investigation of facts, the lawyer’s responsibility for information known to others in the company, and opinion requests that are inappropriate. It also covers formalities of preparing the opinion letter.

16 63 BUS LAW 1277 (2008).
17 ABA Section of Business Law, Closing Opinions of Inside Counsel, 58 BUS LAW 1127 (2003).
Negative Assurance in Securities Offerings (2008 Revision)\textsuperscript{18}

This report deals with the letter (often colloquially referred to as a “10b-5 opinion”) frequently delivered to an underwriter by counsel for an issuer at the closing of a securities offering. Typically, this states that, during the course of counsel’s representation in connection with the offering, nothing came to the opining counsel’s attention that caused it to believe that the offering document contains any untrue statement of material fact, that the offering document omits to state a material fact necessary to make the statements in it, in the light of the circumstances in which they are made, not misleading, or, in an offering registered under the Securities Act of 1933 where law and regulation require specific disclosures, that the offering document omits to state any material fact required to be stated in it.

The report discusses the history and purposes of these letters and to whom it is appropriate to address them. Among other things, it deals with:

- documents that are incorporated by reference into the offering document;
- precisely identifying the offering document covered by the letter;
- the time as of which the letter speaks;
- how to word the negative assurance;
- procedures counsel should undertake in order to give the negative assurance;
- customary qualifications;
- counsel’s role; and
- items not covered.

The report includes an illustrative form of a negative assurance letter and discusses each of its paragraphs in detail. It deals with federal law only. It also discusses the special development of this type of opinion in connection with offerings of securities and notes that it is generally not appropriate to request such an opinion in other contexts, or to deliver the opinion for the benefit of persons other than those who may be able to establish a due diligence defense to potential liabilities under federal securities laws.

Legal Opinions in SEC Filings\textsuperscript{19}

When an issuer registers securities under the Securities Act of 1933, the registration statement must include an opinion of counsel about the validity of the securities.\textsuperscript{20} This report covers the wording for such opinions and the diligence required in order to give them. It covers


\textsuperscript{19} Task Force on Securities Law Opinions, ABA Section of Business Law, \textit{Legal Opinions in SEC Filings}, 59 BUS LAW 1505 (2004).

\textsuperscript{20} Regulation S-K Item 601(b)(5), 17 C.F.R. § 229.601(b)(5).
equity, debt, and derivative securities issued in various types of transactions, including shelf offerings, acquisitions and exchange offers.

The report deals with the federal law and the applicable state law in general terms, focusing especially on the Delaware General Corporation Law and New York contract law.

**Michigan-Specific Note**

If the security being registered is a guaranty of a Michigan corporation whose issuance constitutes a distribution, the opinion giver should consider the effect of Section 345 of the Michigan Business Corporation Act. See the discussion at “Guaranties” in Section IV of this Report.

**No Registration Opinions**

When a company issues securities without registration under the Securities Act of 1933, the purchasers or other parties may require an opinion of counsel that no registration is required. This report analyzes these opinions in some detail. Among other things, it covers representations that should be included in the securities purchase agreement, shares issuable on conversion or exercise of a derivative security, resales, and short positions. It includes specimen opinion forms for:

- common or convertible preferred stock sold directly to purchasers in reliance on Section 4(2) of the Securities Act of 1933 or Regulation D;
- debt securities sold to intermediaries for resale in reliance on Rule 144A or Regulation S.

The report deals only with federal law.

**Law Office Opinion Practices**

This 2004 report analyzes a survey that the Committee on Legal Opinions conducted regarding firms’ and departments’ opinion policies and procedures, including customary practices, competence issues, consultation and the consulting lawyer’s responsibility, opinion committees, limits on opinion giving, disclosure, and resources. It may provide guidance to Michigan practitioners regarding practices and procedures of opinion givers. At the date of this Report, the Committee on Legal Opinions was in the process of conducting a new survey.

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21 MCL 450.1345.
22 Subcommittee on Securities Law Opinions, Committee on Federal Regulation of Securities, ABA Section of Business Law, *No Registration Opinions*, 63 BUS LAW 187 (2007).
24 17 C.F.R. § 230.144A.
26 Committee on Legal Opinions, ABA Section of Business Law, 60 BUS LAW 327 (2004).
TRIBAR OPINION COMMITTEE

Third-Party "Closing" Opinions—A Report of The TriBar Opinion Committee

This is the TriBar Committee’s comprehensive report on third-party opinion practice. While similar to the Accord in its broad scope, the TriBar Report does not provide for express adoption of its principles in the opinion letter as the Accord contemplated. Instead, the report reflects the consensus of the TriBar Opinion Committee’s members about “the meaning of the language used in third-party opinion letters as well as the factual and legal investigation required to support particular opinions ...." It refers to this consensus as “customary practice,” about which it provides detailed guidance.

The TriBar Report contains an index of typical opinion letter features. It provides general guidance about the characteristics of third-party opinions, the negotiating process and the “golden rule,” customary practice and variations, recipient reliance on the opinion letter, and client control over the opinion.

The report analyzes the lawyer’s role in establishing the facts on which opinions are based, including appropriate sources for obtaining facts and the general inappropriateness of relying on statements of “ultimate fact.” It covers the use of assumptions as fact substitutes, the so-called “presumption of regularity and continuity,” certificates of officers and others as sources of fact, and expressions in the opinion letter itself of the lawyer’s responsibility for establishing facts.

The TriBar Report contains a detailed analysis of the remedies opinion, including its form and scope, bankruptcy and equitable principles limitations, the “practical realization” qualification, and other limitations. It provides helpful information about limiting the law covered by the remedies opinion, including alternative methods of handling the situation where an agreement specifies governing law not covered by the opinion and also covers the impact of governing law provisions on other common opinions.

There is a section dealing with opinions beyond the expertise of the opinion giver, where the opinion giver may choose to rely on opinions of other counsel or to make assumptions about matters to be covered by the other counsel’s opinion.

In addition to the remedies opinion, the report discusses the following other common opinions:

- corporate status;
- stock;
- corporate power;

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27 See note 8 for information about the history and makeup of the TriBar Opinion Committee.
28 60 BUS LAW at 595.
29 As noted above, a number of the reports issued by the ABA Section of Business Law or its committees stress customary practice as the touchstone of opinion practice, as do the state and local reports discussed infra.
30 For additional references to discussions of practical realization qualifications, see Section II infra.
Report of the Michigan Ad Hoc Committee on Legal Opinions  

September 15, 2010

- corporate action;
- no breach or default;
- no violation of law;
- approvals and filings; and
- no litigation.

The TriBar Report contains illustrative opinion letters.

U.C.C. Security Interest Opinions—Revised Article 9 Report\textsuperscript{31}

This special report of the TriBar Opinion Committee is helpful for lawyers giving or receiving opinions about security interests under Article 9 of the Uniform Commercial Code. Secured lenders often require such opinions from borrowers’ counsel.

The report covers matters of scope and choice of law, including distinctions between a U.C.C. opinion and the remedies and other common opinions. Among other things, it covers:

- creation or attachment of the security interest, including choice of law for creation of the security interest and requirements for attachment;
- perfection opinions, including the mandatory choice-of-law rules governing perfection and how different methods of perfection affect the opinions given;
- priority opinions, including scope, limitations on usefulness, and detailed information about when qualifications are required and when they are unnecessary because they are inherent in the opinion;
- the need to identify the financing statement and any search reports referred to in the opinion letter;
- dealing with after-acquired property and proceeds; and
- opinions on certificated securities, security entitlements, and securities accounts.

The report contains an illustrative security interest opinion letter and a section addressing issues that arise when the law that governs perfection is a law not covered by the opinion letter.

The Remedies Opinion—Deciding When to Include Exceptions and Assumptions\textsuperscript{32}

Under the original TriBar Report, the remedies opinion is understood to be subject to a number of common assumptions and exceptions that need not be stated in the opinion letter. This special report supplements that discussion by providing a framework for analyzing when the opinion giver should include express exceptions or assumptions and possible alternative


methods for dealing with concerns that appear to require exceptions. It also examines customary practice in handling the following common agreement provisions:

- interest on overdue interest;
- economic remedies provisions;
- waiver of the right to a jury trial;
- no oral modification clause;
- choice-of-law provision; and
- forum selection clause.

**Michigan-Specific Note**

Because Michigan is one of the “few states” referenced but not identified in this report in which enforceability of agreements for interest on overdue interest is limited, it may be appropriate in a remedies opinion to reference the controlling Michigan statute, MCL 438.101. See the discussion at “Specific Contractual Provisions and Issues – Usury” in Section IV below.

**Third-Party Closing Opinions: Limited Liability Companies**

This report supplements Section 6.2.1 of the TriBar Report by focusing on what “duly authorized” does and does not mean in the limited liability company context, noting that there may be situations in which the lawyer cannot give the opinion. While the report deals with state law generally, it emphasizes the Delaware and Model acts and does not mention Michigan law. Notwithstanding this fact, the Committee believes that the report contains useful discussions of conceptual differences between opinions covering limited liability companies and those covering corporations, as well considerations for non-Delaware lawyers in opining on issues affecting Delaware limited liability companies.

**Michigan-Specific Note**

Note that the Michigan Limited Liability Act permits a one-member limited liability company, which may have an operating agreement signed by the sole member. Such an operating agreement is enforceable. Note also that the Michigan Limited Liability Company Act permits but does not require a limited liability company to have an operating agreement. Contrast this with the Delaware Limited Liability Company Act, which provides that “[a] limited liability company agreement shall be entered into or otherwise existing either before, after or at the time of the filing of a certificate of formation...” (emphasis supplied).

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34 Michigan Limited Liability Company Act §§ 102(2)(r) & 215, MCL 450.4102(2)(r) and .4215.
35 Del Code 18-201(d).
Special Report of the TriBar Opinion Committee: Duly Authorized Opinions on Preferred Stock

This report supplements Section 6.2.1 of the TriBar Report by focusing on what “duly authorized” does and does not mean with reference to preferred stock, noting that there may be situations in which the lawyer cannot give the opinion. The report deals with state law generally, emphasizing the Delaware and Model acts. It does not mention Michigan law.

Michigan-Specific Note

One of the situations in which the report says counsel may be unable to give the opinion is when:

the charter establishes a procedure for declaring dividends that contravenes the corporation statute, such as delegating authority to declare dividends to a third party or fixing the amount of the dividend by reference to an external source when the statute requires that the board of directors or a committee of the board have the authority to declare dividends or prohibits references to external sources in the charter.\(^{37}\)

Note that Section 301(4) of the Michigan Business Corporation Act\(^ {38}\) expressly authorizes making voting, distribution, liquidation, or other rights, preferences, or limitations dependent on external facts or events.


\(^{37}\) *Id.* at 926.

\(^{38}\) MCL 450.1301(4).
SECTION II: STATE AND LOCAL REPORTS

The Committee studied and evaluated a number of recently issued reports and updates from other state and local bar groups regarding legal opinions in business transactions (the “State Reports”). The primary purpose for studying the State Reports was to identify any topics or emerging areas addressed by the State Reports that would be helpful to Michigan practitioners and which complement or are not otherwise addressed by the national literature discussed above.

Although the State Reports are generally prepared for the benefit of practitioners in their state or local jurisdictions, the Committee identified the following topics and related discussions, analysis and materials contained within the applicable State Reports as important resources that could be useful to Michigan practitioners with respect to third party closing opinion practice and delivery in Michigan:

- Secured Transactions Opinions under Article 9 of the Uniform Commercial Code contained in the Report of the Legal Opinion Committee of the Business Law Section of the North Carolina Bar Association: Third-Party Legal Opinions in Business Transactions (the “North Carolina Report”). The North Carolina Report provides an illustrative form of opinion for secured transactions under Article 9 of the UCC, as well as commentary and recommended due diligence on common opinion matters that frequently arise in secured transactions under Article 9. Relevant topics addressed under the North Carolina Report include: the creation of security interests; the form of financing statements and the effectiveness of filing financing statements to perfect a security interest in collateral that may be perfected by filing; creation and perfection of security interests in pledged investment property that may be perfected by possession or control, including certificated and uncertificated securities and deposit accounts; and specific assumptions and qualifications applicable to Article 9 secured transaction opinions.


Opinions by lawyers not admitted to practice in Delaware on matters of Delaware corporation law and limited liability company law set forth in the Supplement to Report of the Legal Opinion Committee of the Business Law Section of the North Carolina Bar Association: Third-Party Legal Opinions in Business Transactions (the “North Carolina Supplement”). The North Carolina Supplement addresses the question of whether opinions by non-Delaware lawyers on Delaware corporations or Delaware limited liability companies should be interpreted to cover matters beyond the text of the corporations act or limited liability company act, such as reported judicial decisions construing the statutes or Delaware contract law issues. The North Carolina Supplement also provides model language to be used to limit the coverage of opinions by non-Delaware lawyers to the text of relevant statutes and to exclude judicial decisions and other areas of Delaware law.

Personal property secured transaction legal opinions as discussed and analyzed in the Report of the Uniform Commercial Code Committee of the Business Law Section of the State Bar of California on Legal Opinions in Personal Property Secured Transactions (June 2005) (the “California Report”). The California Report is a guide for California lawyers for preparing legal opinions regarding security interests in personal property secured transactions under Article 9 of the UCC. The California Report contains sample opinions and related qualifications along with commentary regarding the meaning and scope of such opinions and qualifications. Specific matters addressed in the California Report include attachment opinions and the related topic of unnecessary qualifications for attachment opinions, perfection opinions, and priority opinions.

Opinions regarding Limited Liability Companies contained in the Pennsylvania Third-Party Legal Opinion Report of the Legal Opinion Committee of the Business Law Section of the Pennsylvania Bar Association, (the “Pennsylvania Report”). The Pennsylvania Report describes the meaning and due diligence requirements relative to rendering of opinions on limited liability company organization and existence, limited liability company power to carry on business, and limited liability company power and authorization to execute, deliver and perform all necessary action.

Commentary and an examination of the issues related to the formulation and use of the general exceptions known as the “Generic Exception” and “Practical Realization Exception” in connection with remedies opinions are in the following reports: the State Bar of California Business Law Section Report on Third-Party Remedies Opinions, the Report on Lawyers’ Opinions in Business Transactions by the Special

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41 Second Edition (February 2009). See Section 6.0g, pages 7-8.
43 2007 Update, See pages 13-14.

- Special issues to consider when rendering third party legal opinions when acting as local counsel are discussed in the Exposure Draft Report on Standards for Third-Party Legal Opinions of Florida Counsel.45

While the Committee recommends to all Michigan practitioners the discussion and analysis contained in the above-referenced State Reports and materials, practitioners should note that portions of the discussion and analysis are specific or peculiar to a given jurisdiction and therefore may not apply in Michigan. Discussions regarding deeds of trust exemplify such an issue.
SECTION III: UPDATES TO SPECIFIC DISCUSSIONS IN THE 1991 REPORT

REVIEW OF THE 1991 REPORT

We reviewed the 1991 Report to identify areas of discussion that may have become obsolete or inaccurate because of subsequent developments in the law or in customary practice; to cross-reference discussion of certain issues in the national literature identified elsewhere in this report; and to add references to statutes and case law from the intervening years that affect areas of Michigan law discussed in the 1991 Report. The following discussion of the 1991 Report reflects our comments based on that review. For each comment, we have included the caption of the section of the 1991 Report that contains the language on which we comment, and the specific page number of the 1991 Report to which the comment applies.

PART I OF THE 1991 REPORT

INTRODUCTION

Page 4, note 3. There have been a number of significant amendments to the Michigan Business Corporation Act (“BCA”) \(^{46}\) since issuance of the 1991 Report.\(^{47}\) Current issues specific to Michigan law are discussed elsewhere in this Report. The 1991 Report also did not address opinions relating to limited liability companies, since the Michigan Limited Liability Company Act was not enacted until 1993. Since that time, limited liability companies have become widely used and are commonly involved in transactions. The discussion of the national literature and the State Reports above include references to reports addressing limited liability company issues. Finally, in the almost twenty years since the issuance of the 1991 Report, the name of the state agency which oversees regulatory compliance of Michigan businesses, including the issuance of certified copies of articles (see page 26, note 65 of the 1991 Report) has changed several times, and the agency is currently named the Corporation Division of the Bureau of Commercial Services of the Michigan Department of Energy, Labor and Economic Growth.

PRELIMINARY MATTERS

Purpose of Opinions

The members of the Committee have observed a general decline in the use of third party opinion letters in business transactions other than financings. A number of factors may account for this trend, including client reluctance to bear the costs of the preparation and issuance of opinions for what may be considered limited additional comfort to the recipient’s diligence, stricter client control over the extent of diligence review and issuing counsel concern regarding liability exposure for matters addressed in the opinion.

\(^{46}\) MCL 450.1101 et seq.
Opinion Review Procedures

Page 6. As noted in the discussion in Section I, the ABA Business Law Section’s Committee on Legal Opinions surveyed its members regarding the opinion review procedures and policies of their firms or legal departments, and published a survey of the results. A significant majority of the respondents indicated that their firm or department had opinion committees, but the function and policies of those committees varied widely.48 The ABA Legal Opinions Committee has undertaken a new survey of law office opinion practices but has not published results as of the date of this Report. We anticipate that the results of the new survey will be reported in *The Business Lawyer* when available.

While the focus of the Committee, both currently and in the 1991 Report, is on third party opinion letters in business transactions, the 1991 Report noted the need for law firms to consider what firm communications could constitute legal opinions. This question has taken on even greater significance with the widespread use of e-mails as written evidence of advice given to clients. This topic, along with the related question of potential professional liability, is beyond the scope of this Report.

Standard of Care Applicable to Preparation and Delivery of Opinions

**Innocent Misrepresentation.** Page 7, note 8: In addition to the citations in this footnote, see *Roberts v Saalfeld*49 and *M&D, Inc v WB McConkey.*50

**Negligence.** Page 7, note 12: In addition to the citations in this footnote, see *Simko v Blake*51 (stating that where an attorney acts in good faith and in honest belief that his or her acts and omissions are well founded in law and are in the best interest of his or her client, the attorney is not answerable for mere errors in judgment). For a significant non-Michigan opinion imposing liability on opining counsel, see *Dean Foods v Pappathanasi.*52 In that case, a Massachusetts firm was found liable for over $9 million in damages and costs on a negligent misrepresentation theory because of its “no litigation” opinion delivered in connection with the acquisition of its client. The opinion included a statement that there was no “continuing investigation” relating to the client; it failed to mention a government investigation of the client in which the firm had been involved and which, at time of delivery of the opinion, appeared to be dormant. The client subsequently became the target of a Justice Department investigation and paid a seven-figure fine.

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INTRODUCTORY OPINION PARAGRAPHS

Date

Page 10. On the question of whether an opinion speaks only to laws in existence at the time the opinion is delivered, or if it is affected by retroactive legislation or extends to proposed laws, the TriBar Report specifies that actual or proposed changes in applicable law after the opinion is delivered are not included in the law covered by an opinion.\(^{53}\)

Addressee

Page 10. We note that in lending transactions involving larger or syndicated loans, lenders frequently request that opining lawyers permit reliance on their opinion by assignees of the lender. Many firms permit such reliance with specific language noting that reliance is limited to assignees to whom an assignment is made in compliance with the terms of the loan documentation, subject to one or more of the following conditions: that the letter speaks only of its date and opining counsel has no duty to update it; that opining counsel has no obligation to consider applicability of the opinion to any party other than the party to whom it is addressed; that the assignee’s reliance must be reasonable when the assignment is made, in light of the facts and circumstances then prevailing; and that the knowledge of the addressee is imputed to each assignee.

Preparation of the Agreement

Page 11. “Negative assurance” opinions of the type mentioned at page 11 of the 1991 Report were developed primarily in connection with the issuance of opinions to underwriters in securities offerings and generally are not considered appropriate requests in other types of opinions.\(^{54}\) See also the discussion and reference in Section I above regarding the report on Negative Assurance in Securities Offerings. This is also discussed in the 1991 Report at page 29 under the heading “Misstatements and Omissions.”

Local Counsel Opinion

Page 14. Two practices have evolved in the use of local counsel opinions – reliance and assumption. Where the primary opinion giver is familiar with and confident of the competence of local counsel, the opinion giver may obtain the permission of local counsel and rely on local counsel’s opinion. In the alternative, however, many primary opinion givers prefer to include in their opinions an express assumption of the matters addressed in a local counsel’s opinion (this is sometimes referred to as “unbundling” the opinions). In this way, the primary giver does not opine at all on the matters on which local counsel is opining. However, the opinion recipient

\(^{53}\) See note 11, 53 BUS LAW at 596 and note 167, 53 BUS LAW at 662.

\(^{54}\) See Section 4.5 of the ABA Guidelines, 57 BUS LAW at 880.
may prefer to have all of the opinions it requires in a single opinion letter, especially if it is unfamiliar with the local counsel. 55

SUBSTANTIVE OPINION CLAUSES

Opinions Concerning Corporate Status

Due Incorporation Versus Due Organization. Page 17. Section 3.3 of the ABA Guidelines 56 also states that counsel may rely on the presumption of regularity without stating its reliance in the opinion letter, again citing Rogers v Hill. 57 See also Section 2.4 of the TriBar Report. 58

In Miller v Allstate, 59 the Michigan Supreme Court held that under the provisions of BCA Section 221, 60 only the Michigan Attorney General has standing to challenge the proper incorporation of a Michigan corporation once the articles of incorporation have been accepted for filing. Under Section 221, filing is conclusive evidence that all conditions precedent required to be performed under the BCA have been fulfilled and that the corporation has been formed, except in an action or special proceeding by the attorney general.

Validly Existing and Good Standing. Page 17. We note that the practice of obtaining bring down certifications from public authorities in many cases is not required by opinion recipients, who are willing to accept an opinion that is expressly based on a good standing or other certificate as of a relatively recent date. Inasmuch as such opinions often expressly limit the opinion to reliance on the certificate, opining counsel often do not seek such bring down certificates as a matter of their own investigation, although this practice varies by counsel and also by the context of the opinion.

Due Qualification. Page 18. Customary practice is now to limit due qualification opinions to those states where the corporation is qualified, rather than all states where the corporation is “required” to be qualified. Determining the states in which a corporation is required to be qualified could require opining counsel to engage in an intensive factual inquiry and the analysis of state laws with which counsel may be unfamiliar, and therefore is generally considered an inappropriate opinion request. See Section 6.1.6 of the TriBar Report. 61 See also the discussion in “Qualification to Do Business” in Section IV.

55 See Sections 5.4 and 5.5 of the TriBar Report, 53 BUS LAW at 639.
56 57 BUS LAW at 878.
57 289 US 582, 591 (1933).
58 53 BUS LAW at 616.
60 MCL 450.1221.
61 53 BUS LAW at 646.
Opinions Concerning Capital Stock

Validly Issued. Page 19, note 42: This footnote discussed the possibility that a corporation that failed to eliminate references to par value in its Articles of Incorporation might be unable to issue shares for less than the par value stated in its Articles. However, this has not proved to be an issue since issuance of the 1991 Report. One noted treatise has stated that “[t]he references do not have to be deleted; they simply will have no significance under the Act.”

The Enforceability Opinion

Governing Law. Pages 21-22. In considering whether a governing law clause will be enforced, Michigan follows the approach of the Restatement (Second) of Conflict of Laws §§ 187 and 188. For a discussion of the provisions of the Restatement, see the discussion at “Specific Contractual Provisions and Issues – Choice of Law” in Section IV below.

Because of the difficulty of evaluating the “fundamental policies” of states as required by the Restatement, opining lawyers often exclude these provisions from their enforceability opinions or qualify their opinions by expressly disclaiming analysis of states’ fundamental policies. In a so-called “as if” opinion of the type described on page 22 of the 1991 Report, this exclusion is not necessary because the opinion is premised on the assumption that the law governing the opinion would apply and not the law specified in the governing law clause. However, where (i) the law governing the opinion and the chosen law of the contract are the same or (ii) the opining lawyer is asked to provide an express opinion on whether the courts of the opining lawyer’s state would enforce the governing law clause, lawyers in states such as Michigan that follow the Restatement approach may wish to state in their opinion that in addressing the enforceability of the governing law clause, they have not evaluated the fundamental policies of any states.

Pages 21-22, note 51: Michigan statutes provide for the enforceability of provisions that confer jurisdiction on Michigan courts, subject to certain conditions. However, the Michigan Supreme Court has ruled that venue selection provisions are not enforceable under Michigan law. For further discussion, see “Forum Selection” and “Venue Selection” under “Specific Contractual Provisions and Issues” in Section IV.

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63 An alternative to an assumption that the chosen law in the contract is the same as the laws of the State of Michigan, as set forth on page 22 of the 1991 Report, is to render the remedies opinion as if the contract selected Michigan law as the chosen law of the contract.
64 We note that some states have express statutory provisions validating choice of law provisions applying that state’s law to transactions meeting certain criteria, or otherwise directing choice of law rules. Cal. Civil Code § 1646.5; Del. Code Ann. tit. 6 § 2708; 735 Ill. Comp. Stat. Ann. 105/5-5; Or. Rev. Stat. § 81.120; Tex. Bus. & Comm. Code Ann. §§ 35.51–52; N.Y. Gen. Oblig. Law §§ 5-1401,1402. These statutes, however, would not be determinative in analyzing whether a Michigan court would enforce a provision choosing the law of another state.
Fact-Based Matters. Page 22, note 52. We note that the Exon-Florio Act continues in effect as Section 721 of the Defense Production Act of 1950.65

The Bankruptcy Exception


BCA Considerations. Page 23. BCA Section 261(i), which authorizes certain types of upstream and downstream guaranties, was amended in 2006 to add domestic and foreign limited liability companies to the types of entities whose obligations are expressly permitted to be guaranteed. See “Guaranties” in Section IV.

The Equitable Principles Exception. Page 24, note 59. See the discussion regarding the implied covenant of good faith and fair dealing contained in Part IV of this Report.

Page 25, note 60. The citation in this footnote has been superseded and should reference note 78 of the TriBar Report,68 which states, “Lack of good faith and fair dealing and unreasonableness of conduct cover concepts such as coercion, duress, unconscionability, undue influence, and in some cases, estoppel.”

Arbitration. Page 25, note 62: In addition to the citations in this footnote, see Rembert v Ryan’s Family Steak Houses, Inc.69

Page 25, note 64: Michigan courts recognize both statutory and common-law arbitration.70 The language cited in the text is necessary under MCL 600.5001(2) to create statutory arbitration, which is not revocable. The Michigan Supreme Court has held that agreements to arbitrate that lack the specified language are common law arbitration agreements rather than statutory arbitration agreements.71 If statutory arbitration is not available, any written agreement that the parties make to arbitrate will be governed by common law. Michigan courts will also apply common law in instances where parties unsuccessfully have attempted to include the required statutory language in their agreement to arbitrate. Common-law arbitration agreements are unilaterally revocable at any time before the arbitration award is made.72

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65 50 U.S.C. App. 2171. Related regulations are found at 31 C.F.R. Part 800.
66 See note 18, 53 BUS LAW at 881.
67 MCL 566.31-.43.
68 53 BUS LAW at 625.
71 Id.
72 474 Mich at 235.
In Michigan, statutory arbitration is not available for disputes under collective bargaining agreements concerning terms or conditions of employment or for certain real estate title matters.

"No Conflict" Opinions

Orders, Judgments and Decrees. Page 26. See Section 6.5.5 of the TriBar Report for the proposition that “no violation” opinions should be limited to a specific list of agreements and “no violation of orders or judgments” opinions should be limited to a list of orders. In addition, Section 4.3 of the ABA Guidelines states that requests for opinions that a party is generally in compliance with all contracts or orders are inappropriate.

Litigation Opinions

Page 28. Section 6.8 of the TriBar Report discusses litigation opinions and states that public docket checks are not required as a matter of customary practice. It notes that the existence of litigation is a largely factual matter and that opining attorneys sometimes refer to their statements regarding litigation as “confirmations” rather than opinions. Section 4.7 of the ABA Guidelines states that lawyers should not be asked to express opinions on the expected outcome of pending litigation and refers to the Accord.

In the aftermath of the Dean Foods case, some firms are limiting or even declining to give opinions regarding pending litigation. A more limited form of litigation confirmation has been developed by the Boston Bar Association.

PART II OF THE 1991 REPORT

As noted above, use of Part II of the 1991 Report for incorporation by reference to opinions has largely disappeared. Thus, it is unlikely that opinion givers or recipients will deal with an opinion that incorporates Part II to govern the meaning or construction of the opinion. However, because Part II states certain principles related to opinions, we note as follows:

73 MCL 600.5001(3).
74 MCL 600.5005.
75 53 BUS LAW at 658-660.
76 57 BUS LAW at 880.
77 53 BUS LAW at 663-665.
78 57 BUS LAW at 881.
79 See the discussion in connection with note 52.
SECTION A

7. Duly Authorized and Validly Issued Securities

Paragraph (c) of this discussion states that a “validly issued” opinion does not cover possible violation of federal or state securities laws “unless the violation of those statutes would automatically void their issuance or create a right in a third party (i.e., not the opinion recipient) to void their issuance.” This last qualification is not stated in most of the other reports we have reviewed and we do not believe that it continues to represent customary practice. Validly issued opinions typically are not understood to cover compliance with federal or state securities laws, regardless of the remedy for their violation, and to the extent opinion recipients desire opinions regarding such compliance, they are normally separately negotiated and provided.

8. Fully Paid and Nonassessable

Section 314(4) of the BCA, states that “[w]hen the corporation receives the consideration for which the board authorized the issuance of shares, the shares issued are fully paid and nonassessable and the subscriber has all the rights and privileges of a holder of the shares.” This language has been interpreted by the Michigan Attorney General to mean that corporations incorporated under the BCA may not create a class of assessable shares. The Corporate Laws Committee of the State Bar of Michigan Business Law Section, which is responsible for reviewing and suggesting amendments to the Business Corporation Act, is considering possible amendments that would permit closely held corporations to create classes of assessable shares in accordance with the provisions of Section 488 of the BCA.

SECTION B

7. Other Qualifications

The reference to UCC Section 9-501(3) concerning waiver should now refer to UCC Section 9-602, MCL 440.9602. Extensive amendments to Article 9 of the Michigan Uniform Commercial Code became effective in 2001.

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81 MCL 450.1314(4).
82 See Special OAG, No. 291 (March 26, 1976).
83 MCL 450.1488.
SECTION IV: MICHIGAN-SPECIFIC LEGAL ISSUES AFFECTING OPINIONS

This Section identifies certain legal issues that lawyers delivering or receiving transaction opinions may encounter, and discusses provisions of Michigan law relevant to those issues. We hope in this manner to assist Michigan lawyers in evaluating the issues.

Qualification to Do Business

Under the BCA, a corporation organized under the laws of another jurisdiction may not transact business in Michigan until it has obtained a certificate of authority to do so. Similar provisions appear in the Michigan Limited Liability Company Act (“MLLCA”) and the Michigan Revised Uniform Limited Partnership Act (“MRULPA”). Similarly, other states require foreign corporations, limited liability companies and limited partnerships that are transacting business in their jurisdiction to “qualify” under their laws.

It was once common for opining counsel representing an entity to be asked to opine that the entity was duly qualified to transact business in each jurisdiction where the nature of its business required qualification, or perhaps where the failure to be so qualified would have material adverse effect. As noted in the “Due Qualification” discussion in Section III, most reports now take the position that in light of the difficulty, cost, and limited value of an open-ended opinion on due qualification in other states, it is not appropriate to request a broad opinion regarding qualification. Whether an entity is in fact qualified can be determined by obtaining a certificate of good standing from the Michigan Department of Energy, Labor and Economic Growth or similar agency in another state. However, determining whether an entity is required to be so qualified is based on the facts and circumstances of the entity’s activities, which may not be readily known to the opining lawyer.

Michigan law governs whether a foreign entity is required to apply for a certificate of authority in Michigan. Whether an entity must qualify in another jurisdiction is governed by the laws of that state. Unless a lawyer is competent in addressing the laws of that other state, he or she should engage local counsel if required to provide an opinion as to whether or not qualification is required under the laws of another state. It is worth noting that in most (but not all) jurisdictions, the consequences of failing to be qualified are modest and curable.

The Committee believes that customary practice in Michigan mirrors that reflected in other reports to the effect that opinions on foreign qualification generally are limited to whether the entity is in fact qualified in a list of specific states. Further, if the entity is so qualified, the opining attorney should be allowed to state that the opinion is based solely on a certificate of good standing and is limited to the matters covered by the certificate. Since this is merely a factual confirmation that could as easily be determined by the opinion recipient or its counsel, the value of this type of an opinion may be questioned.

84 MCL 450.2011.
85 MCL 450.4910 et seq.
86 MCL 449.1901 et seq.
Guaranties

Power of Corporations. Prior to the 1989 amendments to the BCA, Michigan law was unclear as to whether a corporation lawfully could provide guaranties, other than guaranties for the obligations of wholly-owned subsidiaries. From an opining lawyer’s perspective, the issue is two-fold: does the corporation have the corporate power to give the guaranty, and has the corporation received adequate value in order for the guaranty not to constitute a fraudulent conveyance?

Section 261 of the BCA provides that a corporation has the power in furtherance of its corporate purposes to “[m]ake contracts, give guarantees and incur liabilities.” It has always been the general understanding that a guaranty of the obligations of a wholly-owned subsidiary is in furtherance of a parent corporation’s corporate purpose. The debate has been whether the guaranty of the obligations of an entity that is not wholly-owned is also in furtherance of a corporation’s purpose. The 1989 and 2006 amendments to Section 261(i) clarified that a Michigan corporation has the corporate power to give a guaranty on behalf of a parent corporation or limited liability company that owns all of its shares, and on behalf of a sibling corporation or limited liability company where a common parent owns all of the equity of the sibling and the corporate guarantor.

The issue remains whether a Michigan corporation has the corporate power to guaranty the obligations of a corporation or limited liability company that falls outside of the 100% equity ownership requirements of the statute, an affiliated partnership or any unaffiliated entity. Therefore, unless the opinion covers a situation addressed by Section 261(i), a lawyer giving an opinion may wish either to decline to provide any opinion or to provide a reasoned opinion. The analysis of whether a parent may guaranty the obligations of a less-than-wholly owned subsidiary may be different than for an entity’s guaranty of its sister or parent entity where there is not completely common ownership, since a parent will in all instances realize some effect from the performance of a subsidiary.

Power of Limited Liability Companies. Section 210 of the MLLCA provides that “a limited liability company has all powers necessary or convenient to effect any purpose for which the company is formed, including all powers granted to corporations in section 261 of the business corporation act . . . .”\(^8\)\(^7\) When read together with Section 261(i) of the BCA, it is clear that a Michigan limited liability company has the power to provide guaranties for: (i) a wholly-owned corporate or limited liability company subsidiary; (ii) a parent corporation or limited liability company that owns all of its interests; and (iii) a sibling corporation or limited liability company of a common parent that owns all of the equity of the sibling and the limited liability company issuing the guaranty.

Because the power of a Michigan limited liability company to issue a guaranty under the MLLCA is derived from the power of a Michigan corporation to issue a guaranty under the

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\(^8\)\(^7\) MCL 450.4210.
BCA, an opining lawyer should take into account the same caveats and limitations described above for corporate guaranties when rendering an opinion concerning a limited liability company guaranty. In evaluating this issue, the opining lawyer should also consider whether the limited liability company operating agreement confers express authority to give guaranties not covered by the statute.

**Power of Partnerships and Limited Partnerships.** Neither the Michigan Uniform Partnership Act (“MUPA”)\(^88\) nor the MRULPA directly authorizes partnerships to provide guaranties, nor is there anything in those acts that directly provides or indirectly suggests that partnerships or limited partnerships do not have the power to give guaranties. Section 9 of the MUPA provides that every “partner is an agent of the partnership...and the act of every partner, including the execution in the partnership name of any instrument, for apparently carrying on in the usual way the business of the partnership of which he is a member binds the partnership...”\(^89\) Section 403 of the MRULPA provides that a “general partner of a limited partnership has the rights and powers...of a partner in a partnership without limited partners.”\(^90\)

Consequently, to provide an opinion that a partnership or limited partnership has the power to issue a guaranty may require the opining lawyer to determine whether the guaranty is for “carrying on in the usual way the business of the partnership” or to find case law that supports the guaranty under the particular circumstances. Alternatively, one may argue that if all of the partners agree to provide the guaranty, that action alone brings the giving of the guaranty within the powers of the partnership. In any event, since there is no clear statutory authority, the attorney providing the opinion should consider whether to provide an unqualified opinion. The opining lawyer should also consider whether the partnership agreement confers express authority to give guaranties.

**Remedies for Lack of Power.** Even if an opining lawyer is unable to conclude that a corporation or limited liability company has the corporate or limited liability power to provide a guaranty, Section 1271 of the BCA and Section 211 of the MLLCA provide that the lack of power does not make the act invalid. However, both of these statutory provisions permit the lack of power to be asserted in limited instances in actions brought by: (i) a shareholder/member against the corporation/limited liability company; (ii) the corporation/limited liability company against an officer or director, if a corporation, or a former member or manager, if a limited liability company, for loss or damage resulting from the unauthorized act; or (iii) the attorney general to dissolve the corporation/limited liability company or to enjoin it from transacting unauthorized business. Thus, if the opining attorney determines to provide a reasoned opinion, he or she may want to discuss the impact of the remedy on the opinion recipient.

**Fraudulent Conveyance Matters.** Even if an entity has the power to give a guaranty, the guaranty could constitute a fraudulent conveyance if the guaranty was issued without the

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\(^{88}\) MCL 449.1 et seq.
\(^{89}\) MCL 449.9.
\(^{90}\) MCL 449.1403.
guarantor “receiving reasonably equivalent value . . . .” See Section 35 of the Michigan Fraudulent Transfer Act. Michigan courts have ruled that “fair equivalent” does not mean an exact equivalent in terms of nominal value, but that all of the surrounding circumstances will be considered to determine whether the transaction was fair.

Whether adequate value was provided for a guaranty is a factual issue and the lawyer providing an opinion should decline to render a legal opinion on this issue. It is recommended practice, however, that the authorizing resolutions of the managers, directors, members, shareholders or partners note the benefits and value derived by the guarantying entity as evidence of adequate value.

Most opinions provide a standard bankruptcy exception. Some of these expressly state that they also exclude the effect of fraudulent conveyance statutes on the opinions provided. Even without this express statement, both the national literature and the 1991 Report indicate that as a matter of customary practice, the bankruptcy exception is deemed also to except fraudulent conveyance law. Opining attorneys must decide whether this general exception is sufficient in the context of an opinion concerning the enforceability of a guaranty or whether they should explicitly indicate that, even if the entity had the appropriate power to issue the guaranty, the issuance of the guaranty is also subject to applicable fraudulent conveyance statutes. Note that guaranties that constitute distributions within the meaning of the BCA are not subject to the Uniform Fraudulent Transfer Act.

Distributions by a Corporation or Limited Liability Company

Opining lawyers are sometimes asked to opine on the enforceability of transaction documents involving “distributions” by a corporation or limited liability company. The 1991 Report includes a discussion of this issue in the context of opinions about corporate distributions, noting that such an opinion presents many of the same difficulties presented in a fraudulent conveyance analysis with guaranties, yet the standard bankruptcy exception is not commonly understood to exclude compliance with state corporate law from the enforceability opinion.

The MLLCA was adopted after the issuance of the 1991 Report. It includes similar provisions regarding distributions by limited liability companies. The discussion in the 1991 Report regarding opinions involving corporate distributions is also applicable to opinions on distributions by limited liability companies.

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91 MCL 566.31 et seq.
94 MCL 450.1122(3).
96 See MCL 450.4102(2)(f).
Specific Contractual Provisions and Issues

Choice of Law. Contracts often specify the law that will govern the agreement. Michigan courts have adopted the guidelines set forth in Sections 187 and 188 of the Second Restatement of Conflicts for determining whether to honor the contracting parties’ choice of law.97 Under the Restatement’s approach, chosen law provisions are enforceable unless: (i) the jurisdiction whose law is the chosen law has no substantial or other reasonable relationship to the parties to the transaction or the transaction itself; or (ii) application of the chosen law would be contrary to a fundamental policy of another jurisdiction that has a materially greater interest in the determination of the issue and that would be the jurisdiction whose law would apply in the absence of an effective chosen law provision. This approach balances the expectations of the parties with the fundamental policies of the state whose law would otherwise apply in the absence of a chosen law provision.

Under the Restatement’s first exception, the chosen-law state has no substantial relationship with the transaction or the parties and no other reasonable basis exists for the parties’ choice of law. Opining attorneys examine such factors as the parties’ business locations, the jurisdictions in which the parties are organized, the locations where the contract or transaction will be performed and the places where the transaction documents were negotiated and signed in determining whether a significant relationship exists with the chosen-law state. In many cases, one or more of these factors will enable the opining lawyer to decide that the first exception does not apply. In situations where the first exception arguably would apply, the parties may be able to modify the contract or transaction to establish the necessary contacts with the chosen-law state.

Under the Restatement’s second exception, the state whose law would otherwise apply in the absence of a chosen-law provision either has a materially greater interest in the determination of a particular issue or has a fundamental policy that would be violated if the choice of law provision were enforced. Because of the analytical difficulties that this can present to opining counsel, even in cases where the chosen law and the law governing the opinion are identical, counsel often include a public policy exception in their opinions regarding enforceability of choice of law provisions. See the discussion under “Governing Law” at “Substantive Opinion Clauses – The Enforceability Opinion” in Section III.

Forum Selection. Parties to a contract or transaction often wish to designate the forum for resolving disputes. Typically, the forum is the jurisdiction whose law is chosen by the parties as the governing law. In Michigan, both inbound and outbound forum selection clauses are enforceable, subject to limited exceptions.98 Michigan courts are required to entertain actions if the parties have agreed in writing to resolve their disputes in a Michigan court if: (a) the court has the power to entertain the action; (b) Michigan is a reasonably convenient place for the action; (c) the forum selection agreement was not obtained by misrepresentation, duress, the

97 Chrysler Corporation v Skyline Industrial Services, 448 Mich 113; 528 NW2d 698 (1995).
98 MCL 600.745.

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abuse of economic power or other unconscionable means; and (d) the defendant is served with process as provided by court rules.\(^9^9\) Similarly, a Michigan court is required to stay or dismiss an action where the parties have agreed in writing to resolve their disputes in another state unless either: (a) the court is required by statute to entertain the action; (b) the plaintiff cannot secure effective relief in the other state for reasons other than delay in bringing the action; (c) the other state would be substantially less convenient place for trial; (d) the forum selection clause was obtained by misrepresentation, duress, the abuse of economic power or other unconscionable means; or (e) it would be unfair or unreasonable to enforce the forum selection clause.\(^1^0^0\)

Michigan public policy also favors the enforcement of contractual forum selection clauses.\(^1^0^1\) Consequently, the party seeking to avoid a forum selection clause bears a heavy burden of showing the clause should not be enforced as written. In particular, inconvenience to the party seeking to challenge a forum selection clause that was foreseeable when the party agreed to the clause does not render the clause unenforceable.\(^1^0^2\) Accordingly, an opining lawyer generally will not find the need to take an exception for the enforceability of forum selection clauses unless one or more of the special circumstances outlined above are known to him or her at the time of delivering the opinion.

**Venue Selection.** Unlike forum selection clauses, venue selection clauses are unenforceable in Michigan to the extent the parties contractually agree in advance to resolve prospective future disputes in a particular court. The Michigan Supreme Court has held that such venue selection clauses conflict with both Michigan statutory law and court rules in *Omne Financial, Inc v Shacks, Inc.*\(^1^0^3\) The *Omne Financial* court distinguished decisions upholding venue selection agreements in two other cases, as both cases involved existing, as opposed to prospective, causes of action, and were decided before Michigan’s venue statutes were enacted. Accordingly, a lawyer expressing an opinion under Michigan law on the enforceability of a contract should take an exception for a venue selection clause for potential future litigation between the parties to the agreement.

**Waiver of Jury Trial.** It has become increasingly common for parties to commercial contracts to include waiver of jury trial provisions. Michigan law recognizes a party’s right to waive its constitutional right to a jury trial.\(^1^0^5\) The right to a civil jury trial is permissive, and a voluntary waiver through an agreement does not constitute the complete relinquishment of a constitutional right or a due process violation.\(^1^0^6\) In a recent Michigan Court of Appeals case,\(^1^0^7\)

\(^9^9\) MCL 600.745(2).
\(^1^0^0\) MCL 600.745(3).
\(^1^0^2\) Turcheck, 272 Mich App at 348.
\(^1^0^3\) 460 Mich 305; 596 NW2d 591 (1999) (citing MCL 600.1621, MCL 600.1605 and MCR 2.223(A)(2))
\(^1^0^4\) Garavaglia v Dept of Revenue, 338 Mich 467; 61 NW2d 612 (1953) and Grand Trunk W R Co v Boyd, 321 Mich 693; 33 NW2d 120 (1948).
\(^1^0^5\) Jones v Eastern Michigan Motorbuses, 287 Mich 619, 652; 283 NW2d 710 (1939).
\(^1^0^6\) McKinstry v Valley Obstetrics-Gynecology Clinic PC, 428 Mich 167, 182; 405 NW2d 88 (1987).
\(^1^0^7\) Harmonie Club Enterprises, LLC v TCF National Bank, 2007 WL 1553597 (Mich App 2007).
the court upheld a waiver of jury trial provision for both alleged breach of contract and related torts (intentional interference with a contract, misrepresentation, fraud and deceit) on the part of the lender when the underlying loan documents stated that the waiver of jury trial covered “litigation regarding performance or enforcement of, or in any way related to, this agreement or the loan.” In light of the Michigan authority, as recently reiterated by the Michigan Court of Appeals, and the fact that courts generally enforce arbitration clauses which involve a waiver of rights to both a judicial forum and a jury, the Committee does not believe an exception to the enforceability opinion is warranted for jury waiver provisions.108

Usury. In a loan transaction or other transaction involving financing, a party may request a legal opinion that the terms of the transaction do not violate any usury laws. A lawyer giving an opinion may also need to address usury in the context of an enforceability opinion or an opinion that the transaction does not conflict with any applicable laws, even if usury is not specifically mentioned.

Michigan has many features and nuances to its usury laws, which often depend on the nature of the borrower, lender and collateral involved. This discussion is limited to the context of business entities and transactions, and does not address usury in consumer or household matters.

The BCA provides that a domestic or foreign corporation, whether or not formed at the request of a lender or in furtherance of a business enterprise, may by agreement in writing, and not otherwise, agree to pay a rate of interest in excess of the legal rate and the defense of usury shall be prohibited.109

The MLLCA and the MRULPA have similar provisions (stating that these entities may agree to pay any rate of interest), but add the express limitation that the rate of interest cannot be excess of the rate permitted under Michigan’s criminal usury statute.110 Michigan’s criminal usury statute prohibits interest in excess of 25% per annum.111

There is a Michigan Attorney General Opinion to the effect that the criminal usury statute limits the interest that may be paid by a corporation.112 The Attorney General reasoned that while the BCA prohibits a corporation from asserting the defense of usury on a written contract, the criminal usury statute states a separate public policy prohibiting parties from collecting interest in excess of the criminal usury rate, and the BCA contains no separate authorization for a lender to collect such amounts. Therefore, even where a corporation would be prohibited from asserting usury as a defense in a civil action on a contract, the state could prosecute a lender for collecting interest in excess of 25% per annum in a criminal proceeding (to which the corporate

108 Practitioners should note that under the laws of some jurisdictions, waiver of the right to jury trial may not be effective unless conspicuously noted in the agreement.
109 MCL 450.1275.
110 MCL 450.4212 (MLLCA) and 449.1109 (MRULPA).
111 MCL 438.41 and 438.42.
112 OAG No 5740 (July 17, 1980).
borrower would not be a party). There is no case law on the topic, and therefore an attorney giving a usury opinion relating to a corporation may wish to mention this Attorney General Opinion or otherwise to take exception to the collection of any interest that would exceed the criminal usury rate.

Michigan also provides by statute that interest may be computed and collected on any due and unpaid installment of interest under a written instrument or contract at the same rate as specified in the instrument or contract, but not exceeding 10% per annum, and if no rate of interest is specified in the instrument, then at the annual rate of 7%. Practitioners should also note that under Michigan law, most charges asserted in connection with a loan may be considered interest for usury purposes.

A loan document may contain a provision that the rate of interest will not exceed the maximum permitted by law, known as a “savings clause.” While practitioners may get some comfort from these clauses, there is no published Michigan case law validating them. Reported decisions in other states are not consistent. Accordingly, when addressing a usury issue in a legal opinion, the existence of a savings clause should not be considered conclusive.

**Indemnification for Negligence.** Some commercial contracts, especially construction contracts, contain provisions under which one party agrees to indemnify another party for losses attributable to the indemnified party’s negligence. Michigan law limits the enforceability of such provisions in some situations. For example, Michigan courts will not enforce a contractual agreement to indemnify a party for its own negligence if the negligence is gross negligence or is based on willful or wanton acts. Additionally, in construction contracts, if the indemnitee is solely liable for negligence (i.e., the indemnitor is not also negligent), Michigan courts will not enforce the contractual provision. Opining attorneys should be cognizant of these limitations and take any necessary exceptions when providing an enforceability opinion that includes an indemnification provision under which one party indemnifies another for losses attributable to the indemnified party’s negligence.

**Implied Covenant of Good Faith and Fair Dealing.** Michigan courts have provided additional authority regarding the existence and scope of the duty of good faith and fair dealing. In *Eastway & Blevins Agency v Citizens Insurance Company of America*, the court refused to find a violation of a duty of good faith where one party had terminated the agreement in accordance with its termination provisions:

> According to plaintiff, even where defendant was contractually justified in terminating the agency relationship, its decision to do so was discretionary and, thus, required good faith... Plaintiff’s position lacks legal support. In contract termination cases, good faith

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113 MCL 438.101.
115 MCL 691.991.
is required only where the terminating party has unbridled discretion with respect to the other party’s performance under the contract...A lack of good faith cannot override an express provision in a contract...Under the terms of the agency agreement in this case, defendant could only exercise its discretion if plaintiff breached the agreement. Where, as here, a party’s discretion to terminate is limited, good faith need only have existed at the time the original agreement was made... After reviewing the record, we find no evidence that defendant entered into the agency agreement, including the provisions regarding branch offices, in bad faith.\footnote{206 Mich App at 302-303 (citations omitted).}

The Court of Appeals went further in \textit{Belle Isle Grill Corporation v City of Detroit},\footnote{256 Mich App 463, 666 NW2d 271 (2003).} where it stated:

Plaintiff maintains that “there is an implied covenant of good faith and fair dealing in every contract,” and for its sole argument states that “[w]hether Appellee’s admittedly unfair treatment of Appellants constitutes a breach of this implied covenant is for the Jury to decide but clearly, it has been plead [sic].” The trial court properly ruled that Michigan does not recognize a claim for breach of an implied covenant of good faith and fair dealing...and therefore properly dismissed this claim.\footnote{256 Mich App at 476 (citation omitted).}

However, in \textit{English Gardens Condominium, LLC v Howell Township},\footnote{273 Mich App 69, 729 NW2d 242 (2006), judgment aff’d in part, rev’d in part on other grounds, 480 Mich 962; 741 NW2d 511 (2007).} the Court of Appeals stated:

Of course, all contracts normally presume good faith and fair dealing in their exercise. This principle would prevent defendants from drawing on the letter of credit on the basis of wholly fabricated assertions of plaintiff’s noncompliance. But this principle does not restrict defendants from acting on the basis of reasonable beliefs that plaintiff had failed to fulfill its obligations. In this case, it is obvious that a bona fide controversy existed concerning plaintiff’s compliance with the site plan. Defendants thus satisfied the prerequisites for drawing on the letter of credit as specified by the letter itself.\footnote{273 Mich App at 75-76 (citations omitted).}

As noted in the 1991 Report\footnote{See 1991 Report at 24-25.} and recognized by other reports,\footnote{See, e.g., Section 3.3.4 of the TriBar Report, 53 BUS LAW at 625.} limitations related to good faith and fair dealing are considered to be covered by the equitable principles exception and opining lawyers do not need to take a separate exception for this concept.

\footnotetext[117]{206 Mich App at 302-303 (citations omitted).}
\footnotetext[118]{256 Mich App 463, 666 NW2d 271 (2003).}
\footnotetext[119]{256 Mich App at 476 (citation omitted).}
\footnotetext[120]{273 Mich App 69, 729 NW2d 242 (2006), judgment aff’d in part, rev’d in part on other grounds, 480 Mich 962; 741 NW2d 511 (2007).}
\footnotetext[121]{273 Mich App at 75-76 (citations omitted).}
\footnotetext[122]{See 1991 Report at 24-25.}
\footnotetext[123]{See, e.g., Section 3.3.4 of the TriBar Report, 53 BUS LAW at 625.}
Enforcement of Foreign Judgments

The United States is not a party to any bilateral or multilateral international convention or treaty concerning the enforcement of court judgments issued outside of the United States. In addition, neither the U.S. Constitution nor any other federal law requires a Michigan court or any other state court to recognize or enforce judgments rendered by foreign courts. The enforcement of foreign judgments is a matter of state law. In Michigan, the enforcement of foreign judgments is governed by Michigan’s version of the Uniform Foreign Money Judgments Recognition Act (“UFMJRA”) and the Uniform Enforcement of Foreign Judgments Act (“UEFJA”). The Michigan Court of Appeals has explained that these two statutes “operate in tandem, with the recognition of a foreign money judgment under the UFMJRA the precursor to enforcement under the UEFJA.”

The UFMJRA applies to any judgment of a foreign state (being a governmental unit other than the United States) that is final and conclusive and enforceable where rendered to the extent that it grants or denies recovery of a sum of money (but not including a judgment for taxes, a fine or other penalty). It generally provides for recognition of such judgments, except that (a) a Michigan court may not recognize the judgment if (i) it determines that the judgment was rendered under a judicial system that does not provide impartial tribunals or procedures compatible with the requirements of due process of law or (ii) the court rendering the judgment did not have personal jurisdiction over the defendant and jurisdiction over the subject matter, and (b) a Michigan court may elect not to recognize the judgment if it determines that any of the following apply: (i) the defendant in the foreign court did not receive notice of the proceedings in sufficient time to enable it to defend; (ii) the judgment was obtained by fraud; (iii) the cause of action on which the judgment was based was repugnant to the public policy of the State of Michigan; (iv) the judgment conflicted with another final and conclusive judgment; (v) the proceeding in the foreign court was contrary to an agreement between the parties under which the dispute in question was to be settled otherwise than by proceedings in that court; (vi) in the case of jurisdiction based only on personal service, the foreign court was a seriously inconvenient forum for trial of the action; (vii) the judgment was rendered in circumstances that raise substantial doubt about the integrity of the rendering court with respect to the judgment or (viii) the specific proceeding leading to the judgment was not compatible with the requirements of due process of law.

Under Section 3 of the UFMJRA, a foreign judgment that satisfies the criteria for recognition in the UFMJRA is enforceable in Michigan in the same manner as the judgment of a sister state of the United States which is entitled to full faith and credit. Judgments of sister states of the State of Michigan are enforced under the UEFJA. Thus, the UEFJA is the act under which final and conclusive money judgments obtained in courts outside the United States, and judgments of sister states of the United States, are enforced in Michigan.

124 MCL 691.1131 et seq.
125 MCL 691.1171 et seq.
Once a foreign money judgment has been recognized by a Michigan court, it may be enforced under Sections 3 and 4 of the UEFJA by filing a copy of the judgment, an affidavit and filing fee with a Michigan circuit, district or municipal court. A judgment filed under the UEFJA has the same effect and is subject to the same procedures, defenses and proceedings for reopening, vacating or staying as a judgment of the circuit, district or municipal court in which it is filed, and may be enforced or satisfied in a like manner. Alternatively, the UEFJA expressly maintained and codified the common-law practice of bringing a new action to enforce a foreign money judgment. Section 7 of the UEFJA provides that a “judgment creditor may bring an action to enforce his or her judgment instead of proceeding under this act.”

An opinion on the recognition and enforceability of a hypothetical future foreign judgment is of limited utility, as these matters are dependent upon facts and circumstances existing at the time the judgment is issued and may involve examination of the actual judgment. Nevertheless, a lawyer who is asked to express an opinion on the recognition and enforceability of a possible future foreign judgment may explain the statutes and general principles of Michigan law that are outlined above that affect such matters.

Waiver of Statute of Limitations

Agreements by parties to shorten limitations periods by contract, and thereby waive the statute of limitations that would otherwise apply, generally are enforceable in Michigan. In 2005, the Michigan Supreme Court abolished the “reasonableness” test used to evaluate contracts with shortened limitations periods in the case of Rory v Continental Ins Co.127 Prior to Rory, a Michigan court was required to analyze three factors for “reasonableness” to decide whether to enforce a shortened limitations period: (1) that the claimant have sufficient time to investigate and file an action; (2) that the time not be so short as to work a practical abrogation of the right of action; and (3) that the action not be barred before the loss or damage could be ascertained.128 In Rory, the Michigan Supreme Court held that an unambiguous contract providing for a shortened period of limitations is to be enforced as written, absent a “highly unusual circumstance such as a contract in violation of law or public policy..”129 Aside from these circumstances, only recognized traditional contract defenses such as duress, waiver, estoppel, fraud or unconscionability may be used to avoid the enforcement of provisions in a contract which shorten the limitations period for lawsuits.130 Rory was decided on freedom of contract grounds, with the court concluding that “a mere judicial assessment of ‘reasonableness’ is an invalid basis to enforce contractual provisions.”131 Accordingly, the court upheld a one-year limitations period for insureds to recover uninsured motorist benefits from their insurer under an auto insurance policy. The Michigan Supreme Court acknowledged that the trial court and Michigan Court of Appeals had refused to enforce the shortened limitations period because

127 473 Mich 457; 703 NW2d 23 (2005). Rory was a 4-3 decision, in which Justices Kelly, Cavanaugh and Weaver each wrote a separate dissenting opinion.
129 Id. at 469.
130 Id. at 470.
131 Id.
consumer insurance contracts are contracts of adhesion, but it declined to apply a higher standard to insurance contracts because of that fact. The Michigan Court of Appeals extended the freedom of contract analysis in *Rory* to the employment context, upholding a six-month limitations period for post-termination, employment-related actions contained in an employment application signed by the employee.  

As a result of the *Rory* decision and its progeny, there are few instances when it is necessary for a lawyer opining with respect to Michigan law to include a separate exception for the enforceability of contractual provisions which shorten limitations periods. Michigan has a statute which proscribes shortened limitations period for life insurance policies. Also, following the *Rory* decision, the Michigan Office of Financial and Insurance Regulation issued an order which prohibits new and revised policy forms that limit the time to file a claim or commence a suit for uninsured motorist benefits to less than three years.

**Liquidated Damages**

Liquidated damages provisions are agreements by parties to a contract to fix the amount of damages payable in compensation for loss or injury in the event of a subsequent breach. They are commonly used, and Michigan courts have stated they are particularly appropriate, in instances where “actual damages are uncertain or are of a purely speculative nature.” Michigan courts will enforce liquidated damages provisions if the amount is reasonable in relation to the possible injury suffered and is not unconscionable or excessive. To determine whether the amount stipulated is reasonable, courts will examine conditions existing at the time the contract was signed, not at the time of breach. If contract provisions for liquidated damages are used to exact a penalty or punitive damages from a breaching party, as opposed to serving as estimates of appropriate compensation for future loss or injury, courts will not enforce them. Michigan courts have emphasized that the mere use of the terms “liquidated damages,” “stipulated damages,” “penalty,” or “forfeiture” is not conclusive, and that they will look to the

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133. MCL 500.4046(2).
Based on existing case law and past experience, an opining lawyer may be able to conclude that a particular liquidated damages provision is reasonable and enforceable. Often, however, it may be difficult to assess whether liquidated damages provision will be enforced because of facts that are outside the knowledge of the opining lawyer or because case law does not provide sufficient guidance for the transaction or agreement at issue. Opining lawyers may wish to include an express exception or assumption concerning the enforceability of liquidated damages provisions, except where they have specific case law support for the enforceability of the provision, or the opinion otherwise includes “practical realization” language concerning the economic remedies set forth in the transaction documents.

Covenants Not to Compete

A Michigan statute permits an employer to obtain from an employee an agreement or covenant expressly prohibiting the employee from engaging in employment or a line of business after termination of employment if the provision is reasonable as to duration, geographical area, and the type of employment or line of business. The statute further provides that to the extent any such provision is found to be unreasonable in any respect, a court may limit it so as to render it reasonable in light of the circumstances in which it was made and may specifically enforce the provision as limited.

Michigan case law has recognized this, holding that a non-compete agreement is enforceable as long as it is reasonably drawn as to its duration, geographical scope, and line of business, and it protects the legitimate business interests of the party seeking its enforcement.

In the context of a sale of a business, non-competition agreements are permissible under "the common-law rule of reason embodied within MCL 445.772 if they are reasonable." Even when Michigan law expressly prohibited non-competition agreements prior to 1985, the legislation exempted covenants protecting the buyer of a business. Non-competition agreements in the sale-of-business context have historically been subject to more latitude as to what is a

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139 Decker v Pierce, 191 Mich 64, 72 (1916); Ross v Loescher, 152 Mich 386, 389 (1908).
141 MCL 445.774a.
144 MCL 445.761 et seq. (repealed by Michigan Antitrust Reform Act, 1984 PA 274, MCL 445.771 et seq.)
reasonable duration when compared to enforcement in the employment context. Courts have upheld restrictive covenants in that context with durations as long as five years.\textsuperscript{145}

Opining counsel typically will take an exception regarding the enforceability of a non-competition covenant because the issue of whether the covenant is reasonable as to duration, geographic scope and manner, in light of the circumstances of the particular covenant, is inherently a factual question.

APPENDIX A
MEMBERS OF THE MICHIGAN AD HOC COMMITTEE ON LEGAL OPINIONS

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REPORT OF THE AD HOC COMMITTEE
OF THE BUSINESS LAW SECTION
OF THE STATE BAR OF MICHIGAN
ON STANDARDIZED LEGAL OPINIONS
IN BUSINESS TRANSACTIONS

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# TABLE OF CONTENTS

**INTRODUCTION** .......................... 4  
**PURPOSE OF THE REPORT** ................. 4  
**PART I** .................................. 5  
**PRELIMINARY MATTERS** ...................... 5  
  Purpose of Opinions .......................... 6  
  Opinion Review Procedures ...................... 6  
    1. Second Partner Review .................. 6  
    2. Opinion Committees ..................... 6  
    3. Use of Standard Language ................ 6  
    4. Limitation on Authorized Signatories .... 6  
  Standard of Care Applicable to Preparation and Delivery of Opinions ................. 6  
    Innocent Misrepresentation ................ 7  
    Fraudulent Misrepresentation .............. 7  
    Negligence ................................ 7  
  Reasonableness Standard ................... 9  
**INTRODUCTORY OPINION PARAGRAPHS** ........... 9  
  Date ................................... 9  
  Addressee ................................. 10  
  Characterization of Counsel’s Role ........... 10  
  Description of the Transaction and Reason for the Opinion .................. 10  
  Definitions ............................... 11  
  Preparation of the Agreement ................ 11  
  Examination Underlying the Opinion ........... 11  
    Assumptions .............................. 11  
      (a) Binding Effect of Agreement on Other Parties .................. 11  
      (b) Property Rights ........................ 11  
      (c) Absence of Fact-Based Defenses to Enforcement .............. 11  
      (d) Invalidity of Relevant Laws ................ 12  
      (e) Enforceability of Other Client Agreements .............. 12  
      (f) Lack of Discretionary Action ................ 12  
    Reliance on Certificates of Public Officials .............. 12  
    Officers Certificates .................... 12  
  Documentary Examination ..................... 13  
  Local Counsel Opinions ....................... 13  
  Introduction to the Opinion .................. 14  
  Qualifications ............................. 14  
    Matters Within the Recipient’s Knowledge .............. 15  
    The Opinion Giver’s Knowledge .............. 15  
    Materiality .............................. 16  
**SUBSTANTIVE OPINION CLAUSES** ............... 16  
  Opinions Concerning Corporate Status .......... 16  
    Due Incorporation Versus Due Organization .................. 16  
    Validly Existing and Good Standing .............. 17  
    Due Qualification ........................ 18  
  Opinions Concerning Capital Stock ............. 18  
    Duly Authorized .......................... 18  
    Validly Issued ............................ 18  
    Fully Paid ................................ 19  
  Corporate Power, Authority and Action ............. 20  
    Corporate Power ........................... 20  
    Due Authorization .......................... 20  
  The Enforceability Opinion ................... 20  
    Formulation .............................. 20
<table>
<thead>
<tr>
<th>Section</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Available Remedies</td>
<td>21</td>
</tr>
<tr>
<td>Governing Law</td>
<td>21</td>
</tr>
<tr>
<td>Fact-Based Matters</td>
<td>22</td>
</tr>
<tr>
<td>Exceptions To the Standard Enforceability Opinion</td>
<td>22</td>
</tr>
<tr>
<td>The Bankruptcy Exception</td>
<td>23</td>
</tr>
<tr>
<td><strong>General</strong></td>
<td>23</td>
</tr>
<tr>
<td>Fraudulent Conveyance Laws</td>
<td>23</td>
</tr>
<tr>
<td>BCA Considerations</td>
<td>23</td>
</tr>
<tr>
<td>The Equitable Principles Exception</td>
<td>24</td>
</tr>
<tr>
<td>Arbitration</td>
<td>25</td>
</tr>
<tr>
<td>Other Qualifications</td>
<td>25</td>
</tr>
<tr>
<td>&quot;No Conflict&quot; Opinions</td>
<td>26</td>
</tr>
<tr>
<td>Articles and Bylaws</td>
<td>26</td>
</tr>
<tr>
<td>Orders, Judgments and Decrees</td>
<td>26</td>
</tr>
<tr>
<td>Agreements</td>
<td>26</td>
</tr>
<tr>
<td>Laws, Rules and Regulations</td>
<td>26</td>
</tr>
<tr>
<td>Receipt of Approvals and Consents</td>
<td>27</td>
</tr>
<tr>
<td>Possession of Necessary Permits and Licenses</td>
<td>27</td>
</tr>
<tr>
<td>Litigation Opinions</td>
<td>27</td>
</tr>
<tr>
<td>Title to Assets and Real Property</td>
<td>29</td>
</tr>
<tr>
<td>Misstatements and Omissions</td>
<td>29</td>
</tr>
<tr>
<td>Environmental Matters</td>
<td>29</td>
</tr>
<tr>
<td>Additional Exclusions</td>
<td>29</td>
</tr>
<tr>
<td><strong>PART II</strong></td>
<td>31</td>
</tr>
<tr>
<td><strong>SECTION A</strong></td>
<td>31</td>
</tr>
<tr>
<td>1. Date</td>
<td>31</td>
</tr>
<tr>
<td>2. Addressee</td>
<td>31</td>
</tr>
<tr>
<td>3. Characterization of Counsel's Role</td>
<td>31</td>
</tr>
<tr>
<td>4. Reliance on Certificates of Public Officials and Officers</td>
<td>31</td>
</tr>
<tr>
<td>5. Due Incorporation and Due Organization</td>
<td>31</td>
</tr>
<tr>
<td>6. Validly Existing and Good Standing</td>
<td>31</td>
</tr>
<tr>
<td>7. Duly Authorized and Validly Issued Securities</td>
<td>31</td>
</tr>
<tr>
<td>8. Fully Paid and Nonassessable</td>
<td>31</td>
</tr>
<tr>
<td>9. Corporate Power, Authority and Action</td>
<td>31</td>
</tr>
<tr>
<td><strong>SECTION B</strong></td>
<td>32</td>
</tr>
<tr>
<td>1. Assumptions</td>
<td>32</td>
</tr>
<tr>
<td>(a) Binding Effect</td>
<td>32</td>
</tr>
<tr>
<td>(b) Property Rights</td>
<td>32</td>
</tr>
<tr>
<td>(c) Absence of Fact-Based Defenses</td>
<td>32</td>
</tr>
<tr>
<td>(d) Invalidity of Relevant Laws</td>
<td>32</td>
</tr>
<tr>
<td>(e) Enforceability of Other Client Agreements</td>
<td>32</td>
</tr>
<tr>
<td>(f) Lack of Discretionary Action</td>
<td>32</td>
</tr>
<tr>
<td>2. Documentary Examination</td>
<td>32</td>
</tr>
<tr>
<td>3. Qualifications — The &quot;Knowledge&quot; Exception</td>
<td>32</td>
</tr>
<tr>
<td>4. Local Counsel Opinions</td>
<td>32</td>
</tr>
<tr>
<td>5. The Enforceability Opinion</td>
<td>32</td>
</tr>
<tr>
<td>6. The Bankruptcy and Equitable Principles Exceptions</td>
<td>33</td>
</tr>
<tr>
<td>7. Other Qualifications</td>
<td>33</td>
</tr>
<tr>
<td>8. The &quot;No Conflicts&quot; Opinion</td>
<td>33</td>
</tr>
<tr>
<td>9. Additional Exclusions</td>
<td>33</td>
</tr>
</tbody>
</table>
INTRODUCTION

This Report was prepared by the Ad Hoc Committee on Standardized Legal Opinions in Business Transactions (the "Committee"), a committee of the Business Law Section of the State Bar of Michigan. The Committee was formed in July, 1989 to recommend ways in which the negotiation and delivery of opinions in business transactions could be streamlined by standardization of interpretation and structure. The Committee hopes that standardization will promote the interests of both attorneys and clients by reducing the time and expense devoted to negotiation of opinions and alerting attorneys to the sometimes unintended consequences of opinions they receive or deliver, thus helping to avoid unpleasant surprises after the fact.

The Committee noted and studied the reports of other state and local bar committees regarding business transaction opinions. The Committee has also followed the activities of the Legal Opinions Committee of the American Bar Association (the so-called "Silverado" project) and has reviewed the December 31, 1990 exposure draft of that committee's legal opinion accord and related discussion. The Committee believes that many of its conclusions are in agreement with those set forth in the draft accord.

The draft accord disclaims any attempt to define existing practice and sets forth recommended guidelines and interpretations for use in future opinions. The accord leaves to particular jurisdictions the analysis of various legal issues determined by state or local law.

This Report makes reference, where appropriate, to the draft Silverado accord and tracks the efforts of other state and local bar committees to describe current practice. It also addresses issues specific to Michigan law. The Committee believes that lawyers delivering transaction opinions (particularly in multistate transactions) should review the accord when released in final form. While there is much overlap between this Report, the draft accord and the other state and local reports, the Committee recognized that not all Michigan lawyers would have access to the other reports and desired to prepare a report which could be published in a regular State Bar of Michigan publication and be widely disseminated among Michigan lawyers.

The Committee recognizes the need to attempt to reach common ground with these other reports. The opinion-giving process, particularly in light of the increasingly national and international scope of business transactions, will not be aided if each state issues its own unique report which conflicts with other reports. This Report is intended to assist Michigan lawyers in understanding opinion preparation and language when dealing both with Michigan and non-Michigan lawyers. Thus, the Committee has attempted to continue the effort to reach common understanding exhibited by the other committees whose reports it has studied.

PURPOSE OF THE REPORT

The purpose of this Report is to study language most commonly used in business transaction opinions and provide a standardized interpretation of that language, as well as an analysis of its use and appropriateness in such opinions. The Committee believes that the use of a common vocabulary will lead to a common understanding between opinion givers and opinion recipients and thus reduce the proliferation of exceptions and caveats contained in many business opinions and help facilitate the negotiation of opinions. Additionally, the Committee hopes that standardizing the use and meaning of transaction opinion terms will help opining attorneys determine the scope of investigation necessary for the delivery of such opinions.

This Report consists of two parts. Part I considers standard opinion language in the context of unsecured business transactions. Secured transaction issues in legal opinions are not addressed in this Report; in addition, the Committee has not attempted to address real estate issues in deference to the greater expertise of the members of the Real Property Law Section of the State Bar on those matters. However, the Committee believes that the matters discussed in this report will

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1. The Committee members are listed on Exhibit A to this Report.

3. Particular note should be made of the amendments to the Michigan Business Corporation Act ("BCA") which became effective October 1, 1989.
frequently arise both in secured transactions and real estate transactions.

Part II of this Report contains a summary of the conclusions reached in Part I. The Committee suggests that lawyers in Michigan may desire to refer to Part II or incorporate it by reference into transaction opinions, thus adopting those conclusions as governing the language of the opinion. This will assist opinion givers in ascertaining the meaning of opinion language and will help opinion recipients focus on any points of uncertainty or disagreement, thereby facilitating negotiation. The Committee suggests the following language for this purpose, to be included in opinions:

This opinion is governed by and is subject to Part II of the Report of the Ad Hoc Committee of the Business Law Section of the State Bar of Michigan on Standardized Legal Opinions in Business Transactions dated August 1, 1991, incorporated herein by reference. Without limiting the generality of the foregoing, the meaning of the terms and phrases used in this opinion (other than those defined in the transactional documents) is governed by and is subject to such Part II.

PART I.
PRELIMINARY MATTERS

Purpose of Opinions

This Report analyzes the preparation and delivery of third party opinion letters in business transactions. The term "third party" refers to the fact that the opining lawyer's opinion is addressed and delivered not to the client represented in the transaction but, most often, to the opposing party or its counsel. The delivery of these opinions is frequently a condition to the closing of the transaction with the opinion recipient entitled to refuse to consummate the transaction unless the opinion is delivered.

Transaction opinions generally serve to assure the opinion recipient on matters which are within the knowledge of the opining lawyer or his or her client. In this sense the legal opinion is an adjunct to the representations and warranties of the client contained in the transactional documents; the representations and warranties are intended to provide assurances to the other party on factual matters within the knowledge of the client, while the opinion provides similar comfort with respect to legal matters. These opinions frequently address the corporate power of the client to enter into the transaction and the steps it has taken to specifically authorize the transaction; the absence of certain specified adverse legal consequences arising from the transaction; the enforceability of the client's undertakings in the transactional documents; and the absence of conflicts between the transactional documents and other agreements, judgments or orders binding the client. They may also indicate to the opinion recipient the degree of investigation which has gone into these various matters.

The Committee strongly endorses the "golden rule" of transaction opinions: no lawyer should ask for an opinion that he or she would be unwilling to give under similar circumstances. Opinion recipients and their lawyers should not request opinions on matters which are unnecessary to the specific transaction, even though those matters may be commonly found in transaction opinions. Opinion letters are not intended to be guaranties and should not be viewed as mechanisms to put a lawyer, a law firm or their malpractice carriers in the position of surety of the client's contracts. The Committee believes that it is inappropriate for a lawyer to use a client's leverage over another contracting party to extract an unreasonable opinion from that party's attorney or to take advantage of attorneys who may be relatively inexperienced in transaction opinions by requesting inappropriate opinions. Further, recipients should be mindful of the relative costs and benefits of particular opinions and should avoid requesting opinions whose cost to the opinion giver outweighs the incremental comfort to the recipient.

Legal opinions generally should not require counsel to opine concerning factual issues and are not intended

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4 Section A of Part II relates to matters which are not addressed in the draft Silverado accord; Section B of Part II relates to matters which are also discussed in the draft accord. The purpose of creating two sections is to facilitate integration between this Report and the Silverado accord for lawyers wishing to avail themselves of both; in situations in which an opinion is to be governed by the final Silverado accord, Section A of Part II may nevertheless be incorporated by reference to cover those matters not addressed in the accord. The draft Silverado accord also contains a proposal to incorporate language, and intended interpretation, by reference.

5 The Committee recognizes that often an opinion will speak to a mix of legal and factual matters and that it may be impractical to limit certain opinions to strictly legal matters. Most legal opinions require the application of law to a set of facts. While the division between matters legal and those factual may often be unclear, the Committee nevertheless believes that the
AD HOC COMMITTEE REPORT

to be a reaffirmation by counsel of the representations and warranties made by the client in the transactional documents. In the Committee's view, this use of opinions is inappropriate.

Opinion Review Procedures

Aside from the actual substance and meaning of transaction opinions, many law firms also insist on the establishment of formal guidelines for the delivery and review of firm opinions. The purpose of this report is not to recommend any particular procedure for opinion review. Rather, the Committee notes the following procedures which are used by various firms in the opinion review process:

1. Second Partner Review. Some firms require that an opinion, prior to being delivered, be reviewed by a second partner in addition to the partner preparing the opinion. Often, the second partner must not be otherwise involved in the transaction. Some firms use a "cold review" process in which the second partner merely reads the opinion letter but conducts no investigation or review of underlying documents or facts to determine whether the opinions stated therein are correct. Other firms require a more in-depth review by the second partner. Each approach has drawbacks. A cold review simply provides an opportunity for the second reviewing partner to determine whether, on the face of the opinion, there is an obvious mistake. It offers little comfort as to whether the opinion preparer has conducted an adequate investigation and/or reached appropriate conclusions based on existing law. On the other hand, an in-depth review may require a substantial time commitment; some clients may be unwilling to pay for the time devoted by the second partner, viewing it as an internal procedure meant to protect the firm and not the client. Obviously, to the extent that the review time is not charged to the client, many firms will be reluctant to undertake the process. Finally, many smaller firms may be unable to have the opinion reviewed except by a partner not expert in the area of practice to which the transaction relates.

2. Opinion Committees. Some firms establish formal opinion committees which are required to review all opinions before they are delivered. The use of a committee may help facilitate uniformity in language and style of firm opinions as well as enable a firm to keep track of the types of opinions it is delivering and the consistency of the legal conclusions it expresses. The distinction is useful to separate matters which are the proper subject of legal opinions from those which are not.

3. Use of Standard Language. Many firms have form opinion letters which must be followed by all attorneys delivering opinions on behalf of the firm. These forms establish standard phraseology and include specific exceptions in transaction opinions. Obviously, however, standard form opinions cannot anticipate every possible variation requested or subject matter addressed in a specific opinion and so, while providing a starting point, often must be supplemented by further review procedures.

4. Limitation on Authorized Signatories. Some firms limit the persons authorized to sign opinions on behalf of the firm to specific partners or classes of partners. This operates as a de facto committee system by enabling a select group of people to monitor both the form and substance of firm opinions. However, it may raise concerns as to flexibility. For example, if the designated signatories are not available at closing when an opinion may be revised, the review process may break down or delay consummation of a transaction.

This Report addresses the standardization of documents which are clearly recognized as opinions. The Committee believes that any discussion of what actually constitutes an opinion is beyond the scope of this Report. However, the Committee notes that in establishing general opinion procedures many law firms must deal with the question of what firm communications, beyond commonly recognized letters of opinion, are included within the opinion guidelines (e.g., whether memos to clients or firm newsletters constitute legal opinions).

Standard of Care Applicable to Preparation and Delivery of Opinions

Cases from various states indicate the hazards an attorney may face from an incorrect opinion.\footnote{"An improvidently rendered opinion may lead to: action by state disciplinary authorities or federal agencies having disciplinary powers; a suit claiming negligent malpractice or negligent misrepresentation; a common law fraud action; claims under the federal and state securities laws; penalties under the Internal Revenue Code; a suit under the Racketeer Influenced and Corrupt Organizations statute; an action alleging an unfair trade practice; a demand for punitive damages; a criminal prosecution; a claim for aiding and abetting a breach of duty; a civil conspiracy suit;"}
Michigan, three common-law doctrines conceivably might be advanced to impose liability on attorneys for errors or misrepresentations in their opinion letters: (1) innocent misrepresentation; (2) fraudulent misrepresentation; and (3) negligence, including negligent misrepresentation and malpractice.7

**Innocent Misrepresentation.** In Michigan, innocent misrepresentation requires privity of the parties8. In a 1985 decision, a Federal court construing Michigan law held that attorneys can be liable only to their clients (rather than to non-client third parties) for erroneous opinion letters on an innocent misrepresentation theory.9

**Fraudulent Misrepresentation.** The fraudulent misrepresentation doctrine contains no privity requirement,10 so opining attorneys could be liable to third parties under that theory.11 However, since fraudulent misrepresentation requires elements of deliberate or reckless conduct, it will have little applicability to cases of good faith mistake which comprise most lawyers' concerns regarding transaction opinions.

**Negligence.** Potential liability for negligence presents a more difficult risk analysis for opining attorneys. In general, attorneys must exercise the skill, learning and ability of the average lawyer in representing their clients.12 "Competent handling of a particular matter includes inquiry into and analysis of the factual and legal elements of the problem, and use of methods and procedures meeting the standards of competent practitioners. It also includes adequate preparation."13

Recognizing that clients may hold their attorneys liable for negligently prepared material, the more pertinent question for purposes of this Report is whether third parties have similar causes of action against attorneys. In the malpractice situation, the answer is no. An attorney owes no duty of care to his or her client's adversary. Third parties therefore may not bring malpractice suits for negligently prepared material.

Whether Michigan courts would hold an attorney liable to a third party under a theory of negligent misrepresentation is unclear. In *City National Bank of Detroit v Rodgers & Morgenstein*,14 the Michigan Court of Appeals considered whether a law firm could be held liable under a negligent misrepresentation theory for an opinion letter addressed to the plaintiff, who was not the firm's client. The plaintiff Bank had sought and received the defendant law firm's opinion letter to the effect that certain representations in the partnership agreement were correct. The court held that a negligent misrepresentation claim "must be based upon a material misrepresentation of fact and not an opinion."15 The court explicitly rejected an analogy to the title abstractor principle which it had enunciated in an earlier case.16

We do not accept the analogy, because a distinction must be made between an abstractor's title search and the legal opinion issued in this case. The opinion of defendant Rodgers amounted to an expression of opinion in the exercise of professional judgment rendered upon facts (i.e., the partnership agreement

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10 *United States Fidelity & Guaranty Co. v Black*, supra at 117.


13 Michigan Rules of Professional Conduct ("MRPC") 1.11 comment (1988); see also MRPC 1.1(b) (1988).

14 155 Mich App 318, 319-22; 399 NW2d 505 (1986).

15 Id. at 323 (emphasis added).

provisions) fully disclosed and known to all. Unlike an abstract of title, the opinion did not constitute a summary of facts which could be checked against a record.\(^\text{17}\)

However, the City National Bank court specified that it was not creating a special exception to the title abstractor rule for lawyers. Rather, the particular circumstances of the case constituted no cause of action for negligent misrepresentation. The court indicated that while a different result might occur in a “situation in which an ordinary person deals in reliance upon an attorney’s opinion on a point of law,” the case at bar was “not a situation in which [the] plaintiff was without special knowledge or without the ability to interpret the partnership agreement through its own legal counsel.”\(^\text{18}\)

In considering professional liability for erroneous opinions, some states continue to follow the rationale of Ultramares Corp. v Touche,\(^\text{19}\) in which the court refused to impose liability for negligent misrepresentation upon an accounting firm for erroneous financial statements which the client provided to a third party. The Ultramares court indicated that the imposition of liability would subject the firm to “liability in an indeterminate amount for an indeterminate time to an indeterminate class.”\(^\text{20}\)

However, in Stockler v Rose, 174 Mich App 14 (1989), the Michigan Court of Appeals adopted the approach of the Restatement Torts, 2d, Section 552 with regard to an auditor’s liability to persons who relied upon financial statements certified by it.

Section 552 provides that a person, who in the course of his or her business, profession or employment supplies false information for the guidance of others, is subject to liability for pecuniary loss caused by justifiable reliance upon the information if the provider fails to exercise reasonable care or competence in obtaining or communicating the information. Liability is limited to loss suffered by persons for whose benefit the information is supplied and further limited to those persons who relied upon the information in a transaction which the information supplier intended to influence. See 174 Mich App at 35-36.

Although the Court of Appeals applied Section 552 only with respect to “the scope of an accountant’s potential third party liability for negligent misrepresentation,”\(^\text{21}\) Section 552 is not limited to accountant liability but applies to any provider of “false information for the guidance of others in their business transactions.”\(^\text{22}\) Thus, in addition to rejecting the Ultramares standard for accountant liability, the language of Stockler could be applied to attorney opinion letters, although this apparently has not yet been done by a Michigan court.\(^\text{23}\)

In light of Stockler, it is possible that privity requirements would not limit a lawyer’s liability for negligence in the traditional transaction opinion setting in which the opining lawyer knows that his or her opinion will be relied upon by a limited and discrete class of persons (often a single party) in connection with a well-defined transaction. The potentially unlimited amount and scope of liability feared by the Ultramares court would not be threatened in most such instances. For example, one court has stated that Ultramares actually established the principle that liability for negligent misstatements to one not in contractual privity may attach where the statement is made for the principal purpose of having it relied upon by such person, and where its benefit to the party authorizing the statement stems precisely from such reliance by the third party.\(^\text{24}\)

Going a step further, the Supreme Court of Oklahoma rejected the Ultramares rationale and held that a defendant lawyer could be held liable for negligence upon the information in a transaction which the information supplier intended to influence. See 174 Mich App at 35-36.

\(^{17}\) 155 Mich App at 323-24.

\(^{18}\) 155 Mich App at 325. However, existing Michigan case law indicates that a misrepresentation of the law of another jurisdiction cannot be grounds for a negligent misrepresentation or legal malpractice claim. See Miller v McGinnis, 285 Mich 28, 35; 280 NW 96 (1938), in which the court held that no liability for such a misrepresentation would exist in the absence of bad faith.

\(^{19}\) 225 NY 170; 174 NE 441 (1931).

\(^{20}\) Id. at 444.

\(^{21}\) 174 Mich App at 36.

\(^{22}\) 174 Mich App at 35.

\(^{23}\) One of the questions which a court seeking to apply this principle would have to address is whether a legal opinion constitutes “false information” within the meaning of Restatement Section 552. A legal opinion is not a representation of facts in the sense that a financial statement represents financial condition, and so the Stockler situation may be distinguishable. On the other hand, since an auditor’s role is limited to opining as to whether audited financial statements fairly present the financial condition of the company (the statements themselves are the company’s representations, not the auditor’s), there may be little if any basis for distinguishing an auditor’s responsibilities from those of an opining lawyer under Section 552.

\(^{24}\) Vereins-Und Westbank, AG v Carter, 691 F Supp 704, 709 (SD NY, 1988).
where there was a foreseeable likelihood that his actions could injure a third party such as the plaintiff. The court specifically stated that “‘privity has no applicability under the law of Oklahoma in the realm of tort’."  

Reasonableness Standard. The Committee agrees with the general view, expressed in a number of cases and articles, that a lawyer is not an insurer or guarantor of his or her legal opinion. However, lawyers are generally expected to exercise due care in the preparation and issuance of legal opinions, the scope of which depends on various factors, including the relationship with the client, the nature of the opinion requested, the cost associated with independent verification of facts or legal issues, the identity of the opinion recipient and other relevant considerations. In general, the duty would be satisfied if the opining lawyer has a reasonable basis for the factual and legal matters expressed in the opinion. The Committee believes that this standard applies to the preparation of all opinions, although it can be narrowed or broadened by express language in the opinion and the courts may interpret the duty more or less strictly depending on all relevant circumstances.

25 Bradford Sec. Processing Servs., Inc. v Plaza Bank & Trust, 653 P2d 188, 191 (Okla, 1982).
27 There are certain specific ABA guidelines for opining lawyers with respect to particular areas, including the following: assumed facts opinion in connection with the sale of unregistered securities (see ABA Comm. on Ethics and Professional Responsibility, Op. No. 335 (1974)); standards applicable to lawyers who issue tax shelter opinions (id., No. 346 (Revised) (1992)); and Statement of Policy Regarding Responsibilities and Liabilities of Lawyers in Advising with Respect to Compliance by Clients with Laws Administered by the Securities and Exchange Commission, 31 Bus. Law 543 (1975).
28 For example, the standard of care may be more strict for attorneys who advise on matters within a recognized legal specialty (see e.g., Togstad v Vesely, Otto, Miller & Keete, 291 NW 2d 686 (Minn 1980)) or with respect to matters of foreign law (see e.g., Degan v Steinbrink, 202 App. Div. 477, 195 N.Y.S. 810 (1st Dept 1922)).

Recognition of this standard can greatly facilitate the negotiation of opinions and the standardization of language. The use of endless lists of qualifications and exceptions in opinions often is an attempt to restate this standard; in other words, opining lawyers use such qualifications and exceptions to indicate that they are not sureties or guarantors of the matters set forth but are expressing their opinion based upon a reasonableness standard. Indiscriminate use of qualifications such as “to our knowledge” should not be necessary to further protect the opining lawyer, in light of this standard. Every opinion is expressed to the “knowledge” of the opining lawyer, with the real focus of inquiry being the reasonableness of the investigation performed in reaching that level of knowledge. Many of these matters are addressed below in the specific discussion of opinion qualifications. The Committee believes that the recognition of the reasonableness standard can greatly reduce extraneous opinion language whose real effect is simply to communicate this standard.

This Report is not intended to define the scope of an opining lawyer’s duty nor the standard for determining whether the duty has been satisfied in any particular situation. The degree of care, skill and diligence which is required of an opining lawyer in any particular situation, and the steps which the opining lawyer should take to satisfy the duty of due care, will depend on all applicable circumstances and cannot be precisely articulated here.

INTRODUCTORY OPINION PARAGRAPHS

Date

Normally an opinion will be dated as of the date it is delivered, usually the closing date of the transaction. The third party requesting the opinion usually insists that the opinion speak as of the closing date to guard against any developments between an earlier-dated opinion and the date on which the transaction is consummated. Although, as a practical matter, the factual and legal research underlying the opinion will be performed as of an earlier date, the opining lawyer should bear in mind his or her responsibility to ensure that the opinion is valid as of its date.

Occasionally, a lawyer will be asked to give an opinion but will not be present at the closing to deliver it. This most frequently occurs when lawyers act as local counsel with respect to a transaction which has multi-state implications. The lawyer may feel apprehensive about physically delivering his or her opinion prior to the closing date, and some lawyers attempt to assuage their uneasiness by dating their opinion as of the date it is delivered rather than the closing date. The Committee believes that in most instances this is inappropriate,
absent specific agreement by the opinion recipient that
the opinion may bear a pre-closing date. The preferable
course of action is to date the opinion as of closing but
deliver it in escrow to the principal counsel for the party
for whom the opining lawyer is acting as local counsel.
The Committee believes that if facts or circumstances
affecting the opinion come to the attention of the opining
lawyer, after the date the opinion is delivered but prior
to the closing date, the opining lawyer can notify the
parties (by telecopy or otherwise) that the opinion should
not be delivered and that no one may rely on it.

Retroactive legislation may be passed after the delivery
of an opinion which makes the legal conclusions of the
opinion incorrect as of its date. The Committee believes
that the opining lawyer cannot be held responsible for
such retroactive effect, and that an opinion speaks to
the laws in effect on the opinion's date. A more difficult
issue is presented with respect to pending legislation.
Questions may arise as to whether an opining lawyer
has a duty to discuss pending legislation when opining
that the future performance of an agreement will not
conflict with law.29 The Committee believes that this
matter may be negotiated between the parties but that
absent special provision, the opinion will speak only to
laws which have been adopted on the date of the
opinion.30

Addressee

Opinions will normally be addressed to specific parties
as required by the agreement under which they are
given. There are certain opinions on which other parties,
not in privity with the opining lawyer's client, may seek
to rely. Opinions delivered in connection with the public
offering of securities provide an example. Opining
lawyers will sometimes attempt to limit, within the text of
their opinions, the persons who may rely thereon. It is
the consensus of the Committee that normally only the
addressee of an opinion is entitled to rely upon it;
however, in instances in which it is intended and clearly
foreseeable that other parties may seek to rely upon it,
a lawyer who wishes to limit reliance should consider an
express limitation. However, failure to provide an express
limitation should not be interpreted as an indication of
the opinion giver's intent to permit reliance by anyone
other than an addressee.

Characterization of Counsel's Role

In delivering an opinion, counsel will often describe
his or her participation in, or relationship to, the trans-
action, e.g., "We have acted as counsel to the borrower
in connection with the loan transaction." Attorneys may
attempt to further characterize their participation by
describing themselves as "general" or "special" counsel
(the use of the latter being more prevalent). In describing
oneself as "special" counsel, a lawyer may seek to
convey that he or she has not generally represented the
client, and therefore that such counsel's knowledge is
more limited than that of a so-called "general" counsel.
Certain attorneys may feel that being described as
"general" counsel connotes a closer relationship with
the client and therefore suggests a higher level of
knowledge independent of investigation.

The Committee does not believe that use of
descriptive terms such as "general" or "special" should
determine the standard of care applicable to an opining
lawyer or the degree of investigation which such lawyer
is obligated to perform in connection with the delivery
of an opinion.31 Furthermore, such characterizations may
be misleading. Counsel may intend, by use of the
descriptive term "special counsel," to alert the opinion
recipient to a more limited relationship, and a lower
degree of knowledge, than would be possessed by a
general counsel. The recipient, however, may interpret
the term "special" to connote a higher degree of
expertise with respect to certain substantive areas of
law and therefore a higher duty upon the opining lawyer
in the preparation and delivery of the opinion. Generally,
the Committee believes that an opining counsel who
wishes to convey to a recipient that such counsel's
duty of investigation is limited because of a limited role
in a transaction, or a limited relationship with or
knowledge of a client, should specifically describe the
limitations.

Description of the Transaction and Reason for
the Opinion

The introductory portions of an opinion will generally
describe the transaction pursuant to which the opinion
is delivered (e.g., "We have acted as counsel to XYZ
Corporation as borrower pursuant to that certain loan

29 See the discussion of "No Conflicts" opinions below
at "SUBSTANTIVE OPINION CLAUSES — 'No Conflict'
Opinions".

30 Opining lawyers should consider, however, whether
they have a duty; if they are aware of pending
legislation which is proposed to have a retroactive
effect, to notify the person receiving the opinion of
the pendency of such legislation. Opining lawyers
may find it difficult to give an enforceability opinion
under such circumstances.

31 The standard of care applicable to an opining lawyer
is discussed above at "PRELIMINARY MATTERS —
Standard of Care Applicable to Preparation and
Delivery of Opinions.".
Generally, the Committee believes that these types of opinions are essentially factual in nature and should be avoided. See the discussion at "SUBSTANTIVE OPINION CLAUSES — Misstatements and Omissions."
(d) Invalidity of Relevant Laws. In the absence of reported decisions invalidating specific laws on constitutional or other grounds, opinion givers are entitled to assume that all relevant laws are valid and should not be expected to undertake a constitutional or other analysis of any such validity.

(e) Enforceability of Other Client Agreements. Since opinion givers are often asked to opine that the transactions and documents in question will not conflict with other agreements which are binding upon the opinion giver’s client (see ‘SUBSTANTIVE OPINION CLAUSES — ‘No Conflict’ Opinions’), the opinion giver should be entitled to assume that all such other agreements will be enforced as written.

(f) Lack of Discretionary Action. In assessing whether the transaction under consideration and the performance thereof by the opinion giver’s client will conflict with or contravene any other agreement or orders by which the client is bound or to which it is subject, opinion givers will normally be limited to an examination of the terms and conditions of such other agreements or orders and the specific actions required thereunder. There is always a possibility that action which is not specifically prohibited by such agreements or orders will be taken by the client and could result in a breach of those agreements or orders or a breach of the agreement under consideration. Since these matters are beyond the opinion giver’s control and cannot be investigated or determined in advance, opinion givers and recipients should implicitly assume for purposes of the opinion that no such actions will be taken.

Of course, any of the foregoing assumptions would be inappropriate to the extent that an opinion giver has agreed to deliver an opinion specifically relating to one of them or to a matter which would require the opinion giver to investigate one of these areas.

Reliance on Certificates of Public Officials. Opinions will often contain a reference to certificates of governmental officials upon which the opining lawyer has relied in delivering the opinion. This is most frequent with respect to certificates of good standing or tax clearance certificates. The Committee generally does not believe that the mere reference to public or governmental certificates limits the opining lawyer’s duty or responsibility with respect to the matters covered therein. An attorney wishing to communicate that his or her opinion on matters covered by a certificate is limited solely to the certificate should express a specific limitation to that effect. Opinion givers should also note that relying on government certificates which are dated as of a date prior to the date of the opinion, without a telephonic or telegraphic bring-down to the date of closing, may expose the opining lawyer for events which occur between the certificate date and the closing date.

Officers Certificates. An opining lawyer will also often rely upon certificates of the client’s officers to establish factual matters underlying the opinion. Often the opinion will recite that the opining lawyer is relying on such officers’ certificates and will list such certificates. Whether such certificates are delivered along with the opinion often will depend upon the purpose for which such certificates are given.

The Committee believes that there are two primary purposes for noting the use of officers’ certificates in an investigation underlying an opinion. The first of these is to convey a limitation upon the scope of the opining lawyer’s investigation of the matters covered by such certificate. If intended for this purpose, the opinion should note specifically that the lawyer has performed no other investigation with respect to the matters stated in such certificate, and normally it is appropriate to deliver such certificate along with the opinion. Whether the party receiving the opinion or its counsel will accept such limitation is normally a matter for negotiation between the parties. The second purpose for describing the officers’ certificates relied upon by the opining lawyer is to detail, for the benefit of the opinion recipient and its counsel, the steps taken by the opining counsel to reach its opinion. In this sense it is similar to a comfort procedure on due diligence for the recipient, and the listing of the certificates is meant to be a description of the investigation and not a limitation on it.

The Committee generally believes that unless the description of officers’ certificates is intended to communicate a limitation on the scope of an opining lawyer’s investigation, it is unnecessary to list such certificates, although it certainly is not inappropriate for the receiving party to ask for such description in order to more fully understand the investigation performed by the opining lawyer. Absent a limitation on the scope of the investigation, the Committee believes that a listing of officers’ certificates upon which reliance has been placed adds good standing, and believes that this practice is generally understood and accepted by recipients even without the inclusion of an express limitation in the opinion.
little to the statement, discussed below, that the lawyer has made such investigation as he or she has deemed necessary under the circumstances.

The use of factual certificates as the basis for a legal opinion may sometimes blur the distinction between the factual matters upon which the lawyer should not be expected to opine and the legal matters upon which opinion is expected. At times, however, this is unavoidable. As an example, an opinion that a loan agreement will not conflict with any other agreement to which an opining lawyer's client is subject may require the opining lawyer to rely upon a certificate of the client's chief financial officer to demonstrate that the consummation of the transaction will not violate financial covenants under the client's other lending agreements.\(^{34}\)

The accuracy of certificates delivered as underlying support for legal opinions may affect the analysis of whether the opining lawyer has adequately discharged his or her duty to conduct a reasonable investigation. The Committee believes that opining lawyers normally should be entitled to assume the truthfulness of officers' certificates. Whether the person giving the certificate has the capacity to deliver such a certificate, or has done an inquiry adequate to verify the accuracy of the statements made, are matters which the opining lawyer may bear a responsibility to investigate, depending on the circumstances. As an example, a certificate from a chief financial officer to the effect that a corporation is not in violation of financial covenants in a loan agreement should normally warrant reliance by an opining lawyer; the same certificate from a vice president in charge of personnel should cause careful attorneys to examine such officer's qualifications to make those certifications and to review the specific inquiries and calculations made by the officer in reaching such conclusions. This is simply another way of stating that the circumstances will indicate whether the reasonableness standard has been satisfied.

**Documentary Examination**

Some opining lawyers choose to describe at length the documents which they have reviewed in arriving at their opinion. In the interest of brevity, the Committee does not favor the listing of all documents reviewed but rather prefers a statement that the opining lawyer has examined such documents and made such other investigations as he or she has deemed relevant under the circumstances. The party receiving the opinion may request the listing of documents in order to assure itself that certain documents have been examined. Absent a specific statement to the contrary, however, the Committee does not believe that the mere listing of documents examined serves in any way to limit the scope of the opining lawyer's required investigation. If the lawyer giving the opinion intends to so limit his or her responsibility, specific language for that purpose should be included in the opinion. The Committee further believes that a complete absence of any reference to documentary examination is appropriate if the opinion simply states generally that the opining lawyer has made such investigation as he or she has deemed necessary.

Such description may also contain statements to the effect that the opining lawyer has assumed all signatures to be genuine or that copies of such documents conform to the originals thereof. The Committee believes that assumptions as to genuineness of signatures and conformity of copies to originals are implicit and need not be set forth in the opinion.

**Local Counsel Opinions**

Commonly, a lawyer delivering an opinion with respect to a transaction involving parties in different states, or with respect to a client with multi-state operations, will engage local counsel to opine as to matters peculiar to state laws in which the principal opining lawyer is not expert. Opining attorneys often attempt to limit their opinions to matters arising under the laws of the United States and those of their state of practice. This may be unacceptable to the opinion recipient, however, if the underlying agreement or transaction clearly has ramifications under the laws of other states.\(^{35}\) In such

\(^{34}\) The delivery to an opinion recipient of officers' certificates may also pose questions as to the officers' liability for inaccuracies contained in such certificates. This issue also exists with respect to officers' certificates unrelated to the legal opinion but which are required by the transaction documents to be delivered at closing. The Committee believes that certificates given by officers in their capacity as such should not, absent fraud, impose personal liability on them.

\(^{35}\) One example of this would be a Michigan lawyer opining as to the due incorporation or organization of a Delaware corporation. However, it is common for opining lawyers to express opinions on Delaware corporate law even when not licensed in Delaware, due to the widespread familiarity with such law among attorneys. More often, the problem will arise where, for instance, a Michigan lawyer delivering an opinion with respect to a Michigan parent corporation is asked to opine on the enforceability of an agreement under,
instances, the use of local counsel to review and opine on matters arising under laws of other states is customary.

The manner in which a local counsel's opinion is presented and relied upon by the principal opining lawyer may have important consequences on such lawyer's responsibility if the matters included in the local counsel's opinion prove incorrect. An opinion may state that the principal opining lawyer has relied upon the opinion of local counsel (which is identified and often attached); that the form or scope of the local counsel's opinion is satisfactory; or that reliance upon the opinion of the local counsel is justified. The Committee believes that none of the foregoing recitals indicate that the principal opining lawyer has undertaken to ensure the correctness of the local counsel's opinion or has made an independent investigation of the conclusions reached by local counsel. However, if the principal opining lawyer's opinion states concurrence with the opinion of the local counsel, a higher duty of investigation may exist.

The Committee believes that stating concurrence with local counsel's opinion is not sound practice where the principal opining lawyer is not expert in the laws of the local counsel's jurisdiction. The opinion recipient may be entitled to expect the principal opining lawyer to select local counsel with reasonable care and to examine local counsel's opinion to determine whether it appears to cover the legal issues on which reliance is placed. However, the Committee does not believe it appropriate for the recipient to require the principal opining lawyer to state concurrence with local counsel's opinion. The preferred format usually will be to have the local counsel address his or her opinion directly to the recipient of the principal opinion, rather than to the principal opining lawyer.

**Introduction to the Opinion**

After reciting the preliminary matters referred to above, opinions customarily contain an introduction to the opinion. Often this is set forth as follows:

> Based on the foregoing [and upon such investigation as we have deemed necessary], it is our opinion that:

The clause in brackets may be unnecessary if the opinion's description of the matters investigated (discussed above at "INTRODUCTORY OPINION PARAGRAPHS — Documentary Examination") contains similarly broad language. However, if the earlier language has merely described the specific documents examined, omission of the bracketed clause from the opinion introduction may suggest a limitation on the opining lawyer's investigation. Inclusion of the language communicates that, regardless of the specific investigatory procedures delineated in the preceding paragraphs, the opining lawyer has undertaken such investigation as he or she believes to be reasonably necessary under the circumstances to express the opinions thereafter set forth. The Committee believes, however, that except as expressly limited in the opinion, such investigation is incumbent upon the opining lawyer whether or not stated in the introductory language.

The Committee generally favors introductory language to the effect that "We are of the opinion that," "It is our opinion that," or "We are of the following opinions." Although stylistically some lawyers use phrases such as "We believe that" or "In our view," the Committee believes that the use of such alternative forms may suggest an expression which does not rise to the level of a formal opinion and should be avoided.

**Qualifications**

Opinions are often qualified, in whole or in part, by certain express matters. These qualifications are usually found either in the introduction to the opinion, prior to the paragraphs which actually state the opinion; after the opinion paragraphs; or in the opinion paragraphs themselves. Matters which are intended to qualify all of the opinions expressed may be set forth before or after the opinion paragraphs. This is a matter of style for which the Committee has no preference, provided that the qualifications are stated so as to make clear that they apply to all the opinions expressed in the letter. Qualifications which relate only to certain of the opinion paragraphs should normally be included within such paragraphs. Generally, acceptable qualifications are a matter for negotiation between the opinion giver and the opinion recipient.

Qualifications may express a limitation on the investigation performed in preparing an opinion or may express actual limitations upon the breadth of the opinion. An example of the former would be a "knowledge" exception, while the latter would include, for instance, the standard qualification that enforceability of an agreement may be limited by bankruptcy laws and principles of equity. Each of these specific examples is discussed further below.

Qualifications may be closely related to assumptions. Opinion givers who wish to exclude certain matters from the coverage of their opinions may state an assumption...
as to the truth of these matters without investigation or may express a qualification that the opinion does not extend to the excluded matters.

The Committee believes that qualifications must be judged against an opining lawyer's basic duty with respect to the preparation of an opinion. As discussed above, the Committee believes that this duty is to arrive at a reasonable basis under the circumstances for the factual and legal matters expressed in the opinion. The failure to include any particular exception would not raise this standard of duty. On the other hand, the inclusion of a qualification may change the literal meaning of an opinion so as to limit the lawyer's required scope of investigation. For instance, contrast (i) an opining lawyer's transaction opinion that there is no material litigation pending against a client with (ii) the same lawyer's standard audit response that he or she has not been retained to represent the company in any material litigation. Although the standard of care which the lawyer must meet in order to give either opinion is the same, the scope of the former opinion is much broader than the latter opinion and therefore the latter's limitation to those cases for which the lawyer has been retained has a significant effect on what will actually constitute a reasonable basis for the opinion.

The qualifications of and exceptions to opinions can unnecessarily complicate negotiations and add significant expense to transactions. They may also lead to needlessly lengthy opinions as opining lawyers try to conceive and take exception to every eventuality which may arise from the literal language of the opinion. A goal of this Committee (consistent with that of the other local, state and ABA committees which have considered these issues) is to attempt to reach consensus which may be adopted for use by Michigan lawyers as to the standard meanings of certain commonly given opinions and phrases so as to eliminate the widespread use of lengthy exceptions and qualifications to opinions.

Matters Within the Recipient's Knowledge. Qualifications may relate to certain factual assumptions about matters peculiarly within the control of the person receiving the opinion. As an example, an opinion that the placement of securities will not violate the registration provisions of applicable federal or state securities laws may be qualified by expressly assuming the truth of the opinion recipient's representations concerning investment intent and the performance of its covenant not to transfer the shares without registration or satisfaction of another exemption.

The Opinion Giver's Knowledge. A qualification may also contain a disclaimer of a particular level of investigation. Included would be "To our knowledge" or "To our actual knowledge." The Committee does not believe that the phrase "To our knowledge" differs materially from "To our actual knowledge" without further qualification.

Some lawyers believe that a failure to use a knowledge exception imposes a higher duty on the opining lawyer than the inclusion of a knowledge exception. These lawyers believe that the failure to qualify opinions by reference to the facts "known to us" implies that the lawyer is a guarantor of factual matters. Some also believe that the phrase "to our knowledge," standing alone, only refers to the opining lawyer's knowledge absent investigation, while "to our knowledge after due inquiry" imposes a duty of investigation. The Committee does not agree with either of these views and believes that the mere use of a knowledge exception neither increases nor decreases the burden of a lawyer delivering an opinion.

Knowledge qualifiers are often used as a compromise in an attempt to enable an opinion recipient to reach a certain level of comfort while controlling the investigation (and attendant cost) necessary for the opinion giver to reach the opinion sought.

The scope of the knowledge exception may be a matter of contention between opinion givers and recipients. Some feel that the phrase "to our knowledge" refers to the knowledge of every lawyer in the firm giving the opinion, while others maintain that it encompasses the knowledge of a limited group of attorneys, e.g., the attorneys with active responsibility for that client within the firm or those attorneys actually working on the transaction in question. Proponents of the more expansive interpretation argue that an opinion gives little comfort to a recipient if it merely speaks to the knowledge of a certain few attorneys without any assurance that other attorneys within the same firm have no knowledge of matters which would make the opinion untrue. Advocates of a restrictive scope of knowledge note that in the multi-office large firm environment, it is simply not feasible (from both a time and cost standpoint) for opinion preparers to canvass all other attorneys in their firms in the course of preparing opinions.

The Committee believes that the conflict between these two approaches results from attempts to impose a single resolution on what is really a two-part question. In the Committee's view, the knowledge exception involves two inquiries: (1) whose knowledge (which specific attorneys) is represented? and (2) did those attorneys perform an adequate investigation in reaching their level of knowledge? The Committee believes that
the proper response to the first of these inquiries is that the knowledge qualification refers to the actual knowledge of the specific attorneys within the firm who have participated in the transaction in question or the preparation of the opinion. In this sense, the Committee believes that "actual knowledge" means "conscious awareness," a phrase articulated in the draft Silverado accord. Any other approach involves issues of constructive or imputed knowledge which are more appropriately analyzed under the second inquiry, which will be evaluated under the reasonableness standard and, therefore, will be fact-specific. Thus, the duty of the attorneys whose knowledge is referenced to canvass others, to research files and to make other inquiry within (or outside) the firm will depend on the circumstances. Attorneys in a 500-lawyer firm with offices spread across the country can hardly be expected to canvass all of their colleagues in the preparation of an opinion; the result may be different for attorneys in a 5-lawyer, single-office firm. The Committee believes that the reasonableness standard governs all portions of an opinion and that the foregoing "knowledge" analysis applies whether or not a "knowledge exception" is expressly set forth in an opinion. 36

An opining lawyer who wishes to communicate that he or she has performed a more limited investigation than would be normally required to meet the reasonableness standard should do so by a specific description of the investigation undertaken or a statement that no other factual investigation has been made. The following is an example:

Based solely on the actual knowledge of lawyers within our firm having direct responsibility with respect to the preparation of this opinion and the transactions to which it relates, and a certificate of an officer of the Company, but without any other investigation, we are of the opinion that . . .

Materiality. Another frequently used qualifier is the materiality qualifier, by which attorneys limit their opinions to material matters. Although the use of a materiality qualifier is quite common, it presents the question of whether the lawyer is in a position to determine what is material. Some lawyers specifically refuse to give opinions based on the materiality threshold on the grounds that they are not qualified to make a determination concerning what is material to a client's financial position. Others (including some Committee members) believe that the use of a materiality qualifier requires no such determination by the opining lawyer but merely serves as an additional limitation on the scope of the opinion. 37

The wording of the materiality qualification can have a significant effect upon its meaning. For instance, an opinion that a company is not in material breach of any agreement is different than an opinion that the company has committed no breach which would have a material adverse affect upon it. The former opinion arguably means that there is no breach which would be material to the agreement itself, regardless of whether the agreement is material to the company's financial position or otherwise. For instance, the failure to pay rent under even an immaterial lease would probably be a material breach of that lease. The latter formulation, on the other hand, may require a lawyer to address the question of materiality within the context of the company's financial position. However, it may also relieve an attorney from some of his or her burden of investigation since he or she may determine not to read or investigate those agreements which do not appear to be material to the company overall.

SUBSTANTIVE OPINION CLAUSES

Opinions Concerning Corporate Status

Due Incorporation Versus Due Organization. Most transaction opinion letters contain an opinion that the subject company has been duly incorporated or duly organized. While some attorneys seem to regard these terms as interchangeable, they are not. Due incorporation means that all steps necessary to create a corporation for purposes of state law in effect at the time of incorporation have been taken. Under the BCA this simply means that the company's Articles of Incorporation have been completed as required and filed with the Corporation and Securities Bureau of the Department of Commerce. For corporations incorporated under other laws (for instance, the Michigan Insurance Code) due incorporation includes the filing of proper Articles under such act. Due organization, on the other hand, includes

36 The draft Silverado accord would establish the concept of "Primary Lawyer Group" and by its terms would limit the matters expressed in an opinion to the knowledge of that group, without the need to include an express exception.

37 As an example, an opinion that there is no existing breach of any agreement requires the same standard of care and arguably the same level of inquiry as an opinion that there is no breach which would have a material adverse effect, yet in the second formulation an opinion recipient seeking to assert liability would be required to demonstrate both that any discovered breach was material and that insufficient care was used in the preparation of the opinion.
Validly Existing and Good Standing. An opinion that a corporation is "validly existing" means that at the time the opinion is given the legally incorporated status of the corporation has not terminated. Thus, corporations which have dissolved (voluntarily or involuntarily) or whose term of existence has expired cannot be validly existing. "Good standing" also refers to the status of the corporation at the time the opinion is given but speaks to the ability of governmental authorities to cause dissolution of the corporation. An opinion that a corporation is in good standing means that its jurisdiction of incorporation is not in a position to force its involuntary dissolution, due, for instance, to the failure to file annual reports. Good standing may also apply to the corporation's continuing qualification to do business in states other than the jurisdiction of its incorporation.

Most lawyers satisfy themselves as to the good standing of a corporation, both in its jurisdiction of incorporation and in the jurisdictions in which it is qualified to do business, by obtaining a certificate of good standing from the appropriate state authority. Since such certificates are often dated as of a date prior to closing, some opining lawyers obtain telegraphic, telecopied or telephonic confirmation from the respective authorities that the matters stated in the Certificate of Good Standing continue to be true on the closing date. Other lawyers who feel sufficiently familiar with the affairs of the corporation are willing to give good standing opinions without updating the certificate of good standing.

For corporations governed by the BCA, "validly existing" and "good standing" may mean the same thing, since dissolution in Michigan for failure to file annual reports or pay annual filing fees or penalties is automatic after a prescribed period (two years) and does not require action by the state. A Michigan corporation is entitled to a certificate of good standing until it has been dissolved, even if it is delinquent in the filing of annual reports or the payment of filing fees or penalties and will be dissolved if such delinquency is not remedied within the prescribed period. Thus, the receipt of a certificate of good standing in Michigan does not insure that the corporation will not be dissolved pending the mere passage of time, nor, of course, does it indicate

38 "Validly" is usually paired with "existing" in standard language but is probably meaningless in this context. This opinion speaks to the corporation's legal status, and the term "existing" conveys the same opinion as "validly existing."

39 In other words, "validly existing" means that the corporation has not in fact been dissolved while "good standing" means that it is not in jeopardy of involuntary dissolution by the state.

40 BCA §922.
that no voluntary action has been taken to dissolve the corporation, since the good standing certificate will issue until a certificate of dissolution has been filed.41

**Due Qualification.** With respect to a corporation with operations outside of its jurisdiction of incorporation, an opinion usually will state that the corporation is duly qualified to transact business as a foreign corporation in such states. The manner in which this opinion is expressed has a bearing on the lawyer's diligence in giving the opinion. Some opinion recipients request an opinion that a corporation is duly qualified in all states in which its operations require it to be so qualified. This may require an examination of the law of every jurisdiction and could cause the attendant costs to be prohibitively high. The Committee believes that it is normally appropriate for the opining lawyer and the opinion recipient to agree, based on a review of the corporation's operations, on a list of the states in which the corporation's activities are concentrated and to limit the opinion to those specific states. An alternative approach would be to limit the opinion to those states in which the failure to be qualified would have a material adverse effect on the corporation or its operations or financial condition; however, this may require the opining lawyer to make a judgment as to materiality, which, as noted elsewhere, he or she may not feel qualified to make. Where this latter type of opinion is used, the opining lawyer, in negotiating the opinion language, may reasonably request that this determination be based solely upon an officer's certificate detailing the states in which the operations of the company are material.

The Committee believes that it is appropriate for an opining lawyer to seek to limit the jurisdictions for which a due qualification opinion is given to those in which the corporation's operations, or ownership or use of property, make the question truly relevant. Although opinion recipients may feel more comforted by a sweeping opinion which applies to all states, the Committee believes that time and expense required to make the investigation necessary to give such an opinion, in most instances, is not justified by the relatively limited benefit provided.

**Opinions Concerning Capital Stock**

**Duly Authorized.** Whether or not the transaction in question involves a purchase of shares, an opining lawyer will often be required to opine that some or all of the corporation's outstanding shares have been "duly authorized and validly issued" and are "fully paid and nonassessable". This is often accompanied by a recitation of the number of the corporation's authorized shares and the number outstanding.

A determination of the company's authorized capital can only be made from a review of the corporate records and the records of the appropriate governmental authority of the company's jurisdiction of incorporation. The determination of the number of shares outstanding also may be made from the corporation's records, perhaps including its financial statements. An opinion that shares (whether presently outstanding, to be issued in the transaction in question, or both) are "duly authorized" means that the company has (or had) the corporate power, under applicable law and its Articles of Incorporation and Bylaws, to issue the shares, and furthermore that all corporate action necessary to authorize the issuance of shares has been taken. This generally requires that the number of shares issued will not exceed the number of shares which the corporation has authorized under its Articles of Incorporation, and that the corporation has adopted such Board of Directors' or shareholders' resolutions as are required for the issuance of shares. It also may require investigation of additional matters. For instance, where the number of shares authorized in the corporation's original Articles of Incorporation has been increased by subsequent amendment, the opining lawyer may have to investigate to determine that the amendment was appropriately adopted under applicable law and the corporation's organizational documents.

**Validly Issued.** Shares are "validly issued" when all of the prerequisites to their issuance, under both applicable law and corporate organizational documents, have been met. In addition to due authorization, this includes the issuance of shares for proper and sufficient consideration and the execution and delivery of appropriate certificates or, in the case of uncertificated shares, the creation of the appropriate corporate records to record the ownership of the shares. Although the question apparently has not been addressed under Michigan case law, it may be that shares issued in violation of a shareholders' agreement to which the corporation is a party, or in contravention of shareholders' pre-emptive rights, are not validly issued. This is of particular importance for lawyers opining as to Michigan corporations which were formed prior to 1973.

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41 An opinion relating to good standing and/or valid existence addresses only the legal status of the subject corporation and does not encompass matters such as whether the corporate veil may be pierced to impose liability on the corporation's owners.
since shareholders of those corporations have preemptive rights unless their Articles have been amended to eliminate those rights.  

The Committee agrees with the consensus of other state bar and local bar committees that an opinion that shares are "validly issued" does not encompass matters such as the possible violation of applicable federal or state securities laws in connection with their issuance. Thus, the "validly issued" opinion does not mean that the shares have been appropriately registered under such laws, that a registration exemption is available, that any proxy statement used in connection with the authorization of such shares has met all applicable regulations, or that any other securities law matters have been satisfied.

42 The BCA amendments which became effective October 1, 1989 may raise issues relating to "validly issued" opinions. The amendments have eliminated the former BCA requirement that all Michigan corporations have shares with a specified par value or no par shares with a stated value. These amendments eliminated the significance of par value for Michigan corporations and specifically allow a corporation's Board of Directors, without shareholder approval, to amend the corporation's Articles of Incorporation to eliminate references to par value. However, no transitional rules are provided by the BCA amendments, and it might be contended that a corporation which does not eliminate references to par in its Articles may not issue shares for less than the par value stated therein (although Section 314(3) of the BCA suggests otherwise). In such instances, the opining lawyer's task may be facilitated if the corporation, in connection with the transaction, files the amendment to eliminate par value references in its Articles. Opining lawyers, however, should consider the effect of such amendment on the corporation's financial statements and on any representations or warranties given with respect to those financial statements in the transactional documents.

43 This conclusion assumes that the securities laws in question do not automatically void issuances which are made in violation thereof nor confer upon a regulatory authority or other third party the right to void the issuance of the shares. Where applicable securities laws provide remedies to purchasers for violation of their terms (even including rescission), the "valid issuance" opinion is not implicated if the recipient of the opinion is the party with the right to seek such remedies. In instances in which shares are issued to multiple parties, and the recipient of the

Fully Paid. Shares are "fully paid" when they have been issued for a consideration which is proper under applicable law and the corporation has actually received such consideration. Under the BCA amendments, the issuance of shares for a promise to pay money in the future (e.g., a promissory note) or a promise to perform services in the future is specifically permitted, and the Board of Directors of the issuing corporation may determine either that the receipt by the corporation of the promise is sufficient consideration for the issuance of the shares, or, alternatively, that adequate consideration will not be received until the promise is performed. In the former case, shares should be considered to be validly issued, fully paid and nonassessable when the corporation receives the promise. If the Board has determined that adequate consideration will not be received until performance of the promise, shares may be considered to be validly issued but will not be fully paid until such performance.

The BCA amendments have eliminated the need to capitalize surplus in the case of a stock dividend. This should aid a lawyer in giving "a validly issued, fully paid and nonassessable" opinion in the face of such a dividend since the lawyer should no longer have to determine whether there existed sufficient surplus to enable payment thereof.

44 See BCA §314.

45 The term "nonassessable" generally means that the corporation cannot assess the shares for further amounts beyond the amount for which the shares have been issued. The Articles of Incorporation may also include a provision for further assessment of shares beyond the initial consideration paid.

46 This should be true even if such note is not paid; while the corporation may thereafter have a personal action against the maker of the note to collect the balance, the shares themselves would not be tainted with any liability for assessment. See BCA §314(4). An opposite result might obtain if the Board has determined that adequate consideration will be received only upon performance (i.e. payment of the note).
Corporate Power, Authority and Action

Normally, the recipient of an opinion will seek assurance that the transaction is within the corporation’s power to effect and that the corporation has taken all action necessary to authorize the transaction.

Corporate Power. There are two basic types of corporate power opinions, both of which may be asked for in the same opinion letter. The first of these is a recitation that the corporation in question has the corporate power and authority to own its properties and assets and to carry on its business in the manner in which it is then being conducted. The second of these is a statement that the corporation has the corporate power and authority to enter into and perform the agreement in question. The word “authority” may be superfluous in the context of this opinion, particularly since it is normally accompanied by a statement to the effect that the transaction in question has been duly authorized.

The Committee prefers the phrase “corporate power and authority” as opposed to simply “power and authority” so as to make clear that the particular paragraph of the opinion speaks to the power and authority of a corporation under its organizational documents and the corporate law of its jurisdiction of incorporation, and does not extend to receipt of regulatory approvals which may be necessitated by the nature of the transaction (such as the effectiveness of a registration statement under securities laws) or otherwise. Even where the simple phrase “power and authority” is used, the Committee believes that the proper interpretation of such phrase is to extend only to the question of whether corporate actions are ultra vires, and that the question of whether governmental permits or authorization are needed to complete a transaction or to carry on business should be dealt with separately in the opinion if so desired.

Due Authorization. An opinion with respect to a transaction will usually state that the agreement in question and the performance of the transactions it contemplates have been “duly authorized by all necessary corporate action.”47 Sometimes this opinion will simply state that the agreement and performance have been “duly authorized.” This opinion has the same meaning as in the context of stock opinions discussed above. Essentially, it means that the corporation has complied with applicable corporate law and its Articles of Incorporation and Bylaws in executing, delivering and performing the agreement. This often requires that the agreement be approved by the corporation’s Board of Directors and, if necessary, its shareholders at a properly called meeting for which the appropriate notice is provided, and that the Board and/or shareholders (or the corporation’s Articles or Bylaws) authorize the person who executes and delivers the agreement on behalf of the corporation to perform such tasks.

“Due authorization” speaks to actions necessary under law, the corporation’s Articles and its Bylaws, but does not address contractual restrictions or requirements. As an example, a due authorization opinion does not mean that, in approving a transaction, there has been no violation of a shareholder or voting agreement which may impose limitations on the corporation or its shareholders in authorizing corporate action. However, any such restrictions would normally be implicated by the “no conflicts” or “enforceability” opinion and would therefore have to be considered and addressed by the opining lawyer.

The Committee believes that the due authorization opinion does not extend to the question of whether the approval, execution, delivery or performance of the agreement is consistent with the fiduciary duties of the officers or directors performing those functions, but rather speaks to mechanical compliance with the provisions of applicable law, Articles of Incorporation and Bylaws in approving, executing, delivering and performing the agreement. Since almost every action taken by an officer or director is subject to a fiduciary duty, and since the question of whether a fiduciary duty has been discharged is a factual one, the Committee does not believe that this subject is appropriate for a transactional legal opinion and does not believe that a disclaimer to that effect is necessary in an opinion.

The Enforceability Opinion

Formulation. Transaction opinions customarily require the opining lawyer to state that the agreement which forms the basis for the transaction is valid, binding upon the opining lawyer’s client and enforceable against the client in accordance with its terms (the “enforceability opinion”).48 This is one of the most critical parts of the opinion. It is intended to assure the opinion recipient

47 For the reasons expressed above, the Committee prefers that this opinion include the reference to “necessary corporate action.”

48 Sometimes the wording used in this opinion is that the agreement is “legal, valid, binding and enforceable.” The Committee does not believe that the addition of the term “legal” changes the nature of this opinion.
that the agreement may be enforced against the opining lawyer’s client and that a legal remedy exists should the client breach the agreement.

The Committee believes that the terms "valid," "binding" and "enforceable" have the same meaning within the context of this part of the opinion and, though often all used, the omission of any one term would not affect the meaning of the opinion. Some attorneys seek to omit the phrase "in accordance with its terms" after the word "enforceable" on the theory that including such language implies that specific performance is available for a breach of the agreement. The Committee does not agree that the omission of this phrase changes the meaning of the opinion, so long as it is made subject to the "equitable principles" exception normally contained in opinions and discussed below.

Available Remedies. The Committee has noted the differing approaches of some other state and local bar organizations that have undertaken similar reports. Stated simply, the differing approaches clash over whether the enforceability opinion means that each remedy provided in the agreement is available and each provision therein is enforceable, or merely that some remedy is available for a breach of the agreement and no defense exists to the entire agreement. The Committee believes that the former approach most correctly states the understanding of opining lawyers in Michigan in giving opinions, i.e., that each provision is enforceable and each remedy provided under the agreement is available, subject to stated exceptions and the standard exceptions (and other limitations) discussed below.49

Where parties are particularly concerned over the availability of a specific remedy or the enforcement of a specific provision of an agreement, the Committee recommends that such availability or enforcement be expressly addressed in addition to the general enforceability opinion, so as to focus the opining lawyer and the opinion recipient upon the particular difficulties presented by the remedy or provision in question. The Committee, however, does not believe that the enforceability opinion merely states that "some" remedy is available if the breach occurs. Although obviously not every circumstance which arises may be foreseeable at the time an opinion is given, the Committee believes that an opining lawyer’s responsibility to anticipate and address issues is subject to the same reasonableness test applicable to other provisions of an opinion, as discussed elsewhere.50

Governing Law. The enforceability opinion can present special issues when the agreement in question specifies that it will be governed by the law of a jurisdiction in which the opining lawyer is not expert. It is common for banks or other institutional lenders, as well as underwriters, to provide in their standard documents that the law of their own state of incorporation will govern the agreement. When the borrower’s or issuer’s attorney practicing in a different state is asked to give an enforceability opinion, how can he or she render such an opinion? The Committee believes that in this circumstance the opinion should be construed as speaking to the enforceability of the agreement as though the internal laws of the opining lawyer’s jurisdiction of practice were the internal laws (absent conflict of laws principles) of the law of the specified state.

A related question is whether the enforceability opinion extends to the validity or enforceability of the provision specifying the jurisdiction whose law will govern. In other words, in giving such opinion, does a lawyer opine that the specified law will be applied by any court which hears a dispute regarding the agreement? The Committee believes that the enforceability opinion should be construed as applying to the enforceability of the choice-of-law provision under the law of the opining lawyer’s jurisdiction of practice only.51

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49 However, so long as remedies which are available to a party provide the means by which that party may practically realize the intended benefits of a contract, the unavailability of any particular remedy might not give rise to any actionable claim in respect of an opinion. Nothing herein implies any expansion of an opining lawyer’s responsibility in these circumstances.

50 See "PRELIMINARY MATTERS — Standard of Care Applicable to Preparation and Delivery of Opinions."

51 Suppose also that the agreement provides, as is common in many agreements, that the opining lawyer’s client agrees to submit to the jurisdiction of a particular state’s courts or a federal court sitting in that state. Does the enforceability opinion mean that such courts will consent to assume jurisdiction over the case? The Committee believes that the opinion speaks to the enforceability, under the laws of the opining lawyer’s jurisdiction of practice, of the client’s consent to such jurisdiction but not to whether the particular court will agree to hear the case. If the opinion recipient desires an opinion on assumption of jurisdiction, the topic should be specifically negotiated and addressed. On the question of whether such provisions would be enforced by a Michigan court, see National Equipment Rental Ltd. v Miller, 73 Mich App 421, 251 NW 2d 611 (1977); Garavaglia v Dept. of Revenue, 335 Mich 467, 61 NW 2d 612 (1953);
Nevertheless, because such opinions will be delivered to counsel in other states, it may be prudent (particularly for law firms with offices in more than one jurisdiction) for an opinion giver to express an appropriate limitation in the opinion. A suggested form of such a limitation is the following:

As noted below, our opinion is limited to the application of the laws of the State of Michigan and the United States of America. Section [agreement] specifies that the agreement is to be governed by the laws of the State of . Our opinion as to the enforceability of the agreement, subject to the exceptions set forth above, is based upon our assumption that the laws of the State of which affect enforceability are not different than the laws of the State of Michigan or the United States of America (excluding choice of law rules thereof). We express no opinion as to whether the agreement is valid, binding and enforceable under the laws of the State of or as to whether federal or state courts in Michigan, applying applicable choice of law principles, would apply the laws of the state of or would enforce such agreement if it is not valid, binding and enforceable under the laws of the State of .

Fact-Based Matters. The question of the breadth of the standard enforceability opinion presents additional difficulties. No matter how thoroughly an agreement and opinion are negotiated and drafted, there may be matters which were not anticipated by the parties at the time that the agreement was executed or the opinion delivered. Additionally, it may be difficult or impossible for an attorney to opine as to the enforceability of an agreement with respect to certain laws which are particularly fact-oriented. As an example, consistent with its belief that essentially factual matters should not be the subject of legal opinions, the Committee does not believe that the standard enforceability opinion speaks to whether material misstatements or omissions of material facts have been made so as to grant a purchasing party a right to avoid its obligation, or whether the consummation of a transaction will result in a violation of antitrust laws. Many of these items are outside the scope of the standard exceptions to the enforceability opinion discussed below.

The difficulty, of course, with an approach which holds that certain types of laws ought not to be deemed included within the enforceability opinion is that it does little to facilitate standard opinions and common understanding among opinion lawyers. The Committee believes, at a minimum, that largely factual matters under antitrust and securities laws ought not to be deemed to be included within the standard enforceability opinion. Beyond this, the Committee believes that, here as elsewhere, the “reasonableness” test must be applied in determining whether a particular matter is sufficiently foreseeable or sufficiently susceptible of legal, as opposed to factual, analysis to be considered within the ambit of the standard enforceability opinion. Of course, contracting parties and their lawyers are free to negotiate for the delivery of an opinion which specifically addresses the applicability of certain laws, and the Committee believes that this approach is preferable where doubt exists or the opinion recipient desires to receive comfort on specifically identified matters.

Exceptions To the Standard Enforceability Opinion

The standard enforceability opinion found in most transaction opinions is normally qualified by a statement similar to the following:

The enforceability of the Company’s obligations under the agreement is limited by bankruptcy, insolvency or other similar laws affecting the enforceability of creditors’ rights generally, and is subject to general principles of equity, regardless of

by a foreign acquirer which poses threats to national security. Since the Act failed to detail any objective standards by which such a threat can be evaluated, it is virtually impossible for an attorney to opine that the Act would not impair the enforceability of an agreement subject to it. The Exon-Florio Act expired October 20, 1990 but there have been suggestions that it may be reinstated. 53 Distinction should be made between basically factual matters under these laws, such as whether material misstatements exist or whether a combination results in an unlawful concentration within an industry, and objective legal matters under these laws, such as whether a transaction is required to be registered under the Securities Act of 1933 or blue sky laws, or whether the filing requirements of the Hart-Scott-Rodino Antitrust Improvement Act of 1976 have been met.


52 Another example is the so-called “Exon-Florio Act” (Section 721 of the Defense Production Act of 1954), entitling the President of the United States to seek to prevent or rescind the acquisition of a U.S. business
whether such enforceability is considered in a proceeding at law or in equity.

The first part of this sentence will be referred to herein as the “bankruptcy exception,” while the second part will be referred to as the “equitable principles exception.” Inclusion of the bankruptcy and equitable principles exceptions has become ingrained in standard opinion language. The Committee believes, however, that even where these exclusions are not expressly stated, they should be understood to be implied, since as a practical matter every agreement is subject to these limitations and this fact is commonly recognized and understood among lawyers who give and receive opinions.

As noted above, the Committee generally favors the elimination of laundry lists of exceptions since they tend to burden the process of rendering opinions and lend to confusion in the interpretation of standard language. The Committee recognizes, however, the widespread inclusion of the bankruptcy and equitable principles exceptions in standard opinion giving and the feeling of most opining lawyers that it is safer to include the exceptions rather than rely on the recipient’s tacit understanding of them. Nonetheless, the Committee believes that the exceptions should be construed in such a way as to make expansion of their language, and that of other exceptions, unnecessary.

The Bankruptcy Exception.

General. The bankruptcy exception recognizes the fact that under federal bankruptcy law, and some state creditor’s rights provisions, a court may avoid or alter the obligations of a contracting party which would otherwise be enforceable if such statutes were not applied. With regard to the federal bankruptcy code and traditional state receivership or insolvency statutes, this exception is widely accepted and well understood.

Fraudulent Conveyance Laws. In recent years, the application of fraudulent conveyance laws to acquisition and financing transactions has resulted in the avoidance of transactions, the elimination of security interests and the attachment or levying against property in the hands of a transferee. The increasingly frequent application of fraudulent conveyance laws has raised the question of whether such laws should be considered to be included within the bankruptcy exception; in other words, does the standard bankruptcy exception also exclude the applicability of fraudulent conveyance laws when analyzing whether an agreement is enforceable? Some opining lawyers, out of fear that it does not, have taken to including a specific exception as to the applicability of fraudulent conveyance laws. The Committee believes that fraudulent conveyance laws are included within the exception and that no separate exception need be taken.

Although much attention has been focused in recent years on the application of state fraudulent conveyance laws, the Committee notes that fraudulent conveyance-type provisions are also part of the Federal Bankruptcy Code and sees no basis for differentiating between those provisions as included in federal bankruptcy law and as included in separate state laws. Moreover, many of the principles which apply to the application of state fraudulent conveyance laws involve bankruptcy or insolvency analyses, including the question of whether the transferor will have “unreasonably small” capital after the transfer, whether the transferor will be able to pay its debts as they become due, and whether the transferor will be insolvent at the time of or as a result of the transfer. Finally, the extremely fact-sensitive nature of the analysis of these issues requires determinations beyond the expertise of most lawyers and thus makes them ill-suited for expression of a legal opinion.

BCA Considerations. The 1989 BCA amendments raise some additional considerations when considering the interplay between the bankruptcy exception and fraudulent conveyance laws. BCA Section 261(i) now specifically allows a corporation to guaranty the debt of a parent or brother/sister corporation, in addition to the debt of a subsidiary. Such “upstream guaranties” traditionally have raised the question of whether adequate consideration supports the promise. The specific sanctioning of upstream guaranties apparently is intended to preclude challenges thereto as a matter of general Michigan contract law.54

Additionally, BCA Section 122(3) provides that the Michigan fraudulent conveyance statute will not apply to any “distribution” which is governed by the BCA.55 Thus, in a transaction involving, for example, a share repurchase governed by the BCA, an opining lawyer need not be concerned about state law fraudulent conveyance issues. However, such a transaction will

54 However, Section 261(i) does not specifically state that the corporation providing the guaranty will be deemed to have received “fair consideration” in exchange therefor and does not affect the rights of parties under the Federal Bankruptcy Code.

55 Under the BCA as amended, a “distribution” includes a dividend, a repurchase by a corporation of its shares, the distribution of corporate indebtedness to a shareholder and the incurrence of debt by a corporation on behalf or for the benefit of shareholders.
present the question of whether the repurchase meets the BCA criteria, which prohibit distributions if, after the distribution, (i) the distributing corporation's assets would be less than its liabilities plus the liquidation preference of any senior securities or (ii) the corporation would be unable to pay its debts as they become due in the ordinary course.

Determination of compliance with these provisions presents many of the same difficulties presented in a fraudulent conveyance analysis. Yet, the standard bankruptcy exception is not commonly understood to exclude compliance with state corporate law from the enforceability opinion.56 The amended BCA may actually present greater difficulties for an opining lawyer since it eliminates the applicability of a statute (fraudulent conveyance) widely accepted as being included in the bankruptcy exception yet includes some of that statute's most difficult issues, from a legal opinion standpoint, in a statute not commonly regarded as being within the bankruptcy exception.

The Committee believes that, conceptually, opining as to compliance with the BCA's distribution provisions involves the same analytical uncertainties which apply to fraudulent conveyance opinions, and therefore that transaction opinions should not be understood to speak to such compliance. Since state corporate law is not commonly regarded as being covered by the bankruptcy exception, however, the Committee believes it prudent, in those instances in which the BCA's distribution provisions are implicated, to specifically address the issue.57 This can be accomplished in one of two manners: (1) by expressly assuming that, after the transaction, the corporation's assets will not be less than its liabilities plus preferences and that the corporation will be able to pay its debts as they become due; or (2) by including a specific exception stating that no opinion is given concerning compliance with those provisions. Under the first of these approaches, the opinion technically covers compliance with the BCA's distribution provisions but assumes the facts, without investigation, necessary to reach the legal conclusions, while under the second approach the opinion does not extend to the distribution provisions at all.

The Committee notes the use of solvency opinions prepared by appraisal or valuation experts in addressing fraudulent conveyance issues. Opinion givers may wish to consider such use as a means of addressing an opinion recipient's specific concerns about the applicability of fraudulent conveyance laws.

The Equitable Principles Exception. The equitable principles exception recognizes that a court may use its equitable powers to modify or refuse to enforce a contract's provisions. Since the awarding of equitable relief is within the discretion of a court, lawyers delivering an enforceability opinion must recognize that a court may refuse to award specific performance or injunctive relief even if a contract calls for such relief. Moreover, a court may use its equitable powers to avoid the obligations of a contracting party where it believes that the enforcement of such obligations would result in unfairness or oppression.

The equitable principles exception covers such traditional equitable matters as the awarding of specific performance or injunctive relief; defenses to enforcement such as waiver, laches or estoppel; and unconscionability, impossibility of performance or materiality of breach.

Some attorneys question whether the equitable principles limitation extends to the implied covenant of good faith and fair dealing imposed by statute on contracts subject to the Uniform Commercial Code56 and which may be implied in other contracts.59 Courts may use the implied covenant of good faith and fair dealing to avoid enforcement of the literal language of a contract. The Committee recognizes that this concept is deemed to be included within contracts, and that a defense based on a violation of such a covenant is technically a legal defense; nevertheless, it believes that the application thereof, which requires a court to look beyond the written terms of an agreement to consider notions of fairness, invokes essentially equitable principles. Indeed, the standard equitable principles exception states that it applies whether such principles are considered in a proceeding at law or in equity. Therefore, the Committee concurs with the conclusions

56 This issue is presented in virtually all restructuring transactions involving dividends or share repurchases, whatever law governs, although the analysis may be simpler and more objective for those state laws employing the more traditional "surplus" tests as opposed to Michigan's unified "distribution" concept, with its dual balance sheet and insolvency tests.

57 Moreover, compliance with the distribution provisions of the BCA affects more than merely the enforceability opinion in a transaction opinion letter. Failure to satisfy the distribution tests may also prevent an opining lawyer from giving the "corporate power" and "duly authorized" opinions.

56 See U.C.C. §1-203 (MCLA §440.1203).
reached by other state and local bar committees to the effect that the equitable principles limitation includes the concepts of good faith, fair dealing and similar matters.60

The doctrine of equitable subordination, under which a court may subordinate the repayment of a debtor's indebtedness to a particular creditor to the repayment of its indebtedness to other creditors, also would be included within the equitable principles exception.61

Arbitration. The enforceability opinion may present additional issues with respect to agreements containing arbitration clauses. In the presence of such clauses, an opining lawyer must consider whether a court will enforce the requirement that a dispute be arbitrated, whether the arbitrator will enforce the rights of the parties as set forth in the agreement, and whether a court will recognize and enter a judgment on the arbitration award. Some opining attorneys seek to disclaim arbitration clauses from their opinions by including an exception stating that no opinion is provided as to the enforceability of the arbitration clause. This is intended to guard against the risk that a court will decline to enforce an arbitration clause on grounds of public policy. However, court decisions in recent years have narrowed the causes of action for which arbitration will not be enforced.62 In light of this trend, the Committee believes that use of an arbitration exception is not appropriate except when the subject matter of the agreement falls within one of the areas of remaining uncertainty.63

The Committee also does not believe that it is necessary for an opining lawyer, when faced with an arbitration clause, to take an exception or otherwise note differences between the evaluation of disputes in arbitration proceedings as opposed to litigation. The Committee believes that the differences between litigation and arbitration, including the fact that arbitrators may not be schooled in legal principles and may not apply accepted rules of evidence or procedure, are well understood by most lawyers.

Finally, when faced with an arbitration clause to which no exception is taken, the opining lawyer should be satisfied that the arbitration award will be enforced in a court. In Michigan, this generally requires that the arbitration provision provide that the award of the arbitrator may be enforced by a circuit court.64

Other Qualifications

The Committee has examined the other common qualifications set forth in Section 14 of the draft Silverado accord and concurs in the recommendation that these matters ought normally to be included in the qualifications for transaction opinions. This may be accom-

arising under the Securities Exchange Act of 1934 and the Racketeer Influenced And Corrupt Organizations Act, thus overruling a line of cases which had relied on Wilko to deny arbitration of Exchange Act and RICO claims.

63 When such exception is taken, the Committee believes that language similar to the following would be appropriate:

The foregoing notwithstanding, we express no opinion with respect to the provision of Section of the Agreement requiring arbitration of disputes, because such provisions may not be given effect in the following circumstances which may arise in performance of the agreement: [describe areas of specific concern].

64 See MCL 600.5001; MSA 27A.5001 et seq., especially §5001(2) and §5025; 9 USC 1 et seq. For the required contract provision for entry of judgment upon the award by a circuit court, see E.E. Tripp, Inc. v Jackson County, 60 Mich App 221; 230 NW2d 556 (1975). For the state standard of review, see DAIIE v Gavin, 416 Mich 407; 331 NW2d 418 (1982). For the federal standard of review, see Stroh Container Co. v Delphic Industries, Inc., 783 F2d 743 (CA 6, 1996).
plished by incorporation of the Silverado accord when it is finalized, or by incorporation of Section B of Part II of this Report. Those particular matters are set forth in Section B under the heading "Other Qualifications."

"No Conflict" Opinions

Normally, a transaction opinion, in addition to an opinion that the transaction in question has been duly authorized and is binding, will contain an opinion that the execution of the underlying agreement and performance of the transaction do not violate or conflict with corporate organizational documents or any judgment or order to which the opining lawyer's client is subject, nor will result in any material breach of any agreement or instrument by which the client is bound. Such a "no conflict" opinion is really a series of opinions relating to different subject matters, each of which may require a different analysis or qualification.

Articles and Bylaws. Certified copies of the articles as amended can be obtained from the jurisdiction of the client's incorporation and copies of the bylaws, together with an officer's certificate, can be obtained from the client. Because of the relative ease of obtaining these items and of determining whether they conflict with the transaction in question, the Committee believes that a no-conflict opinion with respect to articles and bylaws can normally be given without qualification.

Orders, Judgments and Decrees. An opining lawyer's ability to give a no-conflict opinion with respect to orders, judgments and decrees will depend both on the amount of investigation undertaken by the opining lawyer and the wording of the opinion. It may be relatively simple for a lawyer who generally represents a client operating in a single state to determine the absence of any such orders, judgments or decrees, due to the lawyer's general familiarity with the client and to the limited number of jurisdictions in which any such orders, judgments or decrees are likely to have been entered. It may be much more difficult for counsel which does not normally represent the client to give such an opinion, particularly where the client may have multi-state or multi-national operations. In such an instance, the opining lawyer may be required to rely on certificates from the client as well as opinions from attorneys normally representing the client in litigation to determine the existence of such orders, judgments or decrees.

Moreover, frequently this opinion is stated to apply not merely to orders, judgments or decrees to which the client is a party, but also to those to which the client or its properties may be subject. The question then arises as to whether such opinion merely refers to those orders, judgments or decrees which could be enforced against the client or its properties even though the client is not named as a party in the proceeding (such as an in rem action against corporate property) or to orders, judgments or decrees which may have general application to parties in the client's circumstances.

The Committee believes that this opinion normally extends only to those orders, judgments or decrees which could be enforced against the client or its properties. It is not practical or useful to expect an opining lawyer to canvass every decision which might arguably be applicable to a client merely to determine whether the terms of the transaction are inconsistent with such decisions. The Committee believes that to the extent that any such decision of general applicability will affect the transaction, it will be considered in connection with the enforceability opinion discussed above, and that if such a decision does not affect enforceability, there is no reason to demand that it be considered by an opining lawyer.

Agreements. The no-conflict opinion as it applies to agreements and instruments by which the client is bound also presents difficulties to the opining lawyer. It is doubtful that an attorney or a firm will be familiar with every agreement or instrument which is binding on a client. Frequently, this part of the no-conflict opinion is qualified by either a knowledge exception, a materiality exception or both. Interpretation of these exceptions and the difficulties caused by them are discussed elsewhere in this report. See "INTRODUCTORY OPINION PARAGRAPHS — Qualifications".

Laws, Rules and Regulations. Opining lawyers may be requested to expand the no-conflict opinion to apply to any laws, rules or regulations which apply to the opining lawyer's client. If interpreted literally, this opinion may be considered to require the opining lawyer to conduct a factual investigation of the client's properties, business and affairs, and then review all possibly relevant federal, state and local statutes, ordinances and regulations. The Committee believes that this interpretation is incorrect and that the opinion should instead be considered to apply only to those statutes, ordinances and regulations which the opining lawyer should reasonably consider to be applicable, based on his or her awareness of the transaction and other facts relating to the client's properties, business and affairs at the time, without inquiry unless the lawyer is on notice that such inquiry is reasonably required. If the opinion recipient wishes to receive assurance as to specific areas of law, those areas should be identified so that
the opining lawyer's research and investigation can be focused and performed more efficiently. To the extent that the opinion recipient's concern relates to the receipt of necessary approvals by a company in a regulated industry, such concern can be addressed in a separate section of the opinion dealing specifically with such approvals as discussed below.

A related and even more difficult form of opinion is one which states that the client's business as presently conducted is not in violation of any law, rule or regulation. The Committee feels that the breadth of this opinion, the relatively low likelihood that an opining lawyer can possibly consider every law which may be applicable to an operating business and the factual circumstances relating to the application of such laws, make such an opinion of little practical comfort to a recipient. The Committee believes that such an opinion is inappropriate because it simply attempts to make the opining lawyer a guarantor that the operation of the company's business is legal. If the opinion recipient has concerns over the applicability of and compliance with specific areas of law, those areas should be identified so that the opining lawyer can focus on them.

**Receipt of Approvals and Consents**

Related to, but separate from, the no-conflicts opinion is an opinion that all approvals and consents necessary for the consummation of the transaction have been received. Where given, this opinion generally will apply both to approvals and consents necessary from governmental entities under applicable law and to approvals and consents from third parties which may be necessary under contracts or agreements which bind the opining lawyer's client.

Where the opinion speaks only to approvals and consents necessary for the consummation of the transaction, it will mean that those approvals or consents necessary to close have been received. However, where it further speaks to the performance by the opining lawyer's client of the client's obligations under the agreement, it may also extend to approvals and consents necessary in the future. This broader opinion can present difficulties since approvals may be required for the future performance of the agreement (for instance, zoning approvals necessary for property development mandated by the agreement) which cannot yet be procured. Furthermore, many agreements contain a covenant of the opining lawyer's client to continue to operate its business in the manner conducted on the date of the agreement or the closing date; such a covenant requires a lawyer giving the broader opinion to speak to the receipt of all approvals necessary for the conduct of the client's business, which presents many of the same issues discussed above in the no-conflict opinion. Particularly where the client is engaged in a regulated industry, the approvals and consents opinion may be appropriate. However, where the opinion extends to approvals and consents required after the closing, some qualification is justified, normally in the form of an exception which limits the opinion's application to those consents and approvals which are obtainable at the time of closing.

The approvals and consents opinion also speaks to consents or approvals necessary under agreements which bind the opining lawyer's client. An example is a loan agreement which requires the lender's consent to any merger or consolidation of the debtor.

**Possession of Necessary Permits and Licenses**

Similar to the approvals and consents opinion (and sometimes included therein) is an opinion that the client holds all permits or licenses necessary for the conduct of its business. As with a no-conflict opinion which applies to the conduct of a client's business, the Committee believes that this type of permits and licenses opinion is overly broad and may not be cost-effective, especially since it will involve many factual determinations which are more appropriately made by the client. For instance, the necessity of an environmental permit may depend on whether the client is performing specific tasks at a given time, which may be impossible for the opining lawyer to determine without conducting an audit of all the client's operations. As with other types of opinions which present difficulties because of breadth, the Committee believes that where an opinion recipient is concerned about the possession of specific permits or licenses, those should be identified and specifically addressed in the opinion.

**Litigation Opinions**

Transaction opinions customarily contain an opinion which speaks to the absence of litigation involving the opining lawyer's client, except as may be set forth on a schedule. The purpose of this opinion is to alert the opinion recipient to any contingent liabilities that may arise from pending or threatened litigation and to assure such recipient of the absence of any such contingencies which are not scheduled or listed. It is arguable that this is a factual determination and that contingencies for litigation exposure ought to be treated no differently than any other contingencies, which normally are not within the purview of a transaction opinion. While the Committee believes that this is a valid observation, it also recognizes the accepted practice of requiring litigation opinions and notes that opinion recipients normally feel that a lawyer is in the best position to
Both of these, read literally, suggest that all material litigation is listed on the exhibit but do not suggest the converse, namely that all the litigation listed is material. Nevertheless, confusion may result between the opining lawyer and the recipient of the opinion, and the Committee believes that, where an opining lawyer feels comfortable speaking to materiality, he or she should specifically identify to the opinion recipient the meaning of the matters contained on the exhibit.

The Committee believes that the investigation necessary to provide a litigation opinion is subject to the same reasonableness standard described with respect to all other aspects of the opinion. See “Preliminary Matters — Standard of Care Applicable to Preparation and Delivery of Opinions”. Many lawyers will conduct a docket search in those courts in which they determine that cases would likely be filed. Other lawyers feel comfortable relying upon an officer’s certificate only. Even if the opining lawyer is confident that the officer providing a certificate would have knowledge of all suits which have been served against the client, a docket search may yield pending litigation which has not been served. Docket searches may be much more difficult to conduct with respect to multi-state clients, however. The Committee believes that the use of docket searches is a matter within the discretion of the opining attorney. An example of a litigation opinion limiting the opining lawyer’s investigation to an officer’s certificate and specific docket searches is the following:

In rendering the opinions contained in paragraph [regarding litigation], we have relied, with your permission, solely upon a certificate of the Company and upon oral and written responses to inquiries made of the following courts as of the following dates: [name courts and date of last response] in each instance asking for a list of all litigation in which the Company is named as a plaintiff or defendant; and we have relied on the accuracy of oral and written responses to these inquiries without further investigation. With your permission, we have not made additional inquiries after the dates indicated.

The draft Silverado accord specifically disclaims any responsibility of an opinion giver to conduct a court search and limits investigation solely to certificates, and a review of the opinion giver’s “Litigation Docket” or other internal compilation of pending litigation. With respect to threatened litigation, the litigation opinion under the draft accord would extend only to claims overtly threatened in writing.
Title to Assets and Real Property

Committee members have encountered instances where opinion recipients have sought an opinion that the opining lawyer’s client has valid title to all of its real and personal property. The Committee believes that this type of opinion is inappropriate. In Michigan, title to real property is usually established by title insurance rather than legal opinion. As it relates to personal property, the Committee believes that this opinion is virtually impossible to give except with respect to certain types of personal property. Most clients will have little evidence enabling an opining lawyer to identify personally and determine whether the company has “title” thereto, with limited exceptions (e.g. titled vehicles or aircraft).

Misstatements and Omissions

Some opining lawyers are asked to give an opinion that the documents on which the transaction is based contain no misstatements of material fact or omissions of material facts necessary to make the statements made not misleading, in light of the circumstances under which they were made. The Committee believes that in most instances this factual opinion is not appropriate, particularly where it extends to statements made in negotiations and discussions in addition to those contained in the documents. An opining lawyer normally will not be in a position to evaluate the truthfulness or accuracy of most statements. Moreover, he or she will rarely be able even to determine what statements have been made in negotiations or discussions, much less their accuracy or completeness. In certain limited instances (such as an opinion delivered pursuant to an underwriting agreement by an attorney who has participated in the preparation of a prospectus or other offering materials) this opinion may be appropriate, although normally even then some qualification would be desired, especially if the opining lawyer does not normally represent the client. If given, such an opinion is often limited to the lawyer’s knowledge derived from participating in document preparation or is otherwise restricted.

Environmental Matters

Environmental matters continue to play a crucial role in virtually all transactions. Often, an opinion recipient will request an opinion that there have been no spills or discharges on specified property belonging to the opining lawyer’s client; that no regulatory proceeding has been commenced to enforce any environmental law against the client; that no conditions exist on any of the client’s properties which would violate or lead to liability under any environmental law (often including properties formerly owned by the client); and/or that the client has undertaken no other activities (such as offsite waste disposal) which might expose the client to environmental liability.

The Committee believes that these types of opinions are so fact-sensitive in nature, and require such an intensive degree of non-legal investigation, that they are normally not appropriate to be included in transaction opinions. The Committee recognizes the fundamental importance of environmental concerns in transactions and notes the availability of alternative methods, such as environmental audits and engineering reports, to give comfort to the opinion recipient regarding the status of environmental matters. When a recipient insists on a legal opinion, at a very minimum the opining lawyer should be entitled to rely upon the results of any environmental audit or engineering report.

Additional Exclusions

In addition to the foregoing matters, the Committee believes that the following items should not ordinarily be considered to be covered within the scope of an opinion given in a business transaction unless they are specifically addressed:

1. Compliance with federal regulations relating to the extension of credit for the purchase of securities in margin transactions.
2. Compliance or permissibility of transactions under employee benefit laws, including ERISA.

This is not to say that environmental matters are not the appropriate subject of legal opinions. Indeed, very lengthy opinions are often rendered by environmental lawyers on such matters. The Committee believes that the inclusion of environmental opinions in standard transaction opinions, however, is not appropriate and will not promote economy or efficiency in the opinion-giving process. In other words, if an environmental opinion is crucial to a transaction it should be separately negotiated and the (sometimes considerable) additional time necessary for the underlying investigation should be reserved.

Opining lawyers should also note that if a transaction opinion contains a statement that to the best of the lawyer’s knowledge the representations and warranties of the client are true, the opining lawyer will be commenting upon the client’s environmental representations and warranties. The Committee believes in the first instance that legal opinions should not speak to the accuracy of representations and warranties.
3. Matters arising under local ordinances and regulations.

4. Matters relating to the creation and enforceability of liens on real or personal property. However, obviously in transactions involving secured financing, the opinion recipient will normally request that these matters be specifically addressed.

Several members of the Committee expressed their belief that compliance with usury laws should be included within the foregoing list, while others believed that opinion recipients in loan transactions normally expect opining lawyers to consider the effect of usury laws. Although usury laws are not included in the list, the Committee recommends that opinion recipients who desire opinion givers to analyze compliance with usury laws specifically request that such analysis be included within the opinion. Adoption by opinion givers of Part II of this Report to govern their opinions will automatically exclude usury laws from the opinions’ coverage.

Of course, opinion recipients may request that any of these matters be addressed in an opinion given in a business transaction. Inclusion of the matters in the foregoing list does not indicate the Committee’s belief that such requests are inappropriate.
PART II.

The following materials constitute Part II of the Report of the Ad Hoc Committee of the Business Law Section of the State Bar of Michigan on Standardized Legal Opinions in Business Transactions. This part summarizes the conclusions of the Ad Hoc Committee reached in Part I of the Report.

This part is organized to correspond with the topical headings of Part I, and readers may wish to refer to Part I for additional explanation. The Ad Hoc Committee suggests that Michigan lawyers delivering business transaction opinions may wish to incorporate Section A of this Part II, which covers matters not addressed by the accord.

The following conclusions assume, in each instance, that the opinion does not contain specific language to the contrary.

SECTION A

1. Date.

(a) A transaction opinion speaks only as of its date and only to the laws which have been adopted and remain in effect on that date.

(b) Opinions which speak to the future performance of an agreement do not include the possible effects of pending legislation on such performance.

2. Addressee

(a) Only the addressee of an opinion is entitled to rely upon it unless additional reliance is authorized in the opinion or it is delivered in a context in which it is both intended and clearly foreseeable that other parties will rely.

3. Characterization of Counsel's Role

(a) The characterization of opining counsel as "general" or "special" counsel does not impose any higher or lower degree of knowledge, investigation or duty on such counsel than would apply in the absence of such characterization.

4. Reliance on Certificates of Public Officials and Officers

(a) Stated reliance upon certificates of public officials or company officers does not limit the scope of an opining lawyer's required inquiry absent language expressly describing such a limitation.

(b) Opining lawyers are entitled to assume the truthfulness of matters stated in an officer's certificate.

5. Due Incorporation and Due Organization

(a) "Duly incorporated" means that all steps necessary to create a corporation under the applicable law in effect at the time of incorporation have been taken.

(b) "Duly organized" includes the concept of due incorporation, but additionally means that actions necessary to create the corporation's internal governance structure have been taken.

6. Validly Existing and Good Standing

(a) "Validly existing" means that at the time of the opinion, the legally incorporated status of the corporation has not been terminated.

(i) "Validly existing" has the same meaning as "existing".

(b) "Good standing" means that the corporation's jurisdiction of incorporation is not in a position to force the corporation's involuntary dissolution.

7. Duly Authorized and Validly Issued Securities

(a) "Duly authorized," with respect to corporate securities, means that the corporation has the corporate power under applicable law and its Articles of Incorporation and Bylaws to issue the securities and that all corporate action necessary to authorize issuance has been taken.

(b) "Validly issued" means that all of the prerequisites to the issuance of securities (including but not limited to the receipt of consideration) under both applicable law and corporate organizational documents have been satisfied.

(c) "Validly issued" does not encompass matters such as the possible violation of applicable federal or state securities laws in connection with the issuance of securities, unless the violation of those statutes would automatically void their issuance or create a right in a third party (i.e., not the opinion recipient) to void their issuance.

8. Fully Paid and Nonassessable

(a) "Fully paid" means that shares have been issued for a consideration proper under applicable law and that the issuing corporation has actually received such consideration.

(b) "Nonassessable" means that the corporation cannot assess the shares for further amounts beyond the amount for which the shares have been issued.

9. Corporate Power, Authority and Action

(a) An opinion that a corporation possesses necessary "corporate power and authority" speaks to the power and authority of a corporation, under the corporate law
of its jurisdiction of incorporation and its organizational
documents, to take the action in question, but does not
speak to the receipt of regulatory, governmental or third-
party consents, permits or authorizations.

(i) Even if an opinion refers merely to the possession
of necessary “power and authority,” the foregoing
analysis applies.

(b) An opinion that a transaction has been “duly
authorized” does not speak to the question of whether
fiduciary duties have been observed by the opining
lawyer’s client or its directors or officers in connection
with the transaction.

SECTION B

1. Assumptions. The following assumptions are
implicit in the opinion whether or not expressly stated:

(a) Binding Effect. The agreement is binding upon
the other parties to a transaction (i.e., parties other than
the opining counsel’s client).

(b) Property Rights. The opinion giver’s client holds
sufficient title or other property rights in assets to
conclude the transaction.

(c) Absence of Fact-Based Defenses. There has
been no mutual mistake, fraud or duress in the formation
of any agreement to which the opinion relates.

(d) Invalidity of Relevant Laws. Unless there has
been a reported decision invalidating a specific law on
constitutional or other grounds, all relevant laws are valid
and there exists no question as to their constitutional or
other validity.

(e) Enforceability of Other Client Agreements.
All other agreements to which a client is a party or by
which it is bound will be enforced in accordance with
their terms.

(f) Lack of Discretionary Action. The client will
undertake no discretionary action which would result in
a breach under any agreement to which it is a party or
by which it is bound.

2. Documentary Examination

(a) A listing of documents examined does not limit
the scope of an opining lawyer’s required inquiry absent
language expressly describing such a limitation.

(b) Assumptions as to the genuineness of signatures
and the conformity of copies to originals are implicit and
need not be stated.

3. Qualifications — The “Knowledge” Exception

(a) Inclusion or omission of phrases such as “to our
knowledge,” without further qualification, do not increase
or decrease an opining lawyer’s scope or duty of inquiry.

(b) If a “knowledge” qualification is intended to
communicate a restriction on the scope of an opining
lawyer’s inquiry, additional language must be added to
expressly describe the limitation.

(c) The “knowledge” referred to in the phrase “to
our knowledge” refers to the actual conscious awareness
(as opposed to imputed or constructive knowledge) of
the specific attorneys within the firm who have partici-
pated in the transaction in question or in the preparation
of the opinion.

(i) Whether those attorneys have discharged their
duty of inquiry in obtaining their level of knowledge
will be determined in accordance with the standards
care applicable to opinions generally.

4. Local Counsel Opinions

(a) None of the following recitals indicate that an
opining lawyer has conducted an examination to insure
the correctness of a local counsel’s opinion delivered in
connection with the preparation of the opining lawyer’s
opinion:

(i) The opining lawyer has relied upon the opinion
of local counsel;

(ii) The form or scope of the local counsel’s opinion
is satisfactory; or

(iii) The opining lawyer or the opinion recipient is
justified in relying upon the local counsel’s opinion.

(b) A statement that an opining lawyer concurs with
the opinion of local counsel indicates that the opining
lawyer has independently investigated the correctness
of the local counsel’s opinion.

5. The Enforceability Opinion

(a) The words “valid”, “binding” and “enforceable”
have the same meaning in this portion of the opinion.

(b) Omission of the words “in accordance with its
terms” after the word “enforceable” does not change
the meaning of this opinion.

(c) Subject to stated exceptions (and those implied
as provided in Sections 8-6, B-7 and B-9 below), the
enforceability opinion means that each remedy provided
under the agreement is available.

(d) An enforceability opinion should be construed as
speaking to the enforceability of the agreement as
though the internal laws of the opining lawyer’s jurisdic-
tion of practice governed the agreement.

(e) With respect to the enforceability of a provision
which specifies that the law of another jurisdiction will
govern an agreement, the enforceability opinion speaks
only to the enforceability of such provision under the
law of the opining lawyer’s jurisdiction of practice. The
enforceability opinion does not address whether a court, to whose jurisdiction the parties have agreed to submit, will consent to assume jurisdiction.

(f) Largely factual matters under antitrust and securities laws are not covered within the standard enforceability opinion.

6. The Bankruptcy and Equitable Principles Exceptions

(a) Both the bankruptcy and equitable principles exceptions to the enforceability opinion should be understood to be implied in an opinion even when they are not expressly stated.

(b) The bankruptcy exception should be deemed to include an exception for compliance with fraudulent conveyance laws, both federal (as part of the Federal Bankruptcy Code) and state.

(c) Although not traditionally covered by the bankruptcy exception, compliance with the distribution provisions (dividend, redemption or otherwise) of state corporate law should be deemed to be excepted from the enforceability opinion.

(d) The equitable principles exception includes the following as limitations upon the enforceability of an agreement: (i) limitations on the awarding of specific performance and injunctive relief; (ii) defenses to enforcement based on waiver, laches, estoppel, unconscionability, impossibility of performance and materiality of breach, (iii) the concept of good faith and fair dealing and (iv) the doctrine of equitable subordination.

7. Other Qualifications. The following additional qualifications are implicit in an opinion, whether or not stated:

(a) The effect of UCC Section 1-102(3) and Section 9-501(3) concerning waiver;

(b) Judicial decisions ruling that Federal courts are not bound by clauses selecting a forum to hear disputes under an agreement;

(c) Rules of contract law relating to the election of remedies which may prevent a party from exercising one remedy if another remedy has previously been elected;

(d) Limitations under common law and the Uniform Commercial Code limiting the rights of a creditor to self-help remedies which would result in a breach of the peace;

(e) Limitations under common law on the enforceability of releases, "hold harmless" provisions or indemnification provisions to the extent that the action or failure to act of a beneficiary of such clauses has been grossly negligent, reckless or willful;

(f) Common law rules relating to the severability of an unenforceable provision of an agreement, which may prevent the enforceability of the balance of the agreement;

(g) Common law and Uniform Commercial Code provisions imposing upon parties a duty to mitigate or otherwise avoid damages arising from a breach of an agreement or obligation; and

(h) Common law and Uniform Commercial Code provisions granting a breaching party the right to cure a breach under certain circumstances.

8. The “No Conflicts” Opinion

(a) With respect to existing orders, judgments or decrees, the “no conflicts” opinion speaks only to those judgments, orders or decrees which could be enforced against the client or its property.

(b) The “no conflicts” opinion does not extend to orders, judgments or decrees which may have general application to parties in the client’s circumstances but do not bind the client, although such matters may affect the enforceability opinion.

9. Additional Exclusions. The following items will not be considered to be included within the coverage of an opinion unless specifically addressed therein:

(a) Compliance with federal regulations relating to the extension of credit for the purchase of securities in margin transactions;

(b) Compliance or permissibility of transactions under employee benefit laws, including ERISA;

(c) Matters arising under local ordinances and regulations;

(d) Matters relating to the creation and enforceability of liens on real or personal property;

(e) Compliance with usury or similar laws limiting the amount of interest which may be charged or collected with respect to obligations.
SELECTED CONDENSED BIBLIOGRAPHY


FitzGibbon and Glazer, Legal Opinions on Incorporation, Good Standing, and Qualification To Do Business, 41 Bus. Law. 461 (1986).


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