

TENNESSEE BAR ASSOCIATION

Report on

Third Party Closing Opinions

by the

**Joint Opinion Committee of the
Sections of Real Estate Law and Business Law**

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Sections of Business Law and Real Estate Law
Tennessee Bar Association

I. Introduction

1.1 Purpose of this Report.

This Report is intended to be a resource to Tennessee practitioners in dealing with third party opinion issues that commonly arise, including opinion issues that are specific to Tennessee law and practice. It is not intended to be an exhaustive treatise on opinion practice or Tennessee law. Further, while this Report may provide evidence of the current status of "customary practice" in Tennessee, it is not intended to be a comprehensive statement of customary practice.

It is not the purpose or intent of this Report to provide mandatory rules for Opinion Givers or to set absolute standards for the degree of diligence that every Opinion Giver must exercise in rendering certain opinions. That diligence will be determined by a variety of factors including, but not necessarily limited to, the demands of the Opinion Recipient, the nature of the Transaction, the Opinion Giver's relationship to and familiarity with the Company, and the Company's willingness and ability to pay for the cost of investigation by the Opinion Giver. Rather, this Report outlines certain issues the Opinion Giver may wish to consider in preparing an Opinion.

1.2 Background.

In 1991, the Committee on Legal Opinions of the Section of Business Law of the American Bar Association issued the *Third Party Opinion Report, Including the Legal Opinion Accord* (the "*Accord*").¹ The Accord represented the culmination of an effort over many years to establish a "national consensus as to the purpose, format and coverage of a third party legal opinion."² The Accord contained statements of principles that governed the interpretation of opinions that adopted the Accord, commentaries, specimen forms of opinions, qualifications, exclusions and limitations. Under the Accord model for delivering Opinion Letters, an Opinion Giver could incorporate the Accord qualifications, exclusions and limitations by reference simply by stating that its Opinion Letter was governed by the Accord.

The Accord did not cover many opinions and issues encountered by Opinion Givers in real estate secured loan transactions. Thus in 1993, a Joint Drafting Committee composed of

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

² *Id.* at (i).

members of the Committee on Legal Opinions of the Real Property, Probate and Trust Section of the ABA and the Attorneys' Opinions Committee of the American College of Real Estate Lawyers issued the *Report on Adaptation of the Legal Opinion Accord of the Section of Business Law of the American Bar Association for Real Estate Secured Transactions* (the "*Real Estate Adaptation*")³. The Real Estate Adaptation modified and supplemented the Accord such that Accord-based Opinion Letters could be given in real estate secured loan transactions.

In 1992, partially in response to the Accord, Tennessee Bar Association President Thomas C. Binkley appointed the Special Committee on Opinion Standards of the Tennessee Bar Association (the "*1995 Committee*"). The 1995 Committee concluded its work in 1995 by issuing the *Report of the Special Committee on Opinion Standards of the Tennessee Bar Association* (the "*1995 Report*"). The 1995 Report was organized into two parts. Part I contained the Tennessee Supplement to the Accord, which listed additional qualifications and exclusions that Opinion Givers issuing Accord-based Opinion Letters should consider adding to their opinions. Part I also contained specimen opinions and commentary regarding opinions given with respect to corporations. Part II of the 1995 Report contained guidelines, commentary and caveats for Opinion Givers with respect to certain commonly requested opinions, as well as certain ethical issues. The 1995 Report was not published, but copies were circulated to members of the Tennessee Bar Association.

Since the issuance of the 1995 Report, there have been a number of significant developments in opinion practice. First, while the Accord is widely respected for its scholarship, it never gained broad acceptance as a model for delivering third party closing opinions, as many Opinion Recipients were simply unwilling to accept an Opinion Letter that incorporated the Accord by reference. This development rendered the Tennessee Supplement to the Accord (Part 1 of the 1995 Report) effectively obsolete.

Second, Article 9 of the UCC was completely revised in every state, including Tennessee, effective in 2001, rendering Article I of Part II of the 1995 Report substantially obsolete.

Last, since 1995 a number of bar reports and statements have been issued that have had significant impact on opinion practice nationally. These include:

Third-Party "Closing" Opinions ("TriBar II"),⁴ issued by the TriBar Opinion Committee in 1998, is a comprehensive report on closing opinions rendered in business transactions (excluding real estate secured loan transactions).

³ Section of Real Property, Probate & Trust, American Bar Association & American College of Real Estate Lawyers, *Report on Adaptation of the Legal Opinion Accord of the Section of Business Law of the American Bar Association for Real Estate Secured Transactions*, reprinted in 29 REAL PROP. PROB. & TR. J. 569 (1994) (original Report issued in 1993).

⁴ TriBar Opinion Committee, *Third-Party "Closing" Opinions*, 53 BUS. LAW. 591 (1998).

1998 Mortgage Loan Opinion Report (the "*NY Mortgage Loan Opinion Report*"),⁵ issued jointly by the Association of the Bar of the City of New York and the New York State Bar Association, is an expansive treatment of opinions issued in connection with real estate secured loan transactions.

Legal Opinion Principles (the "*Principles*"),⁶ issued in 1998 by the Committee on Legal Opinions of the Section of Business Law of the American Bar Association. The *Principles* are intended to provide guidance regarding the application of customary practice to third party closing opinions that do not adopt the Accord.

Guidelines for the Preparation of Closing Opinions (the "*Business Law Guidelines*"),⁷ issued in 2002 by the Committee on Legal Opinions of the Section of Business Law of the American Bar Association. The *Business Law Guidelines* are intended to complement the *Principles* and provide further guidance regarding the application of customary practice to third party closing opinions.

Real Estate Opinion Letter Guidelines (the "*Real Estate Guidelines*"),⁸ issued in 2002 by a joint drafting subcommittee of the Committee on Legal Opinions of the Section of Real Property, Probate and Trust Law of the American Bar Association and the Attorneys' Opinions Committee of the American College of Real Estate Lawyers. The *Real Estate Guidelines* adopt the *Business Law Guidelines* and the *Principles*, but supplement the *Business Law Guidelines* to address issues that are peculiar to opinions issued in real estate secured loan transactions.

Special Report of the TriBar Opinion Committee: UCC Security Interest Opinions—Revised Article 9 ("*TriBar UCC Opinion Report*"),⁹ issued by the TriBar Opinion Committee in 2003, is a comprehensive report on personal property security interest opinions under Revised Article 9 of the UCC.

Third-Party Closing Opinions: Limited Liability Companies ("*TriBar LLC Opinion Report*"),¹⁰ issued by the TriBar Opinion Committee in 2006, supplements *TriBar II* by

⁵ Subcommittee on Mortgage Loan Opinions, Committee on Real Property Law, Association of the Bar of the City of New York & Attorney Opinions Committee, Real Property Law Section, New York State Bar Association, *1998 Mortgage Loan Opinion Report*, 33 REAL PROP. PROB. & TR. J. 551 (1998).

⁶ Committee on Legal Opinions of the Section of Business Law, American Bar Association, *Legal Opinion Principles*, 53 BUS. LAW. 831 (1998).

⁷ Committee on Legal Opinions of the Section of Business Law, American Bar Association, *Guidelines for the Preparation of Closing Opinions*, 57 BUS. LAW. 875 (2002).

⁸ Committee on Legal Opinions of the Section of Real Property, Probate and Trust Law, American Bar Association & Attorneys' Opinions Committee, American College of Real Estate Lawyers, *Real Estate Opinion Letter Guidelines*, 38 REAL PROP. PROB. & TR. J. 241 (2003).

⁹ TriBar Opinion Committee, *Special Report of the TriBar Opinion Committee: UCC Security Interest Opinions—Revised Article 9*, 58 BUS. LAW. 1450 (2003).

¹⁰ TriBar Opinion Committee, *Third-Party Closing Opinions: Limited Liability Companies*, 61 BUS. LAW. 679 (2006).

addressing certain opinions on limited liability companies, specifically opinions on status, power and action and enforceability of operating agreements.

Statement on the Role of Customary Practice in the Preparation and Understanding of Third-Party Legal Opinions (the "*Customary Practice Statement*").¹¹ The *Customary Practice Statement*, which has been approved by numerous national, state and local bar associations and committees, is simply an acknowledgement that lawyers who regularly give and receive opinion letters have an understanding (i) of the work that Opinion Givers are expected to perform in order to be able to give certain opinions and (ii) of the meaning of opinion letters. Thus, customary practice permits the abbreviation of opinion letters by eliminating the need to explain in an Opinion Letter the due diligence that was performed (or not performed) by the Opinion Giver, and by eliminating the need to state in an Opinion Letter many commonly accepted assumptions, qualifications and limitations. The *Customary Practice Statement* has been approved by the Sections of Business Law and Real Estate Law of the Tennessee Bar Association.

This Report presumes that the reader has a basic level of familiarity with the foregoing reports.

1.3 Opinion Resources. The following websites contain articles and reports that are very useful to Opinion Givers, including some of the articles and reports mentioned in Section 1.2 above:

The Legal Opinion Resource Center, co-sponsored by the Legal Opinions Committee of the American Bar Association Section of Business Law and the TriBar Opinion Committee, <http://www.abanet.org/buslaw/tribar/home.shtml>.

The website of the Committee on Legal Opinions of the American Bar Association Real Property, Trust and Estate Section, <http://www.abanet.org/dch/committee.cfm?com=RP213000>.

¹¹ *Statement on the Role of Customary Practice in the Preparation and Understanding of Third-Party Legal Opinions*, 63 BUS. LAW. 1277 (2008).

1.4 Glossary. As used in this Report, the following terms (whether used in the singular or the plural) shall have the meanings indicated:

Collateral: the personal property serving as collateral in a loan transaction.

Company: the party or parties to the Transaction (including predecessor entities where relevant) for which the Opinion Giver provides legal representation.

Constituent Documents: the articles or certificate of incorporation, limited liability company articles of organization, certificate of formation, by-laws, partnership documentation, operating or limited liability company agreement, or other similar organizational documents of the Company.

LLC: limited liability company.

Opinion or opinion: a legal opinion that is rendered by the Opinion Giver to one or more persons involved with the Transaction other than the Company.

Opinion Giver: the law firm rendering the Opinion or, if there is no law firm, the lawyer rendering the Opinion.

Opinion Letter: a document in letter form containing one or more Opinions that is delivered to and accepted by the Opinion Recipient.

Opinion Recipient: the addressee or addressees of the Opinion Letter.

State: the state of Tennessee.

Transaction: the business transaction (e.g., loan, sale of securities, merger or acquisition) among the Company and other parties.

Transaction Documents: the contract setting forth the principal terms of the Transaction addressed by the opinion and any other ancillary contracts that are explicitly addressed by the opinion.

UCC: the Uniform Commercial Code as in effect in the State.

II. Opinions Respecting Corporations

2.1 Existence and Good Standing.

(a) Sample Opinion Language.

The Company is a corporation duly organized [incorporated], validly existing and in good standing under the laws of the State.

(b) Explanatory Comments.

This opinion consists of four parts, each of which serves a distinct purpose and requires a separate scope of inquiry.

(1) "The Company is a corporation . . ."

The Tennessee Business Corporation Act ("*TBCA*"), Tennessee Code Annotated Section 48-11-101 *et seq.*, governs Tennessee corporations.¹² For an entity to become a Tennessee corporation, a charter satisfying the applicable statutory requirements must be executed by the incorporator and filed by the Tennessee Secretary of State, at which point "corporate existence" begins.¹³ The filing of the charter by the Secretary of State is "conclusive evidence" of the formation of the corporation, except in a proceeding by the state to cancel or revoke the incorporation or involuntarily dissolve the corporation.¹⁴

The Opinion Giver should obtain a recent Certificate of Existence from the Tennessee Secretary of State, and make sure that no qualifications are stated in the Certificate. Under Tennessee Code Annotated Section 48-11-309(c), subject to any qualifications stated in the certificate, a Certificate of Existence issued by the Secretary of State may be relied on as conclusive evidence that the corporation is in existence and is in good standing. If any qualifications are stated, the Opinion Giver should bring them to the attention of the Company and the Opinion Recipient. Customary practice allows the Opinion Giver to rely on a current, unqualified Certificate of Existence to support opinions that the Company is a corporation, is validly existing and is in good standing.

¹² The TBCA originally became effective on January 1, 1988, replacing the Tennessee General Corporation Act ("*TGCA*"), then codified at Tennessee Code Annotated Sections 48-1-101 *et seq.*

¹³ Tenn. Code Ann. § 48-12-103(a).

¹⁴ *Id.* § 48-12-103(b).

(2) "*The Company is a corporation duly organized [incorporated]. . .*"

In order for a Tennessee corporation to be duly organized, a charter must first be filed as described above in Section 2.1(b)(1). The Opinion Giver should determine that the Company's charter conformed to statutory requirements in existence at the time the charter was filed and, if the charter has been subsequently amended, applicable statutory requirements at the time of the amendment[s].¹⁵

The TBCA provides that, after the corporation comes into existence by virtue of the filing of its charter, the organization of the corporation is to include the election of directors, the appointment of officers, and adoption of bylaws.¹⁶ These actions may be taken by the initial directors, if named in the charter, or by the incorporator (at least to the extent of electing directors) if no initial directors are named in the charter.¹⁷ These actions can be taken at any time after the charter is filed and can be taken by written consent of all of the incorporators or, unless prohibited by the charter or bylaws, all the directors. Evidence that the necessary organizational steps have been taken would typically be found in the Company's minute book. "Due organization" may also be viewed as requiring authorization of the initial issuance of the Company's stock, although the TBCA does not expressly require such authorization or issuance as an element of the organization process.¹⁸ The Committee believes that under customary practice a "due organization" opinion confirms that the initial issuance of the Company's stock has been authorized by appropriate action as reflected in the Company's minutes and the Company's stock records.

A "due organization" opinion necessarily includes a "duly incorporated" opinion, since a duly organized corporation would necessarily have been "duly incorporated." Conversely, a "duly incorporated" opinion does not include a "duly organized" opinion. A "duly incorporated" opinion requires the same review of the Company's charter as described above for a "due organization" opinion and the same determination that statutory requirements for incorporation in effect at the relevant time were satisfied. A "duly incorporated" opinion would not, however, require a determination that the post-incorporation organizational steps were taken.

Due to the challenge of confirming the due incorporation and due organization of a corporation under requirements in effect at various times in the

¹⁵ Tennessee Code Annotated Section 48-12-102 sets forth the current requirements for a charter.

¹⁶ Tenn. Code Ann. § 48-12-105(a)

¹⁷ *Id.* § 48-12-105.

¹⁸ Prior to January 1, 1988, the TGCA then in effect required a corporation to receive a minimum of \$1,000 for issuance of its shares before commencing business. Accordingly, in opinions on the due organization of Tennessee corporations formed prior to 1988, the fact of receipt of the \$1,000 minimum capital contribution should be confirmed.

past, as well as the uncertainty about the scope of the "due organization" opinion, there is a trend away from the giving and receiving of either "due incorporation" or "due organization" opinions, particularly when the Opinion Giver did not represent the Company in connection with its formation and organization.

(3) *"The Company is a corporation . . . validly existing . . ."*

The phrase "validly existing," when added to the statement that the Company "is a corporation," confirms that the Company's existence has not ended as a result of dissolution and termination or merger or because a period of duration specified in its charter has expired.

Valid existence is not, strictly speaking, affected by the fact that (a) grounds for involuntary dissolution exist, (b) a resolution (or less formal plan) contemplating a dissolution or merger has been adopted or (c) any other event that might potentially affect the existence of the corporation has occurred. Furthermore, Tennessee Code Annotated Section 48-24-105 provides that even a "dissolved corporation continues its corporate existence" (although a dissolved corporation is required by that statute to restrict its business to the winding up and liquidation of its affairs). Only after articles of termination are filed in accordance with Tennessee Code Annotated Section 48-24-108 does corporate existence formally end. Nevertheless, the "validly existing" opinion is generally understood to mean that the corporation has not been dissolved or terminated, and if an Opinion Giver knows that the board of directors or shareholders of a corporation specifically contemplate a dissolution or merger or other event that could lead to the cessation or termination of existence of a corporation,¹⁹ that information generally should be disclosed to the Opinion Recipient.²⁰

To assure that a corporation is "validly existing," the Opinion Giver should check all filings with the Secretary of State subsequent to its incorporation to confirm that it has not been dissolved and that its term of existence, if limited, has not expired. This process has the additional benefit of disclosing any articles of merger or charter amendment affecting the Company.

¹⁹ Under Tennessee Code Annotated Section 48-24-201, the Secretary of State may commence administrative dissolution proceedings for a number of reasons including failure to file an annual report or noncompliance with the registered agent and office requirements. Under the same Section, the Attorney General and Reporter may commence dissolution proceedings if, among other grounds, the corporation "obtained its charter through fraud" or has carried on its business in a "persistently fraudulent or illegal manner," and certain other parties in interest may also seek judicial dissolution on various grounds enumerated in that Section. Tennessee Code Annotated Section 48-11-309 (governing Certificates of Existence) requires the Certificate of Existence to note whether certain grounds for administrative dissolution exist and whether either a Certificate of Dissolution has been filed (indicating that administrative dissolution has occurred) or a decree of judicial dissolution has been filed. However, the Certificate of Existence does not confirm that proceedings for administrative dissolution have not been commenced (although it is reasonable to assume that no such proceedings are pending that are based on grounds the existence of which would be required to be reflected in the Certificate of Existence) or that proceedings for judicial dissolution are not pending.

²⁰ The Opinion Giver should make such disclosure only after compliance with any applicable professional obligation to consult with, and obtain consent from, the client regarding such disclosure.

Customary practice allows the Opinion Giver to rely on a current, unqualified Certificate of Existence from the Secretary of State to support an opinion that the Company is validly existing.²¹

(4) *"The Company is a corporation . . . in good standing . . ."*

The TBCA does not define the term "good standing" nor does it specifically authorize the Secretary of State to issue a "Certificate of Good Standing." Tennessee Code Annotated Section 48-11-309(c) states that a "Certificate of Existence" may be relied upon as conclusive evidence that a corporation "is in existence . . . and is in good standing" without assigning any specific independent meaning to the phrase "good standing." Accordingly, the Committee believes that an opinion that a Tennessee corporation is in good standing can be given if the requirements for an opinion that the corporation is validly existing have been satisfied.

Customary practice allows the Opinion Giver to rely on a current, unqualified Certificate of Existence from the Secretary of State to support an opinion that the Company is in good standing.²²

2.2 Qualification to Transact Business.

(a) Sample Opinion Language.

The Company is authorized to transact business as a foreign corporation in the State.

(b) Explanatory Comments.

(1) In Section 48-25-101(a), the TBCA provides that a foreign corporation, except a foreign insurance corporation subject to the provisions of Title 56 of the Tennessee Code Annotated, may not "transact business" in Tennessee until it obtains a Certificate of Authority from the Secretary of State. Customary practice permits the opinion to be given in reliance on (i) either an assumption that the foreign corporation is in existence in its state of formation or a current, unqualified certificate of existence from its state of formation and (ii) a

²¹ Tennessee Code Annotated Section 48-11-309(c) states that a "certificate of existence" may be relied upon as conclusive evidence that a corporation "is in existence." Accordingly, a "validly existing" opinion may be based solely on a current, unqualified certificate of existence from the Secretary of State, without any direct review of any corporate documents. However, the "validly existing" opinion is usually accompanied by other opinions that do require a review of the corporation's Constituent Documents, such as opinions that a corporation has the requisite power and authority to enter into the Transaction and that the Transaction does not contravene the corporation's Constituent Documents. Reliance on a Certificate of Existence for the "validly existing" opinion would not be warranted if the Opinion Giver, as a result of having reviewed the corporation's charter, was aware that a Certificate of Existence failed to note that a period of duration specified in the charter had expired.

²² See *supra* note 21.

current, unqualified Certificate of Authorization from the Tennessee Secretary of State.

(2) Tennessee Code Annotated Section 48-25-301 sets forth grounds for the Tennessee Secretary of State to revoke a foreign corporation's Certificate of Authority. The Committee believes that, while Opinion Givers are not required to confirm that grounds for revocation do not exist, if Opinion Givers are aware that any such grounds for revocation do exist, they should disclose that information to the Opinion Recipient to avoid giving an opinion which may be misleading.²³

(3) Opinion Givers may be asked for an opinion that business activities a foreign corporation proposes to conduct in Tennessee do not require it to obtain a Certificate of Authority to do business in Tennessee. Tennessee Code Annotated Section 48-25-101(b) sets forth a nonexclusive listing of activities that do not constitute "transacting business" within the State. In some cases, the application of the TBCA exclusions from doing business (as interpreted in any relevant case law) may be sufficiently clear to render a "clean" opinion (i.e., not a qualified or "reasoned" opinion) that a foreign corporation is not required to qualify to do business in Tennessee. More typically, however, either no opinion can be rendered or, at best, only a reasoned and, perhaps, qualified opinion that a foreign corporation is not required to qualify to do business in Tennessee can be rendered.²⁴

2.3 Power.

(a) Sample Opinion Language.

The Company has the corporate power under Tennessee law to [own, lease, license and use its properties and carry on its business as presently conducted and to] enter into and perform its obligations under the Transaction Documents.

(b) Explanatory Comments.

(1) The "power" opinion confirms that the Company's Constituent Documents permit it to engage in the activities covered by the opinion. Typically, the opinion covers the entry into and performance of the Transaction Document(s), but is often expanded to cover the owning of the Company's properties and conduct of its business.

²³ See *supra* note 20.

²⁴ Clients and third parties may also ask the Opinion Giver whether proposed business activities or transactions will cause foreign entities to be liable for various Tennessee taxes. In the context of loan transactions involving lenders who are foreign entities, particular attention should be paid to Tennessee Code Annotated Section 67-4-2105, which establishes a special definition of "doing business" for "financial institutions" in connection with the obligation to pay franchise and excise taxes.

(2) Opinion Givers are often asked to confirm that the Company has the "power and authority" (emphasis added) to perform specified acts, with the potential inference that the phrase "and authority" adds meaning to the opinion, such as a confirmation that the Company has all governmental authorizations that may be necessary for the Transaction. The Committee believes that any opinion regarding "authority" beyond confirmation of the Company's authorization under the TBCA and the Company's Constituent Documents is more appropriately addressed in a separate governmental consents/approval opinion. The Sample Opinion above seeks to address this concern by only using the word power.

(3) In the absence of an unusual restriction in a corporate charter, the breadth of general corporate powers granted to Tennessee corporation law by the TBCA should eliminate most *ultra vires* questions about Tennessee corporations.²⁵ Matters relating to the purchase or redemption of corporate stock (both of which are limited under Tennessee Code Annotated Section 48-16-401) and matters governed by federal law (such as various federal laws relating to banking) may be exceptions to this rule in a corporate setting.

2.4 Due Authorization.

(a) Sample Opinion Language.

The Transaction Documents have been duly authorized by all necessary corporate action on the part of the Company.

(b) Explanatory Comments.

(1) An opinion regarding due authorization generally requires confirmation that procedures required by the TBCA and the Company's Constituent Documents have been followed with respect to the matter being authorized. Typically, such an opinion is supported by a review of the relevant provisions of the TBCA and the Company's Constituent Documents as well as entries in the Company's minute book reflecting the relevant action(s) by the directors and/or shareholders of the Company. The addition of the phrase "by all necessary corporate action on the part of Company" should, as in the Sample Opinion above, be added after the phrase "duly authorized" in order to confirm that the "due authorization" opinion is limited to corporate matters and does not extend to confirmation that governmental regulatory body or other third party approvals have been obtained (which would be the appropriate subject matter of a separate opinion expressly addressed to those issues).

²⁵ The TGCA (in former Tennessee Code Annotated Section 48-1-403) required guaranties to be authorized by a majority of the entire board of directors of the corporation and was also thought to prohibit a corporation from granting a security interest in its own property as collateral for a loan to a third party. This latter problem was avoided by having the corporation guarantee the third party's obligation and secure that guaranty with the grant of a security interest in the relevant property (a transaction specifically contemplated in former Tennessee Code Annotated Section 48-1-403) and providing that recourse on the guaranty was limited solely to the collateral.

(2) The "duly authorized" opinion is understood to be based on an assumption that the directors or shareholders of a Tennessee corporation, in approving a Transaction or agreement, were in compliance with their fiduciary duties (such as the duties of care and loyalty). Additionally, the opinion is understood to be based on an assumption that the relevant director or shareholder action satisfied Tennessee Code Annotated Section 48-18-302 (relating to the approval of Transactions in which conflicts of interest are presented by a majority of the disinterested directors or shareholders). Since the analysis of fiduciary duties involves complex factual issues and subjective judgments, conclusions about fulfillment of fiduciary duties would not normally be appropriate in a legal opinion. An assumption that applicable fiduciary duties have been satisfied generally is not required to be stated expressly in the "duly authorized" opinion.²⁶

(3) Where a Transaction directly or indirectly affects the control of the Company, the Opinion Giver should consider the potential applicability of Tennessee's corporate takeover statutes, including the Business Combination Act, the Control Share Acquisition Act and the Greenmail Act.²⁷

(4) Opinion Givers should note that Tennessee Code Annotated Section 48-16-401(c) prohibits a board of directors of a Tennessee corporation from authorizing "distributions to its shareholders" unless certain financial tests are met. Compliance is essentially a factual matter based on a corporation's financial position and, if applicable, the terms of its preferred stock. In addition to obvious examples of "distributions," such as cash or property dividends and the repurchase of shares, Tennessee Code Annotated Section 48-11-201(8) also defines "distribution" to include the "incurrence of indebtedness (whether directly or indirectly, including through a guaranty) by a corporation to or for the benefit of its shareholders in respect of any of its shares." In a loan Transaction in which a Tennessee subsidiary corporation issues an "upstream" guaranty of the indebtedness of its parent corporation, the Opinion Giver should consider whether such guaranty is a "distribution," within the meaning of Tennessee Code Annotated Sections 48-11-201(8) and 48-16-401(c), made in respect to the corporation's shares, and whether an opinion that the "upstream" guaranty is enforceable should be qualified by disclaiming opinion coverage as to compliance with the requirements of Tennessee Code Annotated Section 48-16-401. If the Opinion Giver concludes that Tennessee Code Annotated Section 48-16-401 is applicable, language such as the following might be used to indicate that the opinion does not cover compliance with the financial tests:

We express no opinion as to compliance with Tennessee Code Annotated Section 48-16-401 insofar as the incurrence of the

²⁶ See Article VIII below for a discussion of assumptions generally and, in particular, Section 8.2(c) regarding reliance on assumptions that the Opinion Giver knows or has reason to believe may be false.

²⁷ Tenn. Code Ann. §§ 48-103-101 to -505.

obligations governed by the [Transaction Documents] may be deemed to be a distribution by the Company.

2.5 Capital Shares.

(a) Sample Opinion Language.

(Status of Shares) The Company's authorized capitalization consists of _____ shares of common stock, of which _____ shares are issued and outstanding. The outstanding shares have been duly authorized and validly issued and are fully paid and nonassessable.

(Issuance of New Shares) The Shares [being issued in the Transaction] have been duly authorized and, upon payment by _____ of the purchase price therefor as provided in the Agreement, will be validly issued, fully paid and nonassessable and have not been issued in violation of any pre-emptive right created under the TBCA, the charter or bylaws of the Company.

(b) Explanatory Comments.

(1) "Due Authorization" of stock is generally understood to mean that the type and number of shares purportedly outstanding or to be issued in the Transaction have been appropriately created in the Company's charter.

(2) The opinion does not cover compliance with the Tennessee Securities Act of 1980, as amended (the "TSA"). If the opinion is to cover compliance with the TSA, such coverage should be the subject of a separate opinion.

(3) Tennessee Code Annotated Section 48-16-301 states that shareholders of a Tennessee corporation do not have pre-emptive rights, by virtue of their status as shareholders, unless the charter expressly provides for such rights. While in certain circumstances the board of directors of a corporation may be deemed to have a fiduciary duty to offer a new issue of securities to the corporation's existing shareholders before offering such securities to others, the Committee believes that customary practice does not require the Opinion Giver to confirm whether any such fiduciary duty existed or was satisfied in order to give a "due authorization" opinion.

(4) As in other contexts, an Opinion Giver's knowledge of a potential claim with respect to board of directors conduct in the issuance of securities may prevent the Opinion Giver from rendering an opinion with respect to, or otherwise participating in, a Transaction or, at the very least, require that the matter be expressly addressed in the Opinion Letter.²⁸

²⁸ See *supra* note 20.

(5) "Valid issuance" of stock requires that any procedure for approving the issuance of the shares set forth in either the charter or the bylaws (as such Constituent Documents existed at the time of the purported authorization) has been complied with and that the issuance was for appropriate consideration. The number of shares outstanding is typically confirmed from the Company's stock ledger or, in the case of a public company, a certificate from its transfer agent. Lost certificates are often replaced on the basis of an affidavit and indemnity from the affected shareholder. Because such procedure does not eliminate the risk that duplicate share ownership claims may arise (one based on the lost certificate and one on the replacement certificate), the Opinion Giver should consider an appropriate disclosure in the opinion if a material number of shares are the subject of lost and replacement certificates.

(6) The TBCA has eliminated the concept of treasury shares. Under Tennessee Code Annotated Section 48-16-302(a), shares acquired by the corporation become "authorized but unissued" (unless under Tennessee Code Annotated Section 48-16-302(b) the corporation would not be authorized to reissue acquired shares). Accordingly, all "issued" shares of a Tennessee corporation governed by the TBCA are necessarily "outstanding." Nevertheless, the Committee approves the continued use of the phrase "issued and outstanding" in opinions.

(7) For shares to be "fully paid," consideration permitted to be received for the issuance of such shares under the TBCA and any applicable provisions of the charter or bylaws must have been received. Tennessee Code Annotated Section 48-16-202 sets forth the types of consideration for which shares may be issued by a Tennessee corporation. Note that under the TGCA in effect until the TBCA became effective on January 1, 1988, contracts for future services and promissory notes were not valid consideration for the issuance of shares (former Tennessee Code Annotated Section 48-1-505(2)). Tennessee Code Annotated Section 48-16-202(b) now provides that a corporation is permitted to accept promissory notes and contracts for future services as consideration for the issuance of stock, and under Tennessee Code Annotated Section 48-16-202(d) such consideration is deemed to be received when the promissory note is issued or the contract for future services is entered into. Note that the prior TGCA provision continues to apply to issuances prior to January 1, 1988.

(8) In Tennessee Code Annotated Section 48-16-202(c), the TBCA provides that before a corporation issues shares, the board of directors must determine that the consideration received or to be received for shares to be issued is "adequate." The statute also states that (a) a decision by the board of directors to accept consideration for shares shall be deemed a determination that the consideration is adequate, and (b) a determination by the board of directors is conclusive insofar as the adequacy of consideration for the issuance of share relates to whether the shares are validly issued, fully paid and nonassessable. Thus, in rendering the "validly issued, fully paid and non-assessable" opinion, the

Opinion Giver need only confirm that the corporation received the consideration for which the board of directors authorized the issuance of shares.²⁹

(9) Under Tennessee Code Annotated Section 48-1-505(3) of the TGCA prior to 1988, the value received by a corporation for the issuance of shares having a par value generally must have been at least equal to the par value, with exceptions not applicable here. The TBCA has eliminated any reference to par value (except where required by other statute or regulation). Tennessee Code Annotated Section 48-16-101(b)(5) notes that although a Tennessee corporation's charter may provide that shares have a par value (including the charter of a corporation existing prior to the effectiveness of the TBCA), "the mere recitation of a par value for shares shall not create a requirement for a minimum consideration for the issuance of any such shares or impose any other restriction on their issuance or create any other right or liability with respect thereto." In other words, the recitation of a par value for a class or series of stock of a Tennessee corporation is purely "ornamental" and any requirement for a minimum consideration for the issuance of shares (or any other restriction, right or liability that may, at one time, have been associated with the concept of "par value") must be created through the use of explicit language in the charter and is not accomplished by the "shorthand" use of the words "par value." Accordingly, an Opinion Giver should, for example, be able to opine that stock with a \$1 par value (but no explicit charter language regarding minimum required consideration for issuance), even in the case of a corporation whose charter was filed prior to the effectiveness of the TBCA, is validly issued (assuming such issuance occurred after the effectiveness of the TBCA) for a consideration of \$0.50, if the board determines such amount to be adequate.

(10) The TBCA confirms the "fully paid" status of stock dividends. Prior to 1988 the TGCA provided that dividends payable in newly issued (versus treasury) shares of the corporation (stock dividends) could be declared only out of surplus. Noncompliance with certain accounting requirements in former Tennessee Code Annotated Section 48-1-511(d)(i) created a potential ambiguity as to whether the dividend shares had been issued for adequate consideration. In Tennessee Code Annotated Section 48-16-204 the TBCA now states that stock dividends may be issued "without consideration" and has eliminated the special accounting rules required by the TGCA for valid issuance of stock dividends.

(c) Transfer of Capital Shares.

(1) A purchaser of corporate shares from a shareholder will sometimes ask the seller's counsel to issue a legal opinion in connection with the transfer of the shares. Such a transfer is a sale of a "security" governed by Article 8 of the

²⁹ Although a separate issue may exist as to whether a breach of a fiduciary duty may have occurred in connection with the stock issuance, as a general proposition a confirmation of the absence of such a breach of fiduciary duty is not within the scope of the "validly issued, fully paid and nonassessable" opinion.

UCC ("Article 8").³⁰ The special report on Opinion Letters in Secondary Sales of Securities by the TriBar Opinion Committee (the "TriBar Secondary Sale Opinion Report"), addresses these Article 8 matters in detail.³¹ The Committee believes that the TriBar Secondary Sale Opinion Report provides comprehensive guidance for Tennessee Opinion Givers, since Tennessee's version of Article 8 is essentially identical to the Official Text.³²

The essence of the requested opinion is that, upon delivery of the stock certificates representing the shares,³³ the purchaser will acquire the shares free of adverse claims. Article 8 defines pivotal terms such as "adverse claim" and "delivery" and prescribes the circumstances in which a purchaser without "notice of an adverse claim" can acquire a security free of an adverse claim or be entitled to be treated as a "protected purchaser" under Article 8.³⁴ The purchaser may request an opinion that the seller has, or the purchaser will acquire, "title" (or good title or marketable title) to the securities, but this language is not consistent with Article 8, which does not deal with "title." Opinion Givers should not issue opinions on title to securities or as to the absence of adverse claims to the securities.

An opinion on the transfer of shares thus should be expressly limited to Article 8, should use the operative terms as defined in Article 8, and should be based on stated factual assumptions. An Opinion Giver should become familiar with Article 8 before rendering such an opinion. The following is a sample opinion that might be given in connection with the transfer of shares in a Tennessee corporation:

The opinions expressed in this paragraph are limited to the effect of Article 8 of the Uniform Commercial Code as in effect in the State of Tennessee (the "Tennessee UCC"). All terms used in this paragraph that are defined in the Tennessee UCC have the meanings set forth in Article 8 of the Tennessee UCC or in the definitions appearing

³⁰ Tenn. Code Ann. § 47-8-101 *et seq.*; see Tenn. Code Ann. § 47-8-102(a)(15) (defining "security").

³¹ TriBar Opinion Committee, *Opinion Letters on Securities: Secondary Sales (UCC Article 8) and LLC Membership Interests*, 66 BUS. LAW. 625. Neither the TriBar Secondary Sale Opinion Report nor this Report covers the sale of its own shares by a corporation.

³² Citations in this Report to the Official Text of the Uniform Commercial Code are to UCC Article * or UCC Section *-*** or UCC § *-***.

³³ This Report is limited to the transfer of a Tennessee corporation's shares that are "certificated," i.e., represented by a stock certificate. See Tenn. Code Ann. § 47-8-102(a)(4) (defining "certificated security"). This Report does not address transfers of "uncertificated securities" (defined in Tenn. Code Ann. § 47-8-102(a)(18)) or securities held in the indirect holding system, such as "securities accounts" (defined in Tenn. Code Ann. § 47-8-501(a)) or "security entitlements" (defined in Tenn. Code Ann. § 47-8-102(a)(17)).

³⁴ See Tenn. Code Ann. § 47-8-102(a)(1) (defining "adverse claim"); Tenn. Code Ann. § 47-8-301 (stating when "delivery" occurs); Tenn. Code Ann. § 47-8-303(a) (defining "protected purchaser"); Tenn. Code Ann. § 47-8-105(a) (stating when a person has "notice of an adverse claim").

elsewhere in the Tennessee UCC and used in Article 8. In rendering the opinions in this paragraph, we assume that Purchaser does not have notice of any adverse claim to the Shares, that the certificates representing the Shares have been effectively indorsed to Purchaser or in blank and that Purchaser is taking possession of the certificates representing the Shares in the State of Tennessee. Based on the foregoing, it is our opinion that, upon payment for the Shares and delivery of the certificates representing the Shares to Purchaser, Purchaser will acquire the Shares free of any adverse claim.

This opinion relies heavily on factual assumptions (stated and unstated) and requires little actual legal analysis. It may be more appropriate and cost-effective therefore for the purchaser to rely on the seller's representations rather than a limited legal opinion based in large part on the same facts.

III. Opinions Respecting Limited Liability Companies

3.1 Background.

Tennessee currently has two statutory schemes under which LLCs can be organized and operate: the Tennessee Limited Liability Company Act (the "Original LLC Act") for LLCs organized before January 1, 2006; and the Tennessee Revised Limited Liability Company Act (the "Revised LLC Act") for LLCs that either were organized on or after January 1, 2006, or were organized before that date but amend their Articles of Organization ("LLC Articles") to contain a statement electing to be governed by the Revised LLC Act. With regard to many of the opinions discussed below, therefore, it is imperative to focus upon when the LLC was organized and under which Act it is operating.

The Original LLC Act was designed to provide a mechanism for LLCs to possess the limited liability protections of corporations while qualifying under Internal Revenue Service guidelines to be taxed as partnerships rather than corporations. The need for the complicated default structures in the Original LLC Act was eliminated in large part by changes enacted in 1997 by the Internal Revenue Service allowing for entities easily to choose whether to be taxed as corporations or as partnerships by checking a box on an IRS form.

The Constituent Documents of LLCs organized under the Original LLC Act may still have provisions reflecting the original complex schemes, even though such provisions may be anachronisms under the Revised LLC Act. As an example, early LLC Articles often provided that the LLC would expire upon a specific date. In order to honor the intentions of the organizers of early LLCs, the Revised LLC Act provides some opt-in or opt-out opportunities, but does not alter provisions adopted by LLCs organized under the Original LLC Act. A consequence of this approach, however, is that some members of early LLCs may assume that their LLC is governed by the Revised LLC Act, even though they have not amended the LLC's Constituent Documents to elect to be governed by the Revised LLC Act.

LLCs are designed to be flexible entities that largely are creatures of contract among the members. As discussed below in reference to specific opinions, the applicable governance issues may rest in one or more agreements that are expressly intended to be taken together to form the LLC's operating agreement, and, under the Revised LLC Act, those agreements may be oral as well as written. As a consequence, the Opinion Giver may need to perform more due diligence and may need to rely more upon certificates of the LLC than may be necessary in the corporate context.

The TriBar Opinion Committee issued a report published in *The Business Lawyer* in February 2006 entitled *Third-Party Closing Opinions: Limited Liability Companies*,³⁵ which, although it focuses primarily upon the Delaware limited liability law, may be of interest to Tennessee attorneys.

³⁵ TriBar Opinion Committee, *supra* note 10.

3.2 Existence, Due Organization and Good Standing.

(a) Sample Opinion Language.

The Company is a limited liability company validly existing under the laws of the State.

(b) Explanatory Comments.

(1) The Sample Opinion (a) assures the Opinion Recipient of the legal character of the Company; (b) confirms that the Company has not been terminated or undergone any organic change that would affect the Company's legal capacity to consummate a Transaction; and (c) identifies any legal disabilities affecting the Company as a result of the failure to comply with statutory requirements or other reasons.

(2) The Sample Opinion is typically analyzed in two component parts. Each is generally thought to serve a distinct purpose and involves a separate inquiry before the opinion can be given.

(A) "*The Company is a limited liability company . . .*"

Under both the Original LLC Act and the Revised LLC Act, LLC Articles satisfying the applicable statutory requirements must be executed by the organizer and filed with the Tennessee Secretary of State to form an LLC. The "existence" of the LLC begins on the filing date, unless a later effective date or future condition (which must occur within 90 days of the filing date) is specified. In the case of LLC Articles that provide that the date of formation is the date of filing, acceptance for filing of the LLC Articles by the Secretary of State is "conclusive evidence" of the formation of the LLC, except in a proceeding by the state to cancel or revoke the organization or to involuntarily dissolve the LLC ("State Revocation Proceeding"). In the case of LLC Articles that provide that the date of formation of the LLC is later than the date of filing, the subsequent filing of a certificate of formation with the Secretary of State creates such conclusive evidence, except in a State Revocation Proceeding.³⁶ Where a certificate of formation is not filed within the time period specified in the applicable LLC Act, a rebuttable presumption is created under both LLC Acts that formation occurred on the ninetieth (90th) day following the filing of the LLC Articles.

The Opinion Giver should determine the conformity of the LLC Articles to statutory requirements in existence at the time the

³⁶ Original LLC Act § 48-203-102(b), (d); Revised LLC Act § 48-249-201(b), (c).

LLC Articles were filed and also, if the filing was under the Original LLC Act, whether the LLC Articles have been subsequently amended to adopt the Revised LLC Act.

A general partnership or limited partnership could convert to an LLC under the Original LLC Act upon filing of articles of conversion containing the required provisions of LLC Articles and certain additional information.³⁷ Any entity may convert to an LLC under the Revised LLC Act upon filing a certificate of conversion and LLC Articles.³⁸ The Opinion Giver should determine if the LLC has converted from another entity and whether the filed documents conform to the relevant LLC Act and whether the original entity complied with the approval requirements for conversion.

(B) *"The Company is . . . validly existing [and in good standing] under the laws of the State."*

The opinion that an LLC is "validly existing" is generally understood to mean that a specified period of duration, if any, in its LLC Articles has not expired and that the existence of the LLC has not ended as a result of dissolution and termination or merger. The issue of existence becomes complicated with LLCs, especially LLCs created and existing under the Original LLC Act. Many LLCs formed under the Original LLC Act have specified termination dates. Further, the Constituent Documents of many LLCs created under the Original LLC Act specified that the LLC would be dissolved upon the occurrence of certain events that caused a member to withdraw.

Both the Original LLC Act and the Revised LLC Act provide that an LLC is dissolved and must be wound up upon the occurrence of events specified in the Constituent Documents. In addition, Section 48-245-101(a)(5) of the Original LLC Act provided that an LLC would be dissolved upon the occurrence of certain listed events ("Statutory Dissolution Events"), unless the LLC provided in its LLC Articles that none or less than all of the Statutory Dissolution Events applied. Amendments to the Original LLC Act (the "1999 Amendments") which became effective on July 1, 1999 (the "Effective Date") attempted to alleviate the absolute nature of this Section by providing: (i) that the Statutory Dissolution Events do not cause dissolution of LLCs created after the Effective Date or of LLCs created before the Effective Date

³⁷ Original LLC Act § 48-204-101.

³⁸ Revised LLC Act § 48-249-703.

which adopt amendments to their LLC Articles electing to have the 1999 Amendments apply; and (ii) that dissolution caused by the Statutory Dissolution Events does not apply if, within 90 days of such event there is at least one member and a majority of the members, or such larger number as is specified in the LLC Articles, elects to continue the LLC. It should be noted, however, that the 1999 Amendments, including the provision allowing members 90 days to vote to continue the LLC, only addressed the Statutory Dissolution Events and did not address the effect of dissolution events specified in the Constituent Documents ("Contractual Dissolution Events").

The Tennessee Secretary of State has no ability to ascertain whether a Statutory Dissolution Event or a Contractual Dissolution Event (except for dissolution due to the expiration of a specified period of existence stated in the LLC Articles) has occurred; therefore, an unqualified Certificate of Existence issued by the Tennessee Secretary of State can be relied upon only to confirm (i) that the period of existence specified in the LLC Articles (if any) has not expired; (ii) that articles of termination have not been filed; and (iii) after the effective date of amendments adopted in 2010, that all LLC annual reports, taxes and fees have been filed and paid, the nonpayment of which would allow administrative dissolution. As a result, the Opinion Giver should: (i) review the Constituent Documents closely to determine if they contain Contractual Dissolution Events and, if so, confirm by certificate or otherwise that none have occurred; (ii) review the LLC Articles of any LLC organized under the Original LLC Act to determine whether the LLC adopted the 1999 Amendments and elected to eliminate any or all of the Statutory Dissolution Events; and (iii) if any of the Statutory Dissolutions Events still apply to the LLC, confirm by certificate or otherwise that none have occurred or, if a Statutory Dissolution Event has occurred and the LLC adopted the 1999 Amendments, further determine whether the required percentage of members acted within 90 days of the occurrence of that Statutory Dissolution Event to continue the LLC. If the LLC's Constituent Documents contain Contractual Dissolution Events or if Statutory Dissolution Events are applicable, it would not be appropriate for the Opinion Giver to state that the "validly existing" opinion is based solely upon a Certificate of Existence. In that event, the Opinion Giver should obtain a certificate signed by all members of the LLC to the effect that no Statutory Dissolution Event or Contractual Dissolution Event has occurred.

Valid existence of an LLC is not, strictly speaking, affected by the fact that a resolution (or less formal plan) contemplating a future dissolution or merger has been adopted. An LLC that was

created under the Revised LLC Act or that was created under the Original LLC Act but has elected to be governed by the Revised LLC Act must file a notice of dissolution prior to dissolution and that notice should prevent an unqualified Certificate of Existence from being issued by the Tennessee Secretary of State. If an Opinion Giver knows that the governors, directors, managers, officers or members of an LLC (as applicable) specifically contemplate a dissolution or merger or other event that could lead to the cessation of existence of an LLC, that information generally should be disclosed to the Opinion Recipient.³⁹

To assure that the LLC is "validly existing," the Opinion Giver should check all filings with the Secretary of State subsequent to its organization to confirm that it has not been dissolved and that its term of existence, if limited, has not expired. This process has the additional benefit of identifying any articles of merger or amendments to the LLC Articles affecting the LLC.

(3) Neither the Original LLC Act nor the Revised LLC Act defines the term "good standing" nor does either specifically authorize the Secretary of State to issue a "Certificate of Good Standing." Tennessee Code Annotated Section 48-247-111 (in the Original LLC Act) and Tennessee Code Annotated Section 48-249-1019 (in the Revised LLC Act) state that a "Certificate of Existence" may be relied upon as conclusive evidence that a domestic or foreign LLC "is in existence or is authorized to transact business in . . . and is in good standing" without assigning any specific independent meaning to the phrase "good standing." Accordingly, the Committee believes that an opinion that a Tennessee limited liability company is in good standing can be given if the requirements for an opinion that the limited liability company is validly existing have been satisfied.

(4) "Due organization" with respect to corporations means that the statutory requirements for electing directors and officers, adopting bylaws and, perhaps, issuing stock have been met. There are no comparable statutory requirements for the organization of LLCs under either the Original LLC Act or the Revised LLC Act. The only organizational requirement for LLCs is the filing of LLC Articles, which is covered by the "validly existing" opinion. Neither the Original LLC Act nor the Revised LLC Act requires that an LLC hold an organizational meeting and, while an operating agreement is required for certain LLCs, neither Act specifies the content of operating agreements. The Revised LLC Act even allows operating agreements to be oral. The Committee believes, therefore, that it is inappropriate to request or give a "due organization" opinion with respect to Tennessee LLCs.

³⁹ See *supra* note 20.

3.3 Qualification to Transact Business.

(a) Sample Opinion Language.

The Company is authorized to transact business as a foreign limited liability company in the State.

(b) Explanatory Comments.

Section 48-246-301(a) of the Original LLC Act and Section 48-249-904(a) of the Revised LLC Act provide that before a foreign LLC "transacts business" in Tennessee, it shall obtain a Certificate of Authority from the Secretary of State. Customary practice permits the opinion to be given in reliance on (i) either an assumption that the foreign LLC is in existence in its state of formation or a current, unqualified certificate of existence from its state of formation and (ii) a current, unqualified Certificate of Authorization from the Tennessee Secretary of State.

Section 48-246-501 of the Original LLC Act and Section 48-249-908 of the Revised LLC Act provide identical grounds for revocation of the Certificate of Authority. The Committee believes that, while Opinion Givers are not required to confirm that such grounds do not exist, if Opinion Givers are aware that such grounds for revocation do exist, they should disclose that information to the Opinion Recipient to avoid giving an opinion that may be misleading.⁴⁰

Opinion Givers may be asked for an opinion that business activities a foreign LLC proposes to conduct in Tennessee do not require it to obtain a Certificate of Authority to do business in Tennessee. Section 48-246-102(a) of the Original LLC Act and Section 48-249-902(a) of the Revised Act set forth a nonexclusive listing of activities that do not constitute "transacting business" within the State. In some cases, the application of the exclusions from doing business (as interpreted in any relevant case law) may be sufficiently clear to render a "clean" opinion. More typically, however, either no opinion can be rendered or, at best, only a reasoned and, perhaps, qualified opinion that a foreign LLC is not required to qualify to do business in Tennessee can be rendered.

⁴⁰ See *supra* note 20.

3.4 Power.

(a) Sample Opinion Language.

The Company has the limited liability company power to [own, lease, license and use its properties and carry on its business as presently conducted and to] enter into and perform its obligations under the Transaction Documents.

(b) Explanatory Comments.

The purpose of the "power" opinion is to assure the Opinion Recipient that the Company is permitted to enter into and perform its obligations under the Transaction Documents pursuant to its Constituent Documents and the laws defining its basic powers. If appropriate, the opinion may also cover the Company's power to own its properties and conduct its businesses, where those matters are relevant to credit or other pertinent judgments. The related issue of whether a particular Transaction has been authorized is discussed below under "Due Authorization."

As used in the Sample Opinion above, "power" means that the LLC is authorized by its Constituent Documents and by the LLC Act under which it was organized to enter into a particular Transaction, to own its properties, or to conduct its business, depending upon the scope of the opinion. In other words, it means that the action addressed is not ultra vires. As with similar opinions regarding corporations, the sample opinion does not include the phrase "and authority" so as to avoid any unintended implication that the opinion covers receipt by the LLC of all governmental authorizations that may be necessary for it to perform its obligations under the Transaction Documents. If such an opinion is intended to be given, it is more appropriately addressed in a separate governmental consents/approval opinion.

Note that LLCs often are utilized as special purpose entities or bankruptcy remote entities and that their Constituent Documents may place limitations upon their powers to enter specific Transactions. Note, too, that the Original LLC Act has a general definition of "series" and Section 48-249-309 the Revised LLC Act is a specific provision dealing with the concept of series of members, holders, managers, directors, membership interests or financial rights that may possess "power" to act only as to certain "property or obligations of the LLC or profits and losses associated with specified property or obligations" and not as to the LLC itself. A close analysis of the Constituent Documents, especially the operating agreement, therefore, is imperative to determine whether the LLC possesses power to act as contemplated by the Transaction Documents.

Only a board-managed LLC under the Original LLC Act is required to have an operating agreement, and the Original LLC Act provides that all operating agreements must be in writing. Section 48-249-203 of the Revised LLC Act provides that an LLC *may* have an operating agreement and that the operating agreement need not be integrated in one document and need not be in writing. The Opinion Giver, therefore, should obtain a certificate from the Company, or, where appropriate, from the members, certifying to

all documents constituting the operating agreement, and certifying either that no oral operating agreements exist or that, if an oral operating agreement exists, the LLC has the power to enter Transactions as contemplated by the Transaction Documents.

In the absence of an unusual restriction in its Constituent Documents, the breadth of powers given to LLCs under both LLC Acts should eliminate most ultra vires questions about Tennessee LLCs.

3.5 Due Authorization.

(a) Sample Opinion Language.

The Transaction Documents have been duly authorized by all necessary action on the part of the Company.

(b) Explanatory Comments.

Only a board-managed LLC under the Original LLC Act is required to have an operating agreement, and the Original LLC Act provides that all operating agreements must be in writing. Section 48-249-203 of the Revised LLC Act provides that an LLC *may* have an operating agreement and that the operating agreement need not be integrated in one document and need not be in writing. The Opinion Giver should obtain a certificate from the Company or, where appropriate, from all members, attaching all documents constituting the operating agreement and certifying such documents to be true, correct and complete, and further certifying either that no oral operating agreements exist or that, if an oral operating agreement exists, the persons authorizing the Transaction and the Transaction Documents have the authority to do so. The Opinion Giver should review all operating agreements for provisions relating to authority. As with general partnerships, where there is any question regarding authority, the safest course for the Opinion Giver is to have all members of the LLC sign the certificate.

Both the Original LLC Act and the Revised LLC Act provide that any member of a member-managed LLC may bind the LLC. A member's power to bind the LLC to an agreement or transaction is separate and distinct from the member's possessing the actual authority to enter the Transaction or to approve the Transaction Documents. A careful review of the Constituent Documents is imperative, and certificates may be necessary to address any ambiguities or uncertainties.

As mentioned in Section 3.4(b) above, LLCs often are used in Transactions because of the statutory flexibility to restrict the authority of the LLC and its members, managers, directors, and officers to act in certain situations. Those restrictions must be scrutinized.

As discussed in Section 3.4(b) above, it is possible for an LLC to establish series of members, holders, managers, directors, membership interests or financial rights that may possess authority to act only as to certain "property or obligations of the LLC, or profits and losses associated with specified property or obligations." If the LLC has series, additional analysis will be necessary.

Unlike corporate stock, membership interests in LLCs are divided into governance rights and financial rights. Sections 48-218-102 and 48-232-102 of the Original LLC Act provide some flexibility in the transfer of governance rights, deferring to provisions in the operating agreement. Section 48-249-508 of the Revised LLC Act provides a statutory default that governance rights can only be transferred to another member or to a third party with the unanimous approval of the members; however, those rights may be altered by the Constituent Documents of the LLC. Section 48-249-508 of the Revised LLC Act further provides that any attempted transfer in violation of the Section is null and void. Section 48-249-501 of the Revised LLC Act provides that, after formation, new members can be admitted only upon approval of all members; however, this too may be altered by the Constituent Documents of the LLC.

The Revised LLC Act includes a definition of "Family LLC" (generally an LLC of which at least 50% of the financial rights are held by members of one family), and Section 48-249-503(b)(2) provides that certain transfers by a member of a Family LLC that have the effect of termination of such member's interest are null and void. Where such withdrawal or transfer in violation of the Revised LLC Act has occurred, votes may need to be recalculated to take into account the percentage interest of the wrongfully terminated member. Note that the definition is broad enough to encompass LLCs that have no intention of being "family owned."

As with corporations, a review must be made of the operating agreements and minutes of board-managed or director-managed LLCs to determine that those persons who are executing Transaction Documents on behalf of the LLC have been elected or appointed properly.

The "duly authorized" opinion is understood to be based upon an assumption that the governors, directors, managers or members of a Tennessee LLC, in approving a Transaction or agreement, complied with their fiduciary duties (such as the duties of care and loyalty). Additionally, the opinion is understood to be based on an assumption that the action of the relevant governor, director, manager or member satisfied Section 48-239-116 of the Original LLC Act or Section 48-249-404 of the Revised LLC Act (relating to the approval of Transactions in which conflicts of interest are presented by a majority of the disinterested governors, directors, managers or members). Since the analysis of fiduciary duties involves complex factual issues and subjective judgments, conclusions about fulfillment of fiduciary duties would not normally be appropriate in a legal opinion. An assumption that applicable fiduciary duties have been satisfied generally is not required to be stated expressly in the "duly authorized" opinion.⁴¹

Opinion Givers should note that Section 48-236-105 of the Original LLC Act and Section 48-249-306 of the Revised LLC Act prohibit an LLC from authorizing "distributions to its members" unless certain financial tests are met. Compliance is essentially a factual matter based on an LLC's financial position. In addition to obvious examples of "distributions" such as distributions of cash or property to members or holders of financial rights, the term "distribution" is defined in both the Original LLC Act

⁴¹ See *supra* note 26.

and the Revised LLC Act to include the "incurrence of indebtedness, whether directly or indirectly, including through a guaranty" by an LLC to or for the benefit of its members or holders of financial rights. In a loan transaction in which an LLC issues an "upstream" guaranty of the indebtedness of one of its members or holders of financial rights, the Opinion Giver should consider whether such guaranty is a "distribution" and whether an opinion that the "upstream" guaranty is enforceable should be qualified by disclaiming opinion coverage as to compliance with the requirements of Section 48-236-105 of the Original LLC Act and Section 48-249-306 of the Revised LLC Act. The following is a sample qualification that might be used to indicate that the opinion does not cover compliance with the financial tests of Section 48-236-105 of the Original LLC Act and Section 48-249-306 of the Revised LLC Act:

We express no opinion as to compliance with [Section 48-236-105 of the Original LLC Act or Section 48-249-306 of the Revised LLC Act] insofar as the incurrence of the obligations governed by the [Transaction Documents] may be deemed to be a distribution by the Company.

IV. Enforceability Opinion and Qualifications

4.1 The Enforceability Opinion.

(a) Sample Opinion Language.

The Transaction Documents are valid and binding obligations of the Company, enforceable against the Company in accordance with their terms.

(b) Explanatory Comments.

(1) The Enforceability Opinion confirms that a contract has been formed and that a court will provide a remedy for the breach or failure to perform any of the covenants in the contract. If the contract provides a specific remedy for the breach of a particular covenant, then the Enforceability Opinion means that a court will give effect to the specified remedy.

(2) Whether a contract has been formed will be determined at least in part by reference to the laws of the state in which the Company is organized. Whether a contract will be enforced will be determined by reference to the law of the jurisdiction whose law is selected by the parties to govern the contract, assuming that the choice of law provision in the contract is enforceable. For a discussion of Choice of Law Opinions, see Section 7.3 below.

(3) Regardless of the formulation used to describe an Enforceability Opinion, e.g., "valid, binding and enforceable" or simply "enforceable," to give an Enforceability Opinion with respect to Transaction Documents, the Opinion Giver must conclude that, under Tennessee law, (i) the Transaction Documents form a contract, (ii) that a remedy will be available with respect to the agreements in the Transaction Documents or such agreements will otherwise be able to be given effect, and (iii) each remedy provided for in the Transaction Documents will be given effect as stated in the Transaction Documents.

(4) An Enforceability Opinion implicitly means that the choice of law provisions in the Transaction Documents will be given effect under Tennessee rules on conflicts of laws.

(5) If the Transaction Documents provide that they will be governed by the law of a jurisdiction other than Tennessee, a Tennessee Opinion Giver may not be willing to give an Enforceability Opinion under the law of the chosen jurisdiction. In that situation, where the Opinion Recipient nevertheless is requesting an Enforceability Opinion, Opinion Givers may consider using one or both of the following approaches:

(A) Give a separate opinion on the enforceability under Tennessee law of the choice of law provisions in the Transaction Documents.⁴²

(B) Give an Enforceability Opinion on an "as if" basis, stating that the Enforceability Opinion is given as if Tennessee law governed the Transaction Documents, notwithstanding the choice of law provision.

(6) An Enforceability Opinion given in a loan transaction implicitly means that all rates of interest stipulated in the Transaction Documents, including default rates of interest, are not usurious. Opinion Givers should confirm that usury laws are not violated by a loan transaction before giving the Enforceability Opinion or should expressly exclude usury issues from the Enforceability Opinion. If compliance with usury laws is intended to be covered in an Opinion Letter, the Opinion Giver should consider doing so in a separate opinion. For a discussion of Usury Opinions, see Section 7.2 below.

(7) In giving an Enforceability Opinion with respect to a loan secured by a deed of trust, Opinion Givers should be aware of the limitation on recovery of a deficiency judgment against a borrower established by Tennessee Code Annotated Section 35-5-118 and, if appropriate, add a qualification.

(8) As a matter of customary practice, an Enforceability Opinion is understood not to confirm title to real property or lien priority matters, unless such matters are specifically addressed.

4.2 Bankruptcy Qualification.

(a) Sample Qualification Language.

This Opinion Letter is subject to the effect of bankruptcy, insolvency, reorganization, fraudulent transfer or conveyance, receivership, moratorium and other similar laws affecting the rights and remedies of creditors generally.

(b) Explanatory Comments.

(1) The Enforceability Opinion is virtually always made subject to a Bankruptcy and Insolvency Qualification.

(2) *TriBar II* provides that the Bankruptcy Qualification and the Equitable Principles Qualification are understood to be applicable to the Enforceability Opinion even if they are not expressly stated.⁴³ Notwithstanding

⁴² See *infra* Section 7.3.

⁴³ *TriBar II*, *supra* note 4, § 3.31, at 623.

that statement, it is prudent to include both qualifications in Opinion Letters that contain an Enforceability Opinion.

4.3 Equitable Principles Qualification.

(a) Sample Qualification Language.

This Opinion Letter is subject to the effect of general principles of equity, whether applied by a court of law or equity. No opinion is rendered herein regarding the availability of any equitable remedy, including without limitation, specific performance or receivership.

(b) Explanatory Comments.

(1) The Enforceability Opinion is virtually always made subject to a General Principles of Equity Qualification.

(2) The comment at 4.2(b)(2) above applies equally to the Equitable Principles Qualification.

4.4 The "Generic" Qualification.

Depending on the Transaction, in addition to the Bankruptcy and Equitable Principles Qualifications, the Enforceability Opinion is sometimes made subject to a third (and perhaps fourth) qualification to the effect that the Enforceability Opinion does not mean that each and every covenant or agreement of the Company in the Transaction Documents is enforceable as written. Secured loan documents, for example, normally contain a broad range of remedial provisions and covenants that are not completely enforceable as written or are of questionable enforceability. The expense that an Opinion Giver would incur in giving an Enforceability Opinion with respect to these types of provisions would far outweigh the benefit to the Opinion Recipient. This third qualification can take the form of a Specific List qualification (see Section 4.5 below) or a Generic Qualification, such as the following, or a combination of both:

(a) Generic Qualification Language.

(1) Basic Qualification.

This Opinion Letter is subject to the qualification that certain remedies, waivers, and other provisions of the Transaction Documents may not be enforceable; . . .

(2) Basic Assurance.

. . . nevertheless, subject to the other qualifications set forth in this Opinion Letter, such unenforceability will not render the Transaction Documents invalid as a whole . . .

(3)(a) Practical Realization Assurance.

. . . or render the remedies afforded by the Transaction Documents inadequate for the practical realization of the principal benefits intended to be provided.

(3)(b) ABA/ACREL Assurance.⁴⁴

. . . or preclude (i) the judicial enforcement of the obligation of the Company to repay the principal, together with interest thereon (to the extent not deemed a penalty) as provided in the Note, (ii) the acceleration of the obligation of the Company to repay such principal, together with such interest, upon a material default by the Company in the payment of such principal or interest or upon a material default in any other material provision of the Transaction Documents, and (iii) the foreclosure in accordance with applicable law of the lien on and security interest in the Collateral created by the Transaction Documents upon maturity or upon acceleration pursuant to clause (ii) above.

(b) Explanatory Comments.

(1) In the Committee's experience, the Generic Qualification is gaining wide acceptance among Opinion Givers and Opinion Recipients in real estate secured loan transactions, but is used less frequently in other business transactions.

(2) The Basic Qualification would not be acceptable to an Opinion Recipient without the addition of assurances. The Basic Assurance is customarily given with the Basic Qualification. In addition to the Basic Assurance, *either* the Practical Realization Assurance or the ABA/ACREL Assurance should be given, but not both.

(3) The Generic Qualification provides both comfort and a caveat to the Opinion Recipient, since it states both that the core promises of the Company made in the Transaction Documents will be enforceable and that other remedies provided to the Opinion Recipient may not be available under all circumstances.

(4) *TriBar II* states that the Practical Realization Assurance "has been encrusted with tradition,"⁴⁵ and is used in only a few types of transactions. The Practical Realization Assurance has been criticized as being vague and open to differing interpretations. The potential for the Opinion Giver and the Opinion

⁴⁴ *Real Estate Adaptation*, *supra* note 3, § 11A, at 595.

⁴⁵ *TriBar II*, *supra* note 4, § 3.4.1, at 626.

Recipient to disagree over the meaning of "practical realization" and "principal benefits," especially if considered years after the date the Opinion Letter is delivered, is significant.

(5) The Real Estate Adaptation has suggested the ABA/ACREL Assurance for use in real estate secured loan transactions in lieu of the Practical Realization Assurance.⁴⁶ The ABA/ACREL Assurance stipulates what the "principal benefits" are in a real estate secured loan Transaction, and thus is more precise. The ABA/ACREL Assurance has gained wide acceptance in real estate secured loan transactions.

(6) The Basic Assurance (with either the Practical Realization Assurance or the ABA/ACREL Assurance) should not be given with and is understood not to affect or limit either the Bankruptcy Qualification or the Equitable Principles Qualification.

4.5 Specific Enforceability Qualifications.

Practices vary as to the inclusion of a list of express qualifications (sometimes referred to as a "laundry list" and referred to herein as a "Specific List") for generally applicable rules of law that may affect the enforceability of particular provisions of the Transaction Documents. Some Opinion Givers prefer the Generic Qualification over the Specific List, but may include an abbreviated Specific List in addition to the Generic Qualification to point out particular provisions of Transaction Documents that are of questionable enforceability. Other Opinion Givers prefer to use only a Specific List. The following example of a Specific List includes qualifications that an Opinion Giver may wish to consider including in appropriate circumstances.

The Opinion Giver should determine whether each particular qualification is relevant to the Transaction or the Transaction Documents and should not include any that are not relevant.

(a) Sample Specific List Qualification.

This Opinion Letter is qualified by and subject to the effect of generally applicable rules of law that:

(a) limit or affect the enforcement of provisions of a contract that purport to require waiver of the obligations of good faith, fair dealing, diligence, and reasonableness;

(b) limit the availability of a remedy under certain circumstances where another remedy has been elected;

⁴⁶ *Real Estate Adaptation, supra* note 3, § 11A, at 595.

(c) *limit the right of a creditor to use force or cause a breach of the peace in enforcing rights;*

(d) *relate to the sale or disposition of collateral or the requirements of a commercially reasonable sale;*

(e) *limit the enforceability of provisions releasing, exculpating or exempting a party from, or requiring indemnification of a party for, liability for its own action or inaction, to the extent the action or inaction involves gross negligence, recklessness, willful misconduct or unlawful conduct;*

(f) *may, where less than all of a contract may be unenforceable, limit the enforceability of the balance of the contract to circumstances in which the unenforceable portion is not an essential part of the agreed exchange;*

(g) *govern and afford judicial discretion regarding the determination of damages and entitlement to attorneys' fees and other costs;*

(h) *may, in the absence of a waiver or consent, discharge a guarantor to the extent that (i) action by a creditor impairs the value of collateral securing guaranteed debt to the detriment of the guarantor, or (ii) guaranteed debt is materially modified;*

(i) *may permit a party who has materially failed to render or offer performance required by the contract to cure that failure unless (i) permitting a cure would unreasonably hinder the aggrieved party from making substitute arrangements for performance, or (ii) it was important in the circumstances to the aggrieved party that performance occur by the date stated in the contract;*

(j) *limit or affect the enforceability of any provision that purports to prevent any party from becoming a mortgagee in possession, notwithstanding any enforcement actions taken under the Transaction Documents;*

(k) *limit or affect the enforcement of provisions attempting to restrain the alienation or transfer of property;*

(l) *limit or affect the enforcement of covenants not to compete;*

(m) *limit or affect the enforceability of provisions for penalties, liquidated damages, late charges, prepayment charges or yield maintenance charges, and acceleration of future amounts due (other than principal) without appropriate discount to present value;*

(n) *limit or affect the enforcement of time-is-of-the-essence clauses;*

(o) *limit or affect the enforcement of confession of judgment clauses;*

(p) *limit or affect the enforcement of provisions that attempt to change or waive rules of evidence or fix the method or quantum of proof or otherwise establish evidentiary standards to be applied in litigation or similar proceedings;*

(q) *limit or affect the enforcement of forum selection clauses and consent to jurisdiction clauses (both as to personal jurisdiction and subject matter jurisdiction);*

(r) *limit or affect the enforcement of provisions restricting access to courts or to legal or equitable remedies (including waivers of the right to trial by jury);*

(s) *provide for the enforcement of provisions granting powers of attorney or authority to execute documents or to act by power of attorney on behalf of the Company;*

(t) *relate to the enforcement of self-help remedies provided in the Transaction Documents (other than those remedies available pursuant to an exercise in accordance with the provisions of Article 9 of the Uniform Commercial Code);*

(u) *relate to the enforcement of provisions that decisions by a party are conclusive;*

(v) *limit or affect the enforcement of provisions purporting to provide remedies inconsistent with the Uniform Commercial Code, to the extent the Uniform Commercial Code is applicable thereto;*

(w) *relate to enforcement of provisions purporting to grant to or limit rights of persons who are not parties to such documents; and*

(x) *relate to the enforcement of provisions purporting to create a trust without compliance with applicable trust law.*

(b) Explanatory Comments.

(1) By including this sample Specific List Qualification in this Report, the Committee does not intend to recommend or encourage the use of either such a list or any of the particular items on the list.

(2) When using a Specific List Qualification such as the foregoing, it is inappropriate to include exceptions that have no relation to the Transaction Documents or the Transaction. Opinion Givers should not use the "kitchen sink" approach to qualifying and limiting Opinion Letters, but should review each qualification to determine its relevance to the Company or the Transaction.

(3) The Specific List and the Generic Qualification are normally not used together in the same Opinion Letter. Nevertheless, in some cases an abbreviated Specific List exception may be used in addition to a Generic Qualification in order to clearly point out to the Opinion Recipient certain provisions of the Transaction Documents that are of questionable enforceability.

V. Real Estate Secured Transactions Opinions

5.1 Form of Deed of Trust Opinion.

(a) Sample Opinion Language.

The Deed of Trust is in a form sufficient to create a lien on all right, title and interest of the Company in the real property described therein.

(b) Explanatory Comments.

(1) See a corresponding Sample Opinion with respect to security interests in personal property under the UCC at Section 6.4 below.

(2) The Enforceability Opinion, when given with respect to a deed of trust, means only that the deed of trust is enforceable between the parties. It does not provide assurance that the deed of trust, when recorded, will be effective to provide notice to all the world of the interest granted to the deed of trust trustee therein. The Form of Deed of Trust Opinion supplements the Enforceability Opinion by confirming that the deed of trust is in a form which is legally sufficient to create the lien it purports to create if recorded in the proper Register's Office.

(3) The Form of Deed of Trust Opinion focuses the Opinion Giver's attention on the details of the document itself and its compliance with both substantive and technical legal requirements. These include the proper language and technical requirements of state law for authorization, creation, execution, acknowledgement, and recording of a deed of trust and other similar matters.

(4) As a matter of customary practice, this opinion is understood not to address title or lien priority issues, even if not expressly excluded, as such issues are more appropriately covered by title insurance. Similarly, this opinion is understood not to address the accuracy or sufficiency of the real property description in the Deed of Trust.

5.2 Adequacy of Documents Opinion.

(a) Sample Opinion Language.

The Transaction Documents do not omit essential remedies that, in the Opinion Giver's experience, are generally found in similar documents for comparable real estate secured loan transactions in the State.

or

The Deed of Trust contains terms and provisions necessary to permit the Lender, following the occurrence of a legally enforceable event of default, to exercise the rights and remedies of acceleration of the secured debt and foreclosure on the real property that are customarily available under the laws of the State to secured lenders holding deed of trust liens on real property.

(b) Explanatory Comments.

(1) The Adequacy of Documents "Opinion" is actually a confirmation to the effect that the Transaction Documents reviewed by the Opinion Giver include the remedial provisions customarily included in real estate secured loan transaction documents in the State.

(2) The *Real Estate Guidelines* suggest that Adequacy of Documents Opinions should not be requested or given,⁴⁷ on the basis that the Opinion Giver has a conflict of interest in providing legal advice to the lender, which is an adverse party. Nevertheless, the *Real Estate Guidelines* acknowledge that a Company may not be well-served by a refusal of its counsel to give such an opinion in instances where the Opinion Recipient and its counsel are located outside of the state whose law is covered by the Opinion, since the refusal to give the Adequacy of Documents Opinion might result in the Opinion Recipient hiring local counsel at the Company's expense.

(3) Although there may be a technical conflict of interest in giving the Adequacy of Documents Opinion, the Company implicitly waives such conflict by agreeing to have its counsel deliver the opinions requested by the lender.

(4) The Adequacy of Documents Opinion should not be requested or given when counsel representing the lender in a real estate secured loan transaction is licensed to practice in the State.

⁴⁷ *Real Estate Guidelines, supra* note 8, § 1.1.b.

5.3 Recording Tax Opinion.

(a) Sample Opinion Language.

The State imposes a tax (the "Recording Tax") when instruments securing an indebtedness are filed for recording. The Recording Tax is calculated based on the principal amount of the indebtedness secured at the rate of \$0.115 per \$100.00 of indebtedness in excess of \$2,000.00. If multiple instruments are filed or recorded to secure the same indebtedness, the tax is paid on the first instrument that is filed or recorded and if the tax is paid at the County Register's Office, the Register's Office will also collect a fee of \$1.00. Additional Recording Tax is payable upon any increase in the indebtedness and may be payable upon any future filing or recording of financing statements, deeds of trust or other instruments in the State.

Tennessee Code Annotated Section 67-4-409(b)(10)-(13) provides that nonpayment or underpayment of the Recording Tax, or failure timely to pay Recording Tax on an increase of indebtedness, shall not affect or impair the effectiveness, validity, priority, or enforceability of the security interest or lien created or evidenced by the instrument, but such nonpayment, underpayment, or failure to pay, until cured, shall result in the imposition of a tax lien in the amount of any Recording Tax and penalties unpaid and owing. If the holder of the indebtedness (the "Holder") fails to pay or underpays the Recording Tax due, the Holder shall be liable for a penalty, in addition to the unpaid tax, in the amount of \$250 or double the unpaid tax due, whichever amount is greater. The Holder may not maintain an action on the secured indebtedness, other than an action limited to an enforcement of the Holder's security interest or lien, against the debtor until such nonpayment or underpayment of the Recording Tax is cured and such penalty is paid. If such an action is commenced and a cure is not effected within a time limit set by the court, the debtor may obtain the dismissal of such action, without prejudice to refile in the event of a subsequent cure of nonpayment. Notwithstanding the terms of the instrument, if a cure is not effected until after the filing of a motion or pleading in which the Holder's noncompliance with Tennessee Code Annotated Section 67-4-409 is raised, the Holder may not thereafter charge the debtor with the cost of curing such noncompliance, and terms in the Transaction Documents would not be enforceable to the extent that they provide otherwise.

Under Tennessee Code Annotated Section 67-4-409(b)(7), the Recording Tax may be apportioned and paid on the basis of the ratio of the value of the "Tennessee collateral" (as defined in the statute) to the value of all the collateral, calculated in accordance with the statute. For this purpose, "value" means only that value which the property would command at a fair and voluntary sale. Tennessee Code Annotated Section 67-4-409(b)(7).

(b) Explanatory Comments.

(1) This opinion is essentially a summary of the pertinent provisions of the Tennessee recording tax statute.⁴⁸ The explanation may be stated as a qualification rather than an opinion.

(2) If the indebtedness is secured by collateral in multiple states, such that, the last paragraph of the Recording Tax Opinion explains the procedure for apportioning the secured indebtedness among such states. If the indebtedness is secured only by property deemed to constitute "Tennessee Collateral" for purposes of apportionment under Tennessee Code Annotated Section 67-4-409(b)(7), then the last paragraph of the Opinion may be omitted.

5.4 Qualification of Enforceability Opinion with Respect to Assignments of Rents and Leases.

(a) Sample Qualification:

We express no opinion whether the assignments of leases, rents and profits in either the Deed of Trust or the Assignment of Leases will be deemed a true assignment rather than a collateral assignment or security interest.

(b) Explanatory Comments.

(1) Many assignments of leases contain language to the effect that the assignment is intended to be a true and absolute assignment of the assignor's rights in the leases, and an enforceability opinion will implicitly confirm the enforceability of such an assignment.

(2) The determination whether an assignment of leases is an absolute assignment or a security interest rests in part upon the language in the assignment of leases, but also depends in large part upon the facts of the given situation and the intention of the parties. While the available Tennessee decisions provide some guidance in distinguishing absolute assignments from collateral assignments or security interests, there is no bright line test. For this reason, the Opinion Giver not only should avoid giving an express opinion that an assignment of rents and leases is an absolute assignment, but also should qualify the enforceability opinion as set forth above.

⁴⁸ Tenn. Code Ann. § 67-4-409(b).

VI. UCC Security Interest Opinions

6.1 Introduction and Scope.

(a) The discussion in this Report regarding opinions on security interests in personal property is not intended to be comprehensive. The *TriBar UCC Opinion Report*⁴⁹ contains an exhaustive discussion of issues relating to opinions on security interests in personal property under Article 9 of the UCC ("Article 9").⁵⁰ The *TriBar UCC Opinion Report* has gained broad acceptance as a source of guidance for opinions on security interests in personal property.

(b) This Report is intended to provide additional guidance to Opinion Givers rendering personal property security interest opinions under Article 9 of the UCC as enacted in Tennessee.⁵¹ This Article of the Report is limited to Transactions in which Tennessee is the only jurisdiction whose law is addressed in the opinion⁵² and Tennessee law applies to each component of a UCC security interest opinion: (i) attachment / creation of the security interest, (ii) perfection of the security interest, and (iii) priority of the security interest.⁵³

(c) Each of the sample opinion paragraphs below limits the opinion to security interests under Article 9. If the opinion language itself is not so limited, the opinion letter should contain a separate statement limiting the security interest opinions to Article 9.⁵⁴

(d) As a matter of customary practice, an opinion that a security interest has been created does not include an Enforceability Opinion with respect to the security agreement in general, and an Enforceability Opinion with respect to the security agreement does not include an opinion on the creation of a security interest.⁵⁵ Any enforceability opinion or security interest opinion, as applicable, should be stated separately. The discussion in Section 4.1 above on the Enforceability Opinion also applies to an opinion on the enforceability of a security agreement.

⁴⁹ *TriBar UCC Opinion Report*, *supra* note 9.

⁵⁰ *Id.* § 1, at 1455.

⁵¹ Tenn. Code Ann. § 47-9-101 *et seq.* Citations in this Report to the Official Text of the Uniform Commercial Code are to UCC Article * or UCC Section *-*** or UCC § *-***.

⁵² Opinions are often limited to UCC Article 9 as enacted in a specific jurisdiction. *TriBar UCC Opinion Report*, *supra* note 9, § 2.1(b), at 1457.

⁵³ *See* Tenn. Code Ann. §§ 47-9-301 through 47-9-307 (regarding the law governing perfection, the effect of perfection or non-perfection and priority of security interests in various kinds of collateral); *see also TriBar UCC Opinion Report*, *supra* note 9, §§ 3.2 and 4.2.

⁵⁴ *See TriBar UCC Opinion Report*, *supra* note 9, § 2.1(b), at 1457 (UCC scope limitations).

⁵⁵ *See TriBar UCC Opinion Report*, *supra* note 9, § 2.2, at 1460.

6.2 Tennessee Non-Uniform Provisions.

(a) Tennessee's version of Article 9 is not substantially different from the Official Text of Article 9, but does contain a few non-uniform provisions. There may be other non-uniform provisions in Tennessee's version of Article 9, but the following appear to be the most significant for opinion purposes.

(1) Tennessee's version of UCC Section 9-108 allows, but does not require, the use of the United States Department of Agriculture, Farm Services Agency, Farm Serial Number in real property descriptions for collateral consisting of crops.⁵⁶

(2) Tennessee has added a non-uniform provision with respect to security interests in "oil and gas production," as defined therein.⁵⁷ This Report does not address opinions on security interests in this kind of specialized collateral.

(3) Tennessee has a non-uniform version of UCC Section 9-503, with respect to the name of the debtor to be used in a financing statement.⁵⁸

(b) Tennessee has a non-uniform version of UCC Section 9-516(b), with respect to a filing officer's refusal of certain records, which does not include the subsection requiring the type of organization, jurisdiction of organization and organizational identification number for an organizational debtor.⁵⁹ Tennessee's version allows the filing office to reject a financing statement if the office is unable to index the filing due to the lack of the debtor's name. In addition, the filing office may reject a financing statement that does not include the Tennessee recording tax statement or is not accompanied by payment of the appropriate amount of recording tax, based on the stated indebtedness amount.⁶⁰ If the filing office rejects a financing statement for any of these reasons, filing does not occur.⁶¹

(c) The uniform version of Article 9 excludes from its scope security interests created by the state or a governmental unit of the state, to the extent another statute of the state expressly governs the creation, perfection, priority or enforcement of such a security interest.⁶² Tennessee's version includes this provision, and adds a cross-reference to the Tennessee Perfection, Priority and Enforcement of Public Pledges and Liens Act,⁶³ as an

⁵⁶ Tenn. Code Ann. § 47-9-108(f).

⁵⁷ Tenn. Code Ann. § 47-9-338.

⁵⁸ Tenn. Code Ann. § 47-9-503; *see infra* discussion at Section 6.5(b)(5).

⁵⁹ Tenn. Code Ann. § 47-9-516(b)(5); UCC § 9-516(b)(5)(C)(i)-(iii).

⁶⁰ Tenn. Code Ann. § 47-9-516(b)(2); *see infra* discussion at Section 6.3.

⁶¹ Tenn. Code Ann. § 47-9-516(b).

⁶² UCC § 9-109(c)(3).

⁶³ Tenn. Code Ann. § 9-22-101 *et seq.* (enacted in 2001).

example of such a law. Since security interests, to the extent covered by this Act, are outside the scope of Article 9, this Report does not address opinions on such security interests.

6.3 Tennessee Recording Tax.

(a) An important Tennessee-specific issue for security interest opinions is the recording tax (or indebtedness tax) imposed under Tennessee Code Annotated Section 67-4-409(b) on the filing of financing statements, deeds of trust and other instruments evidencing indebtedness. See Section 5.3 above for sample language and explanatory comments. Tennessee Opinion Givers approach opinions regarding the recording tax in various ways. While non-payment or underpayment of the recording tax does not affect or impair the effectiveness, validity, priority, or enforceability of a security interest,⁶⁴ a failure to pay the appropriate amount of recording tax may cause other opinions given in an Opinion Letter to be incorrect. Thus it is appropriate, while not required for a UCC perfection opinion, to include an assumption that the correct amount of recording tax has been or will be paid upon the filing of a financing statement.

(b) Tennessee's version of Article 9 has some specific non-uniform provisions related to the recording tax. A Tennessee filing office may reject a financing statement that does not include the Tennessee recording tax statement ("Maximum principal indebtedness for Tennessee recording tax purposes is \$ _____")⁶⁵ or is not accompanied by payment of the appropriate amount of recording tax based on the stated indebtedness amount.⁶⁶ If the filing officer rejects a financing statement for either of these reasons, filing does not occur.⁶⁷

6.4 Attachment of Security Interest.

(a) Sample Opinion Language.

The Security Agreement is effective to create in favor of the Lender a security interest in the collateral described therein, to the extent that a security interest in such collateral can be created under Article 9 of the Uniform Commercial Code as in effect in the State.

(b) Explanatory Comments.

(1) This opinion does not cover the creation of liens or security interests under any laws other than Article 9 (such as common law assignments).⁶⁸

⁶⁴ Tenn. Code Ann. § 67-4-409(b)(10)(A)

⁶⁵ Tenn. Code Ann. § 47-9-516(b)(8).

⁶⁶ *Id.* § 47-9-516(b)(2).

⁶⁷ *Id.* § 47-9-516(b).

⁶⁸ *See* Tenn. Code Ann. § 47-9-109.

(2) An opinion on the creation of a security interest necessarily covers attachment, since a security interest is only valid (i.e., enforceable) if "attachment" has occurred.⁶⁹ In most cases, a security interest attaches only if value has been given, the debtor has rights in the collateral (or the power to transfer rights in the collateral) and the debtor has authenticated a security agreement that describes the collateral.⁷⁰

(3) As a matter of customary practice, the attachment opinion is understood not to confirm that the debtor has title to or rights in the collateral.⁷¹ It is not necessary to include an express assumption or qualification as to title, but it is not unusual for an opinion letter to include an express assumption that the debtor has rights in the collateral, to specifically exclude any opinion on title, or to use language in the opinion indicating that it only covers the rights the debtor has.

(4) As a matter of customary practice, an attachment opinion is understood to cover after-acquired collateral (if included in the collateral description), subject to an unstated opinion that the security interest will not attach until the debtor acquires rights in the collateral.⁷²

6.5 Perfection by Filing.

(a) Sample Opinion Language.

Upon the filing of the Financing Statement in the [Office of the Secretary of State of Tennessee], the Lender's security interest in the collateral [indicated therein and in the Security Agreement] [described in the Security Agreement] will be perfected, to the extent that a security interest in such collateral can be perfected by the filing of a financing statement in the State under Article 9 of the Uniform Commercial Code as in effect in the State.

(b) Explanatory Comments.

(1) General. Perfection opinions are generally limited to collateral in which a security interest can be perfected under Article 9 as in effect in Tennessee. In most cases, a perfection opinion is further limited to the extent that a security interest can be perfected by filing financing statements in Tennessee. In appropriate cases, however, an opinion may cover perfection under Article 9 by possession or control.⁷³

⁶⁹ Tenn. Code Ann. § 47-9-203(a)-(b).

⁷⁰ *Id.*

⁷¹ See *TriBar UCC Opinion Report*, *supra* note 9, § 3.3(c), at 1467.

⁷² See *TriBar UCC Opinion Report*, *supra* note 9, § 7.1, at 1489.

⁷³ See *infra* Section 6.7.

(2) *Included Opinions.* This opinion confirms that, upon the filing of the financing statement in the appropriate office, the security interest will be perfected, and necessarily includes a number of underlying opinions as to the nature of the collateral, the form of the financing statement (including the debtor's name and the collateral indication), the authorization to file and the correct filing office. The Opinion Giver should review the financing statement forms carefully and make sure that the legal requirements have been satisfied.

(3) *Filing Collateral.* This opinion is limited to perfection by filing under Article 9, although collateral descriptions often include types of collateral in which a security interest may not be perfected under Article 9, or may be perfected only by non-filing methods. For instance, Article 9 excludes certain types of collateral (e.g., insurance policies),⁷⁴ and federal law pre-empts Article 9 with respect to perfection of security interests in certain kinds of collateral (e.g., copyrights and aircraft).⁷⁵ A security interest in certain types of collateral (e.g., deposit accounts and letter-of-credit rights)⁷⁶ cannot be perfected by the filing of a financing statement. A security interest in certain types of collateral (e.g., motor vehicles in some circumstances)⁷⁷ may be perfected only by other methods (such as noting a lien on a certificate of title)⁷⁸ under applicable state law. These types of collateral are therefore not covered by the opinion on perfection by filing.

(4) *Attachment.* This opinion necessarily includes an opinion that a valid security interest has been created and has attached. Attachment is a necessary prerequisite for perfection.⁷⁹ If the opinion letter does not include an attachment opinion, it is appropriate to assume that the security interest has attached.

(5) *Form of Financing Statement.* This opinion confirms that the financing statement correctly includes the information required to be effective under Tennessee Code Annotated Section 47-9-502(a) (name and address of debtor, name of secured party, indication of collateral), as well as the items necessary to avoid rejection by the filing office under Tennessee Code Annotated Section 47-9-516(b). Tennessee's version of Section 516(b)(5)(C) does not require a financing statement to indicate the debtor's "organizational identification number" (or absence thereof) for a debtor that is an organization. The financing statement must contain the recording tax statement ("maximum

⁷⁴ See, e.g., Tenn. Code Ann. § 47-9-109(d)(8).

⁷⁵ See *id.* § 47-9-109(c)(1); Tenn. Code Ann. § 47-9-311(a)(1).

⁷⁶ See Tenn. Code Ann. § 47-9-312(b).

⁷⁷ See Tenn. Code Ann. § 47-9-311(a)(2).

⁷⁸ See Tenn. Code Ann. § 55-3-126 (certificates of title).

⁷⁹ Tenn. Code Ann. § 47-9-308(a).

principal indebtedness for Tennessee recording tax purposes is \$ _____"), with the appropriate dollar amount inserted into the blank.⁸⁰

(6) Debtor's Name. The Opinion Giver should carefully review Tennessee Code Annotated Section 47-9-503 as in effect when the opinion is given,⁸¹ to make sure that the debtor's name used in the financing statement is obtained from the permitted or required source of information and is accurately spelled and punctuated. Alternatively, the Opinion Giver may include and rely on an express assumption that the debtor's name is correct for this purpose.

(A) Individual Debtor's Name. Tennessee's version of UCC Section 9-503 provides a limited safe harbor for a financing statement that uses the name of an individual debtor as shown on the debtor's driver's license or identification license issued by the individual's state of residence.⁸² This "identification license" for a Tennessee resident is the photo identification license authorized by Tennessee Code Annotated Section 55-50-336.⁸³

(B) Registered Organization Debtor's Name. Tennessee's version of UCC Section 9-503 provides that a financing statement sufficiently indicates the name of a registered organization only if it uses the name indicated on the debtor's formation documents that are filed of public record in the debtor's jurisdiction of organization to create the registered organization and that show the debtor to have been organized, including any amendments to those documents for the express purpose of amending the debtor's name.⁸⁴

(C) Absence of Debtor's Name. Tennessee's version of UCC §9-516(b) provides that filing does not occur if the filing office refuses to accept the financing statement because the office is unable to index the filing due to the lack of the debtor's name.⁸⁵

(7) Collateral Indication. If the opinion letter does not contain assumptions with respect to the collateral description or indication, this opinion confirms that the indication of the collateral is adequate under Tennessee Code Annotated Sections 47-9-108, 47-9-502 and 47-9-504. The sample opinion

⁸⁰ Tenn. Code Ann. § 47-9-516(b)(8). The appropriate dollar amount is calculated pursuant to Tennessee Code Annotated Section 67-4-409(b).

⁸¹ In 2008, Tennessee enacted two successive amendments to Tennessee Code Annotated Section 47-9-503. See 2008 Tenn. Pub. Acts 648; 2008 Tenn. Pub. Acts 1109.

⁸² Tenn. Code Ann. § 47-9-503(a)(4). The statute as amended does not require the use of the debtor's name as shown on the driver's license or identification license, but merely provides that this name is sufficient.

⁸³ Tenn. Code Ann. § 47-9-503(f).

⁸⁴ *Id.* § 47-9-503(a)(1).

⁸⁵ Tenn. Code Ann. § 47-9-516(b)(3)(D).

language contains two bracketed alternative phrases to be used depending on whether or not the financing statements indicate the collateral as consisting of "all assets" (or uses similar language). A "super-generic" description of this kind is adequate in a financing statement,⁸⁶ but is not adequate in a security agreement.⁸⁷ If an "all assets" indication is used in the financing statement, the Opinion Giver should confirm that the security agreement properly describes the collateral and permits an "all-assets" filing, and should then limit the perfection opinion to the collateral described in the security agreement. If a specific collateral description is used in the financing statement, the collateral must be properly indicated in *both* the security agreement and the financing statement.

(8) Authorization. This opinion also confirms that the secured party is authorized to file the financing statement under Tennessee Code Annotated Section 47-9-509. Alternatively, the Opinion Giver may include an express assumption to this effect.

(9) Filing Office. This opinion confirms that the specified office is the correct filing office for perfection with respect to the particular collateral described in the financing statement. In most cases, the Tennessee Secretary of State's office is the correct office.⁸⁸ Because local county filing is required for collateral consisting of timber or as-extracted collateral (oil and minerals and certain related accounts),⁸⁹ an Opinion Letter will generally contain an express exclusion of this kind of collateral from the perfection opinion, unless particularly important to the Transaction.

(10) Factual Changes. As a matter of customary practice, security interest opinions do not address the effect of factual changes after the date of the opinion letter, unless the opinion expressly covers the maintenance of perfection after the date of the opinion. It is therefore unnecessary to include assumptions as to the continuing factual circumstances or qualifications as to the possible need for additional filings (such as continuation statements) or other actions if there are any changes in such facts (such as a change in the debtor's name.)⁹⁰

⁸⁶ Tenn. Code Ann. § 47-9-504.

⁸⁷ Tenn. Code Ann. § 47-9-108(c).

⁸⁸ Tenn. Code Ann. § 47-9-501(a)(2).

⁸⁹ *Id.* § 47-9-501(a)(1).

⁹⁰ See *TriBar UCC Opinion Report*, *supra* note 9, § 5.4(a), at 1483.

6.6 Perfection by Fixture Filing.

(a) Sample Opinion Language.

The [Deed of Trust] [Fixture Financing Statement] is in appropriate form for filing as a fixture filing in the real property records in the Office of the Register of Deeds for _____ County, Tennessee. Upon such filing, Lender's security interest in the fixtures affixed to the real property described therein and located in such county will be perfected, to the extent that a security interest in such collateral can be perfected by the filing of a financing statement as a fixture filing under Article 9 of the Uniform Commercial Code as adopted in the State.

(b) Explanatory Comments.

(1) In Transactions involving loans secured by real property in multiple states, local counsel in Tennessee may be asked to opine only on perfection by means of a fixture filing, either in the form of a deed of trust or in the form of a separate financing statement to be filed in the real property records.⁹¹ The provisions of Tennessee's Article 9 relating to fixtures are not significantly different from the Official Text of Article 9. If the debtor is located in Tennessee for Article 9 purposes, a security interest in the debtor's fixtures may be perfected either by filing a financing statement in the Tennessee Secretary of State's Office⁹² or by filing a fixture filing in the Register's Office for the county in which the real property is located.⁹³ A fixture filing provides a secured party with additional protection in certain circumstances.⁹⁴

(2) This opinion covers the same elements as a general opinion on perfection by filing. See the Explanatory Comments in Section 6.5 above. This opinion also confirms that the financing statement contains the additional information necessary for a fixture filing. The financing statement must indicate that it is to be filed in the real property records and provide a description of the real property to which the fixture collateral is related. If the debtor does not have

⁹¹ This Report addresses fixtures because this opinion is requested most frequently for fixtures, but collateral consisting of timber to be cut or as-extracted collateral is subject to the same requirements. *See generally* Tenn. Code Ann. § 47-9-501(a)(1)(A) (county filing office); Tenn. Code Ann. § 47-9-502(b) (contents of financing statement); *Id.* § 47-9-502(c) (mortgage effective as a financing statement for collateral consisting of timber to be cut or as-extracted collateral); Tenn. Code Ann. § 47-9-102(a)(6) (defining as-extracted collateral).

⁹² Tenn. Code Ann. § 47-9-501(a)(2) (Except for fixture filings and filings for timber or as-extracted collateral, the Secretary of State's Office is the correct filing office "in all other cases, including a case in which the goods are or are to become fixtures and the financing statement is not filed as a fixture filing.")

⁹³ *Id.* Tenn. Code Ann. § 47-9-501(a)(1)(B); Tenn. Code Ann. § 47-9-102(a)(40) (defining fixture filing).

⁹⁴ *See generally* Tenn. Code Ann. § 47-9-334 (priorities in fixtures and crops).

an interest of record in the real property, the financing statement must also provide the name of a record owner of the real property.⁹⁵

(3) As a matter of customary practice, as with real property opinions, this opinion is understood not to address the accuracy or sufficiency of the real property description in the Deed of Trust.

(4) If the opinion covers a deed of trust, it also confirms that Tennessee permits a deed of trust to be effective as a fixture filing.⁹⁶ In this case, the deed of trust must contain the information required for all financing statements⁹⁷ as well as the information required for fixture filings (except the indication that the deed of trust is to be filed in the real property records.)⁹⁸

(5) Note that a deed of trust that is effective as a fixture filing remains effective until the deed of trust is satisfied or released of record or its effectiveness otherwise terminates as to the real property and does not have to be continued every five years.⁹⁹

6.7 Perfection by Possession or Control.

(a) Sample Opinion Language.

Lender's security interest in the [Instruments] will be perfected upon the Lender's taking possession of the original [Instruments] in the State.

Lender's security interest in the [Securities Account] will be perfected upon the execution and delivery of the [Control Agreement] by Lender, Debtor and Securities Intermediary.

(b) Explanatory Comments.

(1) Security interests in certain kinds of collateral may be perfected by possession (e.g., negotiable documents, goods, instruments, tangible chattel paper)¹⁰⁰ or control (e.g., securities accounts, other investment property, deposit accounts).¹⁰¹ Security interests in certain kinds of collateral can be perfected only by possession (e.g., money)¹⁰² or only by control (e.g., deposit accounts).¹⁰³

⁹⁵ Tenn. Code Ann. § 47-9-502(b).

⁹⁶ *Id.* § 47-9-502(c).

⁹⁷ *Id.* § 47-9-502(a), (b).

⁹⁸ *Id.* § 47-9-502(c).

⁹⁹ Tenn. Code Ann. § 47-9-515(g).

¹⁰⁰ Tenn. Code Ann. § 47-9-313(a).

¹⁰¹ Tenn. Code Ann. § 47-9-314(a).

¹⁰² Tenn. Code Ann. § 47-9-312(b)(1).

(2) The sample opinions above are provided only as examples. An Opinion Giver must first determine if the type of collateral covered by the opinion can be perfected by possession or control,¹⁰⁴ determine what law governs perfection¹⁰⁵ and then determine that the proper steps have been taken.¹⁰⁶ The collateral covered by the perfection opinion should be defined narrowly, and the parties identified properly. The steps necessary to achieve "control" are technical and depend on the type of collateral.¹⁰⁷

6.8 Priority of Security Interests.

(a) Security Interests Perfected by Filing. A lender may request an opinion that the lender's security interest has priority over all other interests in the collateral. If a security interest is perfected by filing, the factual questions and legal rules relating to priority require that any opinion on the topic be heavily qualified, and in nearly all cases, it adds little to a creation and perfection opinion. In the Committee's experience, priority opinions are not commonly requested or given in Tennessee.¹⁰⁸ It is not customary for Opinion Givers to provide opinions confirming their review of UCC search results, even if such an opinion is not treated as a priority opinion.¹⁰⁹

(b) Security Interests Perfected by Possession or Control. It is somewhat more common for a priority opinion to be given when a security interest is perfected by possession or control (as discussed in Section 6.7 above). Article 9 includes special non-temporal rules for the priority of security interests in certain kinds of collateral perfected by possession or control.¹¹⁰ An Opinion Giver must first determine if the type of

¹⁰³ *Id.*

¹⁰⁴ The *TriBar UCC Opinion Report* contains a chart identifying the proper perfection methods for different types of collateral. *TriBar UCC Opinion Report, supra* note 9, § 4.3, at 1471.

¹⁰⁵ For example, if a security interest in goods or instruments is perfected by possession, perfection is governed by the law of the state where the collateral is located. Tenn. Code Ann. § 47-9-301(2). A security interest in a deposit account is perfected by control, and perfection is governed by the law of the "bank's jurisdiction," as described in Tenn. Code Ann. § 47-9-304. Perfection of a security interest in investment property may be governed by the law of the state where a security certificate is located (for certificated securities, under Tenn. Code Ann. § 47-9-305(a)(1)), or by the law of the "issuer's jurisdiction" (for certificated securities, under Tenn. Code Ann. § 47-9-305(a)(2)), or the law of the "securities intermediary's jurisdiction" (for security entitlements or securities accounts, under Tenn. Code Ann. § 47-9-305(a)(4)). This Report assumes that Tennessee law governs perfection by any method covered by the Opinion.

¹⁰⁶ The *TriBar UCC Opinion Report* contains a thorough discussion of the factual and legal considerations to be taken into consideration in giving an opinion on perfection by possession or control. *TriBar UCC Opinion Report, supra* note 9, § 4.3(b), at 1475.

¹⁰⁷ *See, e.g.*, Tenn. Code Ann. § 47-9-104 (control of deposit account); Tenn. Code Ann. § 47-9-106 (control of investment property).

¹⁰⁸ *TriBar UCC Opinion Report, supra* note 9, § 5.1, at 1477-85.

¹⁰⁹ *See generally* *TriBar UCC Opinion Report, supra* note 9, §5.2(b), at 1479.

¹¹⁰ *See, e.g.*, Tenn. Code Ann. § 47-9-327 (deposit accounts); Tenn. Code Ann. § 47-9-328 (investment property); Tenn. Code Ann. § 47-9-330 (purchasers of instruments and chattel paper); Tenn. Code Ann. § 47-9-331 (purchasers of instruments, documents and securities under other chapters).

collateral covered by the opinion is covered by these rules, and then either establish or assume that the factual circumstances are sufficient to entitle the secured party to priority.¹¹¹

(c) Priority Qualifications. This Report does not address the extensive assumptions and qualifications that would be appropriate in connection with a priority opinion.¹¹²

6.9 Qualifications.

(a) The types of qualifications to be included in a security interest opinion depend on both the type of opinion and the nature of the collateral.

(b) In the absence of a priority opinion, it is not necessary to include the lengthy lists of qualifications relating to the rights of other secured parties, purchasers or other third parties, whether under the UCC (e.g., buyers in the ordinary course of business) or under other law (e.g., tax liens).¹¹³

(c) If no priority opinion is given, it is not necessary, but not unusual, for the opinion letter expressly to exclude an opinion on priority. If a priority opinion is given, it is advisable to include a qualification limiting the scope of the opinion appropriately.

(d) Since security interest opinions do not address factual changes after the date of the opinion letter, as a matter of customary practice it is not necessary to include qualifications as to the filing of continuation statements or other amendments that may become necessary as a result of changed circumstances.¹¹⁴

(e) It is not unusual for Opinion Letters to expressly exclude certain kinds of collateral from the attachment or perfection opinions, although the wording of the Sample Opinions in Sections 6.4, 6.5 and 6.6 make express exclusion unnecessary in most cases. For instance, Article 9 excludes certain types of collateral (e.g., insurance policies),¹¹⁵ which, therefore, are not covered by any of the Sample Opinions. Federal law pre-empts Article 9 with respect to perfection of security interests in certain kinds of collateral (e.g., copyrights and aircraft)¹¹⁶ and therefore the perfection opinion does not cover such collateral. A security interest in certain types of collateral (e.g., deposit accounts and letter-of-credit rights)¹¹⁷ cannot be perfected by the filing of a financing statement, and those types of collateral are therefore not covered by the opinion on perfection by filing.

¹¹¹ See generally *TriBar UCC Opinion Report*, *supra* note 9, § 5.3 at 1482.

¹¹² See generally *id.* § 5.2, at 1478

¹¹³ See generally *id.* § 5.4, at 1483.

¹¹⁴ See *id.* § 5.4, at 1483.

¹¹⁵ See, e.g., Tenn. Code Ann. § 47-9-109(d)(8).

¹¹⁶ See *id.* § 47-9-109(c)(1); Tenn. Code Ann. § 47-9-311(a)(1).

¹¹⁷ See Tenn. Code Ann. § 47-9-312(b).

A security interest in certain types of collateral (e.g., motor vehicles)¹¹⁸ often may be perfected only by other methods (such as noting a lien on a certificate of title)¹¹⁹ under applicable state law, and will not be covered by the opinion on perfection by filing. Express exclusions are appropriate for types subject to local filing rules (e.g., minerals, as-extracted collateral and timber) and for types of collateral that require a more specific collateral description (e.g., commercial tort claims and consumer goods).

¹¹⁸ See Tenn. Code Ann. § 47-9-311(a)(2).

¹¹⁹ See Tenn. Code Ann. § 55-3-126 (certificates of title).

VII. Other Commonly Requested Opinions

7.1 Execution and Delivery Opinion.

(a) Sample Opinion Language.

The Company has duly executed and delivered the Transaction Documents.

(b) Explanatory Comments.

(1) Execution and delivery are prerequisites to formation of a contract. Thus, this opinion is subsumed by the Enforceability Opinion, but is commonly requested and given separately.

(2) An Opinion Giver may rely upon a certificate of an appropriate officer of the Company that the persons who executed the Transaction Documents on behalf of the Company were authorized to do so. Opinion Givers customarily assume, expressly or implicitly, that the signatures of all parties (including persons signing on behalf of the Company) are genuine.

(3) If the Opinion Giver is not present when the Transaction Documents are delivered, then it should either expressly assume that delivery has occurred (in lieu of giving a delivery opinion) or confirm that delivery has occurred. One approach to confirming delivery is to obtain a certification from the Company such as the following:

The undersigned was present when a duly authorized representative of the Company put a counterpart of the Agreement, duly executed on behalf of the Company, out of the possession of the Company and into the possession of [the other party] with the actual intent to create a binding contract.

(4) Executed Transaction Documents are often transmitted by electronic means. In this case, the Opinion Giver should confirm that the requirements of the Tennessee Uniform Electronic Transactions Act¹²⁰ and/or the federal Electronic Signatures in Global and National Commerce Act ("E-Sign"), to the extent applicable, have been met.¹²¹

7.2 Usury Opinion.

(a) Sample Opinion Language.

The "Interest Rate" (____%) under the Agreement is not usurious or otherwise unenforceable under the law of the State. The maximum variable rate of interest that may be charged in the State is statutorily defined as the

¹²⁰ See Tenn. Code Ann. §§47-10-101 *et seq.*

¹²¹ 15 U.S.C. § 7001.

"applicable formula rate" which at any given time is the greater of (a) the "formula rate" in effect at such time, or (b) the "formula rate" last published in the Tennessee Administrative Register prior to such time. The "formula rate" means an annual rate of interest four (4) percentage points above the average prime loan rate or the average short-term business loan rate, however denominated for the most recent week for which such an average rate has been published by the Board of Governors of the Federal Reserve System of the United States, or twenty-four percent (24%) per annum, whichever is less. Interest for the purposes of the statute is calculated on the basis of a year of 365 or 366 days, as appropriate. No opinion is given herein with respect to any other rate of interest in the Transaction Documents.

No opinion regarding the enforceability or compliance with State usury statutes is given with respect to any loan fees, late charges or prepayment premiums or penalties. To comply with the law of the State, all loan fees and charges must not exceed those loan charges, commitment fees, and brokerage commissions permitted by Tennessee Code Annotated Section 47-14-113. Commitment fees may only be charged if there is a written commitment; and the collection of commitment fees is limited to compensation that is fair and reasonable for the detriment suffered or the commitment made by the lender, considering the condition of the money market, the interest rates then prevailing, the creditworthiness of the borrower, the likelihood of the loan being made, and interest rate and other terms contained in the loan commitment. Brokerage commissions are limited to compensation that is fair and reasonable for the services performed, considering the condition of the money market, the creditworthiness of the borrower, the custom in the market place, the interest rate to be paid, the nature and value of the security, and other relevant factors. Loan charges may be collected only pursuant to a written contract, and shall be limited to those loan charges agreed to in the contract; provided that no such charges may be validly agreed to in such a contract other than those that are fair and reasonable compensation for some expense incurred or to be incurred or some service rendered or to be rendered, to or on behalf of the borrower, in connection with a particular loan. In any event, no such loan or contract shall include, except as a part of interest, charges for costs indirectly related to that loan or contract, including, but not limited to, overhead of the lender, loan losses, and charges for services performed by officers or employees of the lender unless such services are rendered directly for (y) inspecting and verifying the collateral securing the loan, and (z) collection thereof.

(b) Explanatory Comments.

(1) The Enforceability Opinion implicitly includes an opinion that the interest rates charged in the Transaction Documents are not usurious. Nevertheless, given the variety of factors that affect the calculation of an interest rate, where appropriate, Opinion Givers should consider giving an express Usury Opinion, that explains in detail the factual information and/or assumptions on

which the Usury Opinion is based and the exceptions or qualifications to the opinion.

(2) Care should be taken to identify and consider separately every rate of interest contained in the Transaction Documents. Usually, Transaction Documents provide for a "default rate" in addition to the stated rate of interest.

(3) If a loan bears interest at a variable rate, Opinion Givers should consider giving this opinion as to the initial rate of interest only.

(4) If a usury opinion is not intended to be given, it should be expressly stated in the Opinion Letter.

(5) The explanation in the second paragraph of the Sample Opinion may be stated as a qualification rather than an opinion.

(6) Section 1-3-105 of the Tennessee Code Annotated provides that, unless the context requires otherwise, the term "Year" means the calendar year. Therefore, an interest rate calculated on a 360 day year that appears to be equal to or less than the applicable formula rate (which is based on a 365/366 day year) may actually exceed the applicable formula rate.

7.3 Choice of Law Opinion.

(a) Sample Opinion Language.

For the purposes of the opinion given in this paragraph, we have made the following assumptions [the following are illustrative factors that may support the choice of law of another state]:

1. the negotiation of the Transaction Documents took place in [State A] and [State B];

2. execution of the Transaction Documents will take place in [State A] and [State B];

3. funding of the loans contemplated by the Transaction Documents will take place in [State A];

4. all payments under the [Note] will be paid to Lender in [State A];

5. a portion of the collateral standing as security for the Loan under the Transaction Documents is located in states other than the State;

6. the Company is domiciled in [State B];

7. *the Lender is domiciled in [State A]; and*

8. *the result obtained by applying the substantive law of [State A] to the Transaction Documents would not be contrary to the fundamental public policy of the State.*

Several Tennessee decisions hold that the parties can agree that a contract will be governed by the laws of another state if that other state bears a reasonable relationship to the Transaction, the contract is made in good faith and the contract expresses the agreement of the parties to select the law of such state. Based upon the foregoing assumptions and such decisions, it is our opinion that the choice of law of [State A] to govern the Transaction Documents is enforceable under State law.

(b) Explanatory Comments.

(1) This language would be used in rendering an opinion on the enforceability of the choice of law provisions in Transaction Documents if the law of a state other than Tennessee is selected.

(2) *See, e.g., Deaton v. Vise*, 210 S.W.2d 665 (Tenn. 1948); *Goodwin Bros. Leasing v. H. & B. Inc.*, 597 S.W.2d 303 (Tenn. 1980).

(3) The Choice of Law Opinion requires a reasonable relationship between the Transaction and the state whose law is selected. The assumptions stated above illustrate the types of factual circumstances that might lead an Opinion Giver to conclude that another state has a reasonable relationship to the Transaction, but each Transaction must be analyzed independently. If the Opinion Giver is lead counsel to the Company in the Transaction, these facts may be known by the Opinion Giver and need not be assumed.

(4) Tennessee Code Annotated Section 47-14-119 provides a statutory choice of law rule specifically applicable to usury issues (i.e., interest, loan charges, commitment fees and brokerage commissions). Section 47-14-119 provides as follows:

In any transaction otherwise subject to this chapter which is not subject to the disclosure requirements of the Federal Consumer Credit Protection Act, where the transaction bears a reasonable relationship to this state and also to another state or nation, the parties may agree in the written contract evidencing such transaction that the laws of this state or of any other such state or nation shall govern their rights and duties with respect to interest, loan charges, commitment fees, and brokerage commissions.

7.4 Lender Qualification Opinions.

(a) Sample Opinion Language.

The TBCA (the "Act") provides that a foreign corporation may not transact business in the State until it obtains a certificate of authority ("Certificate of Authority") from the Secretary of State. The Act does not provide a specific exemption relative to the making of loans by foreign corporations, but it provides that the following, among other activities, do not constitute doing business in the State:

"(7) Creating or acquiring indebtedness, deeds of trusts, mortgages, and security interests in real or personal property;

(8) Securing or collecting debts or enforcing mortgages, deeds of trust, and security interests in property securing the debts;

(9) Owning, without more, real or personal property; provided, that for a reasonable time the management and rental of real property acquired in connection with enforcing a mortgage or deed of trust shall also not be considered transacting business if the owner is attempting to liquidate the owner's investment and if no office or other agency therefor, other than an independent agency, is maintained in this state;

(10) Conducting an isolated transaction that is completed within one (1) month and that is not one in the course of repeated transactions of a like nature; or

(11) Transacting business in interstate commerce."

Tenn. Code Ann. § 48-25-101 (1988).

Assuming that the Transaction contemplated by the Transaction Documents is the only connection that the Lender has with the State, we are of the opinion that the Lender (i) does not need to obtain a Certificate of Authority to transact business in the State and (ii) does not need to appoint an agent for service of process within the State.

(b) Explanatory Comments.

(1) In rendering this opinion, an Opinion Giver should use care to distinguish between qualification to do business as a foreign corporation pursuant to the TBCA and qualification to do business for franchise and excise tax purposes.¹²²

¹²² See *supra* note 24.

(2) If the Opinion Recipient requests an opinion regarding the consequences of failing to qualify when required to do so, consider the following:

To the extent that a foreign corporation is required to obtain a Certificate of Authority and fails to do so, it may remedy such situation by applying for a Certificate of Authority at a future date by submitting the required application and information for a Certificate of Authority and paying an amount equal to treble the amount of all fees, penalties and taxes, plus interest, that would have been imposed by the laws of the State upon such corporation had it duly applied for and received a Certificate of Authority as required by the TBCA, and thereafter had failed to file all required reports (Tenn. Code Ann. § 48-25-102). If so remedied, such failure would not prohibit Lender from exercising its available remedies under the Transaction Documents, subject to the qualifications stated herein. A foreign corporation filing an application for a Certificate of Authority to do business in the State must pay a filing fee of \$600.

7.5 No Litigation Opinions.

(a) Sample Opinion Language.

Except as set forth in [the Transaction Documents] [Schedule _____ attached to this Opinion Letter], we are not representing the Company in any pending litigation in which it is a named defendant [that challenges the validity or enforceability of, or seeks to enjoin the performance of, the Transaction Documents].

or

We hereby confirm to you that to our Actual Knowledge, there are no actions or proceedings against the Company, pending or overtly threatened in writing, before any court, governmental agency or arbitrator that challenges the validity or enforceability of, or seeks to enjoin the performance of, the Transaction Documents [, except as disclosed in the Transaction Documents] [, except as disclosed in Schedule _____ attached to this Opinion Letter].

(b) Explanatory Comments.

(1) The first Sample Opinion above was taken from the Boston Form of Streamlined Opinion.¹²³ It is limited to litigation in which the Opinion Giver is representing the Company and hence does not require a knowledge qualification.

¹²³ Donald W. Glazer & Stanley Keller, *A Streamlined Form of Closing Opinion Based upon the ABA Legal Opinion Principles*, 61 BUS. LAW. 389 (2005).

(2) The second Sample Opinion above is a broader version and should be limited by the "Actual Knowledge" of the Opinion Giver. Actual Knowledge can be defined in the opinion as follows:

As used in this Opinion Letter, the phrase "Actual Knowledge" means the conscious awareness of facts or other information by _____, the lawyer[s] in this firm primarily responsible for representing the Company in the Transaction, [without inquiry] [after such inquiry of other lawyers in this firm as they deemed appropriate].

(3) The "No Litigation" Opinion is actually not an "opinion" (i.e., an expression of professional judgment regarding a distinct legal issue), but a confirmation of factual information.

(4) A "No Litigation" Opinion may be fraught with risk for the Opinion Giver. In *Dean Foods Co. v. Pappathanasi*,¹²⁴ an Opinion Giver rendered a "No Litigation" opinion with respect to a Company in a transaction in which the Company was being acquired. The opinion included a confirmation that, to the Opinion Giver's knowledge without investigation, there were no pending investigations against the Company and did not disclose the existence of a governmental investigation that would later involve the Company. The Opinion Giver was found to be liable for damages to the Opinion Recipient, since the lawyer preparing the Opinion was aware of the pendency of the investigation, but did not inquire further to determine if the Company had become a target or if the investigation had been concluded. The investigation had not been concluded and after the Transaction closed, the investigation resulted in a significant monetary fine being imposed upon the Company. The Court found that the Opinion Giver had not fulfilled its duty of diligence to the Opinion Recipient before delivering the opinion.

(5) If giving a "No Litigation" Opinion, the Opinion Giver should consider having the Company deliver a certificate regarding litigation and ensure that the Company consents to the disclosure of litigation to the Opinion Recipient.¹²⁵

(6) An Opinion Giver should consider giving a "No Litigation" Opinion that is limited to litigation affecting the Transaction, as opposed to litigation affecting the Company generally.

(7) The Opinion Giver may wish to consider including a standard of materiality to be stated in the Opinion Letter, if the application of such a standard

¹²⁴ *Dean Foods Co. v. Pappathanasi*, No. Civ.A. 01-2595 BLS, 2004 WL 3019442, at *1 (Mass. Super. Dec. 3, 2004).

¹²⁵ *See supra* note 20.

is practical, given the difficulty of determining the Company's exposure in most litigation.

7.6 No Violation of Law Opinions.

(a) Sample Opinion Language.

Execution and delivery by the Company of, and performance by the Company of its obligations in, the Transaction Documents are not prohibited by applicable provisions of, and do not subject the Company to a fine, penalty or other similar sanctions under, any statutory law or regulation of the State.

(b) Explanatory Comments.

(1) Opinions to the effect that the Company is in compliance with all laws and regulations are inappropriate. The time and expense of the diligence required to support such a comprehensive opinion far outweigh its usefulness to the Opinion Recipient. This opinion therefore should be limited to the particular Transaction.

(2) The *Principles* state that an Opinion Letter covers only law that a Opinion Giver in the applicable jurisdiction exercising "customary professional diligence would reasonably be expected to recognize as being applicable to the entity, transaction, or agreement to which the Opinion Letter relates."¹²⁶ Furthermore, the *Principles* state that, unless it does so expressly, an Opinion Letter is not to be read to cover certain laws, such as securities, tax and insolvency laws, that are understood to be covered only if covered expressly¹²⁷ and municipal or other local laws.¹²⁸

(3) Opinion Givers may consider expressly excluding from the Opinion Letter, without limitation, a list of relevant laws, such as land use, zoning, tax, usury, antitrust, securities, OSHA, ERISA and banking. There is some risk in including such a list, as it is virtually impossible to list all the laws that do not apply in a particular situation.

(4) In loan transactions, the Opinion Giver should consider limiting the applicability of the No Violation of Law Opinion to payment obligations of the Company.

¹²⁶ *Principles, supra* note 6, § II.B.

¹²⁷ *Id.* § II.D.

¹²⁸ *Id.* § II.C.

VIII. Assumptions

8.1 Sample Assumptions.

In rendering the foregoing opinions, we have relied, without investigation, upon the assumptions set forth below:

(a) *Natural persons who are involved in the Transaction on behalf of the Company have sufficient legal capacity to enter into and perform the Transaction or to carry out their role in it.*

(b) *The Company holds the requisite title and rights to any property involved in the Transaction.*

(c) *Each party to the Transaction (other than the Company) has satisfied those legal requirements that are applicable to it to the extent necessary to make the Transaction Documents enforceable against it.*

(d) *Each party to the Transaction (other than the Company) has complied with all legal requirements pertaining to its status as such status relates to its rights to enforce the Transaction Documents against the Company.*

(e) *Each document submitted to us for review is accurate and complete, each such document that is an original is authentic, each such document that is a copy conforms to an authentic original, and all signatures on each such document are genuine. The form and content of all Transaction Documents submitted to us as unexecuted drafts do not differ in any respect relevant to this Opinion Letter from the form and content of such Transaction Documents as executed and delivered.*

(f) *Each public authority document is accurate, complete, and authentic and all official public records (including their proper indexing and filing) are accurate and complete.*

(g) *The parties to the Transaction have not been subject to any mutual mistake of fact or misunderstanding, fraud, duress or undue influence.*

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

(i) *Lender and its agents have acted in good faith and without notice of any defense against the enforcement of any rights created by the Transaction Documents.*

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

(k) *All statutes, judicial and administrative decisions, and rules and regulations of governmental agencies, constituting the law of the State are generally available (i.e., in terms of access and distribution following publication or other release) to lawyers practicing in the State, and are in a format that makes legal research reasonably feasible.*

(l) *The constitutionality or validity of a relevant statute, rule, regulation or agency action is not in issue unless a reported decision in the State has specifically addressed but not resolved, or has established, its unconstitutionality or invalidity.*

(m) *Other agreements and court orders covered by this Opinion Letter would be enforced as written.*

(n) *The Company will not in the future take any discretionary action (including a decision not to act) permitted under the Transaction Documents that would result in a violation of law or constitute a breach or default under any other agreement or court order.*

(o) *The Company will obtain all permits and governmental approvals required in the future, and take all actions similarly required, relevant to subsequent consummation of the Transaction or performance of the Transaction Documents.*

(p) *All parties to the Transaction will act in accordance with, and will refrain from taking any action that is forbidden by, the terms and conditions of the Transaction Documents.*

(q) *The Deed of Trust and Assignment of Leases and Rents have been or will be duly recorded and/or filed in all places necessary (if and to the extent necessary) to create the lien as provided therein.*

(r) *The description of the Property is accurate and is sufficient under law (i) to provide notice to third parties of the liens and security interests provided by the Transaction Documents and (ii) to create an effective contractual obligation under law.*

(s) *Legally adequate value and consideration has been given for the Transaction and the obligations of the Company in the Transaction Documents.*

8.2 Explanatory Comments.

(a) By including the foregoing list of sample assumptions in this Report, the Committee does not intend to recommend or encourage the inclusion of any particular assumptions in an Opinion Letter. In fact, the *Principles* suggest that factual assumptions of general application do not need to be expressly stated, such as assumptions that copies of documents are identical to the originals, signatures are genuine and the parties other than the Opinion Giver's client have the power to enter into the Transaction.¹²⁹

(b) Assumptions are fact substitutes. Opinion Givers are often permitted by the Opinion Recipient to rely upon assumptions when (i) information is not available (or is only available at substantial cost or delay), (ii) the facts being assumed relate to the Opinion Recipient, or (iii) the cost of establishing the facts exceeds the likely benefit to the Opinion Recipient (often because of the improbability that the facts as assumed would prove to be untrue).¹³⁰

(c) If an assumed fact that is essential to an Opinion does not pass the "smell test," then the Opinion Giver has an obligation to investigate further. An Opinion Giver should not rely on an unstated factual assumption it recognizes to be untrue or not to warrant reliance under the circumstances. Further, an Opinion Giver should not rely on a stated factual assumption if it believes that the assumption will cause the Opinion Recipient to be misled with regard to the subject matter of the Opinion.

(d) Often Opinion Givers serve as local counsel in multi-state real estate secured loan transactions, in which the Company is organized in another state and is represented by lead counsel, who is responsible for giving the status, authority and execution and delivery opinions. In such cases, it is appropriate for the Opinion Giver to include the following additional assumptions:

- (a) *The Company is a [type of entity], validly existing in the state of _____.*
- (b) *All actions or approvals by the Company necessary to bind the Company under the Transaction Documents have been taken or obtained.*
- (c) *The Company has duly executed and delivered the Transaction Documents for valid consideration.*

¹²⁹ *Id.* § III.D.

¹³⁰ *TriBar II*, *supra* note 4, § 2.3, at 615.

IX. Afterword

This Report is the culmination of an effort, begun in October 2008, by members of the Committee to prepare an opinion report that Tennessee lawyers will find useful in their practices. While much of the Report represents the unanimous (or nearly unanimous) views of the Committee, more than a few sections provoked vigorous (but always respectful) debate among the members.

The Report has been approved by the Board of Governors of the Tennessee Bar Association, but such approval does not elevate the Report to the status of "black letter law." Rather, the Report represents the collective views of the members of the Committee, all of whom have devoted many hours of time to the study and consideration of third party opinion letters and opinion practice. The Committee also recognizes the ongoing evolution of customary practice, both in Tennessee and nationally.

We hope that you find this Report to be a valuable resource.

TENNESSEE BAR ASSOCIATION

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The Committee wishes to thank Caldwell G. Collins, an associate with Baker, Donelson, Bearman, Caldwell and Berkowitz, PC, for her invaluable editorial assistance in the preparation of this Report.

The Committee wishes to recognize and honor the contributions to Tennessee opinion practice of the following members of the Special Committee on Opinion Standards of the Tennessee Bar Association (the "1995 Committee"), appointed by TBA President Tom Binkley in 1992. Their Report, issued on April 1, 1995 (the "1995 Report"), was the first of its kind in Tennessee. Many of the specimen opinions, commentaries, recommendations and caveats of the 1995 Report have been incorporated into this Report. The members of the 1995 Committee and their firms (at the time of the 1995 Report) were the following:

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