

**Amended and Restated Report on Legal  
Opinions To Third Parties in Georgia Real  
Estate Secured Transactions**

**Approved by the Executive Committee of the  
Real Property Law Section of State Bar of  
Georgia on  
March 17, 2009**

This Amended and Restated Report on Legal Opinions to Third Parties in Georgia Real Estate Secured Transactions has been approved by the Executive Committee of the Real Property Law Section of the State Bar of Georgia. Comments regarding the contents of this Report may be directed to:

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# AMENDED AND RESTATED REPORT ON LEGAL OPINIONS TO THIRD PARTIES IN GEORGIA REAL ESTATE SECURED TRANSACTIONS

## I. INTRODUCTION

**1.01 Purposes of Report.** The legal opinion in a commercial transaction often represents the most challenging, time-consuming and costly aspect of closing and is frequently the most frustrating to counsel. The increasing complexity of commercial transactions has only intensified this problem. In response, state and national bar association groups have focused attention on the subject of legal opinions and have published numerous reports, including model opinion letters, in an attempt to provide uniformity and guidance in preparing legal opinions in various types of commercial transactions.

In 1997, the Legal Opinion Committee of the Real Property Law Section of the State Bar of Georgia (the “Initial Committee”) prepared a Report on Legal Opinions to Third Parties in Georgia Real Estate Secured Transactions in order to develop a model legal opinion for real estate secured transactions in Georgia, and, in 2002, the Committee prepared a Supplement to Report on Legal Opinions to Third Parties in Georgia Real Estate Secured Transactions (collectively, the “1997/2002 Report”).

In recognition of the acceptance of the Report on Legal Opinions to Third Parties in Corporate Transactions<sup>1</sup> by members of the bar in Georgia, the Initial Committee adopted the format of the Corporate Report for the 1997/2002 Report and, with the permission of the Executive Committee of the Corporate and Banking Law Section, reprinted several sections of the Corporate Report that are equally applicable to real estate secured transactions. Certain other sections of the 1997/2002 Report were based on corresponding sections of the Corporate Report, but modified to reflect considerations relevant to real estate secured transactions. This Amended and Restated Report (the “Report” or this “Report”) continues to incorporate such sections from the Corporate Report, as modified in certain respects.

In preparing the 1997/2002 Report, the Initial Committee reviewed and considered the legal opinion reports of many state bar groups as well as the report of the Legal Opinion Project Drafting Committee of the Business Law Section of the American Bar Association, which includes the Legal Opinion Accord.<sup>2</sup> Although the Legal Opinion Accord does not deal with secured financings,<sup>3</sup> a comprehensive proposal for modification of the Legal Opinion Accord for opinions in real estate secured transactions was approved in 1993 by the Council of the Section of Real Property, Probate and Trust Law of the American Bar Association and by the Board of

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<sup>1</sup> Executive Committee of the Business Law Section of the State Bar of Ga. (formerly Corporate & Banking), *Report on Legal Opinions to Third Parties in Corporate Legal Transactions* (Institute of Continuing Legal Education in Ga. Pub. No. 921714, 1992), available at <http://www.gabar.org/public/pdf/sections/buslaw/lotpct.pdf> [hereinafter *Corporate Report*].

<sup>2</sup> Legal Opinion Project Drafting Committee of the Section of Business Law of the ABA, *Third-Party Legal Opinion Report, Including the Legal Opinion Accord, of the Section of Business Law, American Bar Association*, 47 Bus. Law. 167 (1991), reprinted in 29 Real Prop. Prob. & Tr. J. 487 (1994) [hereinafter *Third-Party Legal Opinion Report*].

<sup>3</sup> *Id.* at 169.

Governors of the American College of Real Estate Lawyers.<sup>4</sup> The Initial Committee examined and analyzed the Real Estate Adaptation at length in developing the model form of opinion proposed by the 1997/2002 Report, and where appropriate, adopted the approach suggested by the Real Estate Adaptation.

In preparing the Amended and Restated Report, a new legal opinion committee (the “Committee”) was formed consisting of experienced and respected members of the Bar. Committee members include lawyers who typically represent lenders, lawyers who typically represent borrowers and lawyers who typically represent both borrowers and lenders. Each substantive section of the 1997/2002 Report was assigned to a subcommittee that was responsible for reviewing such section, updating the research of applicable case and statutory law, and determining whether any revisions were required to the applicable section of the 1997/2002 Report and the corresponding provisions of the Model Opinion and the Interpretive Standards. In addition, the subcommittees reviewed the legal opinion reports of other state and local bar associations of other states to determine whether any changes should be made to the 1997/2002 Report.<sup>5</sup> After each of the subcommittees prepared a written report and presented its report at a meeting of the Committee as a whole, the recommendations were then discussed and deliberated and decisions were made by the Committee, acting unanimously, as to any changes to the 1997/2002 Report. One of the tenets guiding the Committee was that the 1997/2002 Report had been widely accepted by members of the bar, was uniformly utilized in Georgia secured transactions in which both the lender and the borrower were represented by Georgia counsel and was widely used in Georgia secured transactions involving counsel from other states. For this reason, rather than propose sweeping, extensive changes to the 1997/2002 Report, the Committee modified the 1997/2002 Report only where appropriate given changes in the law, perceived shortcomings of the 1997/2002 Report or other compelling reasons.

Following these guidelines, the Committee did not include in this Model Opinion the Model No Consent Opinion contained in the 1997/2002 Report. This represents an intended departure from the Corporate Report. The Committee’s rationale is based both on prevailing custom and the substance of the Model No Consent Opinion itself. The Committee examined the model real estate opinions produced by various jurisdictions and notes that the vast majority of jurisdictions do not contain an opinion corresponding to the Model No Consent Opinion. The Committee then considered the purpose of the Report, and determined that the Model No Consent Opinion did not merit inclusion as it was both duplicative and not relevant in the case of typical secured real estate loan transaction. The Model Opinion (in the Model No Violation Opinion) already speaks to the execution of the loan documents not violating any applicable constitution, statute, regulation rule or law to which Borrower or the Property is subject. And, the Model Opinion specifically carves out matters of local law (as provided in Interpretive

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<sup>4</sup> Joint Drafting Committee of the Section of Real Property, Probate & Trust Law of the ABA & the 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 of the Section of Real Property, Probate and Trust Law of the American Bar Association and the American College of Real Estate Lawyers*, 29 REAL PROP. PROB. & TR. J. 569 (1994) [hereinafter *Report on Adaptation of Accord*].

<sup>5</sup> For a compilation of reports from bar association groups, see DONALD W. GLAZER, SCOTT FITZGIBBON, & STEVEN O. WEISE, *GLAZER & FITZGIBBON ON LEGAL OPINIONS*, § 1.7 (3d ed. 2008) [hereinafter *GLAZER & FITZGIBBON*].

Standard 2), which is where matters relating to the execution and delivery of documents requiring governmental consent generally arise. Based on all of the foregoing, the Committee omitted the Model No Consent Opinion from the Model Opinion. If a transaction involves a highly regulated industry or the Opinion Recipient has a particular concern because of the specific nature of the transaction, then it is appropriate for the Opinion Recipient to request that the Opinion Giver address specific issues involving governmental consents which might be relevant.

The Committee, in developing this Report, attempted to formulate standardized forms of opinion language for real estate secured transactions so as to create more uniform opinions and a less time-consuming negotiating process. This does not mean, however, that this Report assumes that a legal opinion is necessary or advisable in every real estate transaction. In many circumstances, parties to a transaction may prudently decide to omit any legal opinion or to limit its scope. The Committee, comprised of practitioners who represent both lenders and borrowers, has considered the interests of both these constituencies and worked to arrive at a fair resolution of the matters addressed by this Report.

This Report is organized in sections relating to particular opinions customarily involved in real estate secured loans. In general, each section contains (i) a suggested model opinion; (ii) comment, including the purpose and background of the model opinion, the elements and scope of the model opinion, and exceptions, qualifications and assumptions required for the model opinion; (iii) additional notes relating to the model opinion; and (iv) the procedure recommended for preparing the model opinion.

The appendices to this Report include a model form of opinion letter, based on the various model opinions in the Report, and Interpretive Standards, setting forth the assumptions, exceptions and qualifications requisite to the various model opinions of this Report as well as qualifications of general application and assumptions of fact generally appropriate for the model opinion letter. The model opinion incorporates the Interpretive Standards by reference to this Report as shown in the model opinion letter. The Interpretive Standards are provided to clarify the various model opinions as well as to shorten the form opinion letter. Incorporation of the Interpretive Standards by reference in a legal opinion based on this Report will avoid the necessity of setting out lengthy qualifications and assumptions in the opinion letter. It will, it is hoped, also shorten negotiations and lead to greater uniformity in opinion letters for secured lending transactions involving Georgia real property.

This Report addresses primarily third party legal opinions in real estate secured financing transactions and does not include opinions to a client or opinions relating to other real estate transactions such as leases. Aspects of other real estate transactions are likely to be similar or identical to matters discussed in this Report, and, in those instances, this Report should be a source of guidance and authority.

The practice procedures recommended by this Report in the course of preparing the model opinion letter do not represent standards for the evaluation of legal opinions given in the past and thus should not be used to evaluate or interpret such opinions. In addition, these practice procedures should not be used to evaluate or interpret legal opinions not adopting the Interpretive Standards. Finally, the practice procedures recommended by this Report should in no way be construed as standards for determining issues of liability. These recommended procedures arise from careful consideration by the Committee of the costs and benefits of particular procedures in

light of the purposes of the opinion. The Committee recognizes, however, that in certain circumstances because of the Opinion Giver's prior representation of Borrower and familiarity with Borrower and its business operations, it may not be appropriate or necessary in a particular transaction for the Opinion Giver to undertake all of the suggested practice procedures. The Committee recognizes further that the recommended practice procedures may change over time as the law and prevailing customs change and develop.

**1.02 Definitions.** Throughout this Report, the following terms shall have the meanings set forth below, except that definitions of terms applicable to the Interpretive Standards shall be as set forth in the Interpretive Standards:

*ABA* means the American Bar Association.

*Borrower* means the entity which is the client of the Opinion Giver and on whose behalf the Opinion Letter is given.

*Committee* means the Legal Opinion Committee of the Real Property Law Section of the State Bar of Georgia.

*Corporate Report* means the *Report on Legal Opinions to Third Parties in Corporate Legal Transactions* of the Corporate and Banking Law Section of the State Bar of Georgia.<sup>6</sup>

*Federal Bankruptcy Code* means the federal statutes governing bankruptcy in effect on the date of this Report.<sup>7</sup>

*Financing Statement* means the UCC financing statement to be filed for the purpose of perfecting the Opinion Recipient's security interest in the Personal Property (other than fixtures, as-extracted collateral, crops or timber to be cut).

*Fixture Filing* means a UCC financing statement that is filed as a fixture filing for the purpose of perfecting the Opinion Recipient's security interest in the Property consisting of goods that are or are to become fixtures.<sup>8</sup>

*GBCC* means the Georgia Business Corporation Code in effect on the date of this Report.<sup>9</sup>

*GLLCA* means the Georgia Limited Liability Company Act in effect on the date of this Report.<sup>10</sup>

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<sup>6</sup> *Corporate Report, supra* note 1.

<sup>7</sup> *See* 11 U.S.C. §§ 101-1330 (2006).

<sup>8</sup> *See* O.C.G.A. §§ 11-9-502(b).

<sup>9</sup> *See* O.C.G.A. §§ 14-2-101 to -1703.

<sup>10</sup> *See* O.C.G.A. §§ 14-11-100 to -1109.

*GRULPA* means the Georgia Revised Uniform Limited Partnership Act in effect on the date of this Report.<sup>11</sup>

*Guarantor* means the person or entity guaranteeing the payment and performance of some or all of Borrower's obligations under the Loan Documents pursuant to the terms of the Guaranty.

*Guaranty* means the instrument whereby Guarantor guarantees the payment and performance of some or all Borrower's obligations under the Loan Documents.

*Interest Charges* means all interest, fees or other charges for the use of money or extension of credit charged, paid, collected or contracted for under the terms of the Loan Documents.

*Interpretive Standards* means the Interpretive Standards Applicable to Certain Legal Opinions to Third Parties in Georgia Real Estate Secured Transactions attached to this Report as an appendix.

*Law(s)* means the constitution, statutes, judicial and administrative decisions, and rules and regulations of governmental agencies of the Opining Jurisdiction and, unless otherwise specified, federal law.

*Legal Opinion Accord* means that convention of statements of position about the scope and meaning of and procedures for third-party legal opinions in business transactions of the Section of Business Law of the ABA.<sup>12</sup>

*Loan* means the indebtedness incurred by Borrower in connection with the Loan Transaction.

*Loan Documents* means the instruments evidencing and securing the Loan Transaction and identified in the Opinion Letter, which contain one or more obligations of Borrower related to the Loan Transaction.

*Loan Transaction* means the real estate secured transaction with respect to which the Opinion Letter is given.

*Local Law* means the statutes, administrative decisions, and rules and regulations of any county, municipality or subdivision, whether created at the federal, state or regional level.

*Model Corporate Act* means the Model Business Corporation Act adopted by the Committee on Corporate Laws of the Section of Corporation, Banking and Business Law of the ABA.<sup>13</sup>

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<sup>11</sup> See O.C.G.A. §§ 14-9-100 to -1204.

<sup>12</sup> See *Third-Party Legal Opinion Report*, *supra* note 2.

<sup>13</sup> See MODEL BUSINESS CORP. ACT ANN. (4<sup>th</sup> Ed. 2008).

*Model Opinion* means the model opinion letter included as Appendix II to this Report.

*Note* means the legal instrument evidencing the obligation of Borrower to repay the loan.

*Opining Jurisdiction* means a jurisdiction, the law of which the Opinion Giver addresses.

*Opinion* means a legal opinion contained in an Opinion Letter.

*Opinion Giver* means the law firm or lawyer giving an Opinion.

*Opinion Letter* means the letter containing one or more Opinions or confirmations of fact by the Opinion Giver.

*Opinion Recipient* means the person or persons to whom the Opinion Letter is addressed.

*Organizational Documents* means Borrower's articles of incorporation and bylaws (if Borrower is a corporation) or Borrower's partnership agreement and certificate (if Borrower is a partnership) or Borrower's articles of organization and operating agreement (if Borrower is a limited liability company).

*Other Agreement* means a document (other than the Loan Documents and the Guaranty) to which Borrower is a party or by which Borrower is bound.

*Other Counsel* means counsel (other than the Opinion Giver) providing a legal opinion or confirmation of fact on aspects of the Loan Transaction directed to the Opinion Recipient or the Opinion Giver or both.

*Other Jurisdiction* means any jurisdiction (other than the Opining Jurisdiction) the law of which is stipulated to be the governing law.

*Personal Property* means the tangible and intangible personal property of Borrower that is security for the Loan.

*Primary Lawyer Group* has the meaning defined by Interpretive Standard 7.

*Property* means the Real Property and the Personal Property of Borrower that is security for the Loan.

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

*Real Estate Adaptation* means that adaptation of the Legal Opinion Accord for use in secured transactions involving real estate of the Joint Drafting Committee of the Section of Real Property, Probate and Trust Law of the ABA and the American College of Real Estate Lawyers.<sup>14</sup>

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<sup>14</sup> See Report on Adaptation of Accord, *supra* note 4.

*Real Property* means the real property of Borrower that is security for the Loan.

*Report* means this Amended and Restated Report on Legal Opinions to Third Parties in Georgia Real Estate Secured Transactions.

*Security Deed* means the deed to secure debt and security agreement conveying security title to and a security interest in the Real Property and granting a security interest in the Personal Property for the purpose of securing the obligations of Borrower evidenced by the Note and certain of the other Loan Documents.

*Silverado Draft* means the *Exposure Draft Third-Party Legal Opinion Report Including the Legal Opinion Accord* of the Section of Business Law of the ABA.<sup>15</sup>

*UCC* means the Uniform Commercial Code in effect in the State of Georgia on the date of this Report.<sup>16</sup>

*UCC Collateral* means such of the Personal Property and fixtures described in the Security Deed as collateral in which a security interest may be created under the UCC in effect in the State of Georgia on the date of the Opinion Letter.

*ULPA* means the Uniform Limited Partnership Act in effect in the State of Georgia on the date of this Report.<sup>17</sup>

*UPA* means the Uniform Partnership Act in effect in the State of Georgia on the date of this Report.<sup>18</sup>

*Usury Laws* mean the laws governing interest and usury in effect in the State of Georgia on the date of this Report.<sup>19</sup>

**1.03 Purposes of Third Party Opinion.** A third party legal opinion is an opinion given by one party's lawyer to the other side. In real estate practice the third party opinion appears most frequently as an opinion from borrower's counsel to a lender in a secured loan transaction and is customarily required to satisfy a condition of the transaction. A third party opinion also involves significant unstated purposes of the negotiating process.

One of the unstated purposes of any third party opinion is to assist the parties in reaching a mutual, subjective understanding of the meaning and effect of their "agreement." The

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<sup>15</sup> Section of Business Law of the ABA, 46 BUS. LAW. S1 (1990).

<sup>16</sup> See O.C.G.A. §§ 11-1-101 to -12-102.

<sup>17</sup> See O.C.G.A. §§ 14-9A-1 to -91.

<sup>18</sup> See O.C.G.A. §§ 14-8-1 to -64.

<sup>19</sup> See O.C.G.A. §§ 7-4-1 to -21.

clarification of meaning arising out of this Report is intended to serve this purpose of achieving a mutual understanding.

A second purpose of any third party opinion is to assure the Opinion Recipient that the Opinion Giver has undertaken a process of verification designed to identify legal issues arising out of a specified context, which, if unaddressed, might adversely affect the accomplishment of the mutual understanding.<sup>20</sup> The conclusions in this Report regarding the meaning of each model opinion and the procedures recommended to be followed in giving the opinion should contribute in providing this assurance and thereby should improve the transaction.<sup>21</sup>

**1.04 Inappropriate Purposes of Third Party Opinion.** Certain purposes are not appropriate for third party opinions. A legal opinion should not serve the purpose of generally repeating the client's factual representations and warranties or of shifting to the Opinion Giver the risk of an acknowledged uncertainty.<sup>22</sup> The purpose of representations and warranties is to place the burden of misstatement of facts on those most intimately acquainted with the facts, not on the lawyer. The Model Litigation Confirmation at Section XXI, for reasons there stated, is a specific, customary and narrow exception to the effort of this Report to discourage fact representations by lawyers in the guise of an opinion. The Model Litigation Confirmation is optional and the Committee neither endorses nor opposes the inclusion of the Model Litigation Confirmation in the Opinion Letter.

If the cost of providing a legal opinion outweighs the benefit of receiving it, the parties should acknowledge that no proper purpose is served by insisting that the legal opinion be given. An example is the opinion that a corporation is qualified to do business in every state in which such qualification is required.<sup>23</sup> Another instance in which no opinion should be requested or given is where the necessary qualifications to or assumptions in a requested opinion render it so innocuous that the opinion has little if any value, such as certain opinions based on hypothetical facts.<sup>24</sup>

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<sup>20</sup> “Most of the rationales probably can be distilled down to the following: a legal opinion is required in a business transaction primarily because it subjects the transaction to the problem-spotting and problem-solving process a lawyer must undertake to render the opinion.” John P. Freeman, *Legal Opinions in Business Transactions*, III CAL. BUS. L. PRAC. I, 3 (1988).

<sup>21</sup> The legal opinion does much more than verify. In the process of negotiating and preparing an opinion, legal questions and possible conflicts with other transactions may be seen. These may be eliminated by changes in the documentation and by getting consents of those involved in the other transactions. If this occurs the transaction is actually improved.

ARTHUR NORMAN FIELD & READE H. RYAN, JR., *LEGAL OPINIONS IN CORPORATE TRANSACTIONS* § 1.03[2] (Matthew Bender Bus. Law Monographs No. 26, 1991).

<sup>22</sup> “[I]t seems clear that no opinion should be enlarged to the point where the lawyer becomes generally responsible for the client's factual representations or the legal or business risks inherent in a transaction.” Special Committee on Legal Opinions in Commercial Transactions of the New York County Lawyers' Association et al., *Legal Opinions to Third Parties: An Easier Path*, 34 BUS. LAW. 1891, 1895 (1979).

<sup>23</sup> *See Corporate Report*, *supra* note 1, at 7.

<sup>24</sup> *See, e.g.*, *First Interstate Bank of Nev. v. Chapman & Cutler*, 837 F.2d 775 (7th Cir. 1988) (involving the issuance of an opinion based on hypothetical facts which were wrong).

Masquerading as an opinion is the so-called “comfort” opinion, which affirms that the Opinion Giver is “not aware of any factual information that would lead the Opinion Giver to believe that the Loan Documents contain an untrue statement of a material fact, or omit to state a fact necessary to make the statements made in the Loan Documents not misleading.” A statement that someone is not aware of a fact is not a legal opinion. The burden of factual inquiry required to furnish this assertion, without qualification, is enormous. If the lawyer furnishing such a “comfort” assertion so qualifies his knowledge that he confesses ignorance of the facts, the assertion is at best useless and, more likely, misleading. If the lawyer does not qualify his knowledge, unless the lawyer’s involvement in the facts is as intimate, thorough and rigorous as it would be in a transaction involving a public offering of securities, the lawyer should not sign the quoted assertion.<sup>25</sup> Therefore, this Report discourages both the requesting and giving of such opinions.

The model opinion letter contains only categorical opinions, and opinions to third parties should generally avoid any so-called “reasoned” opinion. Although such an opinion may prove useful in communicating with one’s own client, where the attorney-client privilege supports complete candor, there is no privilege protecting an opinion to third parties and no confidential relationship. Under certain circumstances where a categorical opinion cannot be given and a reasoned opinion is determined appropriate, the reasoned opinion should be set forth in narrative form and in a section of the opinion letter separate from the categorical opinions.<sup>26</sup>

Finally, it is widely recognized that it is inappropriate to insist upon any opinion that the requesting lawyer would be unwilling to give in like circumstances—the so-called “golden rule” of legal opinions. A professional legal opinion should not depend on which side has more bargaining power or more experience in negotiating opinion letters.

**1.05 When to Determine the Text of an Opinion.** The text of a legal opinion is as important as the text of any document upon which closing is conditioned and therefore should be negotiated, ideally, at the time a loan commitment is negotiated, but in the collective experience of the Committee, this rarely, if ever, occurs. There is a danger even then in agreeing to a catch-all requirement to deliver “an opinion upon such other matters as counsel for lender may reasonably request,” if such agreement invites the party with the superior bargaining position to use the text of the opinion as a bargaining chip or permits any party to use the text as an excuse to avoid closing. Typically, the legal opinion is one of many documents drafted and negotiated as closing preparations progress, but questions regarding the contents of the opinion letter should not be delayed until the period immediately prior to closing. Disputes by lawyers over the text of an opinion letter, particularly those which arise near the closing, may not only postpone the closing but may also result in unanticipated costs. In addition, such controversies tend to heighten any imbalance in bargaining position and can strain the relationship between lawyer and client.

**1.06 Ethical Issues.** On June 12, 2000, the Supreme Court of Georgia adopted the ABA Model Rules of Professional Conduct.<sup>27</sup> Rule 2.3(a) permits a lawyer to “undertake an

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<sup>25</sup> See *Corporate Report*, *supra* note 1, at 7.

<sup>26</sup> *Id.*

<sup>27</sup> See STATE BAR OF GA. RULES OF PROFESSIONAL CONDUCT (2000).

evaluation of a matter affecting a client for the use of someone other than the client” in certain circumstances. A comment to the Rule makes clear that the Rule is intended to apply to legal opinions delivered to third parties.<sup>28</sup>

An initial question for the Opinion Giver is whether delivering the Opinion Letter is compatible with the Opinion Giver’s relationship with the Borrower as its client.<sup>29</sup> Rule 2.3(a) requires that “the lawyer reasonably believe[] that making the evaluation is compatible with other aspects of the lawyer’s relationship with the client . . . .” “Delivery of a closing opinion is one aspect of the broader role a lawyer plays in representing a client in a financial transaction and is required for the client to achieve its objective of consummating the transaction.”<sup>30</sup>

Rule 2.3(a) also requires that the client consent to the evaluation. Typically, the client’s consent to the delivery of the opinion may be inferred where a provision in the Loan Documents makes delivery of an Opinion Letter a closing condition.<sup>31</sup> As noted above, the delivery of the Opinion Letter is likely within the scope of the work the lawyer was retained to perform, and thus, the client’s consent may be apparent from the facts and circumstances of the transaction. Nevertheless, if the Opinion Givers knows that the delivery of the Opinion Letter is likely to materially and adversely affect the client, the lawyer should obtain the client’s consent to the delivery of the opinion.<sup>32</sup>

Ordinarily, delivering an Opinion Letter does not require a lawyer to make disclosures that adversely affect a client’s interest. Nevertheless, due diligence may reveal a legal issue that the client would like to keep confidential. The Opinion Giver should expressly point out such confidential matters to Borrower and obtain Borrower’s informed consent to confidential disclosures.<sup>33</sup> In the event Borrower is unwilling to consent to such disclosures, the Opinion Giver and the Opinion Recipient may determine that the Opinion at issues is not necessary; however, Rule 4.1(a) provides that a lawyer may not knowingly make a false statement of material fact or law to a third person. Further, the Opinion Giver should not give an Opinion that

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<sup>28</sup> GLAZER & FITZGIBBON, *supra* note 5, § 1.7.

<sup>29</sup> Special Joint Committee of the Section of Business Law and the Section of Real Property, Planning and Zoning of the Maryland State Bar Association, Inc. *2007 Report on Lawyers’ Opinions in Business Transactions*, at 10, available at [http://www.msba.org/sec\\_comm/sections/realprop/docs/businesstrans\\_update.pdf](http://www.msba.org/sec_comm/sections/realprop/docs/businesstrans_update.pdf) [hereinafter *2007 Maryland Report*]; see GLAZER & FITZGIBBON, *supra* note 5, § 1.7

<sup>30</sup> GLAZER & FITZGIBBON, *supra* note 5, § 1.7. “The interests of the client and the opinion recipient are adverse . . . . The puzzle is resolved by viewing the opinion giver’s task as an extension of its duty to the client . . . .” ARTHUR NORMAN FIELD & JEFFREY M. SMITH, *LEGAL OPINIONS IN BUSINESS TRANSACTIONS* § 13:1.1 (Practising Law Institute, 2d ed. 2006).

<sup>31</sup> See Committee on Legal Opinions of the Section of Business Law of the American Bar Association, *Guidelines for the Preparation of Closing Opinions*, 57 BUS. LAW. 875, §2.4 at 877 (2002) [hereinafter *2002 Guidelines*].

<sup>32</sup> See MARYLAND REPORT, *supra* note 29, at 11. Rule 1.4 of the STATE BAR OF GA. RULES OF PROFESSIONAL CONDUCT, *supra* note 27, provides that “[a] lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation . . . .”

<sup>33</sup> *Maryland Report*, *supra* note 29, at 12.

he or she knows will be misleading to the Opinion Recipient.<sup>34</sup> This includes delivering an opinion that while technically accurate, may nevertheless be misleading because it “masks a problem that is different and more serious than the opinion recipient ordinarily would expect.”<sup>35</sup>

Although the third party to whom the legal opinion is given is not a client, there is nevertheless a duty to the third party to be competent in preparing the opinion.<sup>36</sup> The Rules of Professional Conduct requires a lawyer to provide competent representation to a client and prohibits a lawyer from handling a matter that “the lawyer knows or should know to be beyond the lawyer’s level of competence without association with another the lawyer who the original lawyer reasonably believes to be competent to handle the matter in question.”<sup>37</sup> “Competence requires the ability not only to address the legal issues covered by the opinions being given but also to understand the customary meaning of those opinions and the work lawyers customarily are expected to do to support them.”

**1.07 Malpractice Issues.**<sup>38</sup> Separate from the ethical requirement of competency is the malpractice issue of due care, for competent lawyers can still be careless. Our courts have held that the duty of attorneys is “to use such skill, prudence and diligence as lawyers of ordinary skill and capacity commonly possess and exercise in the performance of the tasks which they undertake”<sup>39</sup> and that an attorney “is bound to reasonable skill and diligence, and the skill has reference to the character of the business he undertakes to do.”<sup>40</sup>

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

In summary, lawyers are not guarantors of their opinions. The Opinion Recipient is entitled to expect that the opinion is prepared with care, but is entitled only to hope that the opinion is accurate. “Opinions are clearly not guaranties. A lawyer who has acted with due care may be wrong but should not be held liable for it.”<sup>41</sup>

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<sup>34</sup> GLAZER & FITZGIBBON, *supra* note 5, § 1.8; 2002 *Guidelines*, §1.5 at 876 (2002).

<sup>35</sup> GLAZER & FITZGIBBON, *supra* note 5, § 1.8

<sup>36</sup> Richard W. Jennings, *The Corporate Lawyer’s Responsibilities and Liabilities in Pending Legal Opinions*, 30 BUS. LAW. 73, 77-80 (Mar. 1974) (special issue).

<sup>37</sup> STATE BAR OF GEORGIA RULES OF PROFESSIONAL CONDUCT Rule 1.1 (2000).

<sup>38</sup> Section 1.07 is based on Section 1.07 of the *Corporate Report*, *supra* note 1, at 12, with modifications for purposes of updating and consistency with other sections of this Report and internal cross-reference.

<sup>39</sup> *Kellos v. Sawilowsky*, 325 S.E.2d 757, 758 (Ga. 1985) (emphasis and citations omitted).

<sup>40</sup> *Id.*

<sup>41</sup> FIELD & RYAN, *supra* note 21, § 1.04[1]; see *Greyhound Leasing & Fin. Corp. v. Norwest Bank of Jamestown*, 854 F.2d 1122 (8th Cir. 1988) (lender could not recover from borrower’s attorney for negligent opinion where lender’s negligence exceeded that of attorney); see also John P. Freeman, *Current Trends in Legal Opinion Liability*, 1989 COLUM. BUS. L. REV. 235; Richard R. Howe, *The Duties and Liabilities of Attorneys in Rendering Legal Opinions*, 1989 COLUM. BUS. L. REV. 283.

**1.08 How to Use This Report.** The decision as to what third party opinions are appropriate, necessary or required in any particular real estate financing transaction is beyond the scope of this Report. The context of the transaction and the negotiation process will determine that issue, and the Model Opinion included at the end of this Report may provide a useful checklist. Once there is a mutual agreement on the particular opinions to be given, the Committee recommends the following procedures as a guide in assisting the Opinion Giver to prepare the Opinion Letter and to undertake the due diligence and review necessary to insure the accuracy of the Opinions given.

The Opinion Giver should initially draft each individual Opinion included in the Opinion Letter by referring to the corresponding model opinion set forth in the applicable section of this Report. Each model opinion, together with all related interpretations in the Interpretive Standards, should be read carefully in order to determine whether or not the transaction and context dictate appropriate modifications, particularly with regard to definitions and references to parties. The Opinion Giver should also review the comments following each model opinion to obtain information about the positions and discussions of the Committee concerning the meaning and effect of the model opinion language and related Interpretive Standards.

The Interpretive Standards are intended to state qualifications of general application which are frequently appropriate or necessary for third party opinions given in secured real estate financing transactions and are designed to be incorporated in an opinion letter by reference, rather than being set forth in or attached to the opinion letter. The Opinion Giver and the Opinion Recipient should therefore review the Interpretive Standards for the purpose of defining any additional qualifications or opinions necessary in the particular transaction presented. The Opinion Giver should refrain from inserting in the opinion letter qualifications set forth in the Interpretive Standards in an attempt to emphasize a particular qualification or statement already incorporated by reference to the Interpretive Standards.

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

The Opinion Giver should carefully review in each instance the checklist of procedures recommended by the Committee for an Opinion Giver to undertake in order to give each model opinion. These procedures are set forth in a separate section following each separate model opinion. The Committee recognizes, however, that in certain circumstances because of the Opinion Giver's prior representation of Borrower and familiarity with Borrower and its business operations, it may not be appropriate or necessary in a particular transaction for the Opinion Giver to undertake all of the suggested practice procedures.

The Committee believes that the model opinions, the assumptions, qualifications, standards and interpretations set forth in the Interpretive Standards, as well as the due diligence procedures set forth in the Report, are generally appropriate in customary transactions. In each transaction the Opinion Giver should bear in mind, however, that these standards and procedures are general in nature and should not be viewed as a substitute for the exercise of reasoned

professional judgment, legal analysis and due diligence under the circumstances of the particular transaction.

The Committee believes that the Opinion Giver may, in many circumstances, provide opinions in the form of the Model Opinion without modification. Throughout this Report, the Committee recognizes that the Opinion Recipient may, under particular circumstances, request that the Opinion Giver provide opinions which are not contained in the Model Opinion or a modification to an opinion that is included in the Model Opinion. The Committee recommends that in such event, at least the initial draft of the legal opinion be blacklined to show all changes from the Model Opinion or the Opinion Giver otherwise apprise the Opinion Recipient of all changes to the Model Opinion.

**1.09 Statement of the Role of Customary Practice.** The Statement on the Role of Customary Practice in the Preparation and Understanding of Third-Party Legal Opinions (the “Statement on Customary Practice”)<sup>42</sup> summarizes the role of customary practice in the rendering of Opinion Letters. The Statement on Customary Practice provides:

Customary practice permits an opinion giver and an opinion recipient (directly or through counsel) to have common understandings about an opinion without spelling them out. The use of customary practice does this in two principal ways:

1. It identifies the work (factual and legal) opinion givers are expected to perform to give opinions. Customary practice reflects a realistic assessment of the nature and scope of the opinions being given and difficulty and extent of the work required to support them.

2. It provides guidance on how certain words and phrases commonly used in opinions should be understood. Customary practice may expand or limit the plain meaning of those words and phrases.<sup>43</sup>

The Statement on Customary Practice has been adopted and approved by more than twenty-five state and local bar associations or sections as of the date of this Report.

The Committee approves the Statement on Customary Practice as a matter of general policy. The practices and procedures set forth in this Report represent the Committee’s understanding of the current customary practice in the rendering of legal opinions to third parties in connection with secured real estate transactions in Georgia.

## **II. CERTAIN ASPECTS OF OPINION LETTER<sup>44</sup>**

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<sup>42</sup> *Statement on the Role of Customary Practice in the Preparation and Understanding of Third-Party Legal Opinions*, 63 BUS. LAW. 1277 (2008) [hereinafter *The Statement on Customary Practice*]

<sup>43</sup> *Id.* at 1277.

<sup>44</sup> Section II is based on Section II of the *Corporate Report*, *supra* note 1, at 14-26, with modifications for purposes of updating and consistency with other sections of this Report and internal cross-reference.

**2.01 Date of Opinion; Obligation to Update; Future Events.** A legal opinion letter is normally dated as of the date of its delivery, typically upon consummation of the Loan Transaction, and is deemed to speak as of that date. There is no need to specify the effective date of the opinion letter separately, except in the rare case requiring an effective date other than the date of delivery. Similarly, there is no obligation to update the opinion letter after it is delivered absent an undertaking to do so on the part of the Opinion Giver, even though matters which subsequently occur may affect an analysis or conclusion in the opinion letter. This is confirmed in Interpretive Standard 10.

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

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

In some cases, an opinion speaks to future events, such as when “performance” occurring after the date of delivery is addressed by one or more of the opinions expressed.<sup>45</sup> Where an opinion requires consideration not merely of the facts in existence when the opinion is rendered, but also of future factual circumstances, the Opinion Giver is presented with a special problem: if the essence of a legal opinion is the application of legal rules to particular facts, and those facts do not yet exist, how can the Opinion Giver determine with any certainty the facts that are to be subjected to analysis?

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

- (i) A bank and Company execute a credit agreement providing for a revolving line of credit with a maximum commitment of \$10,000,000 and future advances at Company’s request. On the date of execution Company borrows \$1,000,000. Would a remedies opinion rendered to the bank on that date with respect to the credit agreement cover the availability of a remedy for failure to repay additional advances obtained by Company at its discretion at a later time?

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<sup>45</sup> For example, the Model Remedies Opinions in the *Corporate Report* and in this Report constitute a prediction that the legal system will provide a remedy for non-performance of an executory contract and therefore involve future conduct. See Arthur Norman Field & Stephen O. Weise, *Remedies Opinion and Exceptions, in The Silverado Summit: The Standardization of Legal Opinions - Order Out of Chaos*, 1989 A.B.A. SEC. BUS. L. & DEP’T FOR PROF. EDUC. 1-2.

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

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

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

(v) A bank makes a demand loan to Company. Would a remedies opinion with respect to the demand note have to state that the statute of limitations begins to run from the issuance of the instrument?<sup>46</sup>

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

The literature on legal opinions contains little guidance on the subject of dealing with future events. In the development of the Legal Opinion Accord, the Section of Business Law of the ABA published the Silverado Draft, which dealt to some extent with this subject, generally

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<sup>46</sup> See, e.g., *Woodall v. Hixon*, 270 S.E.2d 65 (Ga. Ct. App. 1980), *rev'd*, 256 Ga. 758 (1980).

establishing the principle that an opinion speaks only as of its date<sup>47</sup> and covering other aspects of the predictive nature of opinions in particular rules.<sup>48</sup> Nevertheless, the Silverado Draft does not articulate any general, theoretical framework for dealing with future events, instead focusing only on certain specific facets of the problem. Its primary contribution is an assumption that Company will not take “discretionary” action in the future that could create a problem with a legal conclusion reached by the opinion.<sup>49</sup> The Silverado Draft does not appear to consider expressly the effect of legal principles which, because of the passage of time, could become applicable to the parties and the Loan Documents, the possible consequences of failure of a party to take actions in the future to preserve or extend rights initially arising at the time of the transaction (e.g., filing continuation statements, filing suit within a statute of limitations), or changes in the status of a party.

In a brief discussion of the issue in the context of the remedies opinion, two commentators have proposed a more comprehensive approach, arguing for something akin to a “foreseeability” standard, stating that, in order to give the remedies opinion, the Opinion Giver must “posit situations which might arise during the term of the agreement and which might affect the availability of a remedy . . . [I]t is not enough to take the facts on the date of the opinion as one does in most other opinions.”<sup>50</sup> Their approach would require an Opinion Giver to consider whether or not situations might arise during the term of the Loan Documents that could adversely affect the availability to the Opinion Recipient of a remedy for breach of the Loan Documents. The difficulty of predicting future events would be ameliorated by eliminating any need for the Opinion Giver to consider the possibility of any changes in the status of any party, in the relationship of the parties, or in the agreements involved, or that the parties will not administer them as written.<sup>51</sup>

The Committee believes that a general “foreseeability” standard is overbroad, and agrees with the view that “it goes without saying that no one can certify today what will happen tomorrow.”<sup>52</sup> In general, Opinion Givers should not be expected to anticipate future conduct or changes in circumstances that might affect the availability of remedies, even though an Opinion Giver must consider the availability of remedies for nonperformance of obligations that, as expressed in the Loan Documents, Company will be required to perform in the future as provided in the Loan Documents, and should also consider the circumstances that will exist in the future as a result of the Opinion Recipient’s exercise of absolute rights explicitly conferred on it in the Loan Documents.

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<sup>47</sup> Section of Business Law of the ABA, *supra* note 15, §9.

<sup>48</sup> *Id.* §§ 4(k), 4(l), 4(m), 9, 15(d); *see also* ¶¶ 4.3(vii), 9.1, 13.1, 15.4, 15.5, 16.5.

<sup>49</sup> *Id.* § 4(m); *see also* § 15(d). Using this assumption, an Opinion Giver would not need to be concerned about the effect of future advances under the revolver discussed in hypotheticals (i) and (v), because Company has “discretion” in taking down funds. This result is at variance with the result obtained under the “telescoping assumption” as postulated by the Committee.

<sup>50</sup> Field & Weise, *supra* note 44, at 3-4.

<sup>51</sup> *See id.* at 4.

<sup>52</sup> Donald W. Glazer & Charles R.B. Macedo, *Determining the Underlying Facts: An Epistemological Look at Legal Opinion Letters*, 1989 COLUM. BUS. L. REV. 343, 347.

The Committee has concluded that at this time it should merely follow the approach of the Silverado Draft to “future events,” leaving for future development general principles covering the issues on which the Silverado Draft is silent. Accordingly, the Interpretive Standards, like the Silverado Draft, reiterate that, in general, an opinion speaks only as of its date and include the Silverado Draft assumption that Company will not take discretionary action that violates law, another agreement or a court order. Based on the Committee’s review of proposals under consideration by the Silverado drafting group, Interpretive Standard 16 also includes the assumption that all permits, governmental approvals or other actions necessary in the future under applicable law will be obtained or taken by Company. The Interpretive Standards do not otherwise address the forward-looking nature of certain opinions. Although not expressly stated in the Interpretive Standards, the Committee agrees that an Opinion Giver generally need not consider the possibility of changes in the status of any party, in the relationship of the parties, or in the Loan Documents, or that the parties will not administer the Loan Documents as written. While the Committee has not taken a position on the need to refer in an opinion to, for example, the requirement to file UCC continuation statements,<sup>53</sup> Opinion Givers who clearly recognize that an Opinion Recipient may be unaware of its need to comply with applicable legal requirements to preserve its rights may want to consider making appropriate disclosure to eliminate any concerns over an “accurate presentation.”<sup>54</sup> Any such disclosure should not be considered to imply that the Opinion Giver is assuming a broader obligation with respect to future events than otherwise required by this Report and the Interpretive Standards.

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

Unless otherwise acknowledged, the only person or persons who should be entitled to rely upon the opinion letter are the person or persons to whom it is addressed. This position is supported, generally, by the doctrine of privity of contract. Accordingly, in the context of delivery of an opinion, the Opinion Giver who delivers the opinion, whether at the direction or with the consent of the client, should owe no duty to any party not an addressee or identified in the opinion letter as a person entitled to rely if reliance by others is disclaimed. Until comparatively recently, privity was a barrier to third party liability for professional malpractice in Georgia.<sup>55</sup> However, in *Travelers Indemnity Co. v. A. M. Pullen & Co.*,<sup>56</sup> the Court of Appeals held that:

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<sup>53</sup> *But see infra* § 20.03 I. Interpretive Standard 27 includes, as an implied qualification to the Model UCC Opinion, the termination of perfection in a security interest upon failure to file a continuation statement.

<sup>54</sup> *See supra* § 1.06.

<sup>55</sup> *Hughes v. Malone*, 247 S.E.2d 107 (Ga. Ct. App. 1978).

<sup>56</sup> *Travelers Indem. Co. v. Pullen & Co.*, 289 S.E.2d 792 (Ga. Ct. App. 1982).

[A] third party is entitled to recover from an accountant, despite the absence of privity, where the third party is in a limited class of persons known to be relying upon representations of accountants. . . . Travelers presented evidence, which if believed, would have warranted a conclusion that Pullen was informed by Yaksh that Travelers required financial statements and would rely upon those statements.<sup>57</sup>

A close reading of *Travelers*, which dealt with a motion for summary judgment, indicates only that privity is no defense to an action by a third party beneficiary of the contract between the client and the professional. In *First Financial Savings & Loan Ass'n v. Title Insurance Co. of Minnesota*,<sup>58</sup> the District Court did not read *Travelers* so narrowly:

In such circumstances [knowledge that an assignment of loan closing packages would follow] it was clearly foreseeable that direct assignees such as plaintiff would rely on the accuracy of the closing attorneys' certifications. Accordingly, under Georgia law, [the lawyers certifying title] . . . had a duty to such assignees to exercise reasonable care in the execution and delivery of such certificates.<sup>59</sup>

*Kirby v. Chester*<sup>60</sup> validates the District Court's interpretation. Although citing third party beneficiary authority as support, in *Kirby* the Georgia Court of Appeals also cited *First Financial Savings & Loan* and noted:

We agree with the court's statement made there that "under certain circumstances, professionals owe a duty of reasonable care to persons who are not their clients, i.e., not in privity with them." . . . There is little dispute that Kirby as the lender here relied on Chester's faulty title certification and that Chester knew the purpose of his title search and subsequent certifications was, as in most real estate transactions, to assure the lender of sufficient collateral for the proposed loan.<sup>61</sup>

In *Badische Corp. v. Caylor*,<sup>62</sup> the Eleventh Circuit Court of Appeals certified the question of to whom an accountant was liable for negligence in the preparation of audited financial statements. The Georgia Supreme Court responded:

We specifically reject the plaintiff's argument that the rule established in *Robert & Co.* [250 Ga. 680, 300 S.E.2d 503 (1983)] expands professional liability for negligence to an unlimited class of persons whose presence is merely "foreseeable." Rather, professional liability for negligence, including the liability of

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<sup>57</sup> *Id.* at 795.

<sup>58</sup> *First Fin. Sav. & Loan Ass'n v. Title Ins. Co. of Minn.*, 557 F. Supp. 654 (N.D. Ga. 1982).

<sup>59</sup> *Id.* at 660.

<sup>60</sup> *Kirby v. Chester*, 331 S.E.2d 915 (Ga. Ct. App. 1985).

<sup>61</sup> *Id.* at 919, 920.

<sup>62</sup> *Badische Corp. v. Caylor*, 825 F.2d 339 (11th Cir. 1987).

accountants, extends to those persons, or the limited class of persons, who the professional is actually aware will rely upon the information he prepared.<sup>63</sup>

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

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

This disclaimer should be effective to prevent reliance upon the opinion by persons other than the addressee. When the Georgia Supreme Court in *Robert & Co. v. Rhodes-Haverty Partnership*<sup>64</sup> expanded privity by what is called the “limited foreseeability” rule, it noted that “[t]he additional duty that this rule imposes may be, of course, limited by appropriate disclaimers which would alert those not in privity . . . that they may rely upon [the opinion] only at their peril.”<sup>65</sup>

In certain cases, because of the nature of the transaction, the Opinion Giver knows that the opinion letter is intended to be relied upon by persons other than the addressee. A frequently recurring example is that of bond counsel whose opinion is often printed on the bonds and is intended to be relied on by all purchasers of the bonds. Other examples include an opinion letter given by local counsel in a transaction intended to be relied upon by lawyers principally involved; a loan transaction where the opinion letter is delivered to the lead bank with knowledge that the loan will be participated in by other banks to whom the loan documentation, including the opinion letter, will be delivered subsequent to closing; and an opinion letter delivered to underwriters in a stock issuance where the transfer agent and registrar for the stock is expected to rely upon the opinion. It is also not uncommon for counsel to the Opinion Recipient to rely upon the opinion with the knowledge and consent of the Opinion Giver. In such cases, the opinion letter should specifically describe who, in addition to the specific addressee, may rely upon the opinion letter, and under what circumstances and to what extent. Interpretive Standard 8 discusses who may rely on an Opinion.

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

We have acted as counsel to \_\_\_\_\_ (“Borrower”), a Georgia corporation/general partnership/limited partnership/limited liability partnership/limited liability limited partnership/limited liability company, and

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<sup>63</sup> *Badische Corp. v. Caylor*, 356 S.E.2d 198, 200 (Ga. 1987). In a footnote to this opinion, the Georgia Supreme Court noted that the holding followed the middle ground of the Restatement (Second) of Torts, §552, between the “unlimited foreseeability rule” and the “narrow privity rule which remains the law in some states and which was formerly the law in this state.” *Id.* at 200 n.2.

<sup>64</sup> *Robert & Co. Assocs. v. Rhodes-Haverty P’ship*, 300 S.E.2d 503 (Ga. 1983).

<sup>65</sup> *Id.* at 504.

\_\_\_\_\_ (“Guarantor”)<sup>66</sup>, a resident of the State of Georgia in connection with the closing of a \$\_\_\_\_\_ loan (the “Loan”) from \_\_\_\_\_ (“Lender”), secured by certain real property (the “Real Property”) located in \_\_\_\_\_ County, Georgia, and related personal property (the “Personal Property”) (the “Real Property” and the “Personal Property” hereinafter collectively referred to as the “Property”).

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

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

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

#### **2.04 [Intentionally Omitted]<sup>67</sup>**

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

Capitalized terms used in this opinion letter (and the attachments hereto) and not otherwise defined herein shall have the meanings assigned to such terms in the Interpretive Standards.

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<sup>66</sup> For purposes of the Model Opinion it is assumed that Guarantor is an individual; if Guarantor were an entity, the Model Opinion would typically include as to Guarantor parallel opinions to the Model Status, Powers and Acts Opinions as to Borrower set forth in Paragraphs 1-3 of the Model Opinion.

<sup>67</sup> The 1997/2002 Report included language in the Model Opinion addressing a statement of the reasons for the Opinion. This was omitted from the Report as the Model Opinion does not reference a reason for the Opinion.

The Committee recommends that the opinion letter use the same terms as are used in the statutory law with respect to the opinion being given. For example, the GBCC refers to “articles of incorporation,” “shareholders” and “shares,” rather than “certificate of incorporation,” “stockholders” and “stock.”<sup>68</sup>

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

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

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

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

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

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

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

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<sup>68</sup> See O.C.G.A. §§ 14-2-101 to -1703.

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

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

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

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

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

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

(iii) if the facts are set forth in a certificate, the Opinion Giver has used reasonable professional judgment as to its form and content.<sup>69</sup>

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

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

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<sup>69</sup> See *infra* Interpretive Standard 4.

execution) by the Opinion Recipient. Thus, the appropriate scope of the Opinion Giver's factual investigation must be determined on the basis of sensible and reasonable expectations.

**B. Unwarranted Reliance.** When facts are not to be established through independent investigation but by assumptions or reliance on others, one encounters the question, "But what if the Opinion Giver knows to the contrary or knows of contradictory information?" As a general and overarching principle, the Opinion Giver may not rely upon information (including certificates or other documentation) or assumptions otherwise appropriate in the circumstances, if the Opinion Giver knows that the information is incorrect or the assumptions are unwarranted.<sup>70</sup> Unless otherwise agreed, "Opinion Giver" in the preceding sentence refers to the lawyer in the Opinion Giver's organization (a member of the Primary Lawyer Group as defined in Section 3.02B) principally responsible for providing the response concerning the particular opinion issue to which the reliance relates.

"Knowledge" for purposes of determining when reliance on facts furnished by others is justified must be defined with reference to the Model Knowledge Qualification discussed in Section III of this Report. As discussed in that Section, the Model Knowledge Qualification customarily will be used in reference to specific factual questions (such as, are there any writs outstanding, does any litigation exist?). Because of the Opinion Giver's relationship to Borrower, the Opinion Giver may have particular knowledge that will illuminate those issues. Accordingly, the Opinion Recipient is justified in asking the Opinion Giver to conduct the limited inquiry described in Section III. However, when an appropriate representative of Borrower (or, depending upon the circumstances, another appropriate person on whose representation reliance is placed) represents a fact to be true, burdening the Opinion Giver with any duty of inquiry, other than the limited duty described in Section III, is not justified either from a functional or a cost perspective absent information that causes the Opinion Giver to doubt the representation.<sup>71</sup> The Committee therefore believes that reliance on such a certificate (or other statement of a similar nature) is justified without further inquiry as long as the lawyer (or, in some cases, lawyers) in the Opinion Giver's organization principally responsible for providing the response concerning the particular issue with respect to which the information proposed to be relied upon relates is not currently aware of contradictory facts. The Opinion Giver, absent such current knowledge, is not required to collect facts gleaned over the course of the Opinion Giver's representation of Borrower, examine the interrelationship of all those facts, or draw conclusions as to the potential implications of those facts for the Loan Transaction. Further, the responsible lawyer may not have current knowledge of information contained in the Opinion Giver's files. This standard of current knowledge for reliance purposes is automatically incorporated in an Opinion Letter by reference to the Interpretive Standards.<sup>72</sup>

**C. Objective and Ultimate Facts.** Facts that are normally the subject of assumptions or reliance upon others are those facts that are objective in character and are capable of verification through customary investigative effort (herein, "objective facts"). In contrast, facts that are conclusory or in the nature of the very legal conclusion the Opinion Giver is requested to provide -- sometimes referred to as "ultimate facts" -- are not properly the subject of assumptions

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<sup>70</sup> See *supra* § 1.06.

<sup>71</sup> Glazer & Macedo, *supra* note 52, at 476.

<sup>72</sup> See *infra* Interpretive Standards 3, 7.

or reliance upon others, except in the case of certain facts established by Public Authority Documents. For example, reliance by the Opinion Giver upon a statement in a corporate secretary's certificate that a stated number of directors were present and acting when the board authorized the Loan Transaction would be acceptable, but reliance on a statement in a certificate of a corporate officer that Borrower was duly organized or the Loan Documents was duly authorized would not be appropriate to give those very opinions. A third category involves facts that are neither objective nor ultimate, but are subjective in character (e.g., an appraiser's evaluation or an investment banker's opinion). The Committee believes that reliance on this third type of information is acceptable, but in the usual case the Opinion Giver should disclose such reliance in the opinion letter.

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

Opinion letters in business transactions almost always include some legal conclusions concerning the organization and existence of the client and its ability to transact business in its state of its organization and perhaps in other jurisdictions. The principal sources of verification of these matters are certificates issued by public officials in the various jurisdictions involved.<sup>73</sup>

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

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

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<sup>73</sup> See §§ 5.02, 5.03 (corporations), 8.02 (partnerships) and 12.02 (limited liability companies) of this Report regarding certificates or verifications available from the Office of the Secretary of State of the State of Georgia.

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

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

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

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

**2.08 Assumptions.** It has become customary to rely in an opinion letter upon a number of factual assumptions. The facts assumed are directly relevant to one or more of the issues typically required to be addressed in the opinion letter. Thus, an opinion that the Borrower has executed and delivered the Loan Documents relies upon, and does not supersede nor contradict, the assumption set forth in Interpretive Standard 13 that all signatures on the Loan Documents are genuine. The Committee believes that reliance upon certain assumptions is appropriate since, in most cases, the facts are not readily verifiable or could be verified only by the expenditure of time and effort not usually justified and generally would, upon examination, be found to be true. Examples of such assumptions include those dealing with the authenticity of documents, the existence, good standing and proper authorization of the Loan Transaction by other parties and the post-consummation conduct of the parties. Assumptions upon which Opinion Giver may rely are set forth in Interpretive Standards 12 through 22.

**2.09 Presumption of Regularity and Continuity.** If Borrower has been in existence for many years, its records with respect to its organization and its authorization of various transactions may be incomplete or unavailable. If, after diligent investigation, the Opinion Giver finds this to be the case, the Opinion Giver may be entitled to rely upon the presumption of regularity and continuity,<sup>74</sup> i.e., where there is no known basis for reaching a different conclusion (other than the fact of incomplete or missing records), reliance upon the presumption of regularity

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<sup>74</sup> See *Rogers v. Hill*, 289 U.S. 582, 591 (1933).

and continuity might be appropriate in the circumstances. For example, direct evidence that Borrower received payment years ago of the subscription price for its shares may not be available, although its current financial statements reflect such payment in its capital account. The presumption of regularity and continuity might provide a reasonable basis for an opinion that the shares of Borrower are fully paid and nonassessable. The appropriateness of applying this presumption should be determined by what is reasonable in the circumstances, taking into account the reason for the incomplete or missing records (if known) and the importance of the missing records to the opinion being expressed. The Opinion Giver should consider whether reliance on the presumption of regularity and continuity is sufficiently material to an opinion given in reliance on such presumption to require disclosure in the opinion letter. If such disclosure is warranted, language similar to the following should be used:

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

**2.10 Signature.** Style varies as to the manner in which opinion letters are signed, whether “XYZ by A, a partner”, or “A on behalf of XYZ,” or simply signed in the name of the firm, “XYZ.” If the opinion letter is signed only in the name of the firm, the firm should maintain a record identifying the signatory. In any event, a partner or authorized person should sign the opinion letter, eliminating any question as to the signatory’s authority to bind the firm.

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

### III. THE MODEL KNOWLEDGE QUALIFICATION<sup>75</sup>

*Whenever any opinion or confirmation of fact set forth in this opinion letter is qualified by the words, “to our knowledge,” “known to us” or other words of similar meaning, the quoted words mean the current awareness by lawyers in the Primary Lawyer Group of factual matters such lawyers recognize as being relevant to the opinion or confirmation so qualified. The quoted words do not*

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<sup>75</sup> Section III is based on Section III of the *Corporate Report*, *supra* note 1, at 27-30, with modifications for purposes of updating and consistency with other sections of this Report and internal cross-reference.

*include information not within such current awareness that might be revealed if a canvass of lawyers outside the Primary Lawyer Group were made, if the Opinion Giver's files were searched or if any other investigation were made. "Primary Lawyer Group" means the lawyer who signs this opinion letter and, solely as to information relevant to an Opinion or confirmation issue, any lawyer in this law firm who is primarily responsible for providing the response concerning the particular issue.*

## COMMENT

**3.01 Purpose and Background of the Model Knowledge Qualification.** This qualification, which appears in Interpretive Standards 6 and 7 and therefore need not be expressed in any opinion letter that incorporates the Interpretive Standards, is an express limitation of the extent to which information known to or possessed by the Opinion Giver or its legal, paralegal or non-legal personnel is imputed to the Opinion Giver.<sup>76</sup> By establishing the scope of the knowledge imputed to the Opinion Giver, the qualification also implicitly defines the Opinion Giver's internal due diligence obligations.

**3.02 Elements of the Model Knowledge Qualification.** The Model Knowledge Qualification establishes that the Opinion Giver's responsibility for the statement so qualified is limited to determining that no member of the Primary Lawyer Group (as defined below) is currently aware of additional or contradictory facts that would render the statement inaccurate. "Awareness" is a subjective matter, and an Opinion Giver is not made aware of information just because that information is contained in any of its files (including its billing or time records as well as its client files).<sup>77</sup> Further, in making a statement that is subject to the knowledge qualification, the Opinion Giver is not required to take a poll of its entire staff of legal, paralegal or non-legal personnel, contact other professional advisors to the client, examine records maintained by the Borrower, or examine public records. Such steps generally involve fact gathering rather than legal analysis and, more importantly, are usually not warranted from a cost/benefit perspective. Any agreement between the Opinion Recipient and Opinion Giver for the latter to take any such additional steps should be justified from a cost/benefit perspective.

**A. Current Awareness; Clear Recognition.** The term "current awareness" qualifies the Opinion Giver's responsibility for factual matters from the perspective of time.<sup>78</sup> It recognizes, for example, that a loan agreement negotiated several years ago by the Opinion Giver on behalf of Borrower may not be within the current awareness of the Primary Lawyer Group, particularly if Borrower has not borrowed under that agreement until recently and its recent

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<sup>76</sup> "Primary Lawyer Group," as defined in Interpretive Standard 7, may consist of one lawyer if the Opinion Giver is a sole practitioner or in the unusual case in which only one lawyer in an organization represents the client. In those instances, the term "Primary Lawyer" may be substituted for "Primary Lawyer Group."

<sup>77</sup> Arthur Norman Field & J. Truman Bidwell, Jr., *Dealing with Facts, in The Silverado Summit: The Standardization of Legal Opinions - Order Out of Chaos*, 1989 A.B.A. SEC. BUS. L. & DEP'T. FOR PROF. EDUC. 19; Scott FitzGibbon & Donald W. Glazer, *Opinions as to the Absence of Litigation and Claims, in BUSINESS OPINIONS*, at 435, 446 (PLI Corp. Law & Practice Course Handbook Series No. 674, 1990).

<sup>78</sup> Glazer & Macedo, *supra* note 52, at 486.

borrowing was not brought to the Primary Lawyer Group’s attention. The Committee considers the term “current awareness” synonymous with similar terms adopted by other commentators, including “conscious awareness,” “actual knowledge,” “present recollection” and “current consciousness.”

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

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

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

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

### **3.03 Additional Notes Regarding the Model Knowledge Qualification.**

**A. Incorporation into Opinion.** Incorporation of the Interpretive Standards into the opinion by reference is sufficient to incorporate the Model Knowledge Qualification.

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

(i) *“To the best of our knowledge”* - The Committee believes this phrase is equivalent to the phrase “to our knowledge,” but recommends the use of the latter to avoid an impression that the Opinion Giver has taken all conceivable steps to verify a factual representation when in fact such steps were not taken and are not recommended by this Report.<sup>79</sup> For example, in furnishing a “no litigation” confirmation the Opinion Giver could, but usually does not, conduct a statewide docket search.<sup>80</sup>

(ii) *“Insofar as is known to us”* - One Georgia commentator recommends that this phrase be used to avoid a possible implication that the “to our knowledge” phrase suggests that counsel has knowledge that a fact does not exist.<sup>81</sup> While the Committee finds the “insofar as is known to us” phrase acceptable, it does not read the “to our knowledge” phrase to affirm the absence of a fact, and has selected the latter phrase because it is less cumbersome.

(iii) *“Nothing has come to our attention”* - The Committee believes that this phrase should be avoided because it suggests reliance on coincidence.<sup>82</sup>

(iv) *“After due inquiry”* or *“after reasonable investigation”* - Unless appropriate in a particular instance in light of inquiries actually made, Opinion Givers should avoid these phrases because they may imply more diligence than may be customarily performed in support of a factual statement.<sup>83</sup>

(v) *“Without independent investigation”* - The Committee also discourages use of this phrase because of the ambiguity caused by the word “independent.” Certainly Opinion Givers undertake an inquiry of at least some lawyers (e.g., the Primary Lawyer Group) in almost all instances. Accordingly, to say that the Opinion Giver has not conducted any independent investigation in such a case is potentially misleading, if not incorrect.

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<sup>79</sup> James J. Fuld, *Legal Opinions in Business Transactions - An Attempt to Bring Some Order Out of Some Chaos*, 28 BUS. LAW. 915, 922 (1973).

<sup>80</sup> See *infra* § 21.04B.

<sup>81</sup> Harry C. Howard, *The Corporate Attorney’s Opinion - Content* (unpublished outline by Harry C. Howard of King & Spalding, Atlanta, Georgia), at N 16, n.18.

<sup>82</sup> Fuld, *supra* note 79, at 922; Special Committee on Legal Opinions in Commercial Transactions of the New York County Lawyers’ Association et al., *supra* note 22, at 1919. This phrase may have merit in securities transactions as “negative comfort” as to Borrower’s satisfaction of its disclosure obligations.

<sup>83</sup> J. Patrick Garrett, *Point-Counterpoint Issues, in The Silverado Summit: The Standardization of Legal Opinions - Order out of Chaos*, 1989 A.B.A. SEC. BUS. L. & DEP’T FOR PROF. EDUC. 26; Philip R. Lochner, Jr., *Legal Opinions on Corporate Matters, in DRAFTING LEGAL OPINION LETTERS*, at 119 (M. John Sterba, Jr., Ed., 1988).

**C. Distinguishing the Use of the Term “Knowledge” in Different Contexts.** A subtle distinction exists between the use of the term “knowledge” in the context of the Model Knowledge Qualification and the use of the term in the context of unwarranted reliance discussed at Section 2.07B above. The Model Knowledge Qualification customarily qualifies a specific, fact-based statement that Opinion Giver has been asked to make, usually because the Opinion Giver is presumed to be a reliable repository of information concerning the Borrower’s legal affairs or to have superior access to information about the Borrower of a legal nature. Accordingly, affirmative due diligence obligations of a limited nature are imposed on the Opinion Giver employing the Model Knowledge Qualification. On the other hand, reliance on a certificate provided by an appropriate officer of the Borrower is not unwarranted as long as the lawyers in the Primary Lawyer Group, in relying on that certificate without any further investigation, have no knowledge that such information is false or that reliance on such information would be unreasonable. In that case, no due diligence obligation is imposed because an Opinion Giver is entitled to rely upon factual information provided by an officer who is an appropriate source.<sup>84</sup>

**D. Inappropriate Use of the Model Knowledge Qualification; “Comprehensive Legal Compliance”.** The Committee emphasizes that the Model Knowledge Qualification relates to factual matters and should not be used as a substitute for focused analysis of specific legal issues. The Committee is aware that from time to time Opinion Recipients request that the Opinion Giver opine that, “To our knowledge, the Borrower is in compliance in all material respects with all applicable federal [or state] laws and regulations [or its Articles of Incorporation and Bylaws]” or otherwise suggest that the Opinion Giver could furnish an overly broad legal conclusion if the conclusion is qualified by the Opinion Giver’s knowledge. In these instances, the knowledge qualification is proffered by the Opinion Recipient as a means of relieving the Opinion Giver of an otherwise insurmountable due diligence inquiry, in essence requiring “only” disclosure of clearly known violations. The Committee believes that such a request for an opinion as to “comprehensive legal compliance” is inappropriate. First, depending on the form of knowledge qualification used, the Opinion Giver’s knowledge of Borrower’s affairs might go beyond clearly known violations. Second, absent the client’s informed consent and depending upon the nature of the information involved, the client may be entitled to non-disclosure of instances of material non-compliance with some law as a client confidence or secret.<sup>85</sup> The Committee believes that the better approach is for the Opinion Recipient to identify its concerns more particularly and request one or more specific opinions of a more limited nature.<sup>86</sup>

#### **IV. LIMITATIONS ON OPINIONS AS TO LAWS AND IMPLICATIONS<sup>87</sup>**

**4.01 Limitation on Laws Covered by Opinion.** Generally, an Opinion Giver should not be required to render an opinion about the law of a jurisdiction in which the lawyers primarily

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<sup>84</sup> See *infra* Interpretive Standard 4.

<sup>85</sup> See Rules & Regs. for the Org. & Gov’t of the State Bar of Ga., Rule 3-104, Directory Rule 4-101; Rule 4-102, Standard 28 (1991).

<sup>86</sup> See also *supra* §§ 1.04, 1.06.

<sup>87</sup> Section IV is based on Section IV of the *Corporate Report*, *supra* note 1, at 31-34, with modifications for purposes of updating and consistency with other sections of this Report and internal cross-reference.

responsible for preparing the opinion are not licensed to practice.<sup>88</sup> Interpretive Standard 1 suggests that an opinion letter should be limited expressly to the law of described jurisdiction(s). The following model language expressly limits all opinions included in the opinion letter to the laws of the jurisdiction for which the Opinion Giver has agreed to assume responsibility and applicable federal laws:

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

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

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

**4.02 Duty When Giving Opinion on Laws of Other Jurisdiction.** The Committee recognizes that business transactions often involve matters governed by the laws of foreign jurisdictions, and that an Opinion Giver may find it necessary to give or obtain an opinion involving the laws of a jurisdiction in which the lawyers primarily responsible for preparing the opinion are not admitted to practice. The Opinion Giver should exercise extreme caution in giving any such opinion. Where an Opinion Giver assumes responsibility for a matter involving the laws of a jurisdiction in which the lawyers primarily responsible for preparing the opinion are not admitted to practice, the Opinion Giver may be held to the same standards with regard to such opinion as one licensed to practice in the jurisdiction whose laws are involved.<sup>89</sup> The Opinion Giver may not simply claim ignorance of the laws of that jurisdiction, but may be, instead, under an affirmative duty to acquire knowledge of the laws upon which the opinion is based.

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

**4.03 Retaining Local Counsel.** Where the Opinion Giver declines to give an opinion involving the laws of another jurisdiction, the Opinion Recipient may still require such opinion and

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<sup>88</sup> See STATE BAR OF GA. RULES OF PROFESSIONAL CONDUCT, Rule 1.1 (2000).

<sup>89</sup> *Rekeweg v. Federated Mut. Ins. Co.*, 27 F.R.D. 431 (N.D. Ind. 1961), *aff'd*, 324 F.2d 150 (7th Cir. 1963), *cert. denied*, 376 U.S. 943 (1964); *Degan v. Steinbrink*, 195 N.Y.S. 810 (N.Y. App. Div. 1922), *aff'd*, 142 N.E. 328 (N.Y. 1923).

request that the Opinion Giver retain local counsel in the foreign jurisdiction to render such opinion. There are at least three different ways in which the opinion of such local counsel may be communicated to the Opinion Recipient, each of which poses its own set of considerations as to the responsibility of the Opinion Giver for the opinions rendered by local counsel.

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

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

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

Second, the Opinion Giver may request that local counsel address the requested opinion to the Opinion Giver, the Opinion Recipient, or both, and the Opinion Giver, in turn, delivers the opinion of local counsel to the Opinion Recipient with the statement that the Opinion Giver "concurs" in the opinion of the local counsel. Alternatively, the Opinion Giver may request that local counsel address the opinion only to the Opinion Giver who re-makes the opinion of local counsel as the opinion of the Opinion Giver. The Committee believes that expressing concurrence with the opinion of local counsel or re-making such opinion may imply that the Opinion Giver has verified the accuracy of local counsel's opinion by independent examination of the laws of the foreign jurisdiction. If an opinion letter incorporating the Interpretive Standards does not expressly state concurrence in local counsel's opinion, no such concurrence is implied.

Third, the Opinion Giver may require that the opinion of local counsel be addressed and delivered directly to the Opinion Recipient without the Opinion Giver's concurring in or re-making the opinion of local counsel. In such case, the Committee believes the Opinion Giver has no responsibility for errors in the local counsel's opinion. The Opinion Giver may be requested to advise the Opinion Recipient that the Opinion Giver believes the Opinion Recipient is justified in relying on local counsel's opinion. Such advice means that Opinion Giver believes that, based upon Other Counsel's professional reputation, it is competent to render its opinion. Interpretive Standard 9 addresses the Opinion Giver's responsibility for an opinion of Other Counsel.

Opinion Givers selecting local counsel in connection with legal opinions involving the laws of a foreign jurisdiction must act with due care in making that selection.<sup>90</sup> Additionally, certain cases have suggested that the Opinion Giver has a duty to supervise local counsel in the

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<sup>90</sup> See, e.g., *Wildermann v. Wachtel*, 267 N.Y.S. 840 (N.Y. Sup. Ct. 1933).

preparation of local counsel's opinion.<sup>91</sup> However, the Committee believes that, assuming that the Opinion Giver has acted with due care in selecting local counsel, there is no duty to supervise the work of local counsel beyond seeing that local counsel is apprised of those facts local counsel believes necessary for local counsel to know in giving local counsel's opinion and furnishing local counsel copies of the Loan Documents and related materials which local counsel requests or which the Opinion Giver believes necessary for local counsel to receive in order to be fully apprised of the matters upon which local counsel is requested to opine.

**4.04 No Implied Opinions on Certain Matters.** The Documents should specify in reasonable detail the issues upon which legal opinions are to be given, and the Opinion Recipient has the burden of requesting the specific legal opinions that the Opinion Recipient deems significant. Except for implications essential to the conclusion reached in an expressed opinion and reasonable in the circumstances, the Opinion Recipient may not assume that other legal opinions are included by implication in any opinion. The Committee believes that opinions on the following issues, which are sometimes believed implied in other expressed opinions, are of such importance or are so often unsuitable for conclusory treatment under Georgia law that they should be specifically identified in the Loan Documents if they are to be given and, unless so identified, are not to be deemed included by implication in any opinions expressed in opinion letters incorporating the Interpretive Standards:<sup>92</sup>

- (1) Local law
- (2) Antitrust and unfair competition law
- (3) Securities law
- (4) Fiduciary obligations
- (5) Pension and employee benefit law, e.g., ERISA
- (6) Regulations G, T, U and X of the Board of Governors of the Federal Reserve System
- (7) Fraudulent transfer law
- (8) Environmental law
- (9) Zoning, land use, subdivision and other development laws

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<sup>91</sup> *In Re Roel*, 144 N.E. 2d 24 (N.Y. 1957), *appeal dismissed*, 355 U.S. 604 (1958); *Tormo v. Youak*, 398 F. Supp. 1159 (D. N.J. 1975); *Bluestein v. State Bar of Cal.*, 529 P.2d 599 (Cal. 1974).

<sup>92</sup> This list of matters is modified from the corresponding list in Section 4.04 of the *Corporate Report*, *supra* note 1, at 33-34, and is also set forth in Interpretive Standard 2 of this Report. The list in §4.04 of the *Corporate Report* includes as exceptions usury law and law concerning "creation, attachment, perfection or priority of a security interest." These exceptions have been deleted in the list in this Report; the exceptions in items (19), (20) and (21) have been added, and item (9) has been broadened from the *Corporate Report* to include zoning and similar laws.

- (10) Hart-Scott-Rodino, Exon-Florio and other laws related to filing requirements, other than charter-related filing requirements, such as requirements for filing articles of merger
- (11) Bulk transfer law
- (12) Tax law
- (13) Patent, copyright, trademark and other intellectual property law
- (14) Racketeering law, e.g., RICO
- (15) Criminal statutes of general application, e.g., mail fraud and wire fraud
- (16) Health and safety law, e.g., OSHA
- (17) Labor law
- (18) Law concerning national or local emergency
- (19) The status of title to the Property or the priority of any lien on or security title to the Property
- (20) Law concerning access by the disabled and building codes
- (21) Laws concerning anti-terrorism or money laundering, and the rules, regulations, and policies promulgated thereunder, including the USA PATRIOT Act of 2001, 107 Public Law 56 (October 26, 2001), Executive Order 13224 effective September 24, 2001, and the International Emergency Economic Power Act, 50 U.S.C. §1701 et seq., and any foreign asset control regulations of the United States Treasury Department

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

## **V. THE MODEL CORPORATE STATUS OPINION<sup>93</sup>**

*Borrower was incorporated and duly organized as a corporation under the laws of the State of Georgia. Borrower is existing and in good standing under the laws of the State of Georgia. (Model Corporate Status Opinion)*

*[or]*

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<sup>93</sup> Section V is based on Section V of the *Corporate Report*, *supra* note 1, at 35-46, with modifications for purposes of consistency with other sections of this Report and internal cross-reference.

*Borrower is a corporation existing and in good standing under the laws of the State of Georgia. (Alternative Model Corporate Status Opinion)*

## COMMENT

**5.01 Purpose and Background of the Model Corporate Status Opinion.** The Opinion Recipient in a secured real estate transaction has legitimate concerns about whether or not a purported corporation is a corporation and its standing with the state authorities through which it was created.<sup>94</sup> The form of organization will determine the formalities required to conduct business generally and to engage in a particular transaction and the assets that can be reached in the event of a default. If an entity is not properly organized as a corporation, actions taken by or on behalf of the entity may be void as lacking corporate authority, its creditors may be able to reach its owners' assets and creditors of its owners may be able to reach its assets.<sup>95</sup> A corporation's standing with the relevant state regulatory authorities will affect its ability to conduct business and enter into contracts, as well as the ability of a third party to pursue claims against the corporation.

Two alternative Model Corporate Status Opinions are discussed in Sections 5.02 and 5.03. The Model Corporate Status Opinion consists of four primary elements: (A) incorporation, (B) due organization, (C) continuing existence and (D) good standing. For reasons discussed more fully in Section 5.03, it may be inappropriate under a cost/benefit analysis for the Opinion Giver to be required to provide the Model Corporate Status Opinion for a particular corporation, for example, for certain corporations incorporated under predecessors of the Georgia Business Corporation Code ("GBCC").<sup>96</sup> Under such circumstances, the alternative Model Corporate Status Opinion set forth above (the "Alternative Model Corporate Status Opinion") may be used instead, subject to the caution expressed below in Section 5.03.

## 5.02 Elements of the Model Corporate Status Opinion.

**A. Incorporation.** The phrase "was incorporated" means that Borrower properly complied with Georgia's statutory requirements for incorporation. Such compliance must be evaluated by reference to the statutory requirements in effect at the time of incorporation. The following is an analysis of the requirements for "incorporation" under the GBCC, as in effect at the time of this Report. Though this analysis would not be directly applicable to corporations formed under predecessors of the GBCC, an Opinion Giver would employ a similar analysis under predecessor corporate laws or under the corporate laws of other jurisdictions.

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<sup>94</sup> See generally FIELD & SMITH, *supra* note 30, § 9:3; Scott FitzGibbon & Donald W. Glazer, *Legal Opinions on Incorporation, Good Standing, and Qualification to do Business*, 41 BUS. LAW. 461 (1986); See Richard T. McDermott, *Legal Opinions on Corporate Matters*, in LEGAL OPINION LETTERS 3-12 (M. John Sterba, Jr. ed., Supp. 2006); Rhys T. Wilson, *Analysis of Specific Provisions of a Typical Corporate Opinion: The Corporate Status Opinion* (Eighth Annual Corp. & Banking Law Inst., Institute of Continuing Legal Education in Ga., 1989).

<sup>95</sup> See, e.g., *Miller v. Berman*, 95 S.E.2d 319 (Ga. Ct. App. 1956); see also FitzGibbon & Glazer, *supra* note 94, at 463.

<sup>96</sup> See *infra* note 124.

This element of the Model Corporate Status Opinion confirms (i) that the form and content of the corporation's articles, on their face and based on the assumptions otherwise permitted under this Report,<sup>97</sup> satisfy the requirements of Sections 120 and 202(a) and (ii) that such articles were filed in accordance with the procedural requirements of Section 120. The manner in which the Opinion Giver should examine Borrower's articles is described below in Section 5.05.<sup>98</sup>

Under Section 203(a) of the GBCC, unless a delayed effective date is specified, corporate existence begins when the articles of incorporation are filed. Section 202(a) of the GBCC lists the five items that must be set forth in the articles<sup>99</sup> and Section 120 of the GBCC, which standardizes the filing requirements for all documents filed with the Secretary of State, adds requirements as to format, execution and delivery of the articles.<sup>100</sup>

Section 203(b) of the GBCC states that the filing by the Secretary of State of articles of incorporation is *conclusive proof* that the incorporators satisfied all conditions precedent to incorporation, except in proceedings by the state to cancel or revoke the incorporation or to involuntarily dissolve the corporation. Section 203(b) of the GBCC raises the question of whether or not the Opinion Giver may rely exclusively upon filing of the articles of incorporation by the Secretary of State in establishing the "due incorporation" element of the Model Corporate Status Opinion. In the absence of any cases, the only discussion of the question has been by commentators. One commentator states that "[o]rdinarily there is a need to investigate whether incorporation was proper" because the presumption of validity obtained from a certificate is "usually a rebuttable one."<sup>101</sup> A New York bar association report on legal opinions suggests that:

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<sup>97</sup> These qualifications - that the Opinion Giver's examination of the articles is limited "to their face" and may be based on the type of assumptions otherwise appropriate - limit the scope of the required examination. For example, the Opinion Giver may conclude that the corporate name satisfies the requirements of GBCC Section 401 without having to consider whether or not the name is distinguishable from the names of all other corporations incorporated or transacting business in Georgia. The Opinion Giver may rely on assumptions discussed in Section 2.08 of this Report.

<sup>98</sup> Under Section 127 of the GBCC, a copy of the articles of incorporation certified by the Secretary of State is prima-facie evidence of the filing of the original with the Secretary of State. The GBCC departed from the Model Corporate Act (which made the certificate *conclusive* evidence of filing) to allow for the possibility of fraud or collusion between an employee of the Secretary of State and the person obtaining the certified articles. See O.C.G.A. § 14-2-127 cmt. (2003).

<sup>99</sup> The five items specified by Section 202(a) of the GBCC are (1) a corporate name satisfying the requirements of Section 401 of the GBCC, (2) the number of authorized shares, (3) the address and county of the corporation's initial registered office and the name of its initial registered agent at that office, (4) the name and address of each incorporator and (5) the mailing address of the corporation's initial principal office.

<sup>100</sup> Section 120 of the GBCC requires that articles be (1) typewritten or printed, (2) in the English language, (3) executed by an incorporator (with an appropriate indication of the person's name and capacity) and (4) delivered to the Secretary of State for filing, accompanied by (a) an exact or conformed copy, (b) the correct filing fee and (c) a certificate as to publication of a notice of intent to file articles.

<sup>101</sup> FIELD & SMITH, *supra* note 30, § 9:3.1[A].

Reliance upon a certificate . . . is ordinarily not justified because such official has not verified that the certificate [of incorporation] met the statutory incorporation requirements on the filing date. Nevertheless, if a historical reconstruction of statutory materials is unduly burdensome or impossible, such certificate [of the Secretary of State] may provide the only available basis for an opinion and it may be possible to rely solely on the certificate with appropriate disclosure. See N.Y.-BCL § 403 which gives the Attorney General power to contest incorporation.<sup>102</sup>

On the other hand, a California report, discussing a statute like Georgia's in which filing of the articles of incorporation is conclusive evidence of formation and *prima facie* evidence of existence (except in the case of action by the Attorney General), suggests that a certificate of the Secretary of State "typically gives lawyers satisfactory assurance with respect to the corporation's due incorporation."<sup>103</sup> The Committee believes that the ability of the state to challenge the incorporation under Section 203(b) of the GBCC should not affect the ability of counsel to give a "was incorporated" opinion because the opinion would be correct when given even if incorporation were subsequently cancelled.

Close analysis of Georgia law suggests that exclusive reliance on a certificate without a further corporate records examination should be acceptable in Georgia, even though questionable in other states, because of the extremely limited basis for the state to challenge incorporation in Georgia. Section 203(b) of the GBCC is derived from Model Corporate Act Section 2.03, which contains the sole exception to conclusive proof of filing for state action "to cancel or revoke the incorporation or involuntarily dissolve the corporation." The comment to Model Corporate Act Section 2.03 and its predecessors, Section 50 of the 1950 and 1960 Model Corporate Acts and Section 56 of the 1969 Model Corporate Act, suggests that the exception for state action to cancel or revoke was required by the "inherent powers of the Attorney General or powers usually conferred on his office under general statutes not restricted to corporations." Fletcher discusses *quo warranto* as the appropriate remedy for a state to question persons who "associate[] or assume[] to act as a corporation without any statutory authorization or compliance with statutory requirements for incorporation."<sup>104</sup> A footnote to the quoted words cites cases in thirteen states, not including Georgia, where a *quo warranto* proceeding lay to challenge incorporation.

However, in Georgia *quo warranto* is limited to two explicit events. One is the forfeiture of the articles of incorporation of financial institutions for grounds specified in the Georgia Code.<sup>105</sup> The other is an inquiry into the right of any person to public office.<sup>106</sup> Furthermore,

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<sup>102</sup> Special Committee on Legal Opinions in Commercial Transactions of the New York County Lawyers' Association et al., *supra* note 22, at 1905, n. 19.

<sup>103</sup> Committee on Corps. of the State Bar of Cal., *1989 Report of the Committee on Corporations of the Business Law Section of the State Bar of California Regarding Legal Opinions in Business Transactions*, 45 BUS. LAW. 2169, 2202 (1990).

<sup>104</sup> 5A WILLIAM M. FLETCHER, FLETCHER CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS § 2331 (perm. ed. rev. vol. 2004).

<sup>105</sup> O.C.G.A. § 7-1-92 (1994).

<sup>106</sup> O.C.G.A. § 9-6-60 (2007).

Georgia limits by statute the authority of the Attorney General.<sup>107</sup> Unless the authority of the Attorney General “to cancel or revoke the incorporation” is expressed by statute, no such authority exists. This was affirmed by a Georgia Supreme Court decision holding that the Attorney General was without authority to institute an equitable action in the name of the state to enjoin a domestic corporation from doing acts alleged to be *ultra vires*.<sup>108</sup> The only statutory references found under Georgia law which would appear to authorize any inquiry by the state into incorporation are GBCC Section 1420, authorizing administrative dissolution for post-incorporation failures to file, pay, publish or maintain an office or agent, and GBCC Section 1430 for judicial dissolution in a proceeding by the Attorney General. Section 1430 provides for judicial dissolution only if (i) the corporation obtained its articles of incorporation through fraud or (ii) the corporation has continued to exceed or abuse the authority conferred upon it by law.

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

**B. Due Organization.** The phrase “duly organized as a corporation” means that Borrower properly complied with Georgia’s statutory requirements for organization. Such compliance must be evaluated by reference to the statutory requirements in effect at the time of organization. The following is an analysis of the requirements for “organization” under the GBCC, as in effect at the time of this Report. Though this analysis would not be directly applicable to corporations formed under predecessors of the GBCC, an Opinion Giver would employ a similar analysis under predecessor corporate laws or under the corporate laws of other jurisdictions.

“Due organization” begins with the requirement that the corporation be duly incorporated, but requires that additional actions be taken after the incorporation is completed. The Comment to Section 205 of the GBCC indicates that “organization” must be completed so that the new

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<sup>107</sup> O.C.G.A. § 45-15-3 (1990).

<sup>108</sup> Walker *ex. rel.* Mason v. Ga. Ry. & Power Co., 92 S.E. 57 (Ga. 1917).

corporation may engage in business.<sup>109</sup> Although the commentators have taken varying positions as to what constitutes “due organization,” much of this controversy may arise from the fact that state statutes impose varying requirements for commencing corporate activity. The situation is further complicated by the fact that the requirements for organization in a particular state may be scattered throughout its corporate code.<sup>110</sup>

Against this background, Section 205 of the GBCC provides a clear statement of the steps required for a Georgia corporation to be properly organized. A corporation has been “duly organized” under the GBCC if, after proper incorporation: (i) initial directors were either named in the articles or elected by the incorporators at an organizational meeting; (ii) a duly called organizational meeting of directors or incorporators (as applicable) was held (or a unanimous written consent was executed by the incorporators or directors); and (iii) at the organizational meeting (or by the written consent), officers were appointed, bylaws were adopted and whatever other business was brought before the meeting was transacted.<sup>111</sup> The “duly organized” element of the Model Corporate Status Opinion confirms that each of these requirements was satisfied.<sup>112</sup>

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

Where the Opinion Giver is unable to confirm satisfactorily the organizational process, the “due organization” element of the Model Corporate Status Opinion may be given, in appropriate circumstances, based upon reliance by the Opinion Giver on the presumption of regularity and continuity with respect to the due organization of Borrower.<sup>113</sup>

**C. Continuing Existence.** The third element of the Model Corporate Status Opinion is that Borrower “is existing”. This phrase indicates that Borrower continues to exist as a

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<sup>109</sup> See also *Ward-Truitt Co. v. Bryan & Lamb*, 87 S.E. 1037 (Ga. 1916); *Brooke v. Day*, 59 S.E. 769 (Ga. 1907); *Rau v. Union Paper-Mill Co.*, 22 S.E. 146 (Ga. 1894); *Miller v. Berman*, 95 S.E.2d 319 (Ga. Ct. App. 1956); *Michael Bros. Co. v. Davidson & Coleman*, 60 S.E. 362 (Ga. Ct. App. 1908).

<sup>110</sup> See *FIELD & SMITH*, *supra* note 30, § 9:3.1[B] n.13 (discussing the requirements for organization under New York law).

<sup>111</sup> See O.C.G.A. §§ 14-2-840 (regarding required officers), 14-2-206 (regarding the required content of bylaws). While a corporation is required to have bylaws, the GBCC does not impose requirements as to their contents.

<sup>112</sup> While the comment to Section 205 of the GBCC suggests that the “raising of equity capital by the issuance of shares” is usually required to organize a corporation, the Committee has determined that this is not an element of organization required under Section 205.

<sup>113</sup> See *supra* § 2.09.

corporation as of the date of the opinion.<sup>114</sup> The following discussion is also relevant where the Alternative Model Corporate Status Opinion is used.

Under the GBCC, there are only four occurrences that could cause a Georgia corporation to cease to exist. These events are: (i) expiration of any period of duration stated in its articles of incorporation<sup>115</sup>, (ii) merger into another corporation,<sup>116</sup> (iii) voluntary dissolution, either prior to issuing shares and commencing business<sup>117</sup> or thereafter,<sup>118</sup> or (iv) involuntary dissolution either administrative dissolution<sup>119</sup> or judicial dissolution<sup>120</sup>. Accordingly, either the Model Corporate Status Opinion or the Alternative Model Corporate Status Opinion confirms that none of these four events has occurred.

**D. Good Standing.** Although there is no codified definition of the term “good standing” in application either to corporations or partnerships under Georgia law, a “good standing” opinion traditionally has been requested by Opinion Recipients in order to confirm certain matters. For the reasons set forth below in this Section 5.02D, an opinion that a Georgia corporation is in “good standing” means that (i) the corporation has not filed a notice of intent to dissolve under GBCC Section 1403, (ii) the Secretary of State has not signed a certificate of dissolution with respect to the corporation, (iii) the Superior Court of the county in which the registered office of the corporation is located has not entered a decree ordering the corporation dissolved and (iv) Borrower has satisfied its tax and annual registration requirements under Section 1420 of the GBCC.

If any of the requirements set forth in (i), (ii) or (iii) of the last sentence has not been satisfied, the corporation would be considered to be “in dissolution.” While the corporation’s legal “existence” would continue until the conclusion of such proceedings, and counsel who was unaware of such proceedings could render the “is existing” element of either the Model Corporate Status Opinion or the Alternative Model Corporate Status Opinion, the corporation’s ability to conduct business would be limited and the GBCC would impose special requirements for suits by its creditors.

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<sup>114</sup> In many instances, Opinion Recipients request an opinion that a corporation is “validly existing.” The Committee has concluded that, in this context, the word “valid” is used only for emphasis since a corporation that exists also validly exists. *See, e.g.,* Noel J. Para, *Opinions in Commercial Finance and Banking Transactions*, in LEGAL OPINION LETTERS 4-23 (M. John Sterba, Jr. ed., Supp. 2007) (“‘Valid existence’ refers perhaps more to the absence of a permanent cessation of borrower’s existence . . .”). The use of “valid” does not, therefore, imply any change in the scope of the Opinion Giver’s investigation. Accordingly, the Committee has omitted the term from the model opinion.

<sup>115</sup> O.C.G.A. § 14-2-302. A corporation organized under the GBCC will have perpetual duration unless a limited period of duration is stated in its articles. *See also* O.C.G.A. § 14-2-1409 (revival of corporation whose existence has been terminated by self-imposed period of duration).

<sup>116</sup> O.C.G.A. § 14-2-1106(a)(1).

<sup>117</sup> O.C.G.A. § 14-2-1401.

<sup>118</sup> O.C.G.A. § 14-2-1408(b).

<sup>119</sup> O.C.G.A. § 14-2-1421.

<sup>120</sup> O.C.G.A. § 14-2-1433(c).

As described above in Section 5.02C, a Georgia corporation may cease to exist as a result of either voluntary or involuntary dissolution proceedings or at the expiration of any term indicated in its articles. Although a corporation's legal "existence" will continue while voluntary or involuntary dissolution proceedings are pending,<sup>121</sup> at a certain point in each type of proceeding, the GBCC imposes limits on the power of the corporation to continue to conduct business.<sup>122</sup> Lacking a codified definition of "good standing" or any use of the term in the GBCC,

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<sup>121</sup> Although counsel could render the "existing corporation" opinion while there are grounds for involuntary dissolution or after the commencement of dissolution proceedings, an accurate presentation of either opinion may require disclosure of any such grounds or proceedings known to the Opinion Giver. See FIELD & SMITH, *supra* note 30, § 9:3.1[C]; see also *supra* § 1.06.

<sup>122</sup> The procedure for *voluntary dissolution* would typically involve (1) recommendation of dissolution by the board of directors, (2) approval of dissolution by the shareholders, (3) publication of a notice of intent to dissolve, (4) delivery of this notice to the Secretary of State (after which the corporation is considered to be "in dissolution"), (5) the corporation's winding up and liquidating its business and affairs, and (6) after the debts and obligations of the corporation have been paid or provided for, delivery of articles of dissolution to the Secretary of State for filing. See O.C.G.A. §§ 14-2-1402 to 1408 (2003 & Supp. 2008). The corporation's ability to conduct business is limited upon filing the notice of intent to dissolve (step 4) and it ceases to exist upon filing articles of dissolution (step 6). See O.C.G.A. §§ 14-2-1405 (notice of intent to dissolve), -1408(b) (articles of dissolution) (2003). The Committee has concluded that the corporation should not be considered to be in good standing during this interim period, i.e., while it is "in dissolution."

The Secretary of State may commence *administrative dissolution* proceedings if (1) the corporation has failed to file a license or occupation tax return and pay such taxes for a specified period, as certified by the Georgia Revenue Commissioner, (2) the corporation has not delivered its annual registration and fees to the Secretary of State, (3) the corporation has been without a registered agent or office in Georgia, (4) the corporation has failed to notify the Secretary of State of changes in its registered agent or office, or (5) the corporation has paid a fee to the Secretary of State by a check or other payment method which is dishonored, or (6) the corporation has failed to publish certain required notices. See O.C.G.A. § 14-2-1420 (2003). Such proceedings require (1) written notice to the corporation (specifying the grounds for dissolution) by first-class mail, (2) a 60 day period for the corporation to correct any problem or challenge the grounds alleged and (3) the signing of a certificate of dissolution by the Secretary of State. See O.C.G.A. § 14-2-1421 (2003). Upon the signing of this certificate, the entity's corporate existence continues, but its ability to conduct business is limited. O.C.G.A. § 14-2-1421(c) (2003). The Committee has concluded that the corporation should not be considered to be in good standing after the certificate of dissolution is signed, but remains in good standing until that time.

Proceedings for *judicial dissolution* may be brought by (1) the state Attorney General, (2) a shareholder, (3) a creditor or (4) after a corporation has commenced voluntary dissolution proceedings, by the corporation itself. See O.C.G.A. § 14-2-1430 (2003) (setting forth different grounds for each category of plaintiff). Such proceedings would typically involve (1) the commencement of an action by a proper plaintiff, (2) the corporation's seeking a stay while contesting the alleged grounds, (3) in the court's discretion, the appointment of receivers or custodians to wind up or manage the corporation's affairs, (4) the court's entering a decree ordering the corporation dissolved, with the decree delivered to and filed by the Secretary of State, (5) the winding up and liquidation of the corporation, under the court's direction and (6) the court's entering a decree of dissolution, with the decree filed with the Secretary of State. See O.C.G.A. §§ 14-2-1430 to -1433. The decree ordering dissolution (step 4) has the same effect as a notice of intent to dissolve (so that the corporation's ability to conduct business is limited), and the decree of dissolution (step 6) has the same effect as articles of dissolution (so that the corporation then ceases to exist). O.C.G.A. § 14-2-1433 (2003). The Committee has concluded that the corporation should not be considered to be in good standing after the court enters a decree ordering the corporation dissolved.

the Committee has determined that if voluntary or involuntary dissolution proceedings have been commenced, the corporation should not be considered to be in “good standing”.

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

As described above,<sup>123</sup> a corporation’s failure to file a license or occupation tax return and to pay such taxes or its failure to satisfy annual registration and fee requirements would constitute grounds for the Secretary of State to commence dissolution proceedings. While the mere existence of such grounds would not limit the corporation’s power to conduct its business, it has become traditional for counsel to inquire into these matters in rendering the “good standing” opinion. Such inquiries are relatively easy to conduct. Because of this tradition, the Committee has determined that the opinion that a Georgia corporation is in “good standing” should serve to confirm that the corporation has satisfied the tax and annual registration requirements described in GBCC Section 1420.

**5.03 Elements of the Alternative Model Corporation Status Opinion.** Because corporate records documenting the organizational process may be unavailable or incomplete, or because of difficulties in confirming the completion of the organizational process under a predecessor of the GBCC,<sup>124</sup> the Opinion Giver may be unable or unwilling to give the “was incorporated and duly organized” elements of the Model Corporate Status Opinion. In other cases, requiring an opinion on incorporation and due organization, as opposed to an opinion addressing only the existence in good standing of Borrower, may be unnecessary in the context of the particular transaction or may, due to the costs of examination of the incorporation process, burden the transaction with unwarranted expense. Therefore, the Committee has concluded that, in these and comparable situations, the Opinion Giver, as an alternative to giving the Model Corporate Status Opinion with respect to the incorporation and “due organization” of Borrower, may render the Alternative Model Corporate Status Opinion based solely on a review of articles of incorporation certified by the Secretary of State and by confirmation that Borrower’s existence in good standing has not ceased as described in Section 5.02C and Section 5.02D. This opinion

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<sup>123</sup> See *supra* note 122.

<sup>124</sup> The procedure for incorporation under Georgia’s 1933 Code serves to illustrate the difficulty of determining whether or not an entity was properly incorporated under predecessors of the GBCC. The procedure required clearance of the corporate name by the Secretary of State, the filing of a petition for charter with the Superior Court of the county in which the incorporators desired to transact business, approval by a Superior Court judge, recording of the petition and the order by the Court Clerk, filing with the Secretary of State, and publication of the petition for four weeks in the public newspaper nearest to the proposed place of business. See Sigmund A. Cohn & Robert N. Leavell, *Georgia’s Corporation Law: Is it Adequate?* 2 GA. ST. B.J. 153 (1965). Article III, Section VII, Paragraph XVII of the Georgia Constitution of 1877 provided that the General Assembly could confer authority to grant corporate powers and privileges to ordinary private corporations (as distinguished from banking, insurance, railroad, canal, navigation, express and telegraph companies) only upon Superior Court judges. It was only after a 1976 constitutional amendment that the Georgia Code was amended to provide for filings of articles of incorporation directly with the Secretary of State.

serves to confirm that the State of Georgia recognizes the existence of Borrower as of the date of the opinion and is limited in its ability to challenge the incorporation. More importantly, the opinion provides comfort that third parties (other than the state) may not challenge the incorporation. Where the Opinion Recipient has questions or concerns about a particular aspect of the incorporation process, the Opinion Recipient may request an additional opinion as to that aspect.

Participants in a Loan Transaction should always consider whether or not it is sufficient for the Opinion Giver to give the Alternative Model Corporate Status Opinion in lieu of the Model Corporate Status Opinion. The following factors should be considered in determining if the alternative opinion should be substituted for the Model Corporate Status Opinion: (i) whether Borrower was formed under the GBCC or under a predecessor statute, (ii) whether or not the Opinion Giver participated in the organization process, (iii) whether or not Borrower's records are adequate to reconstruct the incorporation process, and (iv) whether or not any particular aspects of the Loan Transaction require that the entire incorporation process be examined.

#### **5.04 Additional Notes Regarding the Model Corporate Status Opinion.**

**A. Alternative Model Corporate Status Opinion.** Section 5.02C and Section 5.02D relating to continuing existence and good standing, respectively, are equally relevant and applicable to the Alternative Model Corporate Status Opinion.

**B. Type of Corporation.** The phrase “was incorporated and duly organized as a corporation” or “is an existing corporation” serves to confirm that Borrower is not organized under a statute other than the GBCC, such as those governing nonprofit corporations, Secretary of State corporations or professional corporations.<sup>125</sup>

**C. Status for Other Purposes.** Unless otherwise expressly indicated, either the Model Corporate Status Opinion or the Alternative Model Corporate Status Opinion refers only to the status of Borrower under the GBCC and does not refer to Borrower's status for tax, regulatory or other purposes.<sup>126</sup> For example, the opinion does not address the issue of whether or not the “corporate veil” would be recognized or pierced.

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

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<sup>125</sup> Nonprofit corporations are formed under the Georgia Nonprofit Corporation Code, O.C.G.A. §§ 14-3-101 to -1703 (1994 & Supp. 1997); Secretary of State corporations are formed under various statutes which have been recompiled in O.C.G.A. §§ 14-4-1 to -183; and professional corporations are created under the Georgia Professional Corporation Act, O.C.G.A. §§ 14-7-1 to -7.

<sup>126</sup> See FitzGibbon & Glazer, *supra* note 94, at 463

although the opinion should make reference to any deficiency that it is known to the Opinion Giver.<sup>127</sup>

**E. Continuing Corporate “Housekeeping”.** The Opinion Giver should express the “duly organized” opinion in the past tense to indicate clearly that it does not relate to operational matters occurring after the initial organization of Borrower. By rendering either the Model Corporate Status Opinion or the Alternative Model Corporate Status Opinion, the Opinion Giver is not obligated to monitor organizational elements, such as the election of officers or bylaw amendments after the initial organization of Borrower.

**5.05 Practice Procedure for Either Model Corporate Status Opinion.** In order to render the Model Corporate Status Opinion, the Opinion Giver must examine four elements: (i) incorporation, (ii) due organization, (iii) continuing existence and (iv) good standing. In order to deliver the Alternative Model Corporate Status Opinion, the Opinion Giver may rely on a certificate of the Secretary of State and review of the articles as to incorporation, but must examine the two elements referenced in (iii) and (iv) of the preceding sentence.

**A. Incorporation.** The Committee recommends that in rendering an opinion that an entity “was incorporated,” the Opinion Giver should:

1. obtain a copy of the business corporation code in effect at the time of organization;
2. obtain a certified copy of the articles of incorporation from the Secretary of State;
3. examine the certified articles of incorporation to ensure that the five items required by Section 202(a) (or corresponding items of any predecessor to the GBCC) are included and that the articles are otherwise in proper form for filing;

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

1. obtain a copy of the business corporation code in effect at the time of organization;
2. examine Borrower’s minute book or other appropriate evidence of corporate action to confirm that a proper organizational meeting was held or that such corporate action was approved by the appropriate unanimous written consent of the shareholders or directors, as the case may be; and
3. obtain the officer’s certificate described in Section 5.05D.5 below.

**C. Continuing Existence or “Is Existing”.** The Committee recommends that in rendering an opinion that an entity “is existing”, the Opinion Giver should:

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<sup>127</sup> See, e.g., *supra* notes 121, 122 & 124.

1. obtain a certified copy of the articles of incorporation and all amendments from the Secretary of State and examine the certified articles to ensure that no term of duration is stated, that any stated term has not expired or that the articles provide for perpetual duration;<sup>128</sup>
2. obtain a Certificate of Existence from the Secretary of State;
3. examine Borrower's minute book for evidence of merger or dissolution proceedings or otherwise establish the absence thereof; and
4. obtain the officer's certificate described in Section 5.05D.5 below.

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

1. obtain and examine a certified copy of the articles of incorporation and all amendments and examine them as provided in the preceding paragraph;
2. obtain a Certificate of Existence from the Secretary of State to confirm that there is compliance with annual filing and registration requirements and that articles of dissolution have not been filed;
3. obtain a Tax Clearance Certificate from the State Department of Revenue with respect to the payment of license and occupation taxes,<sup>129</sup> alternatively, include an appropriate certification regarding the payment of such taxes in the officer's certificate described in Section 5.05D.5 below;
4. examine Borrower's minute book for evidence of merger or dissolution proceedings or otherwise establish the absence thereof; and
5. obtain a certificate, dated the date of the Opinion Letter, of Borrower's corporate secretary or other appropriate officer, certifying that:
  - (a) Borrower has not received any notice from the Secretary of State of a determination that any grounds exist for administratively dissolving Borrower;
  - (b) Borrower has not received notice of the commencement of any judicial action dissolve Borrower;
  - (c) the Superior Court of the county in which the registered office of the corporation is located has not entered a decree ordering Borrower dissolved;

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<sup>128</sup> Various predecessors of the 1968 Code provided that corporations would have limited durations ranging from 14 years (under the 1861 Code) to 35 years (under the 1933 Code). Under Section 202(a)(2) of the 1968 Code, all Georgia corporations in existence on the effective date of that Code were deemed to have perpetual existence, despite any contrary provisions in their charters.

<sup>129</sup> It is necessary to have Company send a letter to the Georgia Department of Revenue authorizing the release of a Tax Clearance Certificate.

(d) neither the board of directors nor the shareholders of Borrower have taken any action with respect to the dissolution of Borrower;

(e) Borrower has not filed any notice of intent to dissolve with the State of Georgia; and

(f) If a Tax Clearance Certificate with respect to the payment of license and occupation taxes is not obtained, Borrower has paid all license and occupation taxes due under Section 1420 of the GBCC.

## VI. THE MODEL CORPORATE POWERS OPINION<sup>130</sup>

*Borrower has the power to execute and deliver the Loan Documents, to perform its obligations under the Loan Documents, to own and use the Property and to conduct its business.*

### COMMENT

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

**6.02 Elements of the Model Corporate Powers Opinion.** The Model Corporate Powers Opinion means that, pursuant to the GBCC and Borrower's articles of incorporation, Borrower's corporate purposes and powers are such that it can (i) enter into binding contractual obligations by executing and delivering the Loan Documents, (ii) perform all of its obligations under the Loan Documents, (iii) own, lease or license and use the Property as it currently is owned, leased or licensed and used by Borrower, and (iv) conduct its business as it is currently being conducted.

**A. Assumed Opinions.** The Model Corporate Powers Opinion is based on an assumption that the Model Corporate Status Opinion could also be given. The Opinion Giver may rely on this assumption subject to the standards of unwarranted reliance.<sup>131</sup> In circumstances where reliance on this assumption is unwarranted, or in any case in which the Opinion Giver determines that the Model Corporate Status Opinion cannot be given, the Committee has concluded that the Opinion Giver cannot render the Model Corporate Powers Opinion. This conclusion is based upon the Committee's view that the proper incorporation of Borrower is a necessary prerequisite to the ability of the Opinion Giver to deliver an opinion that Borrower has the powers described in the Model Corporate Powers Opinion.<sup>132</sup>

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<sup>130</sup> Section VI is based on Section VI of the *Corporate Report*, *supra* note 1, at 47-57, with modifications for purposes of consistency with other sections of this Report and internal cross-reference.

<sup>131</sup> *See supra* §§ 1.06, 2.07B.

<sup>132</sup> *See supra* § 1.06.

The Committee believes that a persuasive interpretation of Section 205 of the GBCC requires that the corporation must be “duly organized” before it has the power to act. Accordingly, the ability to give the Model Corporate Powers Opinion may be impaired if the Model Corporate Status Opinion cannot be given and only the Alternative Model Corporate Status Opinion can be given because of the inability to give an opinion as to “due organization” of the Borrower.<sup>133</sup>

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

**C. Performance of Obligations.** The Model Corporate Powers Opinion extends to all obligations to be performed by Borrower under the Loan Documents. However, the Opinion Recipient may request that the Opinion Giver refer specifically to certain obligations of Borrower deemed critical to consummation of the Loan Transaction. Delineation of such obligations does not mean that obligations not specifically listed are not covered by the opinion or are less material than those listed. Performance, based on the principles discussed at Section 2.01, means performance on the date of the Opinion Letter and under the circumstances then presented.

**D. Ownership and Use of Property.** The Model Corporate Powers Opinion should be interpreted to cover every manner in which Borrower has rights in the Property, including, but not limited to, by ownership, lease or license, and every manner in which Borrower uses the Property. The phrase “own and use” in the Opinion is not intended to limit the scope of the Opinion to that part of the Property owned by Borrower and includes parts of the Property leased or licensed by Borrower. However, the use of the term “Property” in the Model Corporate Powers Opinion is intended to address only that real and personal property that is the subject of the Loan Transaction, and there should be no implication that the Model Corporate Powers Opinion covers the ownership and use of any other property of Borrower.

**E. Current Conduct of Business and Ownership of Property.** The business or businesses currently being conducted by Borrower and the Property currently owned, leased or otherwise held and used by Borrower that is the subject of the Loan Transaction are all that can be verified factually at the time that the Model Corporate Powers Opinion is given. A new business or new property of Borrower should be addressed only when the Loan Transaction involves entering into a new business or acquiring new property. For example, if the Loan Transaction involves secured financing in connection with the acquisition of a new business or new property, it is appropriate for the Model Corporate Powers Opinion to cover Borrower’s power to conduct such new business and to own and use such new property.

**F. Conduct of Lawful Business; Properly Incorporated.** The Model Corporate Powers Opinion is based upon the assumption that Borrower is engaged in a lawful business as set forth in Interpretive Standard 16. Further, the Model Corporate Powers Opinion is based on the assumption that the Borrower is not required by any state law to be incorporated under any statute other than the GBCC, such as the statutes providing for incorporation as a Secretary of

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<sup>133</sup> See discussion *infra* § 7.02.

State corporation or as a professional corporation. The Opinion Giver may rely on this assumption, subject to the standards of unwarranted reliance set forth in Section 2.07.

**G. Corporate Power.** The words “power” and “authority” are often used together or interchangeably in giving the Corporate Powers Opinion. However, the Committee has used the word “power” in the Model Corporate Powers Opinion because it is used in the GBCC and because use of the word “authority” may imply that the opinion addresses other sources of or limitations on Borrower’s corporate powers. Use of the word “power” rather than “authority” in this context avoids the possibility of a misunderstanding. The Model Corporate Acts Opinion (Section VII) addresses questions of corporate authority.

The words “full,” “requisite” or “necessary” are frequently used in powers opinions in describing the power of the entity. The Committee believes that neither the term “requisite” nor the term “necessary” add anything to the scope of the Model Corporate Powers Opinion and that the use of either word should not imply any broader scope to the opinion. The word “full” should not be used in the context of a powers opinion in order to avoid any implication that the scope of the opinion extends beyond the powers of a partnership under applicable Georgia law.

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

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

The Model Corporate Powers Opinion does not mean that Borrower has obtained any consent, license, authorization or approval from its shareholders or directors or from any third parties (including governmental or regulatory entities or parties to any of Borrower’s agreements). Opinions as to these matters should be addressed, if at all, by the Model Corporate Status Opinion (Section V) and the Model Corporate Acts Opinion (Section VII).

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

The Model Corporate Powers Opinion does not address the effect on Borrower’s purposes or powers of any laws other than the GBCC, including, without limitation: (i) the laws relating to the incorporation of private and public corporate entities other than business corporations incorporated under the GBCC,<sup>134</sup> (ii) the laws of any jurisdiction in which Borrower

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<sup>134</sup> See *infra* § 6.04D.

is or should be qualified to do business as a foreign corporation; or (iii) any other laws that could create or restrict the exercise of corporate powers or purposes, such as the Glass-Steagall Act of 1932,<sup>135</sup> the Bank Holding Borrower Act of 1956,<sup>136</sup> or the Hart-Scott-Rodino Antitrust Improvements Act of 1976.<sup>137</sup>

The Model Corporate Powers Opinion does not cover any restrictions or limitations on Borrower's purposes or powers contained in a document other than its articles of incorporation, bylaws, and corporate resolutions. Opinions as to these matters and the effect of any limitations or restrictions contained in resolutions and agreements of Borrower should be covered, if at all, by the Model No Violation Opinion (Section XVI).<sup>138</sup>

#### **6.04 Additional Notes Regarding the Model Corporate Powers Opinion.**

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

Historically, corporations in the United States have been regarded as having only the powers specifically granted to them by statute because they were entities created by the state. Typically, these corporations could be formed only for specific business purposes and had powers limited solely to such purposes.<sup>139</sup> Thus, dealing with corporations presented a risk that corporate acts might be deemed ineffective, which risk was not an issue when dealing with individuals. Today, however, corporations are regarded as entities created by contract among the shareholders and, thus, their powers are limited only by agreement among the shareholders.<sup>140</sup>

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<sup>135</sup> 12 U.S.C. §§ 347a, 347b, 412 (2000).

<sup>136</sup> 12 U.S.C. §§ 1841-1844, 1846-1850, 1101-1103, 1971-1978 (1994).

<sup>137</sup> Pub. L. No. 94-435, 90 Stat. 1383 (codified in scattered sections of Titles 15, 18, and 28 U.S.C.).

<sup>138</sup> See Frank Babb et al., *Legal Opinions to Third Parties in Corporate Transactions*, 32 BUS. LAW. 553, 560 (1977) (Babb contemplates a broader concept of this opinion to include an opinion as to all laws "purporting to limit or define its corporate powers and capacities" such as the Glass-Steagall Act and suggests that the matters addressed in the fourth paragraph of Section 6.03 should be addressed by the Corporate Powers Opinion.); ARNOLD S. JACOBS, *OPINION LETTERS IN SECURITIES MATTERS: TEXT, CLAUSES, LAW 1-3, 7-1, 7-2* (Clark Boardman Co. rev. ed. 1989) (opinion could be construed to address corporate power from all sources and to opine that no law, statute, rule or regulation prohibits the activities).

<sup>139</sup> See MODEL BUSINESS CORP. ACT ANN. §§ 3.01 cmt. & annot., 3.02 cmt. & annot. (4<sup>th</sup> Ed. 2008).

<sup>140</sup> As noted in the commentary to Section 302 of the GBCC:

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

Business corporations incorporated in the State of Georgia derive their corporate purposes and powers from Sections 301 and 302 of the GBCC. Section 301 provides that a corporation incorporated under the GBCC has the purpose of engaging in any lawful business unless a more limited purpose is set forth in the articles of incorporation. Section 302 provides that “unless its articles of incorporation provide otherwise, every corporation has the same powers as an individual to do all things necessary or convenient to carry out its business and affairs.”

Section 302 also sets forth a nonexclusive list of specific powers contemplated to be included in the grant of power. Because Sections 301 and 302 provide that the only means by which a corporation’s statutory purposes or powers can be limited is in its articles of incorporation, any limitations set forth in its bylaws, corporate resolutions or in any other document will not prevent the Opinion Giver from delivering the Model Corporate Powers Opinion. Any such restrictions in other documents should be addressed, if at all, in the Model No Violation Opinion (Section XVI).

**B. Ultra Vires Acts.** The common law theory of limited corporate capacity provided that attempts by a corporation to engage in transactions that exceeded its corporate powers, i.e., *ultra vires* acts, were ineffective in most cases.<sup>141</sup> However, Section 304 of the GBCC provides that actions to challenge the validity of corporate acts on the grounds that the acts were *ultra vires* may be brought only (i) by shareholders to enjoin or set aside the *ultra vires* acts, (ii) by the corporation against an incumbent or former director, officer, employee or agent with respect to such *ultra vires* acts, or (iii) by the Attorney General of the State of Georgia in a proceeding for dissolution.<sup>142</sup>

Unless a corporation’s articles of incorporation limit its corporate purposes, there are no limits under the GBCC on a corporation’s statutory purposes unless it is engaged in an unlawful business, and there are no limits under the GBCC on the exercise of a corporation’s powers other than those limitations on the powers of an individual.<sup>143</sup> Thus, by equating the powers of a

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law tends to view the corporation as a creature of contract, rather than as a creature of a state that zealously guards its powers through narrow grants to corporate entities.

<sup>141</sup> See MODEL BUSINESS CORP. ACT ANN. §3.04 cmt. & annot. (4<sup>th</sup> ed. 2008).

<sup>142</sup> The comment to § 304 of the GBCC clarifies the limited nature of the *ultra vires* cause of action:

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

See also Babb et al., *supra* note 138, at 563 (acknowledging that a limited corporate powers opinion can be given in certain circumstances where business corporation laws restrict actions to those by shareholders and the state and where the shareholders have approved the transaction, in which case an opinion could be given by acknowledging that such a suit is barred as to the shareholders but not as to the state); *supra* §§ 5.02A, 5.02C regarding dissolution proceedings.

<sup>143</sup> As noted in the commentary to Section 302 of the GBCC, “[t]he general philosophy of Section 14-2-302 is . . . that corporations formed under the Code provisions should be automatically authorized to engage in

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

**C. Unlawful Businesses.** One area of uncertainty with respect to the issue of *ultra vires* acts is the effect on corporate powers of the restrictive phrase “engaging in any lawful business” in Section 301 of the GBCC. Clearly, conduct of an unlawful business would be an *ultra vires* act. However, neither the GBCC, the Model Corporate Act nor the comments thereto provide any guidance as to what would constitute an unlawful business for these purposes. In particular, it is not clear whether the plain language of the GBCC was intended to include as unlawful businesses those specifically reserved to corporations that are required by constitution and statute to be incorporated under statutory provisions other than the GBCC.<sup>144</sup> Because of the scope of the due diligence that would be necessary to give an opinion that no segment of Borrower’s business is unlawful so as to restrict the exercise of Borrower’s powers, the Committee has determined that a specific assumption that Borrower is engaged in a lawful business is necessary for purposes of giving the Model Corporate Acts Opinion, subject only to any current knowledge of the Opinion Giver that would make reliance on the assumption unwarranted.<sup>145</sup>

Absent such an assumption, it would be necessary for the Opinion Giver to determine, in each instance, whether or not Borrower was engaged in any unlawful business and whether the conduct of the unlawful business limited the exercise of corporate powers by Borrower with respect to the Loan Transaction. The Committee has concluded that the Model Corporate Powers Opinion is not the appropriate context for addressing these matters because of the conclusory treatment such matters would be given. Absent specific limitation in Borrower’s Articles of Incorporation, Borrower would have the same power as any individual to engage in any business to the extent that it is not unlawful and any restriction on Borrower’s power to engage in its business would be as a result of its conduct of a particular segment of its business being in violation of a law. If the Opinion Recipient deems it material to the Loan Transaction to receive an opinion addressing whether or not any designated segment of Borrower’s business is unlawful, the Opinion Recipient should request a separate opinion that the conduct by Borrower

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all acts and have all powers that an individual may have[.]” and “[t]he powers of a corporation under the Code exist independently of whether a corporation has a broad or narrow purpose clause.”

<sup>144</sup> Section 14-2-20 of the prior version of the GBCC provided more specifically:

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

The comment to Section 3.01 of the Model Corporate Act states merely that “[t]he specification of an ‘any lawful business’ clause has become so nearly universal in states that permit the clause that no reason exists for treating it otherwise than as the norm for the ‘standard’ corporation.”

<sup>145</sup> *See infra* Interpretive Standard 16. Interpretive Standard 16 of this Report contains an assumption that Borrower is engaged in a lawful business. In Interpretive Standard 25(6) of the *Corporate Report, supra* note 1, at 149, this issue is handled by a qualification that “the Opinion does not affirm that Company is engaged in no unlawful business. . . .”

of an identified segment of its business is not in violation of an identified law so as to restrict the exercise of Borrower's power. To request a blanket opinion that Borrower is in violation of no law is considered inappropriate as discussed in Section 3.03D.

**D. Secretary of State Corporations.** Business corporations incorporated under the GBCC are not the only private corporations that may be granted corporate powers and privileges under Georgia law. The Georgia Constitution grants to the Georgia legislature the power to provide by general law the manner in which private corporate powers and privileges may be granted.<sup>146</sup> Georgia statutory law provides that:

All corporate powers and privileges of banking, trust, insurance, railroad, canal, navigation, express, and telegraph companies shall be issued and granted by the Secretary of State. Corporate powers and privileges of all other private companies shall be granted only as provided in Chapters 2 and 3 of this title.<sup>147</sup>

Corporate entities in the former category are generally referred to as Secretary of State corporations. There are both general and specific provisions of Georgia constitutional and statutory law addressing incorporation of Secretary of State corporations and the powers and privileges of each that reserve to the entities the right to conduct specific businesses. As discussed in 6.04C above, it is not clear whether the plain language of Section 301 of the GBCC limiting corporate purposes to "any lawful business" was intended to exclude any business reserved to Secretary of State corporations. The Committee hopes that Section 301 of the GBCC will not be interpreted in this manner. It is clear, however, that the GBCC was not intended to be applicable to such entities absent specific action by the legislature to make the provisions of the GBCC applicable, whether outright or as a supplement to the existing statutory provisions.<sup>148</sup> Because of the scope of the due diligence that would be necessary to give an opinion that Borrower's business does not require incorporation as a Secretary of State corporation, the Committee has determined that a specific assumption that Borrower is not required by any state law to be incorporated under any statute other than the GBCC is necessary for purposes of giving the Model Corporate Powers Opinion. Absent such an assumption, it would be necessary for the

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<sup>146</sup> GA. CONST., art. III, § 6, ¶ 5(a).

<sup>147</sup> O.C.G.A. § 14-5-2 (1994).

<sup>148</sup> Section 301 of the GBCC is based on Section 3.01 of the Model Corporate Act. However, Section 3.01(b) of the Model Corporate Act also provides that "[a] Corporation engaging in a business that is subject to regulation under another statute of this state may incorporate under this Act only if permitted by, and subject to all limitations of, the other statute." The comment to Section 301 of the GBCC acknowledges that § 3.01(b) of the Model Corporate Act was deleted and cross-references Article 17 of the GBCC, where, in Section 1701(b), the GBCC provides that:

This chapter shall not apply:

(1) To corporations organized under a statute of this state other than either of this chapter or any prior general corporation law, except to the extent that the former general corporation law or any of its provisions or this chapter or any of its provisions specifically have been or shall be made applicable to those corporations[.]

The comment to Section 1701 explains that "Subsection (b), recognizing that the Code cannot constitutionally apply to certain corporations, preserves the language of prior law."

Opinion Giver to determine, in each instance, whether incorporation under the GBCC was appropriate for the business conducted by Borrower. If an opinion as to these matters is deemed material to the Loan Transaction, the Opinion Recipient should request a separate opinion that the conduct of a particular segment of Borrower's business does not require Borrower to be incorporated as a Secretary of State corporation. The form of such an opinion is beyond the scope of this Report.

**E. Professional Corporations.** Similarly, the Model Corporate Powers Opinion does not address whether or not Borrower is required to be incorporated as a professional corporation. If the business of Borrower is one that would permit it to be incorporated as a professional corporation, such as law or architecture, the laws and ethical standards applicable to the business may require that, if corporate status is desired, the business must be incorporated as a professional corporation.<sup>149</sup> If an opinion as to such matters is deemed material to the Loan Transaction, the Opinion Recipient should request a separate opinion that the conduct of a particular segment of Borrower's business does not require Borrower to be incorporated as a professional corporation. The form of such an opinion is beyond the scope of this Report.

**F. Limitation of Purposes and Powers; Describing the Property and the Business.** If Borrower has the full benefit of Sections 301 and 302 of the GBCC, the Opinion Giver need not analyze the nature of Borrower's business. Limitation of the opinion to specific Property and segments of the business is unnecessary in such instances. On the other hand, if Borrower's articles of incorporation limit Borrower's purposes and powers, the Model Corporate Powers Opinion should address only Borrower's Property and the segments of its business that are material to the Loan Transaction. The Committee recommends that the Opinion Letter make reference to a list prepared by an appropriate officer of Borrower for purposes of disclosure to the Opinion Recipient, such as an attachment to the Loan Documents. In order to eliminate the need for materiality concepts, where possible, the Opinion Recipient and the Opinion Giver should agree upon objective standards. However, if a materiality standard is necessary, the opinion could be tailored to include a definition of material Property and material segments of the Borrower's business, upon which definition the Opinion Recipient and the Opinion Giver should agree.<sup>150</sup>

Where Borrower's powers are limited, a detailed description of Borrower's business and Property will be necessary. The Property to be addressed by the Model Corporate Powers Opinion, under most circumstances, can easily be listed in an exhibit to the opinion or as part of a separate disclosure document. However, it would be necessary to prepare a description of the business to be addressed that is similar to the description required in a securities registration statement. The cost of preparing such a description could be prohibitively costly if not otherwise required as part of the Loan Transaction. The expense that the Opinion Giver and Borrower would incur to conduct the due diligence necessary to support a broader opinion would be disproportionate to the importance of the opinion to the Opinion Recipient, except, perhaps, when given by inside general counsel to Borrower.

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<sup>149</sup> See, e.g., O.C.G.A. §§ 14-7-1 to -7 (2003).

<sup>150</sup> See Babb et al., *supra* note 138, at 560 (preferable to limit opinion by reference to objective facts elicited from officers; entitled to rely on certificates, assuming criteria are not manifestly unreasonable, in which case lawyer need not search files; negative assurances given by the opinion that the opining lawyer has no actual knowledge that the certificate is unreasonable).

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

Borrower has the corporate power to execute and deliver the Loan Documents and perform its obligations thereunder and to own and use the Property identified on Exhibit A hereto and to conduct the business identified on Exhibit B hereto.

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

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

A. Review Borrower's articles of incorporation, as amended, certified by the Secretary of State.

B. Review the GBCC limited solely to the relationship of such laws to Borrower's business purposes and powers.

C. If necessary, because Borrower has limited corporate powers, review certificates, dated the date of the opinion, delivered by Borrower's appropriate officers, listing Borrower's material Property and adequately describing the material segments of Borrower's business (or cross-referencing such a list or description in the Loan Documents) and clearly defining the materiality standard, listing the jurisdictions in which such Property and business segments are located and conducted, and providing factual assurance that Borrower's activities that are to be opined upon are within its powers under the GBCC and Borrower's articles of incorporation.<sup>151</sup>

Borrower's articles of incorporation may have been drafted to parallel more restrictive corporate powers provisions of Georgia corporation law that were in effect at the time of adoption, thus specifically limiting the broader powers granted by more modern provisions.<sup>152</sup> Alternatively, the articles of incorporation may reflect an intent on the part of the shareholders or directors to limit such broad powers. Articles of incorporation that limit the grant of such broad powers by the GBCC may present a problem to the Opinion Giver where the activity addressed in the opinion is not specifically contemplated in the restrictive provisions.

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<sup>151</sup> See JACOBS, *supra* note 138, at 2-55, 2-71 to 73.

<sup>152</sup> Section 14-2-1701 of the GBCC provides that the GBCC applies to all corporations existing on or formed after July 1, 1989. However, if Company's articles of incorporation and bylaws do not grant to Company the full powers granted by law, but rather quote provisions in effect when adopted, the benefits of this provision may not be available.

While the Model Corporate Powers Opinion is typically noncontroversial, in certain extraordinary transactions<sup>153</sup> special problems may arise. The GBCC imposes restrictions on the exercise of corporate power under such circumstances. Satisfaction of these restrictions may require specific factual certifications by an appropriate officer of Borrower to the Opinion Giver or specific director or shareholder approval. These issues should be addressed on a case by case basis in completing the due diligence for the Corporate Powers Opinion. The Opinion Giver should consider whether or not any problems arising from any special requirements should be addressed prior to delivering the opinion letter or should be disclosed in the letter in order to give an accurate presentation of the opinion.

## VII. THE MODEL CORPORATE ACTS OPINION<sup>154</sup>

*Borrower has duly authorized the execution and delivery of the Loan Documents and the performance by Borrower thereunder. Borrower has duly executed and delivered the Loan Documents.*

**7.01 Purpose and Background of the Model Corporate Acts Opinion.** The Model Corporate Acts Opinion provides assurances to the Opinion Recipient that Borrower has taken all corporate action necessary, in accordance with the GBCC, its articles of incorporation, its bylaws and its corporate resolutions, to approve or ratify the execution and delivery of the Loan Documents and all performance by Borrower under the Loan Documents and that Borrower has executed and delivered the Loan Documents. If Borrower is a natural person and not a corporation, partnership or limited liability company, see Section XVII below for a discussion concerning the necessary modifications to the Model Opinion as to execution and delivery of the Loan Documents.

**7.02 Elements of the Model Corporate Acts Opinion.** The Model Corporate Acts Opinion has the meanings set forth in this Section 7.02.

A. Borrower's shareholders, directors, committees of the Board of Directors and officers have taken all corporate action necessary to approve the execution and delivery of the Loan Documents and all performance by Borrower of its obligations thereunder, on the

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<sup>153</sup> Extraordinary transactions that may make the Model Corporate Powers Opinion difficult include (a) fiduciary agreements; (b) guaranties; (c) merger; (d) sale of substantially all assets; (e) investment activities; (f) professional activities; (g) banking activities; (h) purchase or redemption of shares; and (i) dividends. See Babb et al., *supra* note 138, at 562 (guaranties); Scott FitzGibbon & Donald W. Glazer, *Legal Opinions in Corporate Transactions: The Opinion on Agreements and Instruments*, 12 J. Corp. L. 657, at 661 & n. 8 (1987) (guaranties); Special Joint Committee of the Maryland State Bar Association, Inc. & the Bar Association of Baltimore City, *Report on Lawyers' Opinions in Commercial Transactions*, 45 BUS. LAW. 705, 734-35 (1990) (fiduciary or guaranty activities or the repurchase or redemption of securities); see also, e.g., O.C.G.A. §§ 14-2-1101 to 1109.3 (2003 & Supp. 2008) (merger transactions requiring shareholder approval); O.C.G.A. §§ 14-2-1109.1, -1109.3 (2003 & Supp. 2008) (conversion from corporation to another type of entity requires shareholder approval); cf. O.C.G.A. § 14-2-1201 and 1202 (2003 & Supp. 2008) (circumstances under which the sale of substantially all of a corporation's assets requires shareholder approval).

<sup>154</sup> Section VII is based on Section VII of the *Corporate Report*, *supra* note 1, at 58-64, with modifications for purposes of consistency with other sections of this Report and internal cross-reference.

assumption of performance on the date of the opinion as discussed in Section 2.01, all to the extent and in the manner required pursuant to (i) the GBCC, (ii) Borrower's articles of incorporation and bylaws, and (iii) if applicable, Borrower's established policies and practices for delegation of authority adopted by resolutions of Borrower's Board of Directors or shareholders.<sup>155</sup>

B. Borrower's officers were duly authorized to execute and deliver the Loan Documents, in order to cause Borrower to enter into the Loan Documents and to perform its obligations thereunder; this opinion affirms that the relevant corporate resolutions were adopted in accordance with the procedural requirements of Borrower's articles of incorporation and bylaws and the GBCC.

C. Authorized Borrower officers have executed and delivered the Loan Documents.

D. The execution and delivery of the Loan Documents were, and Borrower's performance of its obligations under the Loan Documents if performed in accordance with the Loan Documents as written will be, in accordance with the authority granted by the terms and provisions of the relevant corporate resolutions.<sup>156</sup>

The Model Corporate Acts Opinion implicitly addresses matters of agency law because the GBCC does not specifically address what is necessary to create actual authority in a corporation's officers to act on its behalf.<sup>157</sup>

The Model Corporate Acts Opinion is based on the assumption that the Model Corporate Status Opinion and the Model Corporate Powers Opinion could also be given. The Opinion Giver may rely on this assumption subject to the standards of unwarranted reliance set forth in Section 2.07. In any case in which reliance on this assumption would be unwarranted or in any case in which the Opinion Giver determines that the Model Corporate Status Opinion cannot be given or that the Model Corporate Powers Opinion cannot be given, the Committee has concluded that the Opinion Giver cannot render the Model Corporate Acts Opinion. This conclusion is based upon the Committee's view that the proper incorporation of Borrower and the existence of certain inherent powers are necessary prerequisites to the ability of the Opinion Giver to deliver the Model Corporate Acts Opinion.

In light of the Georgia cases concluding that a corporation must be organized in order to conduct business,<sup>158</sup> it would appear that the Model Corporate Acts Opinion could not be given unless the Opinion Giver had concluded that Borrower had been organized. In this connection,

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<sup>155</sup> An example of such delegation would be the delegation of authority to the Company's President to authorize the execution by other officers of debt instruments over \$5,000 only if the delegation is made in writing. Any further action taken in accordance with the delegation of authority must comply with the terms of the delegation, and all such policies and practices must comply with the GBCC and the Company's articles of incorporation and bylaws.

<sup>156</sup> See *supra* § 2.01.

<sup>157</sup> See Babb et al., *supra* note 138, at 563; FitzGibbon & Glazer, *supra* note 153, at 666.

<sup>158</sup> See cases cited *supra* note 109.

the question arises as to what can be done if the facts do not exist which would prove “due organization” under the law as it existed at the time of the purported organization. The following discussion from a Maryland case involving just that absence of facts may give some comfort to Opinion Recipients in those circumstances where an Opinion Giver is unable to give the Model Corporate Status Opinion or does give it in reliance upon the presumption of regularity and continuity discussed at Section 2.09:

Those practicing in the field are aware that instances have been known of closely held corporations where minutes of organizational meetings and bylaws adopted at such meetings cannot be found, being misplaced, lost, strayed, or stolen. This circumstance no doubt accounts for some of our holdings. See, e.g., H. Brune, *Maryland Corporation Law and Practice* § 339, at 406 (rev. ed. 1953), citing *Long v. Baltimore & O.R.R.*, 155 Md. 265, 141 A. 504 (1928) and stating, “After the expiration of a long period of time a presumption of regularity attends corporate proceedings.” At 407 Brune further states, citing *Forst’s Lessee v. Frostburg Coal Co.*, 65 U.S. (24 How.) 278, 16 L.Ed. 637 (1860), *Bartlett v. Wilbur*, 53 Md. 485 (1880), *Laflin & Rand P. Co. v. Sinsheimer*, 46 Md. 315 (1877), and *Franz v. Teutonia Build. Assn.*, 24 Md. 259 (1866), “[T]here have been a number of cases in which those dealing with a reputed corporation as such have been denied the right to question its existence as a corporation.” Brune also asserts: “Though ordinarily a vote of shareholders or directors is necessary to elect or appoint officers, it has been held that the appointment of an officer may be ‘inferred’. Persons acting as officers are presumed to be such and rightfully in office in the absence of proof to the contrary.” *Id.* § 231, at 230. . . . 8 W. Fletcher, *Cyclopedia of the Law of Private Corporations* § 3737, at 9 (rev. ed. Wolf 1966), states, “The maxim that all things shall be presumed to have been rightly and correctly done, until the contrary is proved, extends to the organization proceedings, and hence the corporation will be presumed to have been duly organized where it proceeds to act as a corporation.” See also 2 F. O’Neil, *Close Corporations* § 8.02 (2d ed. 1971), discussing the disregard of corporate ritual and the neglect of paperwork by close corporations.<sup>159</sup>

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

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<sup>159</sup> *Freestate Land Corp v. Bostettler*, 440 A.2d 380, 385 (Md. 1982) (alteration in original).

**7.03 Matters Not Covered by the Model Corporate Acts Opinion.** The Model Corporate Acts Opinion does not address any laws other than the GBCC and the laws of agency as discussed above.<sup>160</sup> Such other laws should be addressed, if at all, only in the Model No Violation Opinion (Section XVI).

The Model Corporate Acts Opinion does not address whether or not the Loan Documents are legal, valid, binding or enforceable or whether or not any consent, license, authorization or approval by any third parties (including, but not limited to, governmental or regulatory entities or parties to any of Borrower's agreements) is required or has been given. These matters should be addressed, if at all, in the Model Remedies Opinion (Section XVIII). This opinion also does not address whether or not Borrower's directors and officers were in compliance with their statutory duties in granting and exercising the requisite authority addressed by the opinion.

#### **7.04 Additional Notes Regarding the Model Corporate Acts Opinion.**

**A. Corporate Authority.** The GBCC and Borrower's articles of incorporation and bylaws establish general principles and, with respect to certain extraordinary transactions, specific rules<sup>161</sup> addressing the circumstances in which shareholder and director authorization is required for corporate action that is to be taken within the scope of the corporation's powers and the manner in which the shareholders and directors may delegate the responsibility to authorize such actions to committees of Borrower's Board of Directors and to Borrower's officers.

**B. Agency.** The Model Corporate Acts Opinion addresses only matters of actual authority rather than those of apparent authority. A corporate acts opinion that addresses only apparent authority is not an opinion that the Opinion Recipient should request or upon which the Opinion Recipient should rely. Failure to obtain assurances as to actual authority would require the Opinion Recipient to be content with the factual uncertainties associated with apparent authority.<sup>162</sup>

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

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<sup>160</sup> See Babb et al., *supra* note 138, at 563; Fuld, *supra* note 79, at 927-28; JACOBS, *supra* note 138, at 6-2 (does not address governmental or third party consents). *But see* FitzGibbon & Glazer, *supra* note 153, at 664-65 (does address compliance with obligations under instruments, including indenture covenant restrictions); JACOBS, *supra* note 138, at 6-1, 6-2, 7-2 (may also include opinion that action cannot be attacked on the grounds of violation of any law or any agreement).

<sup>161</sup> See, e.g., O.C.G.A. §§ 14-2-1101 to 1109.3 (2003 & Supp. 2008) (merger transactions requiring shareholder approval); O.C.G.A. §§ 14-2-1109.1, -1109.3 (2003 & Supp. 2008) (conversion from corporation to another type of entity requires shareholder approval); O.C.G.A. § 14-2-1201 and 1202 (2003 & Supp. 2008) (the sale of substantially all of a corporation's assets requires shareholder approval); FitzGibbon & Glazer, *supra* note 153, at 661-62.

<sup>162</sup> The existence of authority and its effect on the enforceability of corporate acts when analyzed from an apparent authority perspective will depend on facts known to the Opinion Recipient and apparent to all third parties. See, e.g., FitzGibbon & Glazer, *supra* note 153, at 666; Special Committee on Legal Opinions in Commercial Transactions of the New York County Lawyers' Association et al., *supra* note 22, at 1912-13.

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

**E. “Execute and Deliver” vs. “Enter Into”.** See the discussion at Section 6.02B.

**7.05 Practice Procedure for the Model Corporate Acts Opinion.** The Model Corporate Acts Opinion requires substantial due diligence.<sup>163</sup> The Committee recommends that the Opinion Giver complete the following due diligence procedures:

A. Obtain and review Borrower’s articles of incorporation, certified by the Secretary of State, and bylaws, certified by Borrower’s secretary.

B. Obtain and review:

1. any Borrower resolutions specifically authorizing execution and delivery of the Loan Documents and all performance by Borrower under the Loan Documents;

2. to the extent not covered by the secretary’s certificate discussed below in Section 7.05.C, any Borrower resolutions adopted after the date of adoption of the original authorizing resolutions that may amend or revoke the authority granted in the original authorizing resolutions; and

3. Borrower resolutions addressing any delegation of power generally.

C. Obtain and review a certificate, dated the date of the Opinion Letter, of Borrower’s corporate secretary or other appropriate officer, certifying:

1. that copies of Borrower’s articles of incorporation and bylaws reviewed and relied upon by the Opinion Giver are true, complete and correct copies and have not been amended, revoked or otherwise changed since the date adopted;

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

3. that Borrower’s relevant corporate resolutions were adopted in compliance with any procedural requirements of Borrower’s articles of incorporation and bylaws and the GBCC, such as:

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

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

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<sup>163</sup> See, e.g., JACOBS, *supra* note 138, at 43-41 to 82.

(c) if such corporate resolutions were adopted by unanimous written consent in lieu of a meeting, that such written consent was duly executed by all directors or shareholders, as the case may be; and

4. that, if applicable, with respect to the incumbency of officers and directors and the status of shareholders:

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

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

D. Review the GBCC and agency law as to corporate authority.

E. Review the final execution copy of the Loan Documents.

One due diligence issue that often arises with respect to the Model Corporate Acts Opinion is the question of whether or not a delegation of authority is proper. The Committee recommends that the Opinion Giver evaluate whether or not any authority delegated by Borrower's Board of Directors to a committee or Borrower's officers may be delegated. Often corporate resolutions provide for a broad delegation of authority, such as the authority to enter into guaranties or an agreement to sell Borrower, in either case on any terms deemed by the officers in their sole discretion to be appropriate.<sup>164</sup> The Board may also have authorized the officers to make changes in their discretion to approved forms of the Loan Documents. If it is feasible to have the Board of Directors approve and ratify the final or a near-final version of the Loan Documents and any other related action taken by the officers pursuant to the broad delegation of authority, the Opinion Giver should obtain such approval. Ratification should remove any doubts as to the propriety of the delegation of authority.<sup>165</sup>

Reliance on a certificate of Borrower's corporate secretary as to the procedures actually followed in the call of a meeting and whether or not a quorum was present will permit the Opinion Giver to have a basis for the Model Corporate Acts Opinion.<sup>166</sup>

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<sup>164</sup> See Special Committee on Legal Opinions in Commercial Transactions of the New York County Lawyers' Association et al., *supra* note 22, at 1914.

<sup>165</sup> See FitzGibbon & Glazer, *supra* note 153, at 663, 666 (power to delegate not unlimited, particularly with respect to changing terms of an agreement and advisable to have action ratified).

<sup>166</sup> See Babb et al., *supra* note 138, at 563 (counsel need not investigate such matters, except procedural matters as to which doubts are raised by the minutes); FitzGibbon & Glazer, *supra* note 153, at 663 (absent knowledge to the contrary, a lawyer may rely on recitals in the minutes or on an officer's certificate; when concerned, lawyers often review the minutes for confirmation). *But see* Committee on Corps. of the State Bar of Cal., *supra* note 103, at 2207 (review of corporate minute books is necessary).

Interpretive Standard 13 contains an express assumption as to the genuineness of the signatures of all parties to the Loan Documents. In certain circumstances, the Opinion Recipient may request and the Opinion Giver may agree to provide assurance as to the genuineness of Borrower's signature. In such event, the Committee recommends that the Opinion Giver determine by observation who executes the Loan Documents on behalf of Borrower.<sup>167</sup> In the absence of observation, the Opinion Giver should take steps to confirm due execution, such as requesting written confirmation from the general counsel of Borrower (or the Secretary or another officer of Borrower) that he or she witnessed the execution of the Loan Documents by the executing officer (the Committee believes an email from such confirming officer would be acceptable written confirmation). The Opinion Giver may also review and rely on an incumbency certificate and an assumption of the genuineness of the signatures on the Loan Documents.<sup>168</sup>

The Committee recommends that the Opinion Giver also confirm that the mechanics of delivery of the Loan Documents were sufficient to create a binding contractual obligation, i.e., that Borrower put a duly executed agreement out of its possession or custody with the express or (unless the Opinion Recipient knows to the contrary) apparent intent to create an immediately binding contractual obligation. If the Opinion Giver is not present at the actual delivery, certain assumptions will have to be made with respect to, or certificates will have to be delivered describing, the circumstances of the delivery. Generally, there is consent by the parties at the closing that the closing lawyer will deliver all executed Loan Documents to the Opinion Recipient and that delivery by Borrower to the closing lawyer constitutes delivery to the Opinion Recipient. In such circumstances it may be necessary to determine if a written escrow or bailment agreement is necessary, or if an oral agreement is sufficient, to give the closing lawyer the fiduciary responsibilities of an agent or bailee.<sup>169</sup> The Committee recommends that the Opinion Giver also determine whether or not the parties authorized release of the Loan Documents by the closing lawyer. While the Opinion Giver could assume the fact of the delivery of the Loan Documents if the Opinion Giver does not witness delivery, the Opinion Giver, in rendering an opinion as to delivery, ordinarily is entitled to rely solely on a certificate from Borrower's officers addressing the fact of the delivery of the Loan Documents.

### VIII. THE MODEL PARTNERSHIP STATUS OPINION

*FOR LIMITED PARTNERSHIPS: Borrower was formed as a limited partnership under the laws of the State of Georgia. Borrower is existing and in good standing under the laws of the State of Georgia.*

*[or]*

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<sup>167</sup> See Noel J. Para, *Opinions in Commercial Finance and Banking Transactions*, in LEGAL OPINION LETTERS 4-28 (M. John Sterba, Jr. ed., Supp. 2007). *But see* JACOBS, *supra* note 138, at 43-27 (watching the execution of documents and knowing the identity of the person signing is not as desirable as comparing the signature on the document with the signature on an incumbency certificate).

<sup>168</sup> See Babb et al., *supra* note 138, at 563; *see* JACOBS, *supra* note 138, at 43-27.

<sup>169</sup> *Id.*

FOR LIMITED LIABILITY LIMITED PARTNERSHIPS: Borrower was formed as a limited liability limited partnership under the laws of the State of Georgia. Borrower is existing and in good standing under the laws of the State of Georgia.

[or]

FOR GENERAL PARTNERSHIPS: Borrower is a general partnership existing under the laws of the State of Georgia.

[or]

FOR LIMITED LIABILITY PARTNERSHIPS: Borrower is a limited liability partnership existing under the laws of the State of Georgia.

## COMMENT

**8.01 Purpose and Background of the Model Partnership Status Opinion.** The Opinion Recipient in a secured real estate transaction has legitimate reasons for wanting to confirm that a purported limited partnership (including a limited liability limited partnership) or general partnership (including a limited liability partnership) that is a party to the transaction has been formed, actually exists and has complied with all state laws applicable to its formation, existence and good standing (if applicable) in the State of Georgia. The legal form of a partnership will also determine certain procedures and other formalities necessary to enter into a specific transaction and to conduct its business generally.

**8.02 Elements of the Model Partnership Status Opinion.** The Model Partnership Status Opinion for a limited partnership, including a limited liability limited partnership, has three elements: (1) formation, (2) continuing existence and (3) good standing. For reasons described in Section 8.02C below, the Model Partnership Status Opinion for a general partnership, including a limited liability partnership, has only one element: continuing existence.

Opinion Recipients may request an opinion that Borrower has been “duly organized” under the laws of the State of Georgia. The Model Partnership Status Opinion, however, does not endorse issuing a due organization opinion, since actual formation, coupled with present existence and, in the case of limited partnerships and limited liability limited partnerships, good standing, should be sufficient for purposes of the Opinion Recipient.

If an Opinion Recipient requests a due organization opinion, however, we note that as described in Sections 8.02A.1 and 8.02A.2, there are certain organizational steps required for limited partnerships and limited liability limited partnerships, and therefore the phrase “duly organized” may be used for limited partnership and limited liability limited partnership opinions. Nonetheless, the term “duly organized” should not be used for general partnership or limited liability partnership opinions, as there are no essential organizational steps required for these entities which are analogous to the corporation or a limited liability company “due organization” concept.<sup>170</sup> There are certain steps, however, that an Opinion Giver should take in order to

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<sup>170</sup> In the case of both corporations and limited liability companies, articles of incorporation and articles of organization, respectively, containing certain information are required to be filed with the Secretary of

confirm the formation and existence of a general partnership or limited liability partnership, as more particularly described in Section 8.03A below.

Unless otherwise expressly indicated in the Opinion Letter, the Model Partnership Status Opinion refers only to the status of the partnership under the applicable statute governing its formation and does not refer to the partnership's status for tax, regulatory or other purposes.

**A. Formation.**

1. Limited Partnerships.

(a) Governed by GRULPA.

(1) Formation under GRULPA. The limited partnership form is established by statute, and a limited partnership cannot be created in Georgia except pursuant to the Georgia Revised Uniform Limited Partnership Act.<sup>171</sup> In order to create a limited partnership, a certificate of limited partnership must be executed and filed with the Secretary of State and include the following information: (a) the name of the limited partnership;<sup>172</sup> (b) the address of the registered office and the name and address of the initial agent for service of process required to be maintained by Code Section 14-9-104; (c) the name and business address of each general partner; and (d) any other matters that the general partners decide to include therein.<sup>173</sup> The original certificate of limited partnership must be signed by all of the general partners although limited partners are not required to sign.<sup>174</sup> It is not required that the certificate be notarized, and any person may sign the certificate through the use of an attorney-in-fact.<sup>175</sup>

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State. *See supra* § 5.02A; *infra* §12.02A . Although in the case of limited liability partnerships, an election must be recorded, as described in § 8.02A.3, a limited liability partnership is a hybrid of a general partnership, and therefore, the phrase “due organization” is not appropriate as to a limited liability partnership.

<sup>171</sup> *See* O.C.G.A. §§ 14-9-100 to 1204; *see supra* §1.02. Note, however, that a limited partnership formed in Georgia prior to July 1, 1988, is governed by the prior law, the Uniform Limited Partnership Act, O.C.G.A. §§ 14-9A-1 to 91, unless the partnership has elected to be governed by the GRULPA pursuant to an appropriate filing with the Secretary of State. In the case of a limited partnership that was formed prior to July 1, 1988, and that has not elected to be governed by the GRULPA, the relevant issues for such limited partnerships are discussed in more detail in Section 8.02A.1(b). It should be noted that the Uniform Partnership Act, O.C.G.A. §§ 14-8-1 to 64, also applies to limited partnerships except insofar as the GRULPA or other applicable Georgia law would be inconsistent with the UPA. O.C.G.A. § 14-8-6(b); *see supra* § 1.02.

<sup>172</sup> The GRULPA provides that the name must be distinguishable from other entities that have filed with the Secretary of State and must contain either the words “limited partnership” or the abbreviation “L.P.” The name also may not contain any language indicating that the entity is organized on any basis other than that of a limited partnership. O.C.G.A. § 14-9-102(a).

<sup>173</sup> O.C.G.A. § 14-9-201(a).

<sup>174</sup> *See* O.C.G.A. § 14-9-204(a)(1).

<sup>175</sup> O.C.G.A. § 14-9-204(b). In certain circumstances, however, the Secretary of State may require that documentation be filed in order to establish the authority of a person signing as an attorney-in-fact. *See* O.C.G.A. § 14-9-204(b); GA. COMP. R. & REGS. r. 590-7-12-.01(4) (1993).

Pursuant to Section 201(b) of the GRULPA, a limited partnership is formed upon filing the certificate of limited partnership in the office of the Secretary of State unless the certificate states a later time for formation, which may not be later than ninety days from the date of filing and must be specified in the certificate of limited partnership.<sup>176</sup> Accordingly, receipt from the Secretary of State as to the original filing of the certificate of limited partnership and a review of the actual terms of such certificate should provide a reasonable basis upon which an Opinion Giver may conclude that a limited partnership was formed, absent, of course, actual knowledge of facts indicating any failure to meet the statutory requirements described above. The Opinion Giver should be aware, however, that the GRULPA does not contain a statutory presumption of evidence of formation comparable to provisions of the GBCC<sup>177</sup> and the GLLCA.<sup>178</sup>

In the event that the applicable certificate of limited partnership has been amended, the appropriate certificate of amendment must be executed by at least one general partner and must state (a) the name of the limited partnership, (b) the date of the filing of the certificate of limited partnership, (c) the substance of the amendment to the certificate and, if the amendment is to become effective later than the filing, the effective date, which may not be later than ninety days after the filing date.<sup>179</sup> If the amendment involves the admission of a new general partner, then the newly admitted general partner also must execute the amendment.<sup>180</sup>

(2) Conversion of Entity. The GRULPA permits corporations, limited liability companies and general partnerships, both foreign and domestic, to elect to become a limited partnership.<sup>181</sup> In the case of a domestic corporation, its board of directors must adopt and its shareholders must approve a plan of election that contains certain information required by the GBCC, and certain specifics to be included in the limited partnership agreement.<sup>182</sup> In the case of a foreign corporation, any limited liability company or any general partnership, the election to convert to limited partnership status requires the approval of all of the partners, members or shareholders, respectively, or such other approval as may be sufficient under applicable law to authorize such election.

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<sup>176</sup> O.C.G.A. § 14-9-201(b).

<sup>177</sup> O.C.G.A. § 14-2-203(b). Section 203(b) of the GBCC states that the filing by the Secretary of State of articles of incorporation is conclusive proof that all conditions precedent to incorporation were satisfied. *See supra* § 5.02A.

<sup>178</sup> O.C.G.A. § 14-11-206(g). Section 206(g) of the GLLCA allows an Opinion Giver to rely upon the filing of the articles of organization for a limited liability company as prima facie evidence of the formation of a limited liability company. *See infra* § 12.01A. Nevertheless, because there is a set date for formation under the GRULPA, the GRULPA does dispel the confusion engendered by provisions in the prior law that a limited partnership was formed at such time as there was substantial compliance in good faith with the filing requirement. *See* O.C.G.A. § 14-9A-20(b).

<sup>179</sup> O.C.G.A. § 14-9-202(a); O.C.G.A. § 14-2-1109.1

<sup>180</sup> O.C.G.A. § 14-9-204(a)(2).

<sup>181</sup> O.C.G.A. § 14-9-206.2(a).

<sup>182</sup> O.C.G.A. § 14-2-1109.1(c).

The election to convert to limited partnership status is made by delivering to the Secretary of State for filing a certificate of election, which shall state or contain the following:

- (i) the name and jurisdiction of the corporation, limited liability company or general partnership making the election;
- (ii) that such entity elects to become a limited partnership;
- (iii) the effective date, or the effective date and time, of such election if later than the date and time of filing the certificate of conversion;
- (iv) that the election has been approved as required by O.C.G.A. § 14-2-1109.1, in the case of a domestic corporation, and as stated above in the case of a foreign corporation, any limited liability company or any general partnership;
- (v) that filed with the certificate of election is a certificate of limited partnership that is in the form required by Section 201 of the GRULPA,<sup>183</sup> that sets forth a name satisfying the requirements of Section 102 of the GRULPA and that shall be the certificate of limited partnership of the limited partnership formed pursuant to such election; and
- (vi) that the certificate of election sets forth either (1) the manner and basis for converting the shares of the corporation, the interests of the members or the interests of the partners into interests as partners of the limited partnership; or (2) that a written partnership agreement has been entered into among the persons who will be partners of the limited partnership, that such partnership agreement will be effective immediately upon the effectiveness of the election and that such partnership agreement provides for the manner and basis of such conversion.<sup>184</sup>

Upon the effectiveness of the election, the converting entity becomes a limited partnership under the GRULPA, the governing documents of the converting entity (such as articles of incorporation and bylaws of a corporation, articles of organization and operating agreement of a limited liability company, or partnership agreement and any statement of partnership of a general partnership) shall be of no further force or effect, and all property of the converting entity shall be deemed to be vested in the limited partnership formed pursuant to such election.<sup>185</sup>

The Model Limited Partnership Status Opinion can be given with respect to a limited partnership formed pursuant to the election provided by the GRULPA. However, the scope of the due diligence necessary to render such opinion would be expanded to include confirmation by the Opinion Giver that the certificate of election contains all of the statements and

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<sup>183</sup> See *infra*, Section 8.02 (1)(a)(1).

<sup>184</sup> O.C.G.A. § 14-9-206.2(b).

<sup>185</sup> O.C.G.A. § 14-9-206.2(c).

information required by Section 206.2 of the GRULPA and that the converting entity complied with applicable corporate, limited liability company or partnership law in making such election.

(b) Not Governed by GRULPA. The filing requirements for limited partnerships formed between February 15, 1952, and June 30, 1988, are governed by the Uniform Limited Partnership Act as adopted in Georgia.<sup>186</sup> The ULPA requires that a certificate of limited partnership be filed with the Clerk of the Superior Court of the county in which the principal place of business of the limited partnership is situated, with a certified copy of such certificate also to be filed in any other county in which the limited partnership has a place of business.<sup>187</sup>

The filing requirements for limited partnerships formed prior to February 15, 1952, provide for the filing of a certificate of limited partnership with the Clerk of the Superior Court of the county in which the principal place of business of the limited partnership is located.<sup>188</sup> Also, as with the ULPA, a copy of the certificate is to be filed in any other county in which the limited partnership has a place of business.<sup>189</sup>

2. Limited Liability Limited Partnerships. Only a limited partnership subject to, or in the process of being organized under, the GRULPA may become a limited liability limited partnership.<sup>190</sup> A new limited partnership will be formed as a limited liability limited partnership if the formalities for forming a limited liability limited partnership are followed.<sup>191</sup> For an existing limited partnership organized under or subject to the GRULPA to become a limited liability limited partnership, that limited partnership's certificate of limited partnership must be duly amended, and, subject to any contrary agreement among the partners, all of the partners must approve that amendment.<sup>192</sup>

For a limited partnership organized under or subject to the GRULPA to be a limited liability limited partnership, its certificate of limited partnership or its amendment to its

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<sup>186</sup> See O.C.G.A. § 14-9A-1 to 91; *see supra* § 1.02.

<sup>187</sup> O.C.G.A. § 14-9A-20(a)(2). Note that further investigation may be necessary with respect to such limited partnerships as questions could arise regarding the valid formation of a limited partnership if the certificate was not filed in all necessary counties. Although any limited partnership formed during this time period has the option of "opting in" in order to be governed by the GRULPA pursuant to Section 1201(b) of the GRULPA, the question as to whether or not such limited partnership was formed properly in the first place would be governed by the requirements of the ULPA rather than the GRULPA.

<sup>188</sup> O.C.G.A. § 14-9A-115.

<sup>189</sup> *Id.* Compare with the simplified filing requirements under the GRULPA, in which a limited partnership needs to file in only one central location of the Secretary of State and is not required to file in all counties in which the limited partnership conducts business. The format of the certificate under the GRULPA also substantially reduces the detailed disclosure of information about limited partners and their contributions and, in fact, does not even require a list of all limited partners. See O.C.G.A. § 14-9-201(a).

<sup>190</sup> O.C.G.A. § 14-8-62(g).

<sup>191</sup> *Id.*

<sup>192</sup> *Id.*

certificate must (1) contain a statement that the limited partnership is a limited liability limited partnership,<sup>193</sup> and (2) comply with the name requirements of both Section 102 of the GRULPA and Section 63(b) of the UPA. The UPA requires that the limited liability limited partnership's name contain the words "limited liability limited partnership" or "ltd. liability limited partnership," and the abbreviation "L.L.L.P." or the designation "LLLP" as the last words or letters of such name.<sup>194</sup>

A limited partnership becomes a limited liability limited partnership at the time that its certificate of limited partnership or its amendment to its certificate becomes effective. Accordingly, receipt from the Secretary of State of a certificate as to the original filing of the certificate of limited partnership and any amendments thereto, together with a review of the actual terms of such certificate and any such amendments, should provide a reasonable basis upon which an Opinion Giver may conclude that a limited liability limited partnership was formed, absent actual knowledge of facts indicating any failure to meet the statutory requirements described above.

A defect in the formation of a new limited liability limited partnership under the GRULPA would affect such partnership's status as a limited partnership as well as a limited liability limited partnership. However, in the case of an existing limited partnership that has amended its certificate to become a limited liability limited partnership, a defect in the formation of the limited liability limited partnership would presumably not affect such partnership's status as a limited partnership, nor the Opinion Giver's ability to render an opinion as to the formation of the limited partnership. Nevertheless, the Committee recommends that the Opinion Giver expressly refer to the defective attempt at forming the limited liability limited partnership in rendering its opinion.

### 3. General Partnerships.

(a) Governed by UPA. The formation of a general partnership under the Uniform Partnership Act is governed by specific statutory rules although the application of these rules typically requires the examination of mixed questions of law and fact.<sup>195</sup> Generally, the UPA defines a partnership as "an association of two or more persons to carry on as co-owners of a business for profit."<sup>196</sup> It is important to note that the mere joint ownership of property, in and of itself, does not establish the existence of a general partnership,<sup>197</sup> an implication that was created under the statutory predecessor to the UPA.<sup>198</sup>

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<sup>193</sup> *Id.*

<sup>194</sup> O.C.G.A. § 14-8-63(b).

<sup>195</sup> *See* O.C.G.A. §§ 14-8-1 to 64; *see, e.g.,* Pope v. Triangle Chem. Co., 277 S.E.2d 758 (Ga. 1981); Ghee v. Kimsey, 346 S.E.2d 888 (Ga. Ct. App. 1986).

<sup>196</sup> O.C.G.A. § 14-8-6(a).

<sup>197</sup> O.C.G.A. § 14-8-7(2).

<sup>198</sup> The UPA is in accordance with some prior case law. *See, e.g.,* McCowen v. Aldred, 69 S.E.2d 660 (Ga. Ct. App. 1952); Grann v. Cameron, 116 S.E. 338 (Ga. Ct. App. 1923). However, the UPA clearly reverses other implications arising under both some prior case law and earlier statutory provisions. *See*

There are no actual filing or registration procedures comparable to the requisite filing of a certificate of limited partnership that are required in order to form a general partnership. Therefore, the Opinion Giver must investigate whether or not there exists reasonable evidence as to the formation of the general partnership in accordance with the UPA. If no written partnership agreement is in existence, the Opinion Giver should, in most cases, obtain a written certificate signed by each of the general partners of the general partnership in order to confirm the formation and continued existence of the general partnership under Georgia law.<sup>199</sup>

Georgia law does provide, however, that a general partnership can file a statement of partnership in any county or counties.<sup>200</sup> The effect of a statement of partnership is that many of the facts set forth in such statement are conclusively presumed to exist.<sup>201</sup> Because the filing of a statement of partnership is voluntary rather than mandatory, no inference can be made from the absence of a statement of partnership.<sup>202</sup>

Since there are no filing or registration requirements attendant to the formation of a general partnership under the UPA, the Committee believes that the Opinion Giver should not give an opinion that a general partnership is duly organized, but instead only that it is existing as illustrated by the Model Partnership Status Opinion.

(b) Not Governed by UPA. Before the adoption of the UPA in 1984, the question as to whether or not a general partnership had been formed was governed by Georgia law providing that “[a] partnership may be created either by written or parol contract, or it may arise from a joint ownership, use and enjoyment of the profits of undivided property, real or personal.”<sup>203</sup> A mere tenancy in common, however, would not create a partnership in and of itself.<sup>204</sup> Furthermore, an agreement merely to do business “in concert” would not necessarily

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GA. CODE ANN. §§ 75-101, 102 (Harrison 1981) (*repealed by* 1984 Ga. Laws 1439, § 1, effective April 1, 1985). See *also* *Butler v. Frank*, 67 S.E. 884 (Ga. Ct. App. 1910).

<sup>199</sup> See Section 2.07 for a detailed description of the use of certificates from third parties and the extent to which reliance may be placed thereon.

<sup>200</sup> O.C.G.A. § 14-8-10.1.

<sup>201</sup> O.C.G.A. § 14-8-10.1(f).

<sup>202</sup> There may be certain situations in which a statement of partnership may have been filed even though no formal agreement of partnership exists. If the Opinion Giver has reason to believe such is the case, the Opinion Giver may wish to examine the public records of appropriate counties in order to uncover evidence of the existence of a partnership or any counter affidavits that may have been filed by a partner.

<sup>203</sup> See *Butler v. Frank*, 67 S.E. 884 (Ga. Ct. App. 1910). See *also* *Hannifin v. Wolpert*, 193 S.E. 81 (Ga. Ct. App. 1937); *Beard v. Oliver*, 182 S.E. 921 (Ga. App. 1935); *Floyd v. Kicklighter*, 76 S.E. 1011 (Ga. Ct. App. 1912). Although a joint interest in profits and losses is generally indicative of a partnership, this would not necessarily be the case if the intent of the parties was otherwise.

<sup>204</sup> *Borum v. Deese*, 26 S.E.2d 538 (Ga. 1943).

result in the formation of a partnership.<sup>205</sup> Ultimately, the “true test” of a partnership is the intent of the parties.<sup>206</sup>

Since there are no filing or registration requirements attendant to the formation of a general partnership that is not governed by the UPA, the Committee believes that as in the case of general partnerships formed under the UPA discussed in Section 8.02A.3(a), the Opinion Giver should not give an opinion that a general partnership is duly organized, but instead only that it is existing as indicated by the Model Partnership Status Opinion.

It also is important for the Opinion Giver to realize that, prior to the enactment of the UPA, Georgia law provided that a general partnership, as such, could not hold title to real property. Rather, title could vest in the individual general partners only in their capacity as tenants in common, even if a deed specified that it purported to convey title to the partnership itself.<sup>207</sup> Under the UPA, however, “[a]ny estate in real property may be acquired in the partnership name and title to any estate so acquired shall vest in the partnership itself rather than in the partners individually.”<sup>208</sup>

4. Limited Liability Partnerships. In order to form a limited liability partnership, a general partnership must record a limited liability partnership election with the Clerk of the Superior Court of any county in which the partnership has an office.<sup>209</sup> The election must state the following: (i) the name of the partnership, which must comply with O.C.G.A. § 14-8-63, (ii) the business, profession, or other activity in which the partnership engages, (iii) that partnership elects to be a limited liability partnership, (iv) that such election has been duly authorized, and (v) any other matters the partnership determines to include therein.<sup>210</sup> The name of a limited liability partnership must contain the words “limited liability partnership” or “ltd. liability partnership,” and the abbreviation “L.L.P.” or the designation “LLP” as the last words or letters of such name.<sup>211</sup> Subject to any contrary agreement among the partners, the election must be executed by a majority of the partners or by one or more partners authorized to execute an election.<sup>212</sup>

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<sup>205</sup> Benton v. White, 194 S.E. 179 (Ga. 1937).

<sup>206</sup> Allgood v. Feckoury, 135 S.E. 314 (Ga. Ct. App. 1926).

<sup>207</sup> Bloodworth v. Bloodworth, 178 S.E.2d 198 (Ga. 1970); *see also* Hammond v. Chastain, 199 S.E.2d 237 (Ga. 1973) (holding that a partnership could not hold title, but approving the subject conveyance on the grounds that the managing partners of the partnership, in effect, had a power of attorney from the other partners because of the terms of the partnership agreement).

<sup>208</sup> O.C.G.A. § 14-8-8(f). The clear intent of the legislature in enacting §14-8-8(f) was to overrule prior Georgia law concerning the vesting of title in partnerships.

<sup>209</sup> O.C.G.A. § 14-8-62(a).

<sup>210</sup> *Id.*

<sup>211</sup> O.C.G.A. § 14-8-63(a).

<sup>212</sup> O.C.G.A. § 14-8-62(b).

A partnership becomes a limited liability partnership at the time of the recording of the election or at any later date or time stated in the election.<sup>213</sup> The fact that an election has been recorded as stated above is notice that the partnership is a limited liability partnership.<sup>214</sup> Accordingly, a certificate from a general partner or other representative of Borrower setting forth each county in which the partnership has an office accompanied by a copy of an election certified as recorded in the records of the Superior Court of one of such counties by the Clerk of such Superior Court, together with a review of the actual terms of such election, should provide a reasonable basis upon which an Opinion Giver may conclude that a limited liability partnership has been formed, absent, of course, actual knowledge of facts indicating any failure to meet the statutory requirements described above.

Although a general partnership must file an election in order to become a limited liability partnership, since there are no filing or registration requirements attendant to the formation of the underlying general partnership, the Committee believes that the Opinion Giver should not give an opinion that a limited liability partnership is duly organized, but instead only that it is existing as indicated by the Model Partnership Status Opinion.

Since a limited liability partnership is a hybrid form of general partnership, a defect in the formation of a limited liability partnership would presumably not affect such partnership's status as a general partnership, nor the Opinion Giver's ability to render an opinion as to the formation of the general partnership. Nevertheless, the Committee recommends that the Opinion Giver expressly refer to the defective attempt at forming the limited liability partnership in rendering its opinion.

## **B. Continuing Existence.**

Once the Opinion Giver has determined that a general partnership, a limited partnership, a limited liability partnership or a limited liability limited partnership has been formed, the Opinion Giver must confirm that the partnership "is existing," as of the date of the Opinion.<sup>215</sup> In order to give an opinion that a general or a limited partnership, a limited liability partnership or a limited liability limited partnership "is existing," the Opinion Giver should make a reasonable factual inquiry of the partners in order to confirm the absence of any events that may have caused the partnership to fail to exist. The Committee has considered the effect of Section 30 of the UPA, which specifically states that, upon dissolution, a partnership is not terminated, but continues until the winding up of the partnership affairs has been completed.<sup>216</sup> Thus, theoretically, an Opinion

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<sup>213</sup> O.C.G.A. § 14-8-62(c).

<sup>214</sup> O.C.G.A. § 14-8-62(e).

<sup>215</sup> Legal opinions often use the term of art "validly existing." The use of the term "validly" does not appear to modify this opinion in any meaningful way, such as to imply any higher standard of investigation on the part of the Opinion Giver. Accordingly, the Model Partnership Status Opinion does not include the word "validly." This is consistent with the Model Corporate Status Opinion. *See supra* note 114 and accompanying text.

<sup>216</sup> Although the GRULPA provides that after dissolution a limited partnership is wound up, but does not expressly state that a limited partnership in dissolution continues to exist, presumably this is the result. *See* O.C.G.A. § 14-9-803.

Giver could give the opinion that a partnership continues to exist even if voluntary dissolution or statutory involuntary dissolution is underway and/or has taken place. Although such an opinion, is, perhaps, technically accurate, it may create an erroneous impression upon the Opinion Recipient unless the Opinion Giver notes such events of dissolution in the body of the opinion. Therefore, if the Opinion Giver is aware of any events of voluntary or involuntary dissolution or of a certificate of cancellation or other notice of intent to dissolve being filed with the Secretary of State, then the Opinion Giver should describe such events when delivering an “is existing” opinion.<sup>217</sup>

1. Dissolution or Termination of Limited Partnerships.

(a) Governed by GRULPA. The GRULPA sets forth the following specific events that cause the statutory dissolution of a limited partnership governed by the GRULPA: (i) the occurrence of an event specified in writing in the partnership agreement; (ii) the written consent of all partners; (iii) an event of withdrawal of a general partner, unless (x) at least one other general partner remains and the written provisions of the partnership agreement permit the business of the limited partnership to be carried on by the remaining partners, or (y) within ninety days of the withdrawal, all of the remaining partners, or such partners as are required by the written provisions of the partnership agreement, agree in writing to continue the business and, if necessary, to appoint one or more new general partners; or (iv) the entry of a decree of judicial dissolution.<sup>218</sup> A court may decree the dissolution of the limited partnership if it determines that it is not reasonably practicable to carry on the business of the partnership in conformity with the partnership agreement or if a general partner has been guilty of misconduct that would tend to affect the continued operation of the business of the partnership in a prejudicial manner.<sup>219</sup> In addition, a limited partnership can be terminated upon the merger of the limited partnership into another entity such that the limited partnership is not the surviving entity,<sup>220</sup> or upon the filing of a certificate of cancellation in the event of dissolution when all the debts of the partnership have been discharged and all remaining assets distributed or when there are no remaining limited partners.<sup>221</sup>

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<sup>217</sup> This approach is consistent with the recommended approach with respect to corporations, as described in § 5.02C.

<sup>218</sup> O.C.G.A. § 14-9-801.

<sup>219</sup> O.C.G.A. § 14-9-802.

<sup>220</sup> O.C.G.A. § 14-9-206.1.

<sup>221</sup> O.C.G.A. § 14-9-203. Although it may be customary for a limited partnership to file a cancellation of a statement of partnership or certificate of limited partnership, as applicable, upon termination of the partnership, such a filing is not mandated by the GRULPA, contrary to the requirement set forth for limited partnerships in the statutory predecessor to the GRULPA. Therefore, the absence of such a document of cancellation does not create an inference that the partnership continues to exist. Accordingly, even if no such document of cancellation has been filed, it would be inappropriate for an Opinion Giver to deliver the Model Partnership Status Opinion in a situation in which a partnership has been terminated or deemed terminated pursuant to the terms of the applicable partnership agreement or by operation of law, notwithstanding the absence of any certificate of cancellation.

(b) Not Governed by GRULPA. The events of statutory dissolution under the ULPA are generally similar to those under the GRULPA.<sup>222</sup> Under the ULPA, cancellation of a limited partnership is required when the partnership is dissolved or when all of the limited partners cease to have such status.<sup>223</sup> With respect to limited partnerships formed prior to February 15, 1952, however, the applicable statutory provision states that the death of any partner or certain changes to the name or business of the partnership or to the capital contributed by the limited partners dissolves the limited partnership.<sup>224</sup>

2. Discontinuation of Status as a Limited Liability Limited Partnership. A limited partnership continues to be a limited liability limited partnership until it is dissolved and not continued, as provided in Section 8.02B.1, or its certificate of limited partnership is amended to remove the statement that such limited partnership is a limited liability limited partnership or so that its name no longer includes the words “limited liability limited partnership,” the abbreviation “L.L.L.P.” or the designation “LLLP.”<sup>225</sup> If a limited partnership that is a limited liability limited partnership is dissolved and its business is continued without liquidation of the limited partnership’s affairs, the new limited partnership continues to be a limited liability limited partnership until its certificate of limited partnership is amended as described above.<sup>226</sup>

Since a limited liability limited partnership is a hybrid form of limited partnership, the discontinuation of its status as a limited liability limited partnership would presumably not affect such partnership’s continued existence as a limited partnership, nor the Opinion Giver’s ability to render an opinion as to the existence of such limited partnership. Nevertheless, the Committee recommends that the Opinion Giver expressly refer to the discontinuation of status as a limited liability limited partnership in rendering its opinion as to the existence of the limited partnership.

### 3. Dissolution or Termination of General Partnerships.

(a) Governed by UPA. The UPA provides that a general partnership may be dissolved by the occurrence of any of the following events: (i) the termination of the previously agreed upon term or undertaking; (ii) the express will or withdrawal of a partner if there is no agreement as to the term; (iii) the expulsion of a partner pursuant to the applicable partnership agreement; (iv) the unlawfulness of the business; or (v) the death of a partner.<sup>227</sup> A

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<sup>222</sup> O.C.G.A. § 14-9A-90.

<sup>223</sup> O.C.G.A. § 14-9A-25(a).

<sup>224</sup> O.C.G.A. § 14-9A-121. It is also possible, however, that if such a partnership continued notwithstanding the occurrence of any such events, then the status of the limited partnership would change to that of a general partnership. A limited partnership of this era also may have converted into a general partnership if (1) the terms of the partnership were not published within two months of the filing of a certificate and affidavit or (2) it continued to do business after expiration, but did not reform in accordance with the requirements for original formation. O.C.G.A. §§ 14-9A-119(b), 120.

<sup>225</sup> O.C.G.A. § 14-8-62(g).

<sup>226</sup> *Id.*

<sup>227</sup> O.C.G.A. § 14-8-31(a).

court also may dissolve a general partnership pursuant to a decree issued because of a partner's incapacity or misconduct or for other equitable reasons.<sup>228</sup> Absent an express provision in the applicable partnership agreement to the contrary, however, neither the assignment of a partner's interest<sup>229</sup> nor the admission of a new partner<sup>230</sup> would cause dissolution by operation of law.

As in the case of a limited partnership, the dissolution of a general partnership does not terminate the general partnership.<sup>231</sup> Instead, the general partnership continues until the winding up of the partnership affairs is completed.<sup>232</sup> No provision of the UPA expressly addresses termination, but it appears that a general partnership is terminated upon the completion of the winding-up process.<sup>233</sup> As in the case of a limited partnership, while the Opinion Giver could theoretically give an existence opinion regarding a general partnership in dissolution, such an opinion could create an erroneous impression on the Opinion Recipient. Therefore, if the Opinion Giver is aware of any events of dissolution, the Opinion Giver should describe such events in giving the existence opinion.

(b) Not Governed by UPA. Prior to the UPA, a general partnership could be dissolved by the mutual consent of the parties; the death, insanity or felony conviction of any partner; the extinction of the business for which the partnership was formed; or the misconduct of any partner that would justify dissolution on an equitable basis.<sup>234</sup>

4. Discontinuation of Status as a Limited Liability Partnership. A general partnership that becomes a limited liability partnership continues to be a limited liability partnership until it is dissolved and not continued, as provided in Section 8.02B.3, or a cancellation of limited liability partnership election, which states that it has been duly authorized, is executed by a majority of the partners or by one or more partners authorized to execute such a cancellation, subject to any contrary agreement among the partners, and recorded with the Clerk of the Superior Court of each county in which the partnership recorded a limited liability partnership election.<sup>235</sup> The status of a partnership as a limited liability partnership is not affected by changes in the information stated in the election after the recording of a limited liability partnership election.<sup>236</sup> If a limited liability partnership is dissolved and its business continued

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<sup>228</sup> O.C.G.A. § 14-8-32. Although the bankruptcy of a partner or of a partnership would not in and of itself cause dissolution of a partnership by operation of law, a court may issue a decree of dissolution upon such basis. See Larry E. Ribstein, *An Analysis of Georgia's New Partnership Law*, 36 MERCER L. REV. 443, 500-01 (1985).

<sup>229</sup> O.C.G.A. § 14-8-27(b).

<sup>230</sup> O.C.G.A. § 14-8-31(b).

<sup>231</sup> O.C.G.A. §§ 14-8-29, 30.

<sup>232</sup> O.C.G.A. § 14-8-30.

<sup>233</sup> See *id.*

<sup>234</sup> GA. CODE ANN. § 75-107 (Harrison 1981) (*repealed by* 1984 Ga. Laws 1439, § 1, effective April 1, 1985).

<sup>235</sup> O.C.G.A. § 14-8-62(c).

<sup>236</sup> O.C.G.A. § 14-8-62(d).

without liquidation of the partnership's affairs, the new partnership succeeds to the old partnership's election to become a limited liability partnership and continues to be a limited liability partnership until cancellation of such election.<sup>237</sup>

Since a limited liability partnership is a hybrid form of general partnership, the discontinuation of its status as a limited liability partnership would presumably not affect such partnership's continued existence as a general partnership, nor the Opinion Giver's ability to render an opinion as to the existence of such general partnership. Nevertheless, the Committee recommends that the Opinion Giver expressly refer to the discontinuation of status as a limited liability partnership in rendering its opinion as to the existence of the general partnership.

### **C. Good Standing.**

Although there is no codified definition of the term "good standing," in application either to corporations or partnerships under Georgia law, a "good standing" opinion traditionally has been requested by Opinion Recipients in order to confirm certain matters.

1. Limited Partnerships Governed by GRULPA and Limited Liability Limited Partnerships. With respect to limited partnerships governed by the GRULPA and limited liability limited partnerships, the Committee considers it to be appropriate to use the "good standing" opinion. Accordingly, in the absence of any statutory authority to the contrary, an opinion that a limited partnership or a limited liability limited partnership governed by the GRULPA is in "good standing" may be considered to mean that (i) the limited partnership or limited liability limited partnership has not filed a certificate of cancellation or, to the knowledge of the Opinion Giver, other notice of intent to dissolve with the Secretary of State; (ii) to the knowledge of the Opinion Giver, no event of voluntary or statutory dissolution has occurred with respect to the limited partnership or limited liability limited partnership and a court with applicable jurisdiction has not entered a decree ordering the dissolution of the limited partnership or limited liability limited partnership;<sup>238</sup> (iii) the limited partnership or limited liability limited partnership has completed all applicable filing and registration requirements under Section 206 of the GRULPA; and (iv) the limited partnership or limited liability limited partnership is not on "inactive filing status" pursuant to Section 206.7 of the GRULPA.<sup>239</sup> Although there are no administrative dissolution procedures applicable to a limited partnership or limited liability limited partnership for failure to file annual reports and the like, the Committee believes that the good standing requirement contemplates compliance with all administrative requirements and consequently that if such failure exists, such partnership will not be in good standing.

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<sup>237</sup> O.C.G.A. § 14-8-62(f).

<sup>238</sup> See Sections 8.02B.1(a) and 8.02B.4 for a detailed description of events that could cause a limited partnership or limited liability limited partnership to be in the process of dissolution. The Opinion Giver should be entitled to rely upon a certificate from the general partner of the limited partnership or limited liability limited partnership as to the absence of any such event and should be under no obligation to attempt to examine the court records of any county or otherwise to verify such matters independently.

<sup>239</sup> A limited partnership may be placed on an inactive filing status with the Secretary of State if it fails for three (3) consecutive years to meet any filing requirement of the GRULPA. O.C.G.A. § 14-9-206.7. As a result, the partnership's name would then become available for reservation by others. Such inactive status, however, in and of itself, would not affect any limitation on the personal liability of a limited partner.

2. General Partnerships, Limited Liability Partnerships and Limited Partnerships Not Governed by GRULPA. Because the matters or events that are intended to be the subject matter of the “good standing” opinion described above generally relate to filings with the Secretary of State and because there are no analogous filings with respect to general partnerships or limited liability partnerships or with respect to limited partnerships not governed by the GRULPA, the “good standing” concept would appear to be inapplicable with respect to such partnerships. The Secretary of State does not issue any certificate regarding the status of general partnerships, limited liability partnerships or limited partnerships not governed by the GRULPA and, indeed, would have no actual way of knowing whether or not such partnerships have been formed, dissolved or terminated. Therefore, the Committee recommends that an Opinion Giver should not include the phrase “good standing” in connection with a general partnership, a limited liability partnership or a limited partnership not governed by the GRULPA as it may lead the Opinion Recipient to an erroneous conclusion.<sup>240</sup> In addition, as noted in Section 8.02B, if the Opinion Giver is aware of any events of voluntary or involuntary dissolution or of a certificate of cancellation or other notice of intent to dissolve being filed with the Secretary of State, then the Opinion Giver should describe such events when delivering an “is existing” opinion.

**8.03 Practice Procedure for the Model Partnership Status Opinion.** In order to deliver the Model Partnership Status Opinion with respect to a limited partnership, a general partnership, a limited liability partnership or a limited liability limited partnership, the Committee recommends that the Opinion Giver examine the elements described above: (i) actual formation, (ii) continuing existence, and (iii) good standing (with respect only to limited partnerships governed by the GRULPA and limited liability limited partnerships).

**A. Actual Formation.**

1. Limited Partnerships. The Opinion Giver should complete the following due diligence procedures prior to delivering a formation or due organization opinion as to a limited partnership:

(a) obtain and review a copy of the GRULPA in effect at the time of the limited partnership’s formation (or the applicable statutory predecessor with respect to limited partnerships which were formed prior to July 1, 1988, and which did not elect to be governed under the GRULPA);

(b) obtain and review certified copies of the certificate of limited partnership of the limited partnership, including all amendments, from the Secretary of State (or from the Clerk of Superior Court of the county where filed in the case of a limited partnership formed prior to July 1, 1988), to ensure that it conforms with the requirements of GRULPA (or corresponding requirements of the applicable statutory predecessor to the GRULPA) and that the certificate was otherwise in proper form for filing;

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<sup>240</sup> See, e.g., Special Joint Committee of the Maryland State Bar Association and the Bar Association of Baltimore City, *supra* note 153, at 726.

(c) if applicable, obtain and review a certified copy of any election filed by a limited partnership formed prior to July 1, 1988, with respect to such an election to be governed by the GRULPA;

(d) determine whether the limited partnership presently has a registered agent and a registered office as required by O.C.G.A. § 14-9-104; if not, a registered agent should be appointed and a registered office should be established (the registered agent must be an individual resident of this state, a domestic corporation, professional corporation, or limited liability company, or a foreign corporation or limited liability company authorized to transact business in this state);

(e) in the case of a limited partnership formed by conversion from another entity pursuant to Section 206.2 of the GRULPA:

(i) obtain a certified copy of the certificate of election of the limited partnership from the Secretary of State and examine such certified certificate of election to ensure that the contents required by Section 206.2 of the GRULPA at the time of such election are included; and

(ii) in the case of a corporation which has been converted to a limited partnership, obtain and examine copies of the plan of election and resolutions of the converting corporation's board of directors and shareholders approving such plan of election, certified by a duly authorized officer of the corporation, to ensure that the contents of the plan of election required by Section 1109.1(c) of the GBCC at the time of the corporation's election are included and to ensure that such plan of election was approved by the board of directors and shareholders of the converting corporation, or, in the alternative, confirm such approval through the certificate of the managing general partner or other appropriate representative of the limited partnership; or

(iii) in the case of a limited liability company or general partnership which has been converted to a limited partnership, obtain and examine copies of any resolutions, consents or other written instruments setting forth or otherwise evidencing the plan of election and its approval by the members or partners, respectively, certified by (A) a duly authorized representative of a limited liability company,<sup>241</sup> or (B) an individual general partner or a duly authorized officer of a corporate general partner, to ensure that the election was approved by all of the members or partners, respectively, or otherwise in accordance with applicable law, or, in the alternative, confirm such approval through the certificate of the managing general partner or other appropriate representative of the limited partnership; and

(f) obtain the certificate described in Section 8.03B.5 below or other evidence of the facts stated therein.

2. Limited Liability Limited Partnerships. In addition to the due diligence as provided in Section 8.03A.1, the Opinion Giver should complete the following due diligence procedures prior to delivering a formation or due organization opinion as to a limited liability limited partnership:

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<sup>241</sup> See *infra* note 292.

(a) obtain and review certified copies of the certificate of limited partnership of the limited partnership, including all amendments, from the Secretary of State, to confirm that the contents required by the provisions of the GRULPA are included, and that the certificate and amendments were otherwise in proper form for filing.

3. General Partnerships. The Opinion Giver should complete the following due diligence procedures prior to delivering an opinion that a general partnership “is a partnership”:

(a) obtain and review a copy of the UPA in effect at the time of the general partnership’s formation;

(b) obtain and review a copy of the written partnership agreement of the partnership, including all amendments, certified by the managing general partner or other appropriate representative of the general partnership;

(c) determine whether any definite term exists for the partnership (and, if so, whether the term has expired) and whether any agreement exists to wind up the partnership business upon the occurrence of a specific event (and if so, whether that specific event has occurred);

(d) obtain a certificate from one or more of the general partners identifying the present partners and verifying the absence of any circumstances that would require the dissolution of the partnership and the winding up of the partnership’s business;

(e) if no formal general partnership agreement exists, obtain evidence signed by all purported partners, whether or not pursuant to a certificate or otherwise, as to the formation of the general partnership; and

(f) obtain and review the certificate described in Section 8.03B.5 below or other evidence of the facts stated therein.

4. Limited Liability Partnerships. In addition to the due diligence as provided in Section 8.03A.3, the Opinion Giver should complete the following due diligence procedures prior to delivering an opinion that a limited liability partnership “is a limited liability partnership”:

(a) obtain the certificate of the managing general partner or other appropriate partnership representative stating all of the counties in which the partnership has an office and obtain and review a certified recorded copy of an election of limited liability partnership status from the Clerk of the Superior Court of one of such counties to confirm the contents required by Section 62(a)-(f) of the UPA.

## **B. Continuing Existence**

1. Limited Partnerships. The Committee recommends that the Opinion Giver complete the following due diligence procedures prior to delivering an opinion that a limited partnership “is existing”:

(a) obtain and review a copy of the written partnership agreement of the limited partnership, including all amendments, as certified by the managing general partner or other appropriate representative of the limited partnership, together with a certified copy of the certificate of limited partnership of the limited partnership, including all amendments, in order to confirm that no term of duration is stated or, if stated, that any stated term has not expired or that any contractual events of dissolution have not occurred;

(b) with respect to a limited partnership governed by the GRULPA, obtain a certificate of existence from the Secretary of State in order to confirm that the limited partnership has not filed a certificate of cancellation or other notice of intent to dissolve with the Secretary of State; and

(c) obtain the certificate described in Section 8.03B.5 below or other evidence of the facts stated therein.

2. Limited Liability Limited Partnerships. In addition to the due diligence as provided in Section 8.03B.1, the Committee recommends that the Opinion Giver complete the following due diligence procedures prior to delivering an opinion that a limited liability limited partnership “is existing”:

(a) confirm that the certificate of limited partnership of the limited partnership has not been amended to remove the statement that the partnership is a limited liability limited partnership or so that its name no longer contains the words “limited liability limited partnership” or “ltd. liability limited partnership,” the abbreviation “L.L.L.P.” or the designation “LLL.P”.

3. General Partnerships. The Committee recommends that the Opinion Giver complete the following due diligence procedures prior to delivering an opinion that a general partnership “is existing”:

(a) obtain and review a copy of the written partnership agreement of the general partnership, including all amendments, certified by the managing general partner or other appropriate representative of the general partnership, in order to confirm that no term or duration is stated or, if stated, that any stated term has not expired or that any contractual events of dissolution have not occurred;

(b) if no formal general partnership agreement exists, obtain evidence signed by all purported partners, whether or not pursuant to a certificate or otherwise, as to the existence of the general partnership; and

(c) obtain the certificate described in Section 8.03B.5 below or other evidence of the facts stated therein.

4. Limited Liability Partnerships. In addition to the due diligence as provided in Section 8.03B.3, the Committee recommends that the Opinion Giver complete the following due diligence procedures prior to delivering an opinion that a limited liability partnership “is existing”:

(a) confirm that no cancellation of the limited liability partnership election recorded in the office of the Clerk of the Superior Court for each county in which the partnership has an office has been recorded in any such office.

5. General. In the case of limited and general partnerships, as well as limited liability partnerships and limited liability limited partnerships, the Committee recommends that the Opinion Giver obtain a certificate from the managing general partner of the partnership or other appropriate representative of the partnership to the effect that:

(a) no event specified in the written partnership agreement of the partnership that would be a cause for dissolution or termination of the partnership has occurred;

(b) no general partner has died, withdrawn from the partnership or been expelled from the partnership, and no other event of statutory dissolution specified in the GRULPA, the UPA or other applicable law has occurred, or, if any such event has occurred, the remaining partners have taken all actions required under the GRULPA, the UPA or other applicable law in order to continue the partnership;

(c) the partnership has not received any notice from the Secretary of State of a determination that any grounds exist for administratively dissolving the partnership and the partnership has not received notice of the commencement of any judicial action to dissolve the partnership;

(d) none of the partners of the partnership has taken any action with respect to the dissolution of the partnership and the partnership has not filed any notice of intent to dissolve with the State of Georgia;

(e) with respect to a general partnership that has become a limited liability partnership, the only counties in which the partnership has an office are those listed in the certificate, the partners who signed the limited liability partnership election were a majority of the partners or one or more partners authorized to execute the election, and no cancellation of the election has been executed and submitted to be recorded; and

(f) with respect to a limited liability limited partnership that was initially formed as a limited liability limited partnership, no amendment canceling the limited liability status has been executed and submitted to be recorded, or with respect to a limited partnership that has become a limited liability limited partnership by the amendment to the certificate of limited partnership, the amendment electing limited liability status was approved by all of the partners, or the partners required by any agreement among the partners, and no amendment canceling the election has been executed and submitted to be recorded.

### C. Good Standing.

The Opinion Giver should complete the following due diligence procedures prior to delivering an opinion that a limited partnership governed by the GRULPA or a limited liability limited partnership is in “good standing”:

(i) obtain a certified copy of any written partnership agreement of the partnership, including all amendments, and examine it as provided in Section 8.03B.1(a);

(ii) obtain a certified copy of the certificate of limited partnership of the partnership, including all amendments, from the Secretary of State, and examine it as provided in Section 8.03B.1(a);

(iii) confirm, with respect to a limited liability limited partnership, that the certificate of limited partnership has not been amended to remove the statement that the partnership is a limited liability partnership or so that its name no longer contains the words “limited liability limited partnership” or “ltd. liability limited partnership,” the abbreviation “L.L.L.P.” or the designation “LLLP”;

(iv) obtain a certificate of existence from the Secretary of State in order to confirm that the partnership has complied with all annual filing and registration requirements and has not filed a certificate of cancellation or other notice of intent to dissolve with the Secretary of State; and

(v) obtain the certificate described in Section 8.03B.5 or other evidence of the facts stated therein.

## **IX. THE MODEL PARTNERSHIP POWERS OPINION**

*Borrower has the power to execute and deliver the Loan Documents, to perform its obligations under the Loan Documents, to own and use the Property and to conduct its business.*

### **COMMENT**

**9.01 Purpose and Background of the Model Partnership Powers Opinion.** The purpose of the Model Partnership Powers Opinion is to provide assurance to the Opinion Recipient that Borrower’s performance of its obligations under the Loan Documents, its ownership and use of the Property and the conduct of its business are within the scope of its powers and are not subject to any limitations on its powers.

**9.02 Elements of the Model Partnership Powers Opinion.** The Model Partnership Powers Opinion means that, pursuant to applicable Georgia law and the applicable partnership agreement of Borrower, the purposes and powers of the partnership enable it (i) to enter into binding and contractual obligations by executing and delivering the Loan Documents, (ii) to perform all of its obligations under the Loan Documents, (iii) to own, lease or otherwise hold and use the Property as it currently is owned, leased or otherwise held and used, and (iv) to conduct its business as it is currently being conducted.

**A. Assumed Opinions.** The Model Partnership Powers Opinion assumes that the Model Partnership Status Opinion could also be given. The Opinion Giver may rely on this assumption subject to the standards of unwarranted reliance set forth in Section 2.07. In any case in which reliance on this assumption would be unwarranted or in any case in which the Opinion Giver determines that the Model Partnership Status Opinion cannot be given, the Committee has concluded that the Opinion Giver cannot render the Model Partnership Powers Opinion. This

conclusion is based upon the Committee’s view that the proper formation of a general or limited partnership, a limited liability partnership or a limited liability limited partnership is a necessary prerequisite to the ability of the Opinion Giver to deliver an opinion that the partnership has the powers described in the Model Partnership Powers Opinion.

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

**C. Performance of Obligations.** The Model Partnership Powers Opinion extends to all obligations to be performed by Borrower under the Loan Documents. However, the Opinion Recipient may request that the Opinion Giver refer specifically to certain obligations of Borrower deemed critical to consummation of the Loan Transaction. Delineation of such obligations does not mean that obligations not specifically listed are not covered by the opinion or are less material than those listed. Performance, based on the principles discussed at Section 2.01, means performance on the date of the Opinion Letter and under the circumstances then presented.

**D. Ownership and Use of Property.** The Model Partnership Powers Opinion should be interpreted to cover every manner in which Borrower has rights in the Property, including, but not limited to, by ownership, lease or license, and every manner in which Borrower uses the Property. The phrase “own and use” in the Opinion is not intended to limit the scope of the Opinion to that part of the Property owned by Borrower and includes parts of the Property leased or licensed by Borrower. However, the use of the term “Property” in the Model Partnership Powers Opinion is intended to address only that real and personal property that is the subject of the Loan Transaction, and there should be no implication that the Model Partnership Powers Opinion covers the ownership and use of any other property of Borrower.

**E. Current Conduct of Business and Ownership of Property.** The business or businesses currently being conducted by Borrower and the Property currently owned, leased or otherwise held and used by Borrower that is the subject of the Loan Transaction are all that can be verified factually at the time that the Model Partnership Powers Opinion is given. A new business or new property of Borrower should be addressed only when the Loan Transaction involves entering into a new business or acquiring new property. For example, if the Loan Transaction involves secured financing in connection with the acquisition of a new business or new property, it is appropriate for the Model Partnership Powers Opinion to cover Borrower’s power to conduct such new business and to own and use such new property.

**F. Conduct of Lawful Business.** The Model Partnership Powers Opinion is based upon the assumption that Borrower is engaged in a lawful business as set forth in Interpretive Standard 16. The Opinion Giver may rely on this assumption subject to the standards of unwarranted reliance set forth in Section 2.07.

**G. “Power” vs. “Authority”.** The words “power” and “authority” are often used together or interchangeably in giving similar “powers” opinions. It should be noted that there is no consistency in the use of the word “power” in the statutory terminology used in applicable partnership laws. This contrasts with the consistent usage of the word “power” in the GBCC with respect to corporations and in the GLLCA with respect to limited liability companies. In fact, applicable statutes generally use the term “authority” in connection with limited or general

partnerships, rather than “power,” although “power” is used on occasion. Nevertheless, the Committee considers the use of the word “power,” in the context of both limited and general partnerships, as well as limited liability partnerships and limited liability limited partnerships, to be analogous to the use of such word with respect to corporations and limited liability companies. As such, for the purposes of this Report, the word “power” refers to the inherent general power that a partnership possesses under the UPA, the GRULPA and/or other applicable law, as such general power may be limited in any manner pursuant to the applicable partnership agreement. Alternatively, for the purposes of this Report, the word “authority” refers instead to the specific authorization to engage in a specific act or transaction pursuant to the terms of the partnership agreement and/or any consents and resolutions. The use of the word “authority,” either instead of or together with the word “power,” may imply that the Opinion covers other sources of or limitations on a partnership’s powers. Accordingly, the Committee has concluded that the word “power” should be used in the Model Partnership Powers Opinion without the added term “authority” in order to avoid the possibility of a misunderstanding. The Model Partnership Acts Opinion in Section X of this report addresses relevant questions of partnership authority.

The words “full,” “requisite” or “necessary” are frequently used in powers opinions in describing the power of the entity. The Committee believes that neither the term “requisite” nor the term “necessary” add anything to the scope of the Model Partnership Powers Opinion and that the use of either word should not imply any broader scope to the opinion. The word “full” should not be used in the context of a powers opinion in order to avoid any implication that the scope of the opinion extends beyond the powers of a partnership under applicable Georgia law.

**9.03 Matters Not Covered by the Model Partnership Powers Opinion.** Certain matters not covered by the Model Partnership Powers Opinion are covered by other opinions discussed in other Sections of this Report.

The Model Partnership Powers Opinion does not mean that Borrower’s performance of its obligations under the Loan Documents will withstand all challenges from all parties, other than challenges by parties having the right under the GRULPA, the UPA or other applicable partnership law to make such a challenge on the grounds that Borrower’s actions are beyond the inherent power of the limited or general partnership, limited liability partnership or limited liability limited partnership, as applicable. Opinions as to such other matters should be covered, if at all, by the Model No Violation Opinion (Section XVI) and the Model Remedies Opinion (Section XVIII).

The Model Partnership Powers Opinion does not mean that Borrower has obtained any consent, approval, authorization or license from its partners or from any third parties, including, but not limited to, governmental or regulatory authorities or parties to any contracts or agreements of Borrower. Opinions as to these matters should be covered, if at all, by the Model Partnership Status Opinion (Section VIII) and the Model Partnership Acts Opinion (Section X).

The Model Partnership Powers Opinion does not mean that Borrower’s actions as a limited or general partnership, limited liability partnership or limited liability limited partnership, taken in connection with the Loan Transaction, would not result in any breach of or default under any contracts or agreements to which Borrower is a party or by which any of the Property is bound or in a violation of any constitution, statute, law, regulation, rule, order or similar legal requirement pursuant to statutory authority, other than under the GRULPA, the UPA or other

applicable partnership law. Opinions as to these matters should be covered, if at all, by the Model No Violation Opinion (Section XVI).

The Model Partnership Powers Opinion does not cover the effect on Borrower's purposes or powers of any laws other than the GRULPA, the UPA or other applicable partnership law, including, but not limited to, the laws of any jurisdiction in which Borrower is or should be qualified to do business under applicable law or any other laws that could add to, or limit the exercise of, its purposes or powers. Opinions as to these matters should be covered, if at all, by the Model No Violation Opinion (Section XVI).

The Model Partnership Powers Opinion does not cover any restrictions or limitations on Borrower's purposes or powers contained in a document other than the written partnership agreement, including all amendments thereto, and any applicable certificate of limited partnership, statement of general partnership or election regarding limited liability status, including all amendments thereto. Opinions as to these matters and the effect of any limitations or restrictions contained in resolutions and agreements of Borrower should be covered, if at all, by the Model Partnership Acts Opinion (Section X) and the Model No Violation Opinion (Section XVI).

**9.04 Additional Notes Regarding the Model Partnership Powers Opinion.** Although the concept of "*ultra vires* acts," as used with respect to corporations or limited liability companies, is not customarily applied to partnerships, the Opinion Giver must make the analogous analysis of the underlying organizational documents of the applicable limited or general partnership, limited liability partnership or limited liability limited partnership, as well as applicable statutory and case law, in order to determine whether or not a partnership has the inherent power to take the actions in question.

**A. Limited Partnerships.**

1. Governed by GRULPA. Under the GRULPA, a limited partnership has broad inherent power to engage in any activity except to the extent provided by law or in the applicable partnership agreement.<sup>242</sup>

2. Not Governed by GRULPA. The power of a limited partnership, formed after February 15, 1952, and before July 1, 1988, but not opting to be governed under the GRULPA, to carry on a business is set forth in Section 21 of the ULP. This Section states that "a limited partnership may carry on any business which a partnership without limited partners may carry on, except for banking, insurance, railroad, trust, canal, navigation, express and telegraph business."<sup>243</sup> Limited partnerships formed prior to February 15, 1952 could be formed "for the purpose of transacting any mercantile, commercial, mechanical, manufacturing, mining or agricultural business," but not "for the purposes of banking or insurance."<sup>244</sup>

**B. General Partnerships and Limited Liability Partnerships.** The UPA provides that there are no limitations on the power of a partnership beyond those contained in the UPA,

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<sup>242</sup> O.C.G.A. § 14-9-106(a).

<sup>243</sup> O.C.G.A. § 14-9A-21.

<sup>244</sup> O.C.G.A. § 14-9A-111.

except to the extent of any limitations specified in the applicable statement of partnership.<sup>245</sup> It should be noted once again, however, that the filing of a statement of partnership is not mandatory.<sup>246</sup> Perhaps most importantly for the Opinion Giver in a real estate transaction, title to real property now vests in the general partnership itself rather than in the individual partners.<sup>247</sup> Furthermore, a general partnership can convey an interest in real property provided that the instruments of execution are signed by a person purporting to be a general partner.<sup>248</sup>

**C. Limited Liability Limited Partnerships.** Under the GRULPA, which governs limited liability limited partnerships, a limited liability limited partnership has broad inherent power to engage in any activity except to the extent provided by law or in the applicable partnership agreement.<sup>249</sup>

## **9.05 Practice Procedure for the Model Partnership Powers Opinion.**

**A. Limited Partnerships and Limited Liability Limited Partnerships.** The Committee recommends that the Opinion Giver complete the following due diligence procedures prior to delivering the Model Partnership Powers Opinion with respect to a limited partnership or limited liability limited partnership:

1. obtain and review a copy of the written partnership agreement of the limited partnership or limited liability limited partnership, including all amendments, certified by the managing general partner of the partnership or other appropriate representative of the partnership in order to confirm the absence of limitations on the partnership's business, purposes and powers;

2. obtain and review a certified copy of the certificate of limited partnership, including all amendments, from the Secretary of State or from the Clerk of Superior Court of the county where filed;

3. review the GRULPA, the ULPA and/or other applicable partnership law with respect to the partnership's business purposes and powers; and

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<sup>245</sup> See O.C.G.A. § 14-8-10.1(f).

<sup>246</sup> If, however, a statement of partnership is filed, but does not place any limitation on a partner's power, the general partnership would be bound by a transaction that is apparently within the scope of the general partnership's business, even though such a transaction is consummated by the action of a partner whose authority actually has been limited by the general partnership and even if such limitation has been communicated to a third party. On the other hand, a general partnership would not be bound by a real estate conveyance if a statement of partnership contains an applicable limitation on the authority to transact such a conveyance, even if a third party lacks knowledge of such limitation. Ribstein, *supra* note 228, at 461-62 & nn.131, 132.

<sup>247</sup> O.C.G.A. § 14-8-8(f).

<sup>248</sup> O.C.G.A. § 14-8-10(a).

<sup>249</sup> O.C.G.A. § 14-9-106(a).

4. if necessary, in the event that the powers of the partnership have been limited, review a certificate, dated the date of the opinion and delivered by the managing general partner of the partnership or other appropriate representative of the partnership, providing factual assurance that the partnership's activities that are the subject of the opinion are within its powers as limited by the applicable partnership agreement.

**B. General Partnerships and Limited Liability Partnerships.** The Committee recommends that the Opinion Giver complete the following due diligence procedures prior to delivering the Model Partnership Powers Opinion with respect to a general partnership or limited liability partnership:

1. obtain and review a copy of any written partnership agreement of the general partnership or limited liability partnership, including all amendments, certified by the managing general partner of the partnership or other appropriate representative of the partnership, in order to confirm the absence of limitations on the partnership's business, purposes and powers;

2. obtain and review a certified copy of any statement of general partnership that has been filed by the partnership, as may be amended;

3. review the UPA and/or other applicable partnership law with respect to the partnership's business purposes and powers;

4. if no formal general partnership agreement exists, obtain evidence signed by all purported partners, whether or not pursuant to a certificate or otherwise, as to the formation of the general partnership; and

5. if necessary, in the event that the powers of the general partnership or limited liability partnership have been limited, review a certificate, dated the date of the opinion and delivered by the managing general partner of the partnership or other appropriate representative of the partnership, providing factual assurance that the partnership's activities that are the subject of the opinion are within its powers as limited by the applicable partnership agreement or statement of partnership.

## **X. THE MODEL PARTNERSHIP ACTS OPINION**

*Borrower has duly authorized the execution and delivery of the Loan Documents and the performance by Borrower thereunder. Borrower has duly executed and delivered the Loan Documents.*

### **COMMENT**

**10.01 Purpose and Background of the Model Partnership Acts Opinion.** The Model Partnership Acts Opinion provides assurances to the Opinion Recipient that Borrower has taken all partnership action necessary, in accordance with the GRULPA, the UPA or other applicable partnership law, the applicable agreement of partnership, limited partnership, limited liability partnership or limited liability limited partnership and any applicable resolutions and consents of the partnership, to approve or ratify the execution and delivery of the Loan Documents and all

performance by the partnership under the Loan Documents and Borrower has executed and delivered the Loan Documents. If Borrower is a natural person and not a corporation, partnership or limited liability company, see Section XVII below for a discussion concerning the necessary modifications to the Model Opinion as to execution and delivery of the Loan Documents.

**10.02 Elements of the Model Partnership Acts Opinion.** The Model Partnership Acts Opinion has the meanings set forth in this Section 10.02.

A. Borrower's partners have taken all partnership action necessary to approve the execution and delivery of the Loan Documents and all performance by Borrower of its obligations thereunder, on the assumption of performance on the date of the opinion as discussed in Section 2.01, all to the extent and in the manner required pursuant to (i) applicable partnership law, (ii) the applicable partnership agreement, and (iii) the partnership's established policies and practices for delegation of authority adopted by resolutions or consents of the partners or otherwise.<sup>250</sup>

B. The appropriate partner(s)<sup>251</sup> was (were) duly authorized to execute and deliver the Loan Documents, in order to cause Borrower to enter into the Loan Documents and to perform its obligations thereunder; this opinion affirms that the relevant consents of other partners (to the extent necessary in accordance with applicable law and the applicable partnership agreement) were obtained and that any relevant resolutions of Borrower (to the extent required by the applicable partnership agreement) were adopted in accordance with the procedural requirements of the applicable partnership agreement.

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<sup>250</sup> Depending upon the terms of the applicable partnership agreement, certain actions or the execution of certain documents may require the consent of all partners, all general partners or a specified percentage of partnership interests. In the case of consent of a specified percentage of partnership interests, care must be taken in order to address the possibility that the respective percentage ownership interests of the various partners may have changed from the percentages specified in the partnership documentation made available to the Opinion Giver, by reason of assignments, dilution or otherwise. Accordingly, in such instances, a certificate should be obtained from an appropriate representative of the partnership as to the then current respective percentage interests (and voting interests, if applicable) of the partners.

Further, as to matters not governed by a specific grant of authority in the partnership agreement, an Opinion Giver must examine whether or not the action in question is outside the "usual course of business" (for example, the disposal of the goodwill of the business, the assignment of partnership property to creditors, the confession of a judgment or an act that would make it impossible to carry on the ordinary business of the partnership). Section 9 of the UPA provides that a general partner may have the power to act as an agent of a general or limited partnership in order to bind that partnership in transactions with third parties if that general partner is "apparently carrying on in the usual way" of business unless that general partner's authority is restricted and the third party knows of such restriction. To the contrary, however, "[a]n act of a partner which is not apparently for the carrying on of the business of the partnership does not bind the partnership unless authorized by the other partners in the partnership agreement." O.C.G.A. § 14-8-9(2). Therefore, it may be prudent in a situation where there is no specific grant of authority with respect to the transaction in question, to obtain the consent of all partners (or, at a minimum, all general partners), either in the partnership agreement itself or in a subsequent unanimous consent for an action outside the scope of the usual course of business.

<sup>251</sup> The identity of the appropriate partner(s) will be determined by review of the applicable partnership agreement. In many cases, the designated managing partner of the partnership (or the general partner of a limited partnership, limited liability partnership or limited liability limited partnership with only one general partner) will be authorized to act on behalf of the partnership in connection with certain transactions or in connection with any transaction other than certain specified transactions.

C. The appropriate partner(s) authorized by the terms and provisions of the applicable partnership agreement (and/or by any relevant partnership resolutions or consents) has (have) executed and delivered the Loan Documents.

D. The execution and delivery of the Loan Documents were, and Borrower's performance of its obligations under the Loan Documents if performed in accordance with the Loan Documents as written will be, in accordance with the authority granted by the terms and provisions of the applicable partnership agreement and/or any relevant partnership resolutions and consents.

The Model Partnership Acts Opinion is based upon the assumption that the Model Partnership Status Opinion and the Model Partnership Powers Opinion also could be given, on which assumptions the Opinion Giver may rely, subject to the standards of unwarranted reliance set forth in Section 2.07. In any case in which reliance on this assumption would be unwarranted or in any case in which the Opinion Giver determines that the Model Partnership Status Opinion cannot be given or that the Model Partnership Powers Opinion cannot be given, the Committee has concluded that the Opinion Giver cannot render the Model Partnership Acts Opinion. This conclusion is based upon the Committee's view that the proper formation of a general or a limited partnership, limited liability partnership or limited liability limited partnership and the existence of certain inherent powers are necessary prerequisites to the ability of the Opinion Giver to deliver the Model Partnership Acts Opinion.

#### **10.03 Matters Not Covered by the Model Partnership Acts Opinion.**

A. The Model Partnership Acts Opinion does not address any laws other than the GRULPA, the UPA and/or other applicable partnership law and agency law. Other laws should be addressed, if at all, in the Model No Violation Opinion (Section XVI).

B. The Model Partnership Acts Opinion does not address whether the Loan Documents are legal, valid, binding or enforceable or whether any consent, license, authorization or approval by any third parties (including, but not limited to, governmental or regulatory authorities or parties to any of the partnership's contracts or any other agreements) is required or has been obtained. Such matters should be addressed, if at all, in the Model Remedies Opinion (Section XVIII).

#### **10.04 Additional Notes Regarding the Model Partnership Acts Opinion.**

A. **Agency.** The Model Partnership Acts Opinion covers only matters of actual authority, not those of apparent authority. An Opinion Recipient should not request or rely upon an opinion that addresses apparent authority because of the factual uncertainty inherent in apparent authority.

B. **Incumbency.** The Opinion Giver must take great care in order to establish the identity of the appropriate partner(s) with authority to consent to and execute the Loan Documents. The Opinion Giver should review the applicable partnership agreement and, when applicable, obtain a certificate from an appropriate representative of the partnership as to the then

current respective percentage interests (and voting interests, if applicable) of the partners.<sup>252</sup>

C. **Enforceability.** The Model Partnership Acts Opinion does not cover whether or not the Loan Documents are valid, binding or enforceable. The Model Partnership Acts Opinion does establish, however, that certain actions were taken so that the Opinion Giver can make the determination in the Remedies Opinion that such actions were sufficient to create binding contractual obligations.

D. **“Execute and Deliver” vs. “Enter Into.** See the discussion at Section 9.02B of this Report.

### **10.05 Practice Procedure for the Model Partnership Acts Opinion.**

A. **Limited Partnerships and Limited Liability Limited Partnerships.** The Committee recommends that the Opinion Giver complete the following due diligence procedures prior to delivering the Model Partnership Acts Opinion with respect to a limited partnership or a limited liability limited partnership:

1. obtain and review a copy of the written partnership agreement of the limited partnership or limited liability limited partnership, including all amendments, certified by the managing general partner of the partnership or other appropriate representative of the partnership;

2. obtain and review a certified copy of the certificate of limited partnership or limited liability limited partnership, including all amendments, from the Secretary of State or from the Clerk of the Superior Court of the county where filed;

3. if no formal general partnership agreement exists, obtain evidence signed by all purported partners, whether or not pursuant to a certificate or otherwise, as to the formation of the general partnership; and

4. if any relevant potential limitation on the authority of the partners is discovered upon a review of the foregoing, or if a review of the foregoing reveals that resolutions or consents of some or all of the partners of the limited partnership or limited liability limited partnership must or should be obtained in order to authorize the Loan Transaction, then the Opinion Giver also should review:

(a) any partnership resolutions or consents addressing any delegation of power generally or specifically authorizing execution and delivery of the Loan Documents and all performance by the partnership under the Loan Documents; and

(b) to the extent not covered by the managing partner’s certificate discussed in Section 10.05C below, any partnership consents or resolutions adopted after the date of adoption of the original authorizing consents or resolutions that may amend or revoke the authority granted in the original authorizing consents or resolutions.

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<sup>252</sup> See *supra* notes 250 and 251 and accompanying text.

**B. General Partnerships and Limited Liability Partnerships.** The Committee recommends that the Opinion Giver complete the following due diligence procedures prior to delivering the Model Partnership Acts Opinion with respect to a general partnership or limited liability partnership:

1. obtain and review a copy of the written partnership agreement of the general partnership or limited liability partnership, including all amendments, certified by the managing general partner of the partnership or other appropriate representative of the partnership;

2. obtain and review a certified copy of any statement of general partnership or limited liability partnership that has been filed by the partnership, including all amendments; and

3. if any relevant potential limitation on the authority of the partners is discovered upon a review of the foregoing, or if a review of the foregoing reveals that resolutions or consents of some or all of the partners of the general partnership or limited liability partnership must or should be obtained in order to authorize the Loan Transaction, then the Opinion Giver also should review:

(a) any partnership resolutions or consents addressing any delegation of power generally or specifically authorizing execution and delivery of the Loan Documents and all performance by the partnership under the Loan Documents; and

(b) to the extent not covered by the managing partner's certificate discussed in Section 10.05C below, any partnership consents or resolutions adopted after the date of adoption of the original authorizing consents or resolutions that may amend or revoke the authority granted in the original authorizing consents or resolutions.

**C. General.** The Committee also recommends that, with respect to a limited or general partnership, a limited liability partnership or a limited liability limited partnership, the Opinion Giver obtain and review a certificate, dated the date of the opinion, of the managing general partner of the partnership, or other appropriate representative of the partnership, certifying:

1. that copies of the partnership's written agreement of partnership and any statement of partnership, in the case of a general partnership or limited liability partnership, reviewed and relied upon by the Opinion Giver are true, complete and correct, and such written partnership agreement and statement of partnership, if any, have not been amended, revoked or otherwise modified since the date of their execution;

2. that copies of any partnership consents or resolutions and other relevant documentation reviewed and relied upon by the Opinion Giver are true, complete and correct, have not been amended, revoked or otherwise changed since the date adopted, and are the only consents, resolutions or other such documentation relating to the matters that are the subject matter of the opinion;

3. if applicable, that the partnership's relevant consents or resolutions were adopted in compliance with any procedural requirements of the applicable partnership agreement of the partnership; and

4. if applicable, that as of the effective date of any partnership resolution or consent that is being relied upon by the Opinion Giver, the respective percentage ownership interests of the partners, and, if relevant, the voting status of partners (e.g., to the extent that the voting authority of any partner may be subject to any restriction, dilution or rescission) are as set forth in such certificate.

Interpretive Standard 13 contains an express assumption as to the genuineness of the signatures of all parties to the Loan Documents. In certain circumstances, the Opinion Recipient may request and the Opinion Giver may agree to provide assurance as to the genuineness of Borrower's signature. In such event, the Committee recommends that the Opinion Giver determine by observation who executes the Loan Documents by the partners on behalf of the partnership. In the absence of observation, the Opinion Giver should take steps to confirm due execution, such as requesting written confirmation from a representative of the partnership that he or she witnessed the execution of the Loan Documents by the executing partner (the Committee believes an email from such confirming representative would be acceptable written confirmation). The Opinion Giver may also review and rely on the equivalent of an incumbency certificate and an assumption of the genuineness of the signatures on the Loan Documents.

The Committee recommends that the Opinion Giver also confirm that the mechanics of delivery of the Loan Documents were sufficient to create a binding contractual obligation, i.e., that Borrower put a duly executed agreement out of its possession or custody with the express or (unless the Opinion Recipient knows to the contrary) apparent intent to create an immediately binding contractual obligation. If the Opinion Giver is not present at the actual delivery, certain assumptions will have to be made with respect to, or certificates will have to be delivered describing, the circumstances of the delivery. Generally, there is consent by the parties at the closing that the closing lawyer will deliver all executed Loan Documents to the Opinion Recipient and that delivery by Borrower to the closing lawyer constitutes delivery to the Opinion Recipient. In such circumstances, it may be necessary to determine if a written escrow or bailment agreement is necessary, or if an oral agreement is sufficient, to give the closing lawyer the fiduciary responsibilities of an agent or bailee.<sup>253</sup> The Committee recommends that the Opinion Giver also determine whether or not the parties authorized release of the Loan Documents by the closing lawyer. While the Opinion Giver could assume the fact of the delivery of the Loan Documents if the Opinion Giver does not witness delivery, the Opinion Giver, in rendering an opinion as to delivery, ordinarily is entitled to rely solely on a certificate from a representative of Borrower addressing the fact of delivery of the Loan Documents.

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<sup>253</sup> For additional discussion regarding the execution and delivery of documents, see Section 7.02 of this Report.

**XI. THE MODEL CONFIRMATION OF AUTHORIZATION OF FOREIGN LIMITED PARTNERSHIP/FOREIGN LIMITED LIABILITY PARTNERSHIP/FOREIGN LIMITED LIABILITY LIMITED PARTNERSHIP**

*Borrower is authorized to transact business as a foreign limited partnership/foreign limited liability partnership/ foreign limited liability limited partnership in the State of Georgia. The foregoing statement is based solely upon the issuance of a certificate of authority by the Secretary of State of the State of Georgia and is limited in meaning to the wording of such certificate.*

**COMMENT**

**11.01 Purpose and Background of the Model Confirmation of Authorization of Foreign Limited Partnership/Foreign Limited Liability Partnership/Liability Limited Partnership.** Provisions of the GRULPA<sup>254</sup> and the UPA<sup>255</sup> require foreign partnerships -- formed as limited partnerships, limited liability partnerships or limited liability limited partnerships -- to obtain a certificate of authority from the Georgia Secretary of State to transact business in the State of Georgia. There are no comparable statutory provisions relating to foreign general partnerships doing business in the state. It should be noted, however, that the GRULPA, as to foreign limited partnerships,<sup>256</sup> and the UPA, as to foreign limited liability partnerships and foreign limited liability limited partnerships,<sup>257</sup> list certain activities that may be conducted within the State of Georgia, which, in and of themselves, would not be considered the transaction of business requiring registration with the Secretary of State.

A foreign limited partnership that intends to transact business in Georgia must procure a certificate of authority from the Secretary of State by submitting an application, which is signed by a general partner of the partnership and which sets forth certain required information regarding the partnership.<sup>258</sup> A foreign limited liability partnership or foreign limited liability limited partnership that intends to transact business in Georgia must procure a certificate of authority from the Secretary of State by submitting an application, signed by a person duly authorized to sign such instruments by the laws of the jurisdiction under which the foreign limited liability partnership or foreign limited liability limited partnership is organized and setting forth certain required information regarding the partnership.<sup>259</sup>

Under the applicable provisions of the GRULPA, a foreign limited partnership which obtains a certificate of authority from the Secretary of State is deemed to be authorized to

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<sup>254</sup> O.C.G.A. § 14-9-902(a) (relating to foreign limited partnerships).

<sup>255</sup> O.C.G.A. § 14-8-45(a) (relating to foreign limited liability partnerships and foreign limited liability limited partnerships).

<sup>256</sup> O.C.G.A. § 14-9-902(b).

<sup>257</sup> O.C.G.A. § 14-8-45(b).

<sup>258</sup> O.C.G.A. § 14-9-902(a).

<sup>259</sup> O.C.G.A. § 14-8-45(a).

transact business in Georgia.<sup>260</sup> Similarly, if a certificate of authority is issued by the Secretary of State to a foreign limited liability partnership or foreign limited liability limited partnership, such partnership is deemed to be authorized to transact business in the state.<sup>261</sup>

Failure of a foreign limited partnership, foreign limited liability partnership or foreign limited liability limited partnership conducting business in Georgia to secure a certificate of authority to conduct business in the state may expose the entity to several consequences. First, a partnership that has not registered within thirty days of the date on which it begins conducting business in Georgia is liable for a penalty of \$500 for each year during which it transacted business without such proper registration.<sup>262</sup> Additionally, the Attorney General of the State of Georgia may maintain an action to restrict a partnership from transacting business in the state if it is not yet registered.<sup>263</sup> Perhaps the most important consequence, however, is that a partnership that has not secured the appropriate certification of authority is not permitted to maintain an action, suit or proceeding in a Georgia court until such certificate has been obtained.<sup>264</sup>

**11.02 Practice Procedure for the Model Confirmation of Authorization Foreign Limited Partnership/Foreign Limited Liability Partnership/Foreign Limited Liability Limited Partnership.** Prior to delivering a confirmation that a foreign limited partnership, foreign limited liability partnership or foreign limited liability limited partnership is authorized to transact business in the State of Georgia, the Opinion Giver should obtain and review a certificate of authority from the Secretary of State in order to confirm that the certificate has been issued. The Opinion Giver has no obligation to make any investigation regarding the application for the certificate of authority or any other aspect of issuance of the certificate. Instead, the confirmation is expressly limited to the issuance of a certificate of authority by the Secretary of State, subject to the standards of unwarranted reliance set forth in Section 2.07.

## **XII. THE MODEL LIMITED LIABILITY COMPANY STATUS OPINION**

*Borrower was formed and duly organized as a limited liability company under the laws of the State of Georgia. Borrower is existing and in good standing under the laws of the State of Georgia.*

### **COMMENT**

**12.01 Purpose and Background of the Model Limited Liability Company Status Opinion.** The Opinion Recipient in a secured real estate transaction has legitimate reasons for wanting to confirm that a purported limited liability company that is a party to the Loan

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<sup>260</sup> O.C.G.A. § 14-9-903(c).

<sup>261</sup> O.C.G.A. § 14-8-47(c).

<sup>262</sup> O.C.G.A. § 14-9-907(c)(2) (relating to foreign limited partnerships); O.C.G.A. § 14-8-54(c)(2) (relating to foreign limited liability partnerships and foreign limited liability limited partnerships).

<sup>263</sup> O.C.G.A. § 14-9-908 (relating to foreign limited partnerships); O.C.G.A. § 14-8-55 (relating to foreign limited liability partnerships and foreign limited liability limited partnerships).

<sup>264</sup> O.C.G.A. § 14-9-907(a) (relating to foreign limited partnerships); O.C.G.A. § 14-8-54(a) (relating to foreign limited liability partnerships and foreign limited liability limited partnerships).

Transaction has been formed, actually exists, has complied with all state laws applicable to its formation, existence, and good standing in the State of Georgia, and that certain procedures and other formalities necessary to enter into a specific transaction and to conduct its business generally have been complied with.

**12.02 Elements of the Model Limited Liability Company Status Opinion.** The Model Limited Liability Company Status Opinion has three elements: due organization, continuing existence and good standing.

**A. Due Organization.** The phrase “was formed and duly organized as a limited liability company” means that Borrower properly complied with Georgia’s statutory requirements for organization. The Opinion Giver must analyze such compliance by reference to the statutory requirements in effect at the time of organization of Borrower. The following section discusses the requirements for “formation” and “organization” of a limited liability company under the GLLCA.<sup>265</sup>

Under the provisions of the GLLCA, a limited liability company is formed when the articles of organization become effective.<sup>266</sup> Articles of organization of a limited liability company become effective either at the time of filing on the date the articles are filed or at the time specified in the articles of organization as the effective time thereof.<sup>267</sup> The GLLCA permits articles of organization to specify a delayed effective time and date, but provides that a delayed effective date may not be later than the ninetieth day after the date on which the articles are filed.<sup>268</sup>

The only item that must be set forth in the articles of organization of a limited liability company is its name, which must satisfy the requirements of the GLLCA.<sup>269</sup> The GLLCA also provides for certain additional information to be provided to the Secretary of State in connection with the formation of a limited liability company.<sup>270</sup>

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<sup>265</sup> See O.C.G.A. §§ 14-11-100 to -1109; *see supra* §1.02.

<sup>266</sup> O.C.G.A. § 14-11-203(c).

<sup>267</sup> O.C.G.A. § 14-11-206(e).

<sup>268</sup> O.C.G.A. § 14-11-206(f).

<sup>269</sup> O.C.G.A. § 14-11-204 and O.C.G.A. § 14-11-207. The name of the limited liability company (1) must contain the words “limited liability company”, “limited company”, or the abbreviations “L.L.C.”, “LLC”, “L.C.” or “LC”; (2) must be distinguishable from the name of any foreign or domestic corporation, limited liability company, limited partnership, nonprofit corporation, professional corporation or professional association on record with the Secretary of State and (3) must not exceed eighty (80) characters in length, including spaces and punctuation.

<sup>270</sup> The GLLCA provides that (1) the name and address of each organizer, (2) the street address and county of the limited liability company’s initial registered office and the name of its registered agent at that office, and (3) the mailing address of the limited liability company’s principal place of business must be provided to the Secretary of State in such form as the Secretary of State may require. O.C.G.A. § 14-11-203(a).

The GLLCA provides that the filing by the Secretary of State of articles of organization is conclusive proof that the organizer(s) satisfied all conditions precedent to formation,<sup>271</sup> except in a proceeding by the state to cancel or revoke the formation. This provision raises the question of whether or not the Opinion Giver may rely exclusively upon filing of the articles of organization by the Secretary of State in establishing the “duly organized” element of the Model Limited Liability Company Status Opinion. This question also is raised by the GBCC,<sup>272</sup> and the following analysis addresses this issue with respect to corporations:

It would seem unlikely that in Georgia there is any avenue by which the state could seek “to cancel or revoke the incorporation” for failure to satisfy conditions precedent to incorporation, except pursuant to the GBCC Section 1430 because the “corporation obtained its articles of incorporation through fraud.” Any procedural irregularity or failure to comply with a condition precedent in the incorporation other than fraud would not appear to authorize a state challenge. Stated another way, it is difficult to see how the state would have standing to challenge any failure to satisfy a condition to incorporation in the absence of statutory authority and in the face of a statute which limits the authority to dissolve the corporation to the grounds of fraud and the abuse of authority. If this analysis is correct, it means that in Georgia no inquiry by Opinion Giver into the question of whether or not the incorporation was proper is necessary, because the state has no grounds for attacking the incorporation for procedural impropriety short of fraud and it is difficult to envision how an inquiry by the Opinion Giver could expose fraud in the incorporation, particularly since the state has never attacked an incorporation for fraud. Consequently, it would appear that in Georgia an Opinion Giver should be entitled to rely exclusively on a certificate of the Secretary of State and review of the certified articles to support an opinion that an entity was duly incorporated, absent knowledge that the incorporation was fraudulently obtained.<sup>273</sup>

The Committee concurs with the analysis of this question from the Corporate Report, and since there is no provision under the GLLCA comparable to Section 1430 of the GBCC relating to fraud, it appears that in the case of a limited liability company, the state has no grounds for attacking the organization of a limited liability company for any procedural irregularity or failure to comply with a condition precedent in its organization.

Consequently, pursuant to Section 203(d) of the GLLCA, an Opinion Giver should be entitled to conclude from the filing of the articles of organization of a limited liability company that the organizer(s) satisfied all conditions precedent to formation. Further, pursuant to Section 206(g) of the GLLCA, a copy of the articles of organization certified by the Secretary of State is prima facie evidence that the original articles of organization were filed with the Secretary of

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<sup>271</sup> O.C.G.A. § 14-11-203(d).

<sup>272</sup> See O.C.G.A. § 14-2-203(b) (1994).

<sup>273</sup> See *supra* § 5.02A.

State.<sup>274</sup> Based on these statutory provisions, obtaining a certified copy of the articles of organization of a limited liability company confirms that the company was duly organized unless the Opinion Giver possesses knowledge with respect to such documents which would make reliance unwarranted under Section 2.07 of this Report.

With respect to a limited liability company formed under the GLLCA, the “duly organized” opinion confirms (i) that the form and content of the limited liability company’s articles of organization, on their face and based on the assumptions otherwise permitted under this Report,<sup>275</sup> satisfy the requirements of Sections 203(a) and 204(a) of the GLLCA, and (ii) that the articles of organization were filed in accordance with the formation and filing requirements of Sections 203(a) and 206 of the GLLCA.<sup>276</sup>

Once the articles of organization of a limited liability company have been filed with the Secretary of State, the limited liability company has been duly organized and there are no other actions required under the GLLCA to complete the “organization” as a condition precedent to the entity’s ability to commence business. This is unlike a corporation organized under the GBCC, which requires that certain additional actions be taken after the corporation’s articles of incorporation have been filed with the Secretary of State.<sup>277</sup> By rendering the “duly organized” opinion with respect to a limited liability company, the Opinion Giver is not obligated to monitor any matters of an operational nature after the filing of the articles of organization. If there are any elements commonly associated as part of the “organization” of an entity (for example, issuing certificates of ownership,<sup>278</sup> making capital contributions or opening bank accounts) that are important to the Opinion Recipient, each such element should be addressed by a specific opinion.

**B. Continuing Existence.** The second element of the Model Limited Liability Company Status Opinion is that Borrower “is existing,” which means that Borrower continues to exist as a limited liability company as of the date of the Opinion Letter.<sup>279</sup> There are two instances

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<sup>274</sup> Section 206(g) of the GLLCA is similar to § 127 of the GBCC and allows for the possibility of fraud or collusion between an employee of the Secretary of State and the person obtaining the certified document. *See supra* § 5.02A and note 99.

<sup>275</sup> These qualifications (that the Opinion Giver’s examination of the articles of organization is limited to “their face” and may be based on relevant assumptions otherwise permitted) limit the scope of the Opinion Giver’s examination. The Opinion Giver is permitted to conclude that the limited liability company’s name satisfies the requirements of Section 207 of the GLLCA without having to determine whether or not the name is distinguishable from the names of all other entities on file with the Secretary of State. *See also supra* § 5.02A. The Opinion Giver also may rely on the assumption in Interpretive Standard 13 as to the genuineness of the organizer’s signatures.

<sup>276</sup> The statutory presumption contained in Section 206(g) of the GLLCA provides a sufficient basis for the opinion as to filing unless the Opinion Giver knows of facts that would allow the Secretary of State to rebut the presumption.

<sup>277</sup> *See, e.g.*, O.C.G.A. § 14-2-205.

<sup>278</sup> *See* O.C.G.A. § 14-11-501(b).

<sup>279</sup> Opinions often state that an entity is “validly existing.” The Committee believes that the use of the term “validly” does not modify the “is existing” opinion in any meaningful way, such as to imply any higher standard of investigation on the part of the Opinion Giver. Accordingly, the Model Limited Liability Company Status Opinion does not contain the word “validly.”

under the GLLCA that terminate the existence of a Georgia limited liability company. These are (i) merger of the limited liability company into another business entity,<sup>280</sup> and (ii) the filing of a certificate of termination with the Secretary of State by a dissolved limited liability company.<sup>281</sup> Accordingly, the “is existing” element of the Model Limited Liability Company Status Opinion confirms that neither of these events has occurred.

The written operating agreement of a limited liability company may contain provisions which address termination of the company following the dissolution and winding up of its business and affairs. For example, a written operating agreement may provide that upon completion of the business and affairs of a limited liability company and liquidation and distribution of its assets, the company shall be deemed terminated. Since the filing of a certificate of termination under Section 610 of the GLLCA is not mandatory, an argument can be made that a dissolved limited liability company can terminate its existence in accordance with provisions contained in its written operating agreement. Accordingly, the Committee believes that an Opinion Giver must review any written operating agreement of a limited liability company to determine that termination of its existence has not occurred pursuant to the terms of such operating agreement. The Committee further believes that it is not appropriate for an Opinion Giver to render an opinion that a limited liability company “is existing” in a situation where a dissolved limited liability company has been terminated or deemed terminated pursuant to provisions relating to termination contained in a written operating agreement, even though a certificate of termination has not been filed with the Secretary of State pursuant to Section 610 of the GLLCA.

A Georgia limited liability company is dissolved upon the first to occur of the following: (i) at the time specified in the articles of organization or a written operating agreement; (ii) upon the happening of events specified in the articles of organization or a written operating agreement; (iii) at a time approved by all members of the limited liability company; (iv) subject to contrary provision in the articles of organization or a written operating agreement, ninety days after any event of dissociation with respect to any member, other than an event specified in Section 601(b)(1) of the GLLCA, unless within such ninety day period the limited liability company is continued by the written consent of all other members or as otherwise provided in the articles of organization or a written operating agreement; or (v) entry of a decree of judicial dissolution under Section 603(a) of the GLLCA.<sup>282</sup> A limited liability company also may be administratively dissolved, through proceedings commenced by the Secretary of State, if the limited liability company does not deliver its annual registration to the Secretary of State, together with all required fees and penalties, within sixty days after it is due, or if the limited liability company is without a registered agent or registered office in Georgia for sixty days or more, or if the limited liability company does not notify the Secretary of State within sixty days that its registered agent or registered office has been changed, that its registered agent has resigned or that its registered office has been discontinued.<sup>283</sup>

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<sup>280</sup> See O.C.G.A. § 14-11-901(a).

<sup>281</sup> See O.C.G.A. § 14-11-610. Section 610 of the GLLCA does not expressly provide that the existence of the limited liability company ceases upon the filing of a certificate of termination. It is the Committee’s conclusion, however, that this would be the effect.

<sup>282</sup> O.C.G.A. § 14-11-602.

<sup>283</sup> O.C.G.A. § 14-11-603(b).

Although the legal “existence” of a limited liability company continues after dissolution has occurred, the GLLCA restricts the power of a dissolved limited liability company to continue to conduct or carry on business.<sup>284</sup> Thus, theoretically, an Opinion Giver could give an opinion that a limited liability company continues to exist even if voluntary dissolution or statutory involuntary dissolution is underway and/or has taken place. Although such an opinion is, perhaps, technically accurate, it may create an erroneous impression upon the Opinion Recipient unless the Opinion Giver notes such events of dissolution in the body of the opinion. Therefore, the Committee recommends that if the Opinion Giver is aware of any events of voluntary or involuntary dissolution, the Opinion Giver should describe such events when delivering an “existing” opinion.<sup>285</sup>

The Committee recognizes that, unlike administrative and judicial dissolution proceedings, the existence of which can be verified independently by an Opinion Giver, dissolution of a limited liability company under any of the events specified in paragraphs (1) through (4) of Section 602 of the GLLCA (which are specified in clauses (i) – (iv) of the third paragraph of Section 12.02B), in many instances, can be determined only by the Opinion Giver’s review of the articles of organization and any written operating agreement of the limited liability company and inquiries

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<sup>284</sup> In the case of dissolution of a limited liability company under the provisions of Section 602 of the GLLCA, Section 6.02 further mandates that the limited liability company’s “affairs shall be wound up.” Section 606 of the GLLCA provides that upon dissolution, a statement of commencement of winding up, which states the fact that the limited liability company has dissolved and commenced its winding up activities, may be delivered for filing to the Secretary of State. Section 604(b) of the GLLCA further provides that dissolution terminates all authority of every person to act for the limited liability company, except in connection with the winding up of its affairs or to complete transactions begun but not finished at the time of dissolution, and except that prior to the filing of a statement of commencement of winding up, the limited liability company shall be bound to any person without knowledge of the dissolution with respect to any transaction which would bind the limited liability company if dissolution had not occurred.

Under Section 603(a) of the GLLCA, proceedings for judicial dissolution of a limited liability company may be brought by or for a member of the limited liability company, and the court may decree dissolution whenever it is not reasonably practicable to carry on the business in conformity with its articles of organization or written operating agreement. Section 603(a) further provides that a certified copy of any such decree shall be delivered to the Secretary of State, who shall file it. Under Section 602(5) of the GLLCA, entry of a decree of judicial dissolution under Section 603(a) of the GLLCA dissolves a limited liability company.

The Secretary of State may commence an administrative dissolution proceeding if it determines that one or more of the grounds set forth in Section 603(b)(1) of the GLLCA exist. Such proceeding requires (1) written notice to the limited liability company of such determination by first class mail, (2) a 60 day period following such notice for the limited liability company to correct each ground for dissolution or to demonstrate that such ground or grounds do not exist, and (3) the signing and filing of a certificate of dissolution citing the ground or grounds therefore and its effective date. O.C.G.A. § 14-11-603(b)(2). Section 603(b)(3) of the GLLCA mandates that a limited liability company which has been administratively dissolved continues in existence, but may not carry on any business except that necessary to wind up and liquidate its business and affairs. Compare Section 30 of the UPA, which states that upon dissolution, a partnership is not terminated, but continues until the winding up of the partnership affairs has been completed. O.C.G.A. § 14-8-30 (1994); *see discussion supra* § 8.02B.

<sup>285</sup> This approach is consistent with the recommended approach with respect to corporations, as described in Section 5.02C of this Report, and partnerships, as described in Section 8.02B of this Report.

directly with the members or managers of the limited liability company. Accordingly, an Opinion Giver is entitled to rely on certificates from members or managers of a limited liability company with respect to the occurrence or non-occurrence of any of the events specified in paragraphs (1) through (4) of Section 602 of the GLLCA.

**C. Good Standing.** Although there is no codified definition of the term “good standing” applicable to limited liability companies organized under Georgia law, a “good standing” opinion traditionally has been requested by Opinion Recipients in order to confirm certain matters. The Committee believes that the good standing requirement contemplates compliance with all administrative requirements such as the filing of annual reports and consequently that if a failure to comply exists, the limited liability company will not be in good standing. Accordingly, an opinion that a Georgia limited liability company is “in good standing” means that (i) to the knowledge of Opinion Giver, none of the events of dissolution set forth in paragraphs (1) through (4) of Section 602 of the GLLCA has occurred; (ii) to the knowledge of Opinion Giver, the Superior Court of the county in which the limited liability company’s registered office is located has not entered a decree of judicial dissolution pursuant to Section 603(a) of the GLLCA; (iii) the Secretary of State has not signed and filed a certificate of dissolution of the limited liability company pursuant to Section 603(b) of the GLLCA; and (iv) the limited liability company has completed all applicable filing and registration requirements under Section 1103 of the GLLCA.

If any of the events in (i), (ii), or (iii) of the last sentence has occurred, Borrower would be considered to be “in dissolution.” While the limited liability company’s legal “existence” would continue until the conclusion of such proceedings, and counsel who was unaware of such proceedings could render the “is existing” element of the Model Limited Liability Company Status Opinion, the limited liability company’s ability to conduct business would be limited and the GLLCA would impose special requirements for suits by its creditors.

As described above in Section 12.02B, a Georgia limited liability company may cease to exist as a result of either voluntary or involuntary dissolution proceedings or at the expiration of any term or upon the happening of events indicated in its articles or a written operating agreement. Although a limited liability company’s legal “existence” will continue while voluntary or involuntary dissolution proceedings are pending, at a certain point in each type of proceeding, the GLLCA imposes limits on the power of the limited liability company to continue to conduct business. Lacking a codified definition of “good standing” or any use of the term in the GLLCA, the Committee has determined that when such limits are imposed, the limited liability company should not be considered to be in “good standing”.

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

As described above, a limited liability company’s failure to satisfy its filing and registration requirements would constitute grounds for the Secretary of State to commence dissolution

proceedings. While the mere existence of such grounds would not limit the limited liability company's power to conduct its business, it has become traditional for counsel to inquire into these matters in rendering the "good standing" opinion. Such inquiries are relatively easy to conduct by reference to a certificate of existence issued by the Georgia Secretary of State. Because of this tradition, the Committee has determined that the opinion that a Georgia limited liability company is in "good standing" should serve to confirm that the limited liability company has satisfied its filing and registration requirements described in Section 1103 of the GLLCA.

### **12.03 Additional Notes Regarding the Model Limited Liability Company Status Opinion.**

**A. Status for Tax and Other Purposes.** Unless otherwise expressly indicated in the Opinion Letter, the Model Limited Liability Company Status Opinion refers only to the status of a limited liability company under the GLLCA and does not refer to the company's status for tax, regulatory or other purposes. For example, the Model Limited Liability Company Status opinion shall not be construed by an Opinion Recipient as an opinion that a limited liability company shall be classified as a partnership for federal or Georgia tax purposes. The Model Limited Liability Company Status Opinion also does not address the issue of whether or not the limited liability company entity would be disregarded under other laws.<sup>286</sup>

**B. Conversion of Entity to Limited Liability Company.** The GLLCA permits a domestic or foreign corporation, limited partnership or general partnership to elect to become a limited liability company.<sup>287</sup> In the case of a corporation, its board of directors must adopt and its shareholders must approve a plan of election that contains certain information required by the GBCC.<sup>288</sup> In the case of a limited or general partnership, the election to convert to limited liability company status requires the approval of all of the partners or such other approval as may be sufficient under applicable partnership law to authorize such election.

The election to convert to limited liability company status is made by delivering to the Secretary of State for filing a certificate of election, which shall state or contain the following:

1. the name of the corporation, limited partnership or general partnership making the election;
2. that such entity elects to become a limited liability company;
3. the effective date, or the effective date and time, of such election if later than the date and time of filing the election;
4. that the election has been approved by the board of directors and shareholders of a corporation or by the partners in the case of a limited or general partnership, as required by applicable law;

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<sup>286</sup> O.C.G.A. § 14-11-314.

<sup>287</sup> O.C.G.A. § 14-11-212.

<sup>288</sup> O.C.G.A. § 14-2-1109.1(c).

5. that filed with the certificate of election are articles of organization that are in the form required by Section 204 of the GLLCA, that set forth a name satisfying the requirements of Section 207 of the GLLCA and that shall be the articles of organization of the limited liability company formed pursuant to such election; and

6. that the certificate of election sets forth the manner and basis for converting the shares of the corporation or the interests of the partners into interests as members of the limited liability company or that a written operating agreement has been entered into among the persons who will be members of the limited liability company, that such operating agreement will be effective immediately upon the effectiveness of the election and that such operating agreement provides for the manner and basis of such conversion.<sup>289</sup>

Upon the effectiveness of the election, the converting entity becomes a limited liability company formed under the GLLCA, the governing documents of the converting entity (such as articles of incorporation and bylaws of a corporation, certificate of limited partnership and partnership agreement of a limited partnership, or partnership agreement and any statement of partnership of a general partnership) shall be of no further force or effect, and all property of the converting entity shall be deemed to be vested in the limited liability company formed pursuant to such election.<sup>290</sup> The converting entity is not dissolved but rather the limited liability company formed pursuant to the election constitutes a continuation of the existence of the converting entity.<sup>291</sup> The limited liability company formed pursuant to the election is deemed to have commenced on the date the converting entity commenced its existence in the jurisdiction in which the converting entity was first created, formed, incorporated, or otherwise came into being.<sup>292</sup>

The Model Limited Liability Company Status Opinion can be given with respect to a limited liability company formed pursuant to the election provided by the GLLCA. However, the scope of the due diligence necessary to render such opinion would be expanded to include confirmation by the Opinion Giver that the certificate of election contains all of the statements and information required by Section 212(b) of the GLLCA and that the converting entity complied with applicable corporate or partnership law in making such election.

**12.04 Practice Procedure for the Model Limited Liability Company Status Opinion.** In order to render the Model Limited Liability Company Status Opinion, the Committee recommends that the Opinion Giver examine the elements of due organization, continuing existence and good standing.

**A. Due Organization.** In rendering an opinion that Borrower was formed and duly organized as a limited liability company,” the Opinion Giver should:

1. obtain and review a copy of the GLLCA in effect at the time of the formation of Borrower;

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<sup>289</sup> O.C.G.A. § 14-11-212(b).

<sup>290</sup> O.C.G.A. § 14-11-212(c).

<sup>291</sup> O.C.G.A. § 14-11-212(d).

<sup>292</sup> O.C.G.A. § 14-11-212(c)(1).

2. obtain a certified copy of the articles of organization of Borrower from the Secretary of State and confirm that the articles state the name of Borrower and that such name complies with the requirements of Section 207 of the GLLCA; and

3. in the case of a limited liability company formed by conversion from another entity pursuant to Section 212 of the GLLCA:

(a) obtain a certified copy of the certificate of election of Borrower from the Secretary of State and examine such certified certificate of election to ensure that the contents required by Section 212(b) of the GLLCA at the time of such election are included; and

(b) in the case of a corporation which has been converted to a limited liability company, obtain and examine copies of the plan of election and resolutions of the converting corporation's board of directors and shareholders approving such plan of election, certified by a duly authorized officer of the corporation, to ensure that the contents of the plan of election required by Section 1109.1(c)(1)-(5) of the GBCC at the time of the company's election are included and to ensure that such plan of election was approved by the board of directors and shareholders of the converting corporation, or, in the alternative, confirm such approval through the certificate of an authorized representative of the limited liability company;<sup>293</sup> or

(c) in the case of a partnership which has been converted to a limited liability company, obtain and examine copies of any resolutions, consents or other written instruments setting forth or otherwise evidencing the plan of election and its approval by the partners, certified by an individual general partner or a duly authorized officer of a corporate general partner, to ensure that the election was approved by all of the partners or otherwise in accordance with applicable partnership law, or, in the alternative, confirm such approval through the certificate of an authorized representative of the limited liability company.

**B. Continuing Existence.** In rendering an opinion that Borrower "is existing," the Committee recommends that the Opinion Giver:

1. obtain a certified copy of the articles of organization of Borrower from the Secretary of State and examine the certified articles to ensure that no term or duration is stated or that any stated term has not expired;

2. obtain a copy of any written operating agreement of Borrower, certified by an authorized representative of Borrower, and examine the certified written operating agreement to ensure that no term or duration is stated or that any stated term has not expired;

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<sup>293</sup> For purposes of this Report, the term "authorized representative" of a limited liability company means a member or manager, as the case may be, or such officer of a limited liability company responsible for maintaining the company's records, similar to the office of a corporate secretary. In the absence of authority in a written operating agreement, a certificate could be provided by any member of a company managed by its members or by any manager in a company managed by a manager or managers. O.C.G.A. § 14-11-301(a), -301(b)(2).

3. obtain a certificate of existence from the Secretary of State to confirm that no decree of judicial dissolution, no certificate of administrative dissolution or no certificate of termination has been filed;<sup>294</sup>

4. examine any minute book or other records of the proceedings of Borrower for evidence of merger or dissolution proceedings or otherwise establish the absence thereof through the certificate of an authorized representative of Borrower described in Section 12.04 C.5 below; and

5. obtain the certificate of an authorized representative of Borrower described in Section 12.04C.5 below.

**C. Good Standing.** In rendering an opinion that Borrower is in “good standing,” the Committee recommends that the Opinion Giver:

1. obtain a certified copy of the articles of organization of Borrower from the Secretary of State and examine them as provided in Section 12.04B.1 above;

2. obtain a copy of any written operating agreement of Borrower, certified by an authorized representative of the limited liability company and examine it as provided in Section 12.04B.2 above;

3. obtain a certificate of existence from the Secretary of State to confirm that there is compliance with annual filing and registration requirements and that no decree of judicial dissolution, no certificate of administrative dissolution or no certificate of termination has been filed;

4. examine any minute book or other records of the proceedings of Borrower for evidence of merger or dissolution proceedings or otherwise establish the absence thereof through the certificate of an authorized representative of Borrower described in Section 12.04C.5 below; and

5. obtain a certificate from an authorized representative of Borrower to the effect that:

(a) Borrower has not received any notice from the Secretary of State of a determination that any grounds exist for administratively dissolving the company;

(b) Borrower has not received any notice of the commencement of any judicial action to dissolve Borrower;

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<sup>294</sup> Although the GLLCA does not contain a provision comparable to Section 128 of the GBCC, relating to the issuance of a certificate of existence for a domestic corporation by the Secretary of State, the Committee has been advised by the Secretary of State’s office that it will issue a certificate of existence with respect to a domestic limited liability company and that the contents of such certificate of existence will be comparable to the contents of a certificate of existence issued with respect to a domestic corporation.

(c) the members of Borrower have not taken any action with respect to dissolution of Borrower and Borrower has not delivered to the Secretary of State for filing any statement of commencement of winding up;

(d) no events of dissociation specified in Section 601(a) of the GLLCA or in any written operating agreement have occurred with respect to any member of Borrower, or as to any such event of dissociation which has occurred, that the members of Borrower took all such actions required under its articles of organization, any written operating agreement or Section 602(4) of the GLLCA to continue the company; and

(e) no other events specified in the articles of organization of Borrower or in any written operating agreement that would cause the dissolution of Borrower have been taken or have occurred.

### **XIII. THE MODEL LIMITED LIABILITY COMPANY POWERS OPINION**

*Borrower has the power to execute and deliver the Loan Documents, to perform its obligations under the Loan Documents, to own and use the Property and to conduct its business.*

#### **COMMENT**

**13.01 Purpose and Background of the Model Limited Liability Company Powers Opinion.** The purpose of the Model Limited Liability Company Powers Opinion is to give the Opinion Recipient assurance that Borrower's execution and delivery of the Loan Documents and performance of its obligations thereunder, the ownership and use of the Property and the conduct of its business are within the scope of its inherent powers and are not subject to any limitations on its powers.

**13.02 Elements of the Model Limited Liability Company Powers Opinion.** The Model Limited Liability Company Powers Opinion means that, pursuant to the GLLCA, the articles of organization of Borrower and any written operating agreement of Borrower, the purposes and powers of Borrower enable it to (i) enter into binding contractual obligations by executing and delivering the Loan Documents, (ii) perform all of its obligations under the Loan Documents, (iii) own, lease or otherwise hold and use the Property as currently owned, leased or otherwise held and used by Borrower, and (iv) conduct its business as it is currently being conducted.

**A. Assumed Opinions.** The Model Limited Liability Company Powers Opinion assumes that the Model Limited Liability Company Status Opinion could also be given. The Opinion Giver may rely on this assumption subject to the standards of unwarranted reliance set forth in Section 2.07. In any case where reliance on this assumption would be unwarranted or in any case in which the Opinion Giver determines that the Model Limited Liability Company Status Opinion cannot be given, the Committee has concluded that the Opinion Giver cannot render the Model Limited Liability Company Powers Opinion. This conclusion is based on the Committee's view that the due organization of a limited liability company is a necessary prerequisite to the ability of the Opinion Giver to deliver an opinion that Borrower has the powers described in the Model Limited Liability Company Powers Opinion.

**B. “Execute and Deliver” vs. “Enter Into”.** The phrases “execute and deliver” and “enter into” are often used interchangeably in giving a limited liability company powers opinion. These phrases are synonymous in this context. The Committee has used the phrase “execute and deliver” to specify the limited liability company acts to be taken by Borrower.

**C. Performance of Obligations.** The Model Limited Liability Company Powers Opinion extends to all obligations to be performed by Borrower under the Loan Documents. However, the Opinion Recipient may request that the Opinion Giver refer specifically to certain obligations of Borrower deemed critical to consummation of the Loan Transaction. Delineation of such obligations does not mean that obligations not specifically listed are not covered by the opinion or are less material than those listed. Performance, based on the principles discussed at Section 2.01, means performance on the date of the Opinion Letter and under the circumstances then presented.

**D. Ownership and Use of Property.** The Model Limited Liability Company Powers Opinion should be interpreted to cover every manner in which Borrower has rights in the Property, including, but not limited to, by ownership, lease or license, and every manner in which Borrower uses the Property. The phrase “own and use” is not intended to limit the scope of the Model Limited Liability Company Powers Opinion to that part of the Property owned by Borrower and includes parts of the Property leased or licensed by Borrower. However, the use of the term “Property” in the Model Limited Liability Company Powers Opinion is intended to address only that real and personal property that is the subject of the Loan Transaction, and there should be no implication that the Model Limited Liability Company Powers Opinion covers the ownership and use of any other property of Borrower.

**E. Current Conduct of Business and Ownership of Property.** The business or businesses currently being conducted by Borrower and the Property currently owned, leased or otherwise held and used by Borrower that is the subject of the Loan Transaction are all that can be verified factually at the time that the Model Limited Liability Company Powers Opinion is given. A new business or new property of Borrower should be addressed only when the Loan Transaction involves entering into a new business or acquiring new property. For example, if the Loan Transaction involves secured financing in connection with the acquisition of a new business or new property, it is appropriate for the Model Limited Liability Company Powers Opinion to cover Borrower’s power to conduct such new business and to own and use such new property.

**F. Conduct of Lawful Business.** The Model Limited Liability Company Powers Opinion is based on the assumption that Borrower is engaged in a lawful business as set forth in Interpretive Standard 16. The Opinion Giver may rely on this assumption subject to the standards of unwarranted reliance set forth in Section 2.07.

**G. “Power” vs. “Authority”.** The word “power” alone, without the use of the added word “authority” is used in the Model Limited Liability Company Powers Opinion. This terminology is based on the fact that the word “power” is used consistently in the GLLCA as well as the GBCC. As in the case of the Partnership Powers Opinion in this Report,<sup>295</sup> the Committee has determined that the word “power” should refer to the inherent power that a limited liability company possesses and that the word “authority” should refer to the authorization to engage in a

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<sup>295</sup> See *supra* § 9.02G.

specific act. The Model Limited Liability Company Acts Opinion in Section XIV covers questions of authority of the limited liability company.

The words “full,” “requisite” or “necessary” are frequently used in powers opinions in describing the power of the entity. The Committee believes that neither the term “requisite” nor the term “necessary” add anything to the scope of the Model Limited Liability Company Powers Opinion and that the use of either word should not imply any broader scope to the opinion. The word “full” should not be used in the context of a powers opinion in order to avoid any implication that the scope of the opinion extends beyond the powers of a limited liability company under applicable Georgia law.

**13.03 Matters Not Covered by the Model Limited Liability Company Powers Opinion.** Certain matters not covered by the Model Limited Liability Company Powers Opinion are covered by other opinions discussed in other sections of this Report.

The Model Limited Liability Company Powers Opinion does not mean that Borrower’s performance of its obligations under the Loan Documents will withstand all challenges from all parties, other than challenges by parties having the right under the GLLCA to make such a challenge on the grounds that such actions are *ultra vires*. Opinions as to such other matters should be addressed, if at all, by the Model No Violation Opinion (Section XVI) and the Model Remedies Opinion (Section XVIII).

The Model Limited Liability Company Powers Opinion does not mean that Borrower has obtained any consent, approval, authorization or license from its members or managers or from any third parties, including, but not limited to, governmental or regulatory authorities or parties to any contracts or agreements of Borrower. Opinions as to these matters should be covered, if at all, by the Model Limited Liability Company Status Opinion (Section XII) and the Model Limited Liability Company Acts Opinion (Section XIV).

The Model Limited Liability Company Powers Opinion does not mean that Borrower’s actions as a limited liability company taken in connection with the Loan Transaction will not result in any breach of or default under any contracts or agreements to which Borrower is a party or by which the Property is bound or in any violation of any constitution, statute, law, regulation, rule, order or similar legal requirement pursuant to statutory authority, other than the GLLCA. Opinions as to these matters should be covered, if at all, by the Model No Violation Opinion (Section XVI).

The Model Limited Liability Company Powers Opinion does not cover the effect on Borrower’s purposes or powers of any laws other than the GLLCA, including, but not limited to, the laws of any jurisdiction in which Borrower is or should be qualified to do business as a foreign limited liability company or any other laws that could add to, or limit the exercise of, its purposes or powers. Opinions as to these matters should be covered, if at all, by the Model No Violation Opinion (Section XVI).

The Model Limited Liability Company Powers Opinion does not cover any restrictions or limitations on Borrower’s purposes or powers contained in any document other than its articles of organization or any written operating agreement. Opinions as to these matters and the effect of

any restrictions or limitations contained in resolutions and agreements of Borrower should be covered, if at all, by the Model No Violation Opinion (Section XVI).

### **13.04 Additional Notes Regarding the Model Limited Liability Company Powers Opinion.**

**A. Ultra Vires Acts.** The Opinion Recipient has a valid interest in obtaining assurance that the Loan Transaction will not be enjoined or otherwise challenged by Borrower or third parties on the ground that the actions taken by a limited liability company in connection with the Loan Transaction were beyond the company's statutory powers and its powers as set forth in its articles of organization and any written operating agreement.

Limited liability companies organized in Georgia derive their powers and purposes from Sections 201 and 202 of the GLLCA. Section 201 provides that a limited liability company may be formed for any lawful purpose and that, unless a more limited purpose is set forth in the articles of organization or a written operating agreement, the company has the purpose of engaging in any lawful activity. Finally, Section 202 provides that a limited liability company has "the same powers as any person has to do all things necessary to carry out its purpose, business and affairs."<sup>296</sup>

Because Section 201(b) of the GLLCA provides that the only way by which a limited liability company's statutory powers or purposes can be limited is in its articles of organization or a written operating agreement, any limitations set forth in resolutions or other documents will not prevent the Opinion Giver from rendering the Model Limited Liability Company Powers Opinion. Any such limitations in resolutions or other documents should be covered, if at all, in the Model No Violation Opinion (Section XVI).

Unless a limited liability company's articles of organization or written operating agreement limits its purposes, there are no limits under the GLLCA on the statutory purposes of a limited liability company unless it is engaged in an unlawful activity, which would include an unlawful business. In addition, there are no statutory limits on the exercise of a limited liability company's powers, other than limitations on the powers of any individual.<sup>297</sup>

**B. Unlawful Business.** Section 201(b) of the GLLCA uses the phrase "engaging in any lawful activity" in reference to the purpose for which a limited liability company may be organized. However, the GLLCA does not define the word "activity" or otherwise give any guidance as to what "activity" encompasses. The Committee has determined that for purposes of this Report it suffices to treat the word "activity" as synonymous with "business."

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<sup>296</sup> The GLLCA provides that "person" means an individual, business entity, business trust, estate, trust, association, joint venture, government, governmental subdivision or agency, or any other legal or commercial entity. O.C.G.A. § 14-11-101(19).

<sup>297</sup> The Committee believes that the use of the word "person" in Section 202 of the GLLCA is intended to be construed in the broadest sense. Since the definition of "person" in Section 101(19) of the GLLCA includes an individual, the Committee believes that Section 202 should be interpreted to mean that there are no limits on the exercise of a limited liability company's powers other than those limitations on the powers of an individual.

The use of the phrase “engaging in any lawful activity” in Section 201(b) of the GLLCA limits the power of a limited liability company. Although the conduct of an unlawful business by a limited liability company would be an *ultra vires* act, the GLLCA does not provide any guidance as to what would constitute an unlawful business for this purpose. Because of the scope of the due diligence that would be required to render an opinion that no portion of the company’s business is unlawful so as to limit the exercise of its powers, a specific express assumption that the limited liability company is engaged in a lawful business is necessary for purposes of rendering the Model Limited Liability Company Powers Opinion. The assumption that Borrower is engaged in a lawful business is set forth in Interpretive Standard 16, and the Opinion Giver may rely on this assumption, provided that the Opinion Giver has no current knowledge which would make such reliance unwarranted under Section 2.07. Without this assumption, the Opinion Giver would be required to determine whether or not Borrower is engaged in any unlawful business and whether or not the conduct of any such unlawful business limits the exercise of Borrower’s powers with respect to the Loan Transaction. The Committee has determined that these matters should not be addressed in such a broad and conclusory fashion. The Committee believes, however, that a separate opinion to the effect that the conduct by the company of a specific part of its business does not violate a specific law so as to limit the exercise of the company’s powers is appropriate and may be requested if an Opinion Recipient believes that the receipt of such an opinion is important to the Loan Transaction.

C. **Limitation of Purposes and Powers.** Limitation of the Model Limited Liability Company Powers Opinion to the Property of Borrower is unnecessary where there are no limitations on Borrower’s purposes set forth in its articles of organization or any written operating agreement. If Borrower’s articles of organization or written operating agreements limit its purposes, the Model Limited Liability Company Powers Opinion should address such limitations only to the extent that such limitations pertain to the Property or the Loan Transaction.

**13.05 Practice Procedure for the Model Limited Liability Company Powers Opinion.** The Committee recommends that the Opinion Giver complete the procedures set forth below prior to rendering the Model Limited Liability Company Powers Opinion.

A. Review the articles of organization of Borrower, certified by the Secretary of State.

B. Review any written operating agreement of Borrower, certified by an authorized representative of the limited liability company.

C. Review the GLLCA solely as it relates to the business purposes and powers of Borrower.

D. If necessary, in the event that the powers of Borrower have been limited, review a certificate, dated as of the date of the Opinion Letter and executed by an authorized representative of Borrower, providing other appropriate factual assurance that the company’s activities which are the subject of the Model Limited Liability Company Powers Opinion are within its powers under the GLLCA and Borrower’s articles of organization and any written operating agreement.

E. With respect to certain extraordinary transactions, such as merger, sale of substantially all of a limited liability company's assets and distributions to members, the GLLCA imposes certain requirements and restrictions for the exercise of a limited liability company's powers in such transactions. Satisfaction of these requirements and restrictions may require specific approval by or consent of the members or managers or specific factual certifications to the Opinion Giver by an authorized representative of Borrower. These requirements and restrictions may also require additional disclosures in the Model Limited Liability Company Powers Opinion for completeness and accuracy. Such matters should be addressed by the Opinion Giver in completing the practice procedure for the Model Limited Liability Company Powers Opinion.

#### **XIV. THE MODEL LIMITED LIABILITY COMPANY ACTS OPINION**

*Borrower has duly authorized the execution and delivery of the Loan Documents and the performance by Borrower thereunder. Borrower has duly executed and delivered the Loan Documents.*

#### **COMMENT**

**14.01 Purpose and Background of the Model Limited Liability Company Acts Opinion.** The Model Limited Liability Company Acts Opinion provides the Opinion Recipient assurances that Borrower has taken all actions required under and in accordance with the GLLCA, its articles of organization, any written operating agreement and the resolutions of its members and/or managers to authorize the execution and delivery of the Loan Documents and all performance by the limited liability company thereunder and that Borrower has executed and delivered the Loan Documents. If Borrower is a natural person and not a corporation, partnership or limited liability company, see Section XVII below for a discussion concerning the necessary modifications to the Model Opinion as to execution and delivery of the Loan Documents.

**14.02 Elements of the Model Limited Liability Company Acts Opinion.** The Model Limited Liability Company Acts Opinion has the meanings set forth in this Section 14.02.

A. Borrower's members, managers and committees of members or managers have taken all actions required to authorize the execution and delivery of the Loan Documents and all performance by Borrower of its obligations thereunder, on the assumption of performance on the date of the opinion as discussed in Section 2.01, to the extent and in such manner required under (i) the GLLCA, (ii) Borrower's articles of organization, (iii) any written operating agreement of Borrower, and (iv) any established policies and practices for delegation of authority adopted by resolutions of Borrower's members or managers.<sup>298</sup>

B. The appropriate member(s), manager(s), or officer(s) was (were) duly authorized to execute and deliver the Loan Documents, in order to cause Borrower to enter into the Loan

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<sup>298</sup> For example, it would appear that a member or manager could delegate to an officer of a limited liability company, such as its president, the authority to authorize the execution by other company officers of promissory notes or other evidence of indebtedness not to exceed a stated dollar amount, provided such delegation is in writing. Any action taken pursuant to such written delegation of authority must be in accordance with the terms of such delegation, and such policies and practices of the company must be permitted by the GLLCA, the company's articles of organization and any written operating agreement.

Documents and to perform its obligations thereunder; this Opinion affirms that the relevant consents of other members (to the extent necessary in accordance with applicable law and the applicable operating agreement) were obtained and that any relevant resolutions of Borrower (to the extent required by the applicable operating agreement) were adopted in accordance with the procedural requirements of the applicable operating agreement.

C. The appropriate member(s), manager(s), or officer(s) authorized by the terms and provisions of the applicable operating agreement (and/or by any relevant resolutions or consents) has (have) executed and delivered the Loan Documents.

D. The execution and delivery of the Loan Documents were, and the performance by Borrower of its obligations thereunder if performed in accordance with the Loan Documents as written will be, in accordance with such authority granted by Borrower's members, managers and committees of members or managers.

The Model Limited Liability Company Acts Opinion implicitly addresses matters of agency law because the GLLCA does not specifically address, as to every type of management structure permissible for a limited liability company, including management providing for the appointment of officers, what is necessary to create actual authority to act on behalf of a limited liability company. However, to the extent not specifically addressed by the GLLCA, the authority of agents and other members and managers to act may be expressed in the articles of organization, a written operating agreement or any resolutions of Borrower.

The Model Limited Liability Company Acts Opinion is based on the assumption that the Model Limited Liability Company Status Opinion and the Model Limited Liability Company Powers Opinion could also be given, on which assumption the Opinion Giver may rely subject to the standards of unwarranted reliance set forth in Section 2.07. In any case where reliance on this assumption would be unwarranted or in any case in which the Opinion Giver determines that the Model Limited Liability Company Status Opinion cannot be given or that the Model Limited Liability Company Powers Opinion cannot be given, the Committee has concluded that the Opinion Giver cannot render the Model Limited Liability Company Acts Opinion. This conclusion is based on the Committee's view that due organization of a limited liability company and the existence of certain inherent powers are necessary prerequisites to the ability of the Opinion Giver to render the Model Limited Liability Company Acts Opinion.

#### **14.03 Matters Not Covered by the Model Limited Liability Company Acts Opinion.**

A. The Model Limited Liability Company Acts Opinion does not address any laws other than the GLLCA and agency law. Other laws should be addressed, if at all, in the Model No Violation Opinion (Section XVI).

B. The Model Limited Liability Company Acts Opinion does not address whether or not the Loan Documents are legal, valid, binding or enforceable or whether or not any consent, license, authorization or approval by any third parties (including, but not limited to, governmental or regulatory authorities or parties to any of Borrower's contracts or other agreements) is required or has been obtained. Such matters should be addressed, if at all, in the Model Remedies Opinion (Section XVIII).

C. The Model Limited Liability Company Acts Opinion does not address whether or not Borrower's members, managers or officers were in compliance with their statutory duties in granting or exercising the authority covered by the Model Limited Liability Company Acts Opinion.<sup>299</sup>

#### **14.04 Additional Notes Regarding the Model Limited Liability Company Acts Opinion.**

A. **Management and Authority.** A limited liability company may be managed by its members or by one or more managers. Management of the business and affairs of a limited liability company is vested in its members unless the members elect in either the articles of organization or a written operating agreement to vest management in a manager or managers.<sup>300</sup> In either form of management structure, the articles of organization or the written operating agreement may set forth any specific limitations on the authority of the members or managers.<sup>301</sup>

The GLLCA provides great flexibility in the management of a limited liability company and states that the articles of organization or a written operating agreement “may contain any provision relating to any phase of managing the business or regulating the affairs of the limited liability company.”<sup>302</sup> If a limited liability company's articles of organization or written operating agreement do not provide rules for making management decisions, the GLLCA establishes rules which generally require a majority vote of the members (or the managers, if management is vested in managers) to approve most management decisions.<sup>303</sup> Certain extraordinary transactions, including but not limited to dissolution, merger, the sale, exchange, lease or other transfer of all or substantially all of the assets of the limited liability company, admission of new members to the limited liability company, and approval of distributions, require unanimous approval unless otherwise provided in the limited liability company's articles of organization or written operating agreement.<sup>304</sup>

The GLLCA also permits a limited liability company which owns real property to file a copy of its articles of organization, certified by the Secretary of State, in the book kept for statements of partnership for general partnerships in the Office of the Clerk of the Superior Court of the county where such real property is located.<sup>305</sup> Any limitations on the authority of the members or managers set forth in its articles of organization, as so filed, are to be conclusively presumed in favor of the limited liability company and against a grantee of the limited liability

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<sup>299</sup> See, e.g., O.C.G.A. § 14-11-305.

<sup>300</sup> O.C.G.A. § 14-11-304(a).

<sup>301</sup> O.C.G.A. § 14-11-304(a), -301(b).

<sup>302</sup> O.C.G.A. § 14-11-304(a).

<sup>303</sup> O.C.G.A. § 14-11-308(a).

<sup>304</sup> O.C.G.A. § 14-11-308(b).

<sup>305</sup> O.C.G.A. § 14-11-302.

company, or a person claiming through such grantee, as to any real property of the limited liability company located in the county where such filing was made.<sup>306</sup>

**B. Agency.** The Model Limited Liability Company Acts Opinion covers only matters of actual authority, as established by the GLLCA or a written operating agreement, not those of apparent authority.<sup>307</sup> An Opinion Recipient should not request or rely upon an opinion that addresses apparent authority because of the factual uncertainty inherent in apparent authority.

**C. Incumbency.** The Opinion Giver should use care in determining the incumbency of managers and officers, if appointed or elected as part of the management structure of Borrower. The Opinion Giver should review any written operating agreement and, when necessary, obtain a certificate from an authorized representative of Borrower to establish the identity of the managers and officers with authority to consent to and execute the Loan Documents and, if applicable, the then current percentage interests or voting interests of the members or managers.

**D. Enforceability.** The Model Limited Liability Company Acts Opinion does not address whether or not the Loan Documents are valid, binding or enforceable. The Model Limited Liability Company Acts Opinion does establish, however, that certain actions were taken so that the Opinion Giver can make the determination in the Remedies Opinion that such actions were sufficient to create binding contractual obligations.

**E. “Execute and Deliver” vs. “Enter Into”.** See Section 13.02B of this Report.

**14.05 Practice Procedure for the Model Limited Liability Company Acts Opinion.** In view of the flexibility in management structure allowed under the GLLCA, the Model Limited Liability Company Acts Opinion requires substantial due diligence. The Committee recommends that the Opinion Giver perform the following procedures:

A. Obtain and review:

1. a copy of the written operating agreement of Borrower, including all amendments, as certified by an authorized representative of Borrower;

2. a certified copy of Borrower’s articles of organization, including all amendments, from the Secretary of State; and

3. to the extent necessary if authority is not express in Borrower’s articles of organization or a written operating agreement:

(a) any Borrower resolutions which specifically authorize execution and delivery of the Loan Documents and all performance by Borrower thereunder;

(b) to the extent not covered by the authorized representative’s certificate described in Section 14.05B below, any Borrower resolutions adopted after the date of

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<sup>306</sup> *Id.*

<sup>307</sup> *See supra* § 7.04.

adoption of the original authorizing resolutions that may amend, rescind or revoke the authority granted in the original authorizing resolutions;

(c) any Borrower resolutions addressing any delegation of authority generally; and

(d) the provisions of the GLLCA and provisions Georgia law relating to agency as to authority.

B. Obtain and review a certificate, dated the date of the opinion, of an authorized representative of Borrower certifying:

1. that copies of the articles of organization and any written operating agreement of Borrower, and any amendments thereto, reviewed and relied upon by the Opinion Giver are true, complete and correct, and such articles of organization and written operating agreement have not been amended, revoked or otherwise modified since the date of their execution;

2. that copies of any Borrower resolutions reviewed and relied upon by the Opinion Giver are true, complete and correct, and such resolutions have not been amended, rescinded or revoked since the date adopted and are the only resolutions relating to the matters that are the subject matter of the Opinion;

3. that Borrower's relevant resolutions were adopted in compliance with any procedural requirements set forth in Borrower's articles of organization, any written operating agreement and the GLLCA; and

4. if applicable, that, with respect to the incumbency of managers and officers, if appointed or elected, and the status of members:

(a) both the managers voting on the relevant resolutions and the managers or officers acting on behalf of Borrower were duly appointed and incumbent in their offices at the time of all relevant action and at all relevant times thereafter; and

(b) any members voting on relevant resolutions were members at the time of such relevant action and entitled to vote.

Because of the flexibility permitted in management structures of limited liability companies, the Committee believes that the question of whether or not a delegation of authority is proper may sometimes arise in connection with the Model Limited Liability Company Acts Opinion.<sup>308</sup> The Committee recommends that the Opinion Giver analyze whether or not any authority delegated by Borrower's members or managers to a committee of members or managers or to any Borrower officers may be delegated.

Interpretive Standard 13 contains an express assumption as to the genuineness of the signatures of all parties to the Loan Documents. In certain circumstances, the Opinion Recipient

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<sup>308</sup> See *supra* § 7.05.

may request and the Opinion Giver may agree to provide assurance as to the genuineness of Borrower's signature. In such event, the Committee recommends that the Opinion Giver witness the execution of the Loan Documents on behalf of Borrower. Otherwise, the Opinion Giver should take steps to confirm due execution, such as requesting written confirmation from a representative of Borrower that he or she witnessed the execution of the Loan Documents by the executing officer or other representative (the Committee believes an email from such confirming representative would be acceptable written confirmation). The Opinion Giver may also review and rely on an incumbency certificate and an assumption of the genuineness of the signatures on the Loan Documents.

The Committee recommends that the Opinion Giver also confirm that the mechanics of delivery of the Loan Documents were sufficient to create a binding contractual obligation, i.e., that Company put a duly executed agreement out of its possession or custody with the express or (unless the Opinion Recipient knows to the contrary) apparent intent to create an immediately binding contractual obligation. If the Opinion Giver is not present at the actual delivery, certain assumptions will have to be made with respect to, or certificates will have to be delivered describing, the circumstances of the delivery. Generally, there is consent by the parties at the closing that the closing lawyer will deliver all executed Loan Documents to the Opinion Recipient and that delivery by Company to the closing lawyer constitutes delivery to the Opinion Recipient. In such circumstances it may be necessary to determine if a written escrow or bailment agreement is necessary, or if an oral agreement is sufficient, to give the closing lawyer the fiduciary responsibilities of an agent or bailee.<sup>309</sup> The Committee recommends that the Opinion Giver also determine whether or not the parties authorized release of the Loan Documents by the closing lawyer. While the Opinion Giver could assume the fact of the delivery of the Loan Documents if the Opinion Giver does not witness delivery, the Opinion Giver, in rendering an opinion as to delivery, ordinarily is entitled to rely solely on a certificate from a representative of Company addressing the fact of the delivery of the Loan Documents.

## **XV. THE MODEL CONFIRMATION OF AUTHORIZATION OF FOREIGN LIMITED LIABILITY COMPANY**

*Borrower is authorized to transact business as a foreign limited liability company in the State of Georgia. The foregoing statement is based solely upon the issuance of a certificate of authority by the Secretary of State of the State of Georgia and is limited in meaning to the wording of such certificate.*

### **COMMENT**

**15.01 Purpose and Background of the Model Confirmation of Authorization of Foreign Limited Liability Company.** Provisions of the GLLCA require a foreign limited liability company to obtain a certificate of authority to transact business in the State of Georgia.<sup>310</sup> It should be noted, however, that the GLLCA lists certain activities that a foreign limited liability

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<sup>309</sup> *Id.*

<sup>310</sup> O.C.G.A. § 14-11-702(a).

company may conduct within the state, which, in and of themselves, would not be considered the transaction of business requiring registration with the Secretary of State of Georgia.<sup>311</sup>

A foreign limited liability company that intends to transact business in Georgia must procure a certificate of authority from the Secretary of State by submitting an application, signed by a person authorized to sign such instruments by the laws of the jurisdiction under which such company is organized and setting forth certain required information regarding the company.<sup>312</sup> Under the applicable provisions of the GLLCA, a foreign limited liability company that obtains a certificate of authority from the Secretary of State is deemed to be authorized to transact business in the State of Georgia.<sup>313</sup>

Failure of a foreign limited liability company conducting business in Georgia to secure a certificate of authority to conduct business in the state may expose the entity to several consequences. First, a foreign limited liability company that has not registered within thirty days of the date on which it begins conducting business in Georgia is liable for a penalty of \$500 and for all fees which would have been imposed had it registered as required.<sup>314</sup> Additionally, the Attorney General of the State of Georgia may maintain an action to restrict a foreign limited liability company from transacting business in the State if it is not yet registered.<sup>315</sup> Perhaps the most important consequence, however, is that a foreign limited liability company that has not secured the appropriate certificate of authority “may not maintain an action, suit or proceeding in a court of [the State of Georgia] until” such certificate has been obtained.<sup>316</sup>

**15.02 Practice Procedure for the Model Confirmation of Authorization of Foreign Limited Liability Company.** Prior to delivering a confirmation that a foreign limited liability company is authorized to transact business in the State of Georgia, the Opinion Giver should obtain and review a certificate of authority from the Secretary of State in order to confirm that the certificate has been issued. The Opinion Giver has no obligation to make any investigation regarding the application for the certificate of authority or any other aspect of issuance of the certificate. Instead, the confirmation is expressly limited to the issuance of a certificate of authority by the Georgia Secretary of State, subject to the standards of unwarranted reliance set forth in Section 2.07.

## **XVI. THE MODEL NO VIOLATION OPINION**

*The execution and delivery by Borrower of the Loan Documents do not violate Borrower’s Organizational Documents, do not violate any applicable constitution, statute, regulation, rule, or law to which Borrower or the Property is subject, and do not, to our knowledge, (i) constitute a breach or default under any*

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<sup>311</sup> O.C.G.A. § 14-11-702(b).

<sup>312</sup> O.C.G.A. § 14-11-702(a).

<sup>313</sup> O.C.G.A. § 14-11-704(c).

<sup>314</sup> O.C.G.A. § 14-11-711(c).

<sup>315</sup> O.C.G.A. § 14-11-712.

<sup>316</sup> O.C.G.A. § 14-11-711(a).

*other material written agreements known to us to which Borrower is a party or by which Borrower or the Property is bound, or (ii) violate any judicial or administrative decree, writ, judgment or order known to us to which Borrower or the Property is subject.*

## COMMENT

**16.01 Purpose and Background of the Model No Violation Opinion.** The Model No Violation Opinion provides assurance to the Opinion Recipient that the Organizational Documents of Borrower do not prohibit its entering into the Loan Transaction.<sup>317</sup> A second purpose of the Model No Violation Opinion is to disclose, for evaluation by the Opinion Recipient, information that is known to the Opinion Giver and that, although not directly affecting the Loan Transaction, may impact it. Except with respect to the Organizational Documents, the Model No Violation Opinion is not intended to require the Opinion Giver to investigate matters outside its knowledge, as the cost of doing so in the context of a real estate loan transaction outweighs its benefit. Rather, except with respect to the Organizational Documents, the Model No Violation Opinion seeks to disclose known information as an adjunct to the Opinion Recipient's due diligence. Reference should be made to Interpretive Standard 37 for a description of the parameters of the Model No Violation Opinion.

### **16.02 Elements of the Model No Violation Opinion.**

**A. Conflict.** Historically, the term "conflict" has been used in the "no violation" opinion in conjunction with or in lieu of the terms "violation," "breach" or "default." Because the term "conflict" may connote matters which do not reach the level of a breach or default, the terms "violation," "breach" or "default" should be used instead. It should be noted that the Model No Violation Opinion uses the term "violation" in reference to the Organizational Documents and in reference to laws and the terms "breach" and "default" in the context of other agreements of Borrower.

**B. Organizational Documents.** The Model No Violation Opinion may duplicate the Model Corporate, Partnership and Limited Liability Company Acts Opinions, but it is focused and precise, as well as customarily requested.

**C. Laws.** The "no violations of Laws" opinion contained in the 1997/2002 Report contained a knowledge qualifier. The 1997/2002 Report stated that the "no violations of Laws" opinion was intended as a disclosure mechanism. As part of its deliberations, the Committee recognized that the knowledge limitation to this Opinion is often objected to by the Opinion Recipient. The Committee noted that the Opinion relates solely to whether the acts of execution and delivery of the Loan Documents result in a violation of the documents, instruments and agreements referenced in the text of the Model No Violation Opinion, and thus elected to remove the knowledge limitation. The Committee also elected to remove "order" from the scope of laws covered by this Opinion, however, as orders are covered in clause (ii) of this Opinion.<sup>318</sup>

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<sup>317</sup> For a discussion of the Model No Violation Opinion in the context of corporate transactions, see Section VIII of the *Corporate Report*, *supra* note 1, at 65-71.

<sup>318</sup> The reference to "known to us" shall refer to the knowledge of the Primary Lawyer Group. *See* § III.

**D. Breach of Agreements.** Corporate financing transactions generally impose covenants regarding maintenance of financial ratios, accounts receivable aging and other financial matters, and the documents containing these agreements are not publicly recorded. It is, therefore, common in this context for Borrower to identify its material written agreements and for the Opinion Giver to opine that the transaction does not violate them. Possibly because in a real estate secured transaction the real property is often the single asset of Borrower, or because financial restrictions imposed in such financings will generally appear of record (and if they do not, will not impact title to the Property), it is not usual practice in a real estate loan transaction to require the review of Borrower's contracts generally. For these reasons, the Committee incorporated a knowledge limitation in that part of the Model No Violation Opinion relating to breach of agreements. This represents an intended departure from the terms of the Corporate Report.<sup>319</sup> It is appropriate, nevertheless, for the Opinion Giver to identify material known agreements that the Loan Transaction may violate. An acceptable alternative to clause (ii) would be to schedule a specific list of agreements, in which event clause (ii) should be revised to read: "*(ii) constitute a breach or default under any agreement listed on Schedule \_\_\_ hereto*", the Opinion Recipient should obtain from Borrower a certified list of written agreements not related to the Loan Transaction, and such agreements should be specifically identified on said schedule. This section assumes that contracts governed by the laws of another jurisdiction can be the subject of an opinion, and that the Opinion Giver may rely on the plain meaning of the contracts, without need for explicit qualification or specific investigation or research of laws from said other jurisdiction.

**E. Judicial and Administrative Actions.** It would not be cost justified to require the Opinion Giver to conduct a general search of dockets and records to determine any decrees, writs, judgments and orders to which Borrower or the Property may be subject. The Opinion Recipient has, or can have, the assurance provided by a title examination and may also obtain the warranties and representations of Borrower regarding such matters. Consequently, consistent with the Committee's view that, except as to violation of the Organizational Documents, the Model No Violation Opinion should be a disclosure mechanism, that portion of the Model No Violation Opinion relating to judicial and administrative actions is subject to a knowledge limitation.<sup>320</sup>

### **16.03 Matters Not Covered by the Model No Violation Opinion.**

**A. Performance.** An Opinion Recipient may request that the scope of a "no violation" opinion be expanded to cover post-closing performance by Borrower. The Model No Violation Opinion looks only to the closing of the Loan Transaction, however, and does not cover performance of Borrower's post-closing obligations under the Loan Documents. The Loan Documents usually contain covenants to the effect that Borrower will keep the Property in good condition and in compliance with all applicable laws, and construction loans also raise issues as to compliance with building and zoning laws. These and other covenants of Borrower create possible implications of land use, environmental and other unintended opinions, which should be specifically addressed if of particular concern to the Opinion Recipient.<sup>321</sup> Opining as to

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<sup>319</sup> *Id.* at 68-69.

<sup>320</sup> The reference to "known to us" shall refer to the knowledge of the Primary Lawyer Group. *See* § III.

<sup>321</sup> Although Interpretive Standard 2 excludes any opinion concerning local law and zoning, land use, subdivision and development law, the Committee believes that, given the importance of zoning and

performance of payment obligations under the Loan Documents carries with it a hidden usury opinion, which should be specifically addressed in a separate usury opinion rather than implicitly in the Model No Violation Opinion.<sup>322</sup> Finally, given that a remedies opinion is universally required, cost-benefit and foreseeability issues arise if an additional “performance” analysis is required in the context of the Loan Documents. For these reasons, the Committee consciously deviated from the Corporate Report, which incorporates performance as an element of the “no violation” opinion.<sup>323</sup>

**B. Creation of Liens.** The Model No Violation Opinion does not include language, sometimes seen in corporate opinions, that execution of the Loan Documents will not result in the creation or imposition of a contractual lien against the assets of Borrower under other written agreements.<sup>324</sup> A real estate secured transaction involves the creation of a lien or security title on particular real property, and recording statutes provide both disclosure and ranking of any existing liens. Title insurance should provide the Opinion Recipient with assurance regarding the priority of its lien or security title under the Loan Documents, and a title examination will provide information as to the existence of any other liens. A search of UCC filings will disclose prior liens on personalty related to the real property that is the subject of the Loan.<sup>325</sup> In view of these aspects of a real estate secured transaction, the Model No Violation Opinion does not address the creation of liens against the Property.

**16.04 Practice Procedure for the Model No Violation Opinion.** In rendering the Model No Violation Opinion, the Committee recommends that as in the case of the Model Corporate, Partnership and Limited Liability Company Acts Opinions, the Opinion Giver obtain and review certified copies of Borrower’s Organizational Documents, certified by an officer or other authorized representative of Borrower or by a government agency, or otherwise establish to its satisfaction that its review is based on the most recent version of the Organizational Documents, as amended. In the event written agreements are scheduled as indicated in the alternative election for clause (ii) contained in the Model No Violation Opinion, described in Section 16.02D, the Opinion Giver should obtain and review a list and complete copies of all such agreements, certified by an officer or other authorized representative of Borrower, or otherwise

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similar laws in real estate transactions, it is preferable to avoid any inference of an implied opinion by expressly excluding post-closing performance from the Model No Violation Opinion. See Section XXIII for a discussion of zoning, land use and similar issues in the context of legal opinions in real estate secured transactions.

<sup>322</sup> The Real Estate Adaptation limits the coverage of its “no violation of laws” opinion to violations of law resulting from performance of *payment* obligations in order to avoid implied opinions as to land use, environmental compliance and similar matters. *Report on Adaptation of Accord, supra* note 4, at 601. However, under the Real Estate Adaptation, an opinion as to enforceability of documents includes an implied opinion that the loan is not usurious. *Id.* at 583. However, since the Model Opinion includes a Model Usury Opinion, as discussed in Section XIX of this Report, the Committee determined that there was no need to include payment obligations within the scope of the Model No Violation Opinion.

<sup>323</sup> *See Corporate Report, supra* note 1, at 66. Although the *Corporate Report* assumes that Borrower is to perform its obligations as of the date of the Opinion Letter, the Committee decided to omit any reference to performance in order to avoid the implication of unintended opinions as to local law matters.

<sup>324</sup> *Id.* at 69.

<sup>325</sup> *See infra* § 20.04.

establish to its satisfaction that its review is based on a complete list of such other written agreements and complete copies thereof. Although the remaining portions of the Model No Violation Opinion that are knowledge based do not require investigation of the Opinion Giver's files, those persons in the Primary Lawyer Group should be consulted for their knowledge of matters covered by this Opinion.

## **XVII. EXECUTION AND DELIVERY OF THE GUARANTY.**

*Guarantor has executed and delivered the Guaranty.*

### **COMMENT**

**17.01 Purpose and Background of the Execution and Delivery of the Guaranty Opinion.** The Model Opinion assumes that the Guarantor is an individual. If this assumption is not correct and Guarantor is an entity, the Model Opinion should be modified to include as to Guarantor parallel opinions to the opinions as to Borrower set forth in paragraphs 1-4 of the Model Opinion and the opinions in paragraphs 5 and 6 of the Model Opinion should be deleted.

The Opinion that Guarantor has executed and delivered the Guaranty relies upon, and does not supersede nor contradict, the assumption set forth in Interpretive Standard 13 that all signatures on the Guaranty are genuine.

If Borrower is an individual rather than an entity, the Model Opinion should be modified to include as to Borrower parallel opinions to the opinions as to Guarantor set forth in paragraphs 5 and 6 of the Model Opinion and the opinions as to Borrower set forth in paragraphs 1-4 of the Model Opinion should be omitted.

**17.02 Practice and Procedure if Guarantor or Borrower is an Individual.** Interpretive Standard 13 contains an express assumption as to the genuineness of the signatures of all parties to the Loan Documents. In certain circumstances, the Opinion Recipient may request and the Opinion Giver may agree to provide assurance as to the genuineness of Guarantor's or Borrower's signature. In such event, the Committee recommends that the Opinion Giver witness the execution of the Guaranty on behalf of Guarantor or the Loan Documents on behalf of Borrower. In the absence of observation, if Guarantor or Borrower is an individual, the Opinion Giver and the Opinion Recipient should agree on the appropriate steps to be taken by the Opinion Giver to provide assurance to the Opinion Recipient that Guarantor or Borrower has executed the Guaranty or the Loan Documents, as applicable.

The Committee recommends that the Opinion Giver also confirm that the mechanics of delivery of the Guaranty or the Loan Documents, as applicable, were sufficient to create a binding contractual obligation, i.e., that Guarantor or Borrower put a duly executed agreement out of its possession or custody with the express or (unless the Opinion Recipient knows to the contrary) apparent intent to create an immediately binding contractual obligation. If the Opinion Giver is not present at the actual delivery, certain assumptions will have to be made with respect to, or certificates will have to be delivered describing, the circumstances of the delivery. Generally, there is consent by the parties at the closing that the closing lawyer will deliver the executed Guaranty and Loan Documents to the Opinion Recipient and that delivery by Guarantor or Borrower, as applicable, to the closing lawyer constitutes delivery to the Opinion Recipient. In such circumstances it may be necessary to determine if a written escrow or bailment agreement is necessary, or if an oral agreement is sufficient, to give the closing lawyer the fiduciary

responsibilities of an agent or bailee.<sup>326</sup> The Committee recommends that the Opinion Giver also determine whether or not the parties authorized release of the Guaranty or the Loan Documents, as the case may be, by the closing lawyer. While the Opinion Giver could assume the fact of the delivery of the Guaranty or the Loan Documents, if the Opinion Giver does not witness delivery, the Opinion Giver, in rendering an opinion as to delivery, ordinarily is entitled to rely solely on a certificate from a representative of Guarantor or Borrower addressing the fact of the delivery of the Guaranty or the Loan Documents, as the case may be.

## **XVIII. THE MODEL REMEDIES OPINION**

*The Loan Documents are valid and enforceable against Borrower in accordance with their respective terms.*

*The enforceability opinion set forth above is subject to the qualification that certain provisions of the Loan Documents may not be enforceable; nevertheless, such unenforceability will not render the Loan Documents invalid as a whole or preclude (i) the judicial enforcement of the obligation of Borrower to repay the principal, together with interest thereon, both as provided in the Note, as limited by the usury opinion set forth below and subject to the obligation to confirm an exercise of power of sale pursuant to O.C.G.A. Section 44-14-161 as a prerequisite to an action to obtain a deficiency judgment, (ii) the acceleration of the obligation of Borrower to repay such principal, together with such interest, upon a material default by Borrower in the payment of such principal or interest [**Optional: or upon any other material default under the Loan Documents**], and (iii) the non-judicial foreclosure of the security title to the Real Property by exercise of power of sale pursuant to the Security Deed in accordance with Georgia law upon maturity of the Note or upon acceleration pursuant to (ii) above.*

*The Guaranty is valid and enforceable against Guarantor in accordance with its terms.*

*The enforceability opinion set forth above with respect to the Guaranty is subject to the qualification that certain provisions of the Guaranty may not be enforceable; nevertheless, such unenforceability will not render the Guaranty invalid as a whole or preclude the judicial enforcement of Guarantor's obligation to pay the principal together with interest thereon, both as provided in the Note, to the extent guaranteed pursuant to the Guaranty, as limited by the usury opinion set forth below.*

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<sup>326</sup> For additional discussion regarding the execution and delivery of documents, see Section 7.02 of this Report.

## COMMENT

**18.01 Purpose and Background of the Model Remedies Opinion.** In a financing transaction the “remedies” or “enforceability” opinion typically represents the most critical as well as the most extensively negotiated part of the Opinion Letter. This opinion provides assurance to the Opinion Recipient that the agreements made by Borrower in the Loan Documents, and by Guarantor in the Guaranty, are legally binding and that remedies will be available to the Opinion Recipient to enforce such agreements.<sup>327</sup>

In its traditional form, the remedies opinion states that all provisions of a set of documents are “enforceable,” or alternatively, “valid, binding and enforceable,” but subject to numerous stated exceptions and qualifications. This approach, the listing of various exceptions and qualifications, is often referred to as the “laundry list” approach. The scope and wording of the matters contained in the laundry list can result in protracted negotiations, and ultimately the Opinion Giver cannot be certain that the list is complete, nor can the Opinion Recipient be certain that all of the exceptions and qualifications have not deprived the Opinion Recipient of the intended core benefits of the transaction. To resolve the limitations of the express laundry list, two other forms of the remedies opinion have come into use: (i) creation of an *implied* laundry list and (ii) use of a “generic qualification” and “generic qualification assurance.”<sup>328</sup>

An implied, i.e., incorporated by reference, laundry list usually includes broad exceptions such as the “application of equitable principles” or the “effect of bankruptcy, insolvency and similar laws relating to creditors rights.” These two general exceptions are contained in the Legal Opinion Accord together with a list of ten other matters to be excluded from a remedies opinion based on the Legal Opinion Accord.<sup>329</sup> The Corporate Report also adopts an implied list of nineteen items excepted from its model enforceability opinion.<sup>330</sup> Such items are intended to be incorporated by reference in an opinion based on the Interpretive Standards of the Corporate Report.<sup>331</sup>

Although an express or implied list of exceptions to a remedies opinion provides precision, the Opinion Giver is always at risk that some qualification has been omitted or overlooked. Conversely, the laundry list approach can also be criticized as being too comprehensive. What does the Opinion Recipient have after giving effect to all of the exceptions? Finally, in the context of a secured real estate transaction, the myriad of covenants, warranties, agreements, conditions, waivers, undertakings and remedies set forth in typical loan documents, in

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<sup>327</sup> The term “Loan Documents” does not include the Guaranty; therefore, the Model Remedies Opinion addresses the Guaranty separately.

<sup>328</sup> *See Report on Adaptation of Accord, supra* note 4, at 589-600.

<sup>329</sup> *See Third-Party Legal Opinion Report, supra* note 3, at 529-34.

<sup>330</sup> *See Corporate Report, supra* note 1, at 81-84. Interpretive Standard 23 of the *Corporate Report* contains the exceptions to the Corporate Remedies Opinion. *Id.* at 146-48. It is, conceptually, a combination of Sections 12-14 of the Legal Opinion Accord. *Third-Party Legal Opinion Report, supra* note 3, at 529-34. The exceptions in the Legal Opinion Accord and Interpretive Standard 23 overlap to a substantial degree.

<sup>331</sup> *See Corporate Report, supra* note 1, at 82.

particular, the deed to secure debt, the assignment of rents and leases, the security agreement, the environmental indemnity and the guaranty agreement, simply have no parallel in corporate or banking transactions and may not be enforceable in all circumstances.<sup>332</sup> To impose upon the Opinion Giver the obligation to opine absolutely as to the enforceability of such a quantum of provisions, even with numerous exceptions, is particularly onerous.

The second form of remedies opinion, the generic qualification, overcomes the deficiencies of the laundry list and for this reason is frequently used in secured real estate transactions. The generic qualification is a broad exception excluding unenforceable or ineffective provisions generally and typically states that “certain provisions of the Loan Documents may not be enforceable.”<sup>333</sup> The virtues of the generic qualification are essentially the defects of the laundry list approach; it is general and comprehensive and eliminates negotiation about exceptions through the use of one comprehensive statement, but arguably provides less certainty to the Opinion Recipient. Because inclusion of the generic qualification alone would effectively eviscerate a remedies opinion, the generic qualification is usually coupled with some general assurance concerning the overall enforceability of the Loan Documents notwithstanding the unenforceability of certain provisions.<sup>334</sup>

The generic qualification assurance - to the effect that any unenforceable provisions do not nullify the Loan Documents and that certain remedies relating to the intended core benefits of the Loan Transaction are enforceable - provides assurance that, notwithstanding the generic qualification, certain substantial benefits of the Loan Documents remain. The generic qualification assurance pertains *only* to the matters covered by the generic qualification; it does not modify or limit any general qualifications such as those regarding equitable principles or bankruptcy that are excepted from a remedies opinion.

The Corporate Report recognizes that the generic qualification and generic assurance approach may be appropriate in secured lending transactions and real estate loan transactions, but felt it unnecessary to address this issue in light of the exclusion of such transactions from the scope of the Corporate Report.<sup>335</sup> The Corporate Report states further that an Opinion Giver preparing a remedies opinion for a secured transaction or real property transaction may need to consider whether or not it would be appropriate to request that the Opinion Recipient accept a generic qualification and generic assurance or some other generalized limitation as to the scope of the opinion.<sup>336</sup>

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<sup>332</sup> For a discussion of the distinction between corporate and real estate transactions and the ramifications of this distinction on a remedies opinion, see *Report on Adaptation of Accord*, *supra* note 4, at 583-84, and *Corporate Report*, *supra* note 1, at 88-89.

<sup>333</sup> *Report on Adaptation of Accord*, *supra* note 4, at 587.

<sup>334</sup> This assurance is referred to in the *Report on Adaptation of Accord*, *supra* note 4, at 584, as the “generic qualification assurance” or “assurance.”

<sup>335</sup> *Corporate Report*, *supra* note 1, at 89.

<sup>336</sup> *Id.* at 102.

In formulating the Model Remedies Opinion, the Committee has considered the reports of various bar organizations and their recommendations regarding the remedies opinion. Based on this review the Committee has concluded that the itemization of exceptions to enforceability, i.e., the laundry list approach, while admittedly a practice still utilized in some transactions, is ill-suited for use in most real estate secured transactions where the documents may contain a host of complex remedies, including some of questionable enforceability. The laundry list approach may also result in protracted last minute negotiations and in variations in the remedies opinion from transaction to transaction and among different Opinion Givers and Opinion Recipients. These consequences are, in the view of the Committee, inherent deficiencies that often do not serve the interests of Borrower, the Opinion Giver or the Opinion Recipient. In light of these factors, the Committee strongly endorses and recommends the use of the generic qualification and generic qualification assurance, in addition to the commonly-accepted bankruptcy and equitable principles exceptions, as the modern approach that should be generally acceptable to an Opinion Recipient in a real estate secured transaction. The form of generic qualification and assurance adopted by the Committee is based on a form published by the American College of Real Estate Lawyers<sup>337</sup> and has been modified to reflect Georgia law considerations. Optional language has also been suggested to provide additional comfort to the Opinion Recipient if requested and appropriate.<sup>338</sup>

**18.02 Elements of the Model Remedies Opinion.** The Model Remedies Opinion has the meaning described below and is subject to the exceptions and limitations set forth in this Section 18.02 when used in an opinion letter incorporating the Interpretive Standards by reference.

**A. General Meaning.** The Model Remedies Opinion means, with respect to the Loan Documents, to which Borrower is a party, and to the Guaranty, to which Guarantor is a party, that:

1. As to each Loan Document and as to the Guaranty, a contract has been formed under the law of contracts of the applicable jurisdiction.<sup>339</sup>

2. Under laws applying to contracts like the Loan Documents, to parties like Borrower, and to transactions like the Loan Transaction, although certain obligations imposed on and agreements of Borrower and certain rights, benefits and remedies conferred by Borrower may not be given effect, effect will be given to those remedies in the Loan Documents providing for (i) judicial enforcement of the obligation to repay the principal of the Loan, together with interest thereon, subject to limitations of usury and subject to the requirement of confirmation of a foreclosure, conducted prior to obtaining a judgment on the note, as a prerequisite to an action to

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<sup>337</sup> *American College of Real Estate Lawyers Statement of Policy on Mortgage Loan Enforceability Opinions, in THE ATTORNEY'S OPINION LETTER IN REAL ESTATE TRANSACTIONS* (American College of Real Estate Lawyers ed., 1992).

<sup>338</sup> Inclusive Real Estate Secured Transaction Opinion, Joint Report of American Bar Association, Section of Real Property, Probate and Trust Law, Committee on Legal Opinions in Real Estate Transactions, Subcommittee on Creation of an Inclusive Opinion and American College of Real Estate Lawyers Attorneys' Opinion Committee (2/2/99) (hereinafter the *Inclusive Report*).

<sup>339</sup> *See Corporate Report, supra* note 1, at 77.

obtain a deficiency judgment, (ii) the acceleration of the obligation to repay such principal and interest upon a material default in the payment of principal or interest<sup>340</sup>, and (iii) the non-judicial foreclosure by exercise of power of sale in accordance with Georgia law of the security title to the Real Property upon maturity or upon acceleration pursuant to (ii) above.

3. Under laws applying to contracts like the Guaranty, to parties like Guarantor, and to transactions like the Loan Transaction, although certain obligations and agreements of Guarantor, certain waivers and consents made by Guarantor, and certain rights, benefits and remedies conferred by Guarantor may not be given effect, effect will be given in the Guaranty to that remedy providing for the judicial enforcement of Guarantor's obligation to pay the principal together with interest thereon, both as provided in the Note, to the extent guaranteed pursuant to the Guaranty, subject to limitations of usury.

4. The Security Deed is in a form sufficient to create a lien on or to grant security title in all right and interest of Borrower in the Real Property.<sup>341</sup>

**B. Existence of Contract.** In order to render the Model Remedies Opinion, which, as discussed in Section 18.02A.1, means that as to each Loan Document and the Guaranty a contract has been formed, the Opinion Giver must conclude that:

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

2. Neither the Loan Document nor the Guaranty violates law as to formation of contracts that would prevent a court presented with the Loan Document or the Guaranty from enforcing it.

3. Borrower does not presently have available any contractual defenses to the Loan Document or the Guaranty that would render any applicable component of the generic qualification assurance unenforceable.

**C. Form of Documents.** The Model Remedies Opinion implies an opinion that the Security Deed is sufficient in form to convey security title to the Real Property. A distinction should be made between the sufficiency of the form of the Security Deed and the actual creation or priority of the security title or lien.<sup>342</sup> No opinion is given concerning title to any property or the priority of any lien on or security title to property, and Interpretive Standard 2(19) includes an express qualification to this effect as discussed in Section 22.01.

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<sup>340</sup> If the optional opinion language in clause (ii) is included in the opinion, then the opinion shall also include "acceleration upon a material default under the Loan Documents."

<sup>341</sup> See *Report on Adaptation of Accord*, supra note 4, at 581.

<sup>342</sup> *Id.* at 604.

**D. Generic Qualification and Generic Qualification Assurance.** The generic qualification, stating that certain provisions of the Loan Documents may be unenforceable, advises the Opinion Recipient that some agreements, remedies or other provisions may not be given effect. The generic qualification is comprehensive and eliminates dispute over the precise number of exceptions and wording of each, but, standing alone, its broad scope leaves the Opinion Recipient without certainty or specifics as to which provisions may be unenforceable. For this reason the generic qualification is typically accompanied by an assurance as to certain core benefits and security provided by the Loan Documents.<sup>343</sup>

The chief advantage of the form of generic assurance published by the American College of Real Estate Lawyers, which has been adopted by the Committee for the Model Remedies Opinion with certain modifications, is that it succinctly states the specific benefits of the Loan Documents about which assurance is given.<sup>344</sup> A 1991 report of the American College of Real Estate Lawyers discusses both the laundry list and the generic qualification approaches to remedies opinions, stating a preference for a generic qualification as follows:

Certain remedies, waivers, and other provisions of the Loan Documents may not be enforceable, but such unenforceability will not render the Loan Documents invalid as a whole or preclude (i) the judicial enforcement of the obligation of Borrower to repay the principal, together with interest thereon, as provided in the note (to the extent not deemed a penalty), and (ii) the foreclosure of the mortgage (or deed of trust) [and/or any security agreement].<sup>345</sup>

This generic qualification was further refined by the American College of Real Estate Lawyers Opinions Committee in 1992 as follows:

Certain [remedies, waivers, and other] provisions of the Transaction Documents may not be enforceable; nevertheless such unenforceability will not render the Transaction Documents invalid as a whole or preclude (i) the judicial enforcement of the obligation of the Client 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 Client to repay such principal, together with such interest, upon a [material] default by the Client in the payment of such principal or interest, and (iii) the foreclosure in accordance with Applicable Law of the lien on and

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<sup>343</sup> The *Report on Adaptation of Accord*, *supra* note 4, discusses several forms of assurance to the generic qualification adopted by various bar association reports as well as the traditional assurance to the effect that “such laws and judicial decisions do not make the Security Documents legally inadequate for the practical realization of principal benefits and/or security intended to be provided thereby.” *Id.* at 590. This form lacks precision because there are no universally accepted definitions of “practical realization” or “principal benefits,” and there may be significant interpretive differences among Opinion Givers and Opinion Recipients regarding the meaning of these terms. *Id.* at 589-600. For a further discussion of the “practical realization” concept, see *Corporate Report*, *supra* note 1, at 88.

<sup>344</sup> *Report on Adaptation of Accord*, *supra* note 4, at 595.

<sup>345</sup> *American College of Real Estate Lawyers Statement of Policy on Mortgage Loan Enforceability Opinions*, *supra* note 337, at 7.

security interest in the Collateral created by the Security Documents upon maturity or upon the acceleration pursuant to (ii) above.<sup>346</sup>

The generic assurance qualification adopted by the Committee in the Model Remedies Opinion is based on the foregoing revised form and is intended to assure the Opinion Recipient that, notwithstanding the generic qualification, the essential core benefits of the transaction are enforceable. The Committee has also provided optional language to provide additional comfort to an Opinion Recipient if necessary as described below. First, the generic qualification assurance provides that, subject to usury limitations, Borrower's obligation to repay the principal and interest, as provided in the Note, is enforceable. The reference to "as provided in the Note" is intended to encompass any non-recourse provisions contained therein. Second, the generic qualification assurance provides that the Opinion Recipient shall have the right to accelerate the obligation to repay principal and interest upon a material default by Borrower in the payment of principal or interest. Note that the generic qualification assurance does not extend to acceleration on account of immaterial monetary defaults or on account of defaults relating to obligations other than the obligation to repay principal or interest, unless the optional language is included as discussed below. Third, the generic qualification assurance provides that the Opinion Recipient shall be entitled to exercise non-judicial foreclosure by exercise of power of sale upon maturity or upon acceleration upon a material default by Borrower in the payment of such principal and interest. As to the Guaranty, the generic qualification assurance in the Model Remedies Opinion provides that, subject to usury limitations, Guarantor's obligations to pay the principal together with interest thereon, both as provided in the Note, to the extent guaranteed pursuant to the Guaranty, is enforceable. All of the generic qualification assurances are, however, further subject to the implied exceptions described in Section 18.03 below.

The specific assurance in clause (ii) of the Model Remedies Opinion is particularly narrow in scope as noted above. As such, it is sometimes met with resistance by Opinion Recipients. The optional language is provided as additional assurance in clause (ii), that acceleration of Borrower's obligation to repay principal and interest "upon any other material default under the Loan Documents." This represents a compromise between the narrow opinion as to acceleration upon a material default in the repayment of principal and interest on the one hand, and an opinion as to acceleration for any default under the Loan Documents on the other hand. This is discussed in the Report on Adaptation of Accord<sup>347</sup> and in the Inclusive Report.<sup>348</sup> A form of this additional assurance is also included in a number of other model real estate secured transaction opinions drafted by other state bar associations.<sup>349</sup> The Committee believes that a "material default" is

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<sup>346</sup> *Report on Adaptation of Accord*, *supra* note 4, at 595.

<sup>347</sup> *Report on Adaptation of Accord*, *supra* note 4, at 598.

<sup>348</sup> *Inclusive Report*, *supra* note 338, at 14.

<sup>349</sup> See the real estate opinion reports from the states of Florida [Florida Bar Opinion Committee, *Report on Standards for Opinions of Florida Counsel of the Special Committee on Opinion Standards of the Florida Bar Business Law Section*, 46 BUS. LAW.1407 (1991), supplemented by Opinions in Real Estate Transactions, Including Loan Transactions (June 1997) (unpublished report available from the Florida Bar Association) (hereinafter the *Florida Report*)], Hawaii [Opinion Committee of the Real Property and Financial Services Section of the Hawai'i State Bar Association, *Hawai'i 2000 Report Regarding Lawyers' Opinion Letters in Mortgage Loan Transactions*, 22 UH L. Rev. 347 (Spring 2000) (hereinafter the *Hawaii Report*)], Maryland [Special Joint Committee of the Maryland State Bar Association, Inc., and

intended to mean that a court of competent jurisdiction would find all legal elements required to permit acceleration and non-judicial foreclosure have occurred. Accordingly, the Opinion Giver only needs to determine if there are other provisions of law that would prevent the exercise of the remedy of acceleration.<sup>350</sup> The Opinion Giver is not charged, and should not be charged, with the responsibility of determining whether a court would find that a “material default” has occurred in the event the optional language is used. A “material default” is a function of the nature, circumstances and consequences of the breach.<sup>351</sup> A breach of a covenant or obligation may be a “material default” under certain circumstances but not under other circumstances. The Committee believes that the determination of whether a default is “material” is not the responsibility of the Opinion Giver.

Given the recognition of this language in the Inclusive Report and a number of other state bar model opinions, as well as the absence of existing contradictory reported Georgia law,<sup>352</sup> the Committee believes this optional language is not unduly burdensome to the Opinion Giver. Additional diligence in review of the Loan Documents may be warranted. Note that Interpretive Standard 23 A.(2) has not been modified. The optional language is not included as part of the Model Remedies Opinion unless agreed upon by Opinion Giver and the Opinion Recipient. The Committee neither endorses nor opposes the inclusion of the optional language in the Opinion.

The generic qualification assurance does not provide the Opinion Recipient assurance that other provisions of the Loan Documents falling outside the scope of the matters specifically referred to in the assurance are enforceable. Examples of such matters not covered by the generic qualification assurance include the assignment of rents provision, the provisions entitling the Opinion Recipient to the appointment of a receiver and the Opinion Recipient’s right to enter on the Real Property and act as a mortgagee in possession.<sup>353</sup>

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the Bar Association of Baltimore City, Special Joint Committee on Lawyers’ Opinions in Commercial Transactions, 45 BUS. LAW. 705 (1990) (hereinafter the *Maryland Report*), New York [Joint Mortgage Loan Opinion Report, *Real Property Probate and Trust Journal (Fall 1998)* (hereinafter the *New York Report*)], and Texas [Committee on Lawyers’ Opinion Letters in Mortgage Loan Transactions, Real Estate, Probate and Trust Law Section, State Bar of Texas, *1996 Texas Supplement Regarding Lawyers’ Opinion Letters in Mortgage Loan Transactions* (May 1, 1996) <<http://www.reptl.org/drawonepage.aspx?pageID=57>> (hereinafter the *Texas Report*)]. Note, however, the Committee has elected the phrase “material default under the Loan Documents” rather than “material default in any other material provisions of the Loan Documents” which is used in most of these other opinion reports. Although the meanings are substantially the same, the Committee is intended to relieve the Opinion Giver from analyzing or specifying which covenants or provisions in the Loan Documents constitute a “material provision.”

<sup>350</sup> *New York Report*, *supra* note 349.

<sup>351</sup> *New York Report*, *supra* note 349.

<sup>352</sup> See, e.g., *Benton v. Patel*, 257 Ga. 669, 362 S.E. 2d 217 (1987), in which the Georgia Supreme Court permitted acceleration and foreclosure after the borrower failed to obtain required insurance coverage prior to the expiration of the applicable cure period but arranged for a policy to be in place after the cure period expired. No reported cases were found invalidating acceleration or foreclosure in the case of a non-monetary default on the grounds that the non-monetary default in question was not sufficiently material.

<sup>353</sup> *Id.* at 597.

If the law of the Opining Jurisdiction limits or restricts the specific assurances stated or implied in the generic qualification assurance, the Opinion Giver should expressly mention such limitations or restrictions as additional qualifications or exclusions.<sup>354</sup> For this reason and because of Georgia limitations on usury, the Model Remedies Opinion contains an express qualification regarding usury, and usury is addressed by the Model Usury Opinion as discussed in Section XIX.

Similarly, the necessity of confirmation proceedings of a non-judicial foreclosure in order to maintain an action to obtain a deficiency judgment in Georgia is addressed as an express limitation in subparagraph (i) of the Model Remedies Opinion.<sup>355</sup> Under Georgia law, when the holder of a loan exercises the power of sale contained in a security deed securing title to land, prior to obtaining a judgment on the promissory note secured by such security deed, “no action may be taken to obtain a deficiency judgment” unless the sale is confirmed in accordance with specified statutory requirements.<sup>356</sup> In the event a judgment on the applicable promissory note is obtained prior to the non-judicial foreclosure, no confirmation is necessary, nor is obtaining a deficiency judgment. The judgment debtor remains obligated for any judgment amount remaining after application of the proceeds of the foreclosure sale.<sup>357</sup>

The Model Remedies Opinion in subparagraph (iii) expressly refers only to non-judicial foreclosure of the Real Property by exercise of power of sale. This differs from the form published by the American College of Real Estate Lawyers, which provides an assurance that the general remedy of foreclosure of the lien on and security interest in the real and personal property collateral will not be precluded.<sup>358</sup> The reference to foreclosure in the American College of Real Estate Lawyers’ form does not guarantee any specific foreclosure remedy, i.e., judicial or non-judicial, and the Committee concluded that it is appropriate for the Opinion Giver to opine as to the non-judicial power of sale contained in the Loan Documents since this is the remedy customarily used in the State of Georgia. The failure to address judicial foreclosure is not intended to suggest that judicial foreclosure is not enforceable, but to limit the generic qualification assurance to those remedies that are of primary importance to the Opinion Recipient. The security interest in the Personal Property is addressed in this Report by the Model UCC Opinion, which is discussed in Section XX.

The Committee believes that the generic qualification and assurance set forth in the Model Remedies Opinion is sufficient in the great majority of real estate secured transactions. This form allows the Opinion Giver to avoid opining as to the enforceability of each and every provision of

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<sup>354</sup> *Id.*

<sup>355</sup> See *Vaughan v. Moore*, 202 Ga. App. 592, 415 S.E. 2d 47 (1992), *Georgia R.R. Bank & Trust Co. v. Griffith*, 176 Ga. App. 198, 335 S.E. 2d 417 (1985), and *Taylor v. Thompson*, 158 Ga. App. 671, 282 S.E. 2d 157 (1981).

<sup>356</sup> In order to bring an action for a deficiency judgment after exercise of the power of sale, the holder of a security deed is required to file a report of the sale within 30 thirty days thereof with the Superior Court of the county in which the real property is located, together with proof that the property was sold for “true market value” and that the sale was procedurally sound. O.C.G.A. § 44-14-161.

<sup>357</sup> *Taylor v. Thompson*, *supra* at 672-673.

<sup>358</sup> *Report on Adaptation of Accord*, *supra* note 4, at 595.

the Loan Documents, but gives the Opinion Recipient specific assurance as to the principal benefits of the Loan Documents. If the Opinion Recipient seeks confirmation of an issue not addressed by the Model Remedies Opinion, such as a particular remedy other than non-judicial foreclosure, a specific assurance must be added to the assurances following the generic qualification. The generic qualification should be viewed as excluding all matters of enforceability, and any matter excluded by the generic qualification can be replaced only by an assurance.<sup>359</sup>

**18.03 Implied Exceptions to the Model Remedies Opinion.** Given the adoption of the Model Remedies Opinion containing a generic qualification and generic qualification assurance, the Committee has concluded that no express qualifications or exceptions are required beyond those stated in the Model Remedies Opinion, other than certain implied qualifications set forth in the Interpretive Standards of this Report and those which the Opinion Giver properly finds to be specific to a particular transaction.<sup>360</sup> The Committee has identified four exceptions - bankruptcy, equitable principles, choice of law and enforceability of waivers of guarantors - that may affect the assurance contained in the Model Remedies Opinion and therefore must be retained notwithstanding the use of the generic qualification. These exceptions are set forth in Interpretive Standard 25, and a Model Remedies Opinion that incorporates the conventions of this Report as reflected in the Interpretive Standards will be deemed to include and be subject to the following exceptions:

- (i) the effect of bankruptcy, insolvency, reorganization, moratorium or other similar laws affecting the rights and remedies of creditors;
- (ii) the effect of general principles of equity, whether applied by a court of law or equity;
- (iii) the effect and possible unenforceability of contractual provisions providing for choice of governing law; and
- (iv) the possible unenforceability of provisions purporting to waive certain rights of guarantors.

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<sup>359</sup> *Id.* at 589. The Committee believes that in order to preserve the effectiveness of the generic qualification and assurance opinion recommended by this Report, with the exception of the optional language bracketed in clause (ii) of the specific assurances for reasons hereinbefore discussed, such requests for further specific assurances should be limited to special or unique circumstances in specific or isolated transactions and should not be a standard of practice resulting from a lack of familiarity with the generic qualification and assurance approach.

<sup>360</sup> It should be noted that the remedies opinion contemplated by the *Report on Adaptation of Accord* includes not only a generic qualification and assurance, but also the laundry list of implied exceptions set forth in Section 14 of the Legal Opinion Accord, *Third-Party Legal Opinion Report*, *supra* note 3, at 532-34, which the *Report on Adaptation of Accord*, *supra* note 4, at 600-01, modifies for use in secured real estate transactions. Some practitioners also take this approach, but the Committee has determined that in view of the fact that the generic qualification assurance is limited to certain specific remedies and that no opinion is given as to other remedies, it is not necessary to include the implied exceptions of Section 14 of the Legal Opinion Accord. In the Committee's view, coupling the generic qualification/generic qualification assurance with an unabridged laundry list represents a dilution of the remedies opinion that would be unacceptable to most Opinion Recipients.

**A. The Bankruptcy Exception.** The bankruptcy exception includes the effect of the Federal Bankruptcy Code<sup>361</sup> in its entirety, including matters of contract rejection, fraudulent conveyance and obligation, turn-over, preference, equitable subordination, automatic stay, conversion of a non-recourse obligation into a recourse obligation, and substantive consolidation. It also includes state laws regarding fraudulent transfers, obligations, and conveyances, including Sections 18-2-20 to 18-2-80 of the Georgia Code,<sup>362</sup> and state receivership laws.<sup>363</sup>

**B. The Equitable Principles Exception.** The equitable principles exception includes the following concepts: (i) principles governing the availability of specific performance, injunctive relief or other traditional equitable remedies; (ii) principles affording traditional equitable defenses (e.g., waiver, laches and estoppel); (iii) good faith and fair dealing; (iv) reasonableness; (v) materiality of the breach; (vi) impracticability or impossibility of performance; (vii) the effect of obstruction or failure to perform or otherwise act in accordance with an agreement by a person other than Borrower; (viii) the effect of Section 1-102(3) of the UCC; and (ix) unconscionability.<sup>364</sup>

**C. The Choice of Law Exception.** The issuance of a remedies opinion in a real estate secured transaction will often involve unique issues relating to choice of law. Many modern real estate transactions concern real property located in the Opining Jurisdiction as well as in one or more Other Jurisdictions. Certain documents to a Loan Transaction, such as a promissory note and a loan agreement, may purport to be governed by the laws of a jurisdiction in which none of the Real Property is located. This multi-jurisdictional setting will create significant issues relating to the meaning and effect of a remedies opinion issued in this context. These issues fall in two main areas: (i) the legal effect of a choice of law provision in a Loan Document or a Guaranty, and (ii) given the conclusions as to item (i), the intended meaning of a remedies opinion issued with respect to a Loan Document or a Guaranty.

The Corporate Report describes three situations that an Opinion Giver may face in connection with a request to give a remedies opinion: (i) a document may be silent with respect to the governing law, (ii) a document may specify that the substantive law of the Opining Jurisdiction will apply, or (iii) a document may specify that the substantive law of an Other Jurisdiction will apply.<sup>365</sup>

In modern real estate transactions, a fourth situation may also exist: (iv) a document may specify that the substantive law of the Opining Jurisdiction will apply as to certain provisions of the document and that the substantive law of an Other Jurisdiction will apply as to other provisions of the document. Furthermore, different documents in the same transaction may state that they are governed by different substantive laws.

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<sup>361</sup> See 11 U.S.C. §§ 101-1330 (1994).

<sup>362</sup> See O.C.G.A. §§ 18-2-20 to -2-59 (1991).

<sup>363</sup> See *Corporate Report*, *supra* note 1, at 89-90.

<sup>364</sup> *Id.* at 901-93.

<sup>365</sup> *Id.* at 98.

As noted above, the first issue relating to choice of law involves the legal effect of the selection of law clause. Although the generic qualification could be construed so as to result in no opinion being rendered as to the choice of law provision, the Committee has taken a more direct approach. Outside of certain contexts where specific, mandatory choice of law rules apply, such as found in the UCC,<sup>366</sup> the Georgia law regarding choice of law rules has not been extensively developed and is unclear. Some limitations, however, are evident from the law. For example, Georgia courts will generally not give effect to the selection of the law of an Other Jurisdiction to govern a document if such law violates Georgia's public policy.<sup>367</sup> Similarly, a Georgia court may not recognize the selection of the law of an Other Jurisdiction to govern a document if there is no substantial relationship of one or more of the parties and/or the transaction with the selected Other Jurisdiction.<sup>368</sup> The parameters of these rules are unclear, however, due to the limited Georgia authority regarding these issues and to the reluctance of the Georgia courts to adopt specific guidelines for applying these principles.<sup>369</sup>

Given this uncertainty, the Committee has concluded that the Model Remedies Opinion should include the limitation in Interpretive Standard 24 providing for an exception for the effect and possible unenforceability of contractual provisions providing for choice of governing law. The Committee notes that in some instances in which an Opinion Recipient requests a specific opinion on a governing law clause, a "reasoned" opinion may be used in lieu of the limitation in Interpretive Standard 24.<sup>370</sup>

Although such form of opinion restates the general limitations applied to choice of law clauses, such opinions may be helpful or appropriate in a particular transaction depending on the factual circumstances involved.

The second primary issue for consideration involves the interpretation of the meaning of the Model Remedies Opinion given the selection of law clause (or lack thereof) in the applicable Loan Document or the Guaranty. In the context of a choice of law clause selecting the law of the Opining Jurisdiction to govern, the intent of the Opinion Recipient and the Opinion Giver should be the same -- that the Model Remedies Opinion is given assuming that the law of the Opining Jurisdiction is to govern. In the context of a Loan Document or Guaranty providing for the law of an Other Jurisdiction to govern, the intent of the Opinion Recipient and the Opinion Giver is not as clear. If the Model Remedies Opinion were to assume that the governing law clause was enforceable and that the law of the Other Jurisdiction applied, then the Model Remedies Opinion would, in effect, be giving no opinion at all as to the balance of the Loan Document or Guaranty.

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<sup>366</sup> See O.C.G.A. §§ 11-1-101 to -12-102 (1994 & Supp. 1997).

<sup>367</sup> See, e.g., *Myers v. Texaco Ref. & Mktg. Inc.*, 422 S.E.2d 216 (Ga. Ct. App. 1992); *Kinnick v. Textron Fin. Corp.*, 422 S.E.2d 303 (Ga. Ct. App. 1992).

<sup>368</sup> See *General Elec. Credit Corp. v. Home Indem. Co.*, 309 S.E.2d 152 (Ga. Ct. App. 1993).

<sup>369</sup> See *Corporate Report*, *supra* note 1, at 98-102, 99 n.176; Francisco Figueroa, *Choice-of-Law of Contracts: A Summary Reference to the Situation in Georgia*, 21 MERCER L.REV. 389 (1970).

<sup>370</sup> The full text of the sample "reasoned" opinion form and related discussion are set forth in the *Corporate Report*, *supra* note 1, at 101-02.

This is presumably not the meaning intended by the Opinion Recipient. Similarly, if a Loan Document or the Guaranty does not make a selection of governing law, the intent of the Opinion Giver and the Opinion Recipient as to the meaning of the Model Remedies Opinion will also not be clear without further clarifying assumptions.

With regard to the interpretation of the Model Remedies Opinion, the Committee has adopted Interpretive Standard 22 of the Corporate Report as Interpretive Standard 24 of this Report with certain modifications.<sup>371</sup> Interpretive Standard 22 of the Corporate Report provides that if a document contains a governing law provision naming the Opining Jurisdiction or contains no governing law provision and if, in the enforcement of rights under the document, a court of the Opining Jurisdiction applies the substantive law of the Opining Jurisdiction, the remedies opinion means that the result will be as stated in the remedies opinion and Interpretive Standard 22 of the Corporate Report. Where a document specifies the law of an Other Jurisdiction to govern, Interpretive Standard 22 contains an assumption that, notwithstanding the contractual choice of law provision, a court of the Opining Jurisdiction will apply the substantive law of the Opining Jurisdiction, and therefore the remedies opinion is interpreted as if the law of the Opining Jurisdiction were to apply.<sup>372</sup> It is not unusual in a secured real estate transaction that an out-of-state lender may require that the Loan Documents or the Guaranty be construed under the laws of its jurisdiction. Even though the laws of an Other Jurisdiction apply, an opinion as to the Loan Documents or the Guaranty, based on the assumption that the law of the Opining Jurisdiction is to apply, provides comfort to the Opinion Recipient that, in the event the matter were litigated in the Opining Jurisdiction and the courts disregarded the choice of law provision and instead applied the law of the Opining Jurisdiction, the Loan Documents or the Guaranty would be enforceable.

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<sup>371</sup> The full text of Interpretive Standard 22 is as follows:

If a Document covered by the Remedies Opinion contains no governing law provision, or contains a governing law provision which names the Opining Jurisdiction, the Remedies Opinion means that if Company is brought before a proper court of the Opining Jurisdiction to enforce rights under the Document, and if such court applies the substantive law of the Opining Jurisdiction, the result will be as stated in the Opinion and these Interpretive Standards.

If the Document contains a governing law provision which names a jurisdiction other than the Opining Jurisdiction, the Remedies Opinion does not opine whether any court of any jurisdiction will give effect to the governing law provision in the Agreement, but assumes that if Company is brought before a proper court of the Opining Jurisdiction to enforce rights under the Document, such court will apply the substantive law of the Opining Jurisdiction, notwithstanding the governing law provision in the Document, and based upon such assumption the result will be as stated in the Opinion and these Interpretive Standards.

The Remedies Opinion does not extend to the content or effect of any law other than the law of the Opining Jurisdiction and federal law.

*Id.* at 145-46.

<sup>372</sup> The Committee notes that in some instances it may be inappropriate to give the Model Remedies Opinion with respect to all or portions of a Loan Document or a Guaranty even assuming that the substantive law of the Opining Jurisdiction would apply to the Loan Document or the Guaranty. For example, it may be inappropriate to give the Model Remedies Opinion with respect to mortgage or deed of trust provisions that are intended to be governed by the laws of an Other Jurisdiction where such provisions are peculiar to the laws of such Other Jurisdiction or are not recognized or utilized within the Opining Jurisdiction.

Due to the possibility, as noted, that in a real estate secured transaction a Loan Document may provide for the law of the Opining Jurisdiction to govern certain provisions and for the law of an Other Jurisdiction to govern other provisions, and in order to reflect that the Model Opinion in this Report includes a Guaranty, the Committee has made the following revisions to the second paragraph of Interpretive Standard 22 of the Corporate Report in Interpretive Standard 24 of this Report:

If the Loan Document *or the Guaranty, as applicable*, contains a governing law provision which names a jurisdiction other than the Opining Jurisdiction, *or if the Loan Document or the Guaranty, as applicable, contains a governing law provision which names a jurisdiction other than the Opining Jurisdiction as to certain provisions and which names the Opining Jurisdiction as to other provisions*, the Model Remedies Opinion does not opine whether any court of any jurisdiction will give effect to the governing law provision in the Loan Document *or the Guaranty, as applicable*, but assumes that if Borrower *or Guarantor, as applicable*, is brought before a proper court of the Opining Jurisdiction to enforce rights under the Loan Document *or the Guaranty, as applicable*, such court will apply the substantive law of the Opining Jurisdiction, notwithstanding the governing law provision in the Loan Document *or the Guaranty, as applicable*, and based upon such assumption the result will be as stated in the Opinion and these Interpretive Standards.

Finally, the Committee notes that in multi-jurisdictional transactions, a question may arise regarding the effect on a Loan Document included in the Model Remedies Opinion of other documents of the Loan Transaction which may be governed by the laws of an Other Jurisdiction. Since the validity of other documents to the Loan Transaction may impact the validity and enforceability of a Loan Document included in the Model Remedies Opinion, the Committee has adopted Interpretive Standard 17, which assumes that such other documents will be enforceable.

The Committee's conclusion as to the meaning and effect of a remedies opinion with respect to the application of the law of the Opining Jurisdiction is consistent with the approach contained in the Real Estate Adaptation. The Real Estate Adaptation supports the interpretive standard contained in the Legal Opinion Accord, which provides that the remedies opinion will be interpreted as if the law of the Opining Jurisdiction governed the document, notwithstanding that the document may provide otherwise or be silent on the issue.<sup>373</sup> As to the enforceability of the governing law clause itself, the Committee's conclusions are also consistent with the position of the Legal Opinion Accord that no opinion is given as to the enforceability of a clause in a document that contains a governing law provision choosing the law of an Other Jurisdiction or as to the governing law in a document that does not contain a governing law provision.<sup>374</sup>

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<sup>373</sup> See *Report on Adaptation of Accord, supra* note 4, at 581. The actual text of Section 10(b) of the Legal Opinion Accord provides that a remedies opinion "is given as if the Law of the Opining Jurisdiction governs the Transaction Document, without regard to whether the Transaction Document so provides[.]" *Third-Party Legal Opinion Report, supra* note 3, at 524.

<sup>374</sup> Section 10(d)(ii) of the Legal Opinion Accord specifically provides that the remedies opinion, as to the governing law, is given on the basis that it "does not include an opinion as to what law governs if the Transaction Document contains a governing law provision choosing the law of an Other Jurisdiction or does not contain a governing law provision." *Third-Party Legal Opinion Report, supra* note 3, at 524.

A difference exists, however, with respect to the opinion given as to a governing law clause selecting the law of the Opining Jurisdiction. Section 10(d)(i) of the Legal Opinion Accord provides that in such case, the remedies opinion “includes an opinion that a governing law provision choosing the Law of the Opining Jurisdiction will be given effect under the choice-of-law rules of the Opining Jurisdiction if the Transaction Document contains such a governing law provision[.]”<sup>375</sup> The report of the ABA and the American College of Real Estate Lawyers on the Real Estate Adaptation discusses the difficulty and uncertainty in providing such opinions in the context of real estate transactions and concludes that “[t]he Remedies Opinion is qualified to exclude any opinion implied pursuant to Section 10(d)(i) of the Legal Opinion Accord that application of the Law of the Opining Jurisdiction is not contrary to a fundamental policy of the Law of an Other Jurisdiction”<sup>376</sup> The commentary to the Real Estate Adaptation further notes that a remedies opinion in a real estate transaction may often exclude *any* implication of a choice of law opinion.

**D. The Exception as to Rights of Guarantors.** A Guaranty generally consists of two components. First, the Guarantor contractually undertakes to pay or perform the obligation of a third party.<sup>377</sup> This undertaking is disfavored under the law which makes numerous statutory and common law defenses available to a Guarantor. A Guaranty therefore generally contains a second component consisting of a series of waivers of these otherwise available statutory and common law defenses.<sup>378</sup>

1. Statutory and Codified Common Law Defenses. In the absence of a waiver or consent by the Guarantor<sup>379</sup>, the following defenses may otherwise be available to a Guarantor:

(a) Discharge. A Guarantor will be discharged if the guaranteed obligation is extinguished by *an act of the creditor*<sup>380</sup> without the consent of the surety.<sup>381</sup> The Guarantor will

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<sup>375</sup> *Id.*

<sup>376</sup> *Report on Adaptation of Accord*, *supra* note 4, at 582.

<sup>377</sup> The formation of an enforceable contract of guaranty in Georgia is relatively simple. The word “guarantor” alone following a signature forms a contract of guaranty. *Sadler v. Kay*, 172 S.E.2d 202 (Ga. Ct. App.1969). The words “payment guaranteed” alone constitute an enforceable contract of guaranty. O.C.G.A. § 11-3-416(1).

<sup>378</sup> Common law defenses have been codified at O.C.G.A. §§ 10-7-20 to -22 (1994).

<sup>379</sup> Although the Georgia Code utilizes the term “sureties,” the traditional distinction between a surety (one who undertakes to pay the debt of another in return for consideration to the principal) and a guarantor (one who undertakes to pay the debt of another in return for consideration flowing directly to the guarantor) has been abolished in Georgia, with effect as to all contracts made after January 1, 1981. O.C.G.A. § 10-6-1. Although the distinction may continue to have vitality in connection with the construction or enforcement of a guaranty or surety agreement made before 1981, under current law it should not have any bearing on a Model Remedies Opinion relating to a guaranty, and the terms “surety” and “guarantor” are used interchangeably herein.

<sup>380</sup> *Franklin v. Mobley*, 42 S.E.2d 755 (Ga. 1947) (“mere affirmance” of common law).

not be discharged if the guaranteed obligation is extinguished *by operation of law*, e.g., a discharge of the principal obligor as the debtor in a bankruptcy case.<sup>382</sup> No defect in the guaranteed obligation known to a Guarantor at the time of making a Guaranty (e.g., the incapacity of the principal) will discharge a Guarantor.<sup>383</sup>

(b) Release. A Guarantor will be discharged if there is any release or “compounding” (i.e., the settlement of an obligation for less than the amount due) with a co-guarantor without the consent of the Guarantor.<sup>384</sup>

(c) Changes. A Guarantor will be discharged if there is *any change* in the nature or terms of the guaranteed obligation without the consent of the surety (without regard to actual injury or increase in the obligations of the surety).<sup>385</sup>

(d) Increased Risk. Any act of the creditor that injures the surety or exposes it to increased risk (including impairment of collateral) will result in the discharge of a Guarantor.<sup>386</sup>

(e) Demand. Sections 10-7-23 and 10-7-24 of the Georgia Code empower sureties with both the right of subrogation<sup>387</sup> and the right to demand that a creditor first sue the principal on the debt before enforcing the surety’s obligation.<sup>388</sup>

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<sup>381</sup> Schwitzerlet-Siegler Co. v. Citizens & S. Bank, 118 S.E. 365 (Ga. 1923); Hendricks v. Davis, 395 S.E.2d 632 (Ga. Ct. App. 1990), *cert. denied*, 395 S.E.2d 632 (Ga. Ct. App. 1990); Peterson v. Midas, 287 S.E.2d 61 (Ga. Ct. App. 1981).

<sup>382</sup> Growth Properties of Fla., Ltd., IV v. Wallace, 310 S.E.2d 715 (Ga. Ct. App. 1983).

<sup>383</sup> O.C.G.A. § 10-7-2.

<sup>384</sup> O.C.G.A. § 10-7-20.

<sup>385</sup> O.C.G.A. § 10-7-21; Bank of Terrell v. Webb, 341 S.E.2d 258, 260 (Ga. Ct. App. 1986) (opining that it is the “unconsented change in potential risk or liability not the imposition of greater liability that causes the discharge”).

<sup>386</sup> O.C.G.A. § 10-7-22; U.S. v. Blue Dolphin, 620 F. Supp. 463, 468 (S.D. Ga. 1985) (in response to guarantors’ claim that foreclosure completed as to tangible collateral impaired same, holding that “risk [of guarantors] cannot be increased within the meaning of § 10-7-22 by lawful act taken by creditor in pursuit of available remedies”); Panasonic v. Hall, 399 S.E.2d 733 (Ga. Ct. App. 1990) (stating that grounds for discharge are generally applicable and creditor’s filing of financing statements in wrong Georgia county resulting in unperfected security interests found to increase risk of guarantor, but holding that consent to such increase in risk found in waiver contained in guaranty).

<sup>387</sup> Section 10-7-23 of the Georgia Code provides that evidence of the obligation guaranteed and any securities therefor must be delivered by the creditor to a surety upon tender of the amount of the surety’s debt, if such delivery is “within [the] power” of the creditor. Failure to comply results in discharge. Note that absent a showing of reliance, a guarantor is not discharged by the creditor’s failure to comply with O.C.G.A. § 10-7-23 as to a co-guarantor. Hall v. First Nat’l Bank of Atlanta, 243 S.E.2d 569 (Ga. Ct. App. 1978).

<sup>388</sup> Section 10-7-24 of the Georgia Code permits a guarantor, at any time after the debt for which it is liable is due, to demand, by a written notice setting forth the demand and the residence (including county) of the principal, that the creditor sue the principal on the guaranteed debt. If the principal can be sued within the

2. Waivers of Defenses. The second component of a Guaranty - waivers of statutory and common law defenses customarily set forth in the Guaranty - raises the issue of whether or not each such of waivers is enforceable. What all of the defenses described in Section 18.03D.1 have in common is the necessity of some creditor action being taken, usually when an otherwise valid guaranty exists. The rule that a Guarantor may consent to actions that would otherwise result in discharge is well established in Georgia law.<sup>389</sup> It appears to be equally well established under Georgia law that such consent may be given in advance, including the time at which the Guaranty is executed and delivered.<sup>390</sup> For this reason a Guaranty should include waivers of the statutory and common law defenses set forth above in order to assure the enforcement of the Guaranty, and most forms of Guaranty include such waivers.

3. Exception as to Enforceability of Waivers. As discussed in Sections 18.03D.1 and 18.03D.2, the statutory and common law defenses available to a Guarantor can be identified, and Georgia case law establishes that a Guarantor may waive such defenses in advance. Notwithstanding these considerations, the Committee has adopted the Model Remedies Opinion with an implied exception for the possible unenforceability of such waivers as set forth in Interpretive Standard 25.

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State of Georgia, the creditor's failure to commence such suit within three months after such notice discharges the guarantor giving the notice and all subsequent guarantors, endorsers, etc.

<sup>389</sup> “Georgia courts, in numerous cases, have held that a guarantor may consent in advance to conduct which would otherwise result in statutory discharge.” *Regan v. U.S. Small Bus. Admin.*, 926 F.2d 1078, 1080 (11th Cir. 1991) (citing *Casgar v. Citizens & S. Nat’l. Bank*, 372 S.E.2d 815 (Ga. Ct. App. 1988)) (increased risk due to impairment of collateral consented to in guaranty agreement); *Bobbitt v. Firestone Tire Co.*, 281 S.E.2d 324 (Ga. Ct. App. 1981).

<sup>390</sup> “A party may consent in advance to the conduct of future transactions and will not be heard to ‘claim his own discharge’ upon the occurrence of that conduct.” *Panasonic v. Hall*, 399 S.E.2d 733, 734 (Ga. Ct. App. 1990) (quoting with approval *Thurmond v. Georgia R.R. Bank & Trust Co.*, 290 S.E.2d 126 (Ga. Ct. App. 1982) (holding that material variations in terms of guaranteed obligation were not sufficient grounds for discharge of guarantor in light of “general waiver provisions in the guaranty”); *Overcash v. First Nat’l Bank of Atlanta*, 155 S.E.2d 32 (Ga. Ct. App. 1967) (holding effective provision in guaranty agreement regarding prior consent to release of co-guarantor and substitution of another). Other cases in which provisions of guaranty agreements have been found to be effective waivers of conduct that would otherwise discharge a guarantor include: *J.R. Watkins Co. v. Fricks*, 78 S.E.2d 2 (Ga. 1953) (reversing lower court and holding that provisions of Code §103-205 (now § 10-7-24) may be waived by language in guaranty agreement); *Delta Diversified, Inc. v. Citizens & S. Nat’l Bank*, 320 S.E.2d 767 (Ga. Ct. App. 1984) (subordination of creditor’s interest in certain collateral, whether characterized as impairment of collateral or a change in the terms of the guaranteed obligations, consented to in guaranty agreement, despite provisions of documents to which guarantors were not parties, governing the guaranteed obligations requiring consent of guarantors to any modification of terms); *Griswold v. Whetsell*, 278 S.E.2d 753 (Ga. Ct. App. 1981) (impairment of collateral, apparently by failing to perfect security interest, consented to in guaranty agreement); *DeKalb County Bank v. Haldi*, 246 S.E.2d 116 (Ga. Ct. App. 1978) (creditor’s failure to obtain credit life insurance on life of primary obligor impaired collateral for guaranteed obligations but consented to in guaranty agreement); *Dunlap v. Citizens & S. DeKalb Bank*, 216 S.E.2d 651 (Ga. Ct. App. 1975) (substitution of new note, signed by additional co-obligor, and additional advance of funds consented to in guaranty agreement); *Twisdale v. Georgia R.R. Bank & Trust Co.* 198 S.E.2d 396 (Ga. Ct. App. 1973) (surrender or release of collateral consented to in guaranty agreement); *Hemphill v. Simmons*, 172 S.E.2d 178 (Ga. Ct. App. 1969) (extension of maturity consented to in guaranty agreement).

The Committee adopted the approach taken in the Corporate Report, which addresses this issue by an implied exception to its remedies opinion for “[t]he possible unenforceability of provisions purporting to waive certain rights of guarantors.”<sup>391</sup> In reaching this decision, the Committee took into consideration the fact that guaranties are disfavored obligations and courts often find ways to invalidate guaranties. The Committee also had concerns about the nature and extent of enforceable waivers, for example, the language required in order to make a waiver of a defense enforceable. Finally, the Committee recognized that creditors prefer not to rely on waivers by guarantors and, when practical, require contemporaneous consent to modifications and other actions taken with respect to guaranteed obligations.

4. Enforceability of Particular Waivers. The Committee recognized that most forms of Guaranty include waivers of some or all of the statutory and common law defenses discussed in Section 18.03D.1. The Committee also recognized that in contemporary commercial practice lenders, in reliance on the enforceability of such waivers, sometimes take actions that might, absent a waiver, give rise to such defenses. Accordingly, an Opinion Recipient may request an opinion that particular waivers are enforceable.

Although the Model Opinion does not include an opinion that waivers of defenses available to Guarantors are *generally* enforceable, it may be appropriate for the Opinion Recipient to request and for the Opinion Giver to opine that a *particular* waiver is enforceable. In determining whether such an opinion is appropriate, the Opinion Giver should carefully review the language of the particular waiver in light of applicable law.<sup>392</sup> Further, in framing the opinion, the Opinion Giver should note that the exception set forth in subsection (4) of Interpretive Standard 25 will not apply to an opinion that a particular waiver is enforceable, and should review the Interpretive Standards and consider whether any additional assumptions or qualifications are appropriate in that instance.

**18.04 Matters Not Constituting Implied Exceptions to the Model Remedies Opinion.** The Opinion Letter should expressly state any exceptions to the Model Remedies Opinion not comprehended by the qualifications listed in Section 18.03 that apply to particular provisions of the Loan Documents or particular parties to the Loan Transaction. For instance, specific qualifications may be necessary for opinions relating to transaction-specific, or transaction-peculiar, documents such as leases, collateral assignments of partnership interests and letters of credit, which are beyond the scope of this Report.<sup>393</sup> Specific assurances to particular

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<sup>391</sup> *Corporate Report, supra* note 1, at 82.

<sup>392</sup> *See, e.g.*, cases cited at footnotes 389 & 390.

<sup>393</sup> An example of a Loan Transaction that may require additional qualification because of the particular parties arises out of the Georgia Racketeer Influenced and Corrupt Organizations Act. O.C.G.A. §§ 16-14-1 to -15 (1996). This act requires registration of “alien corporations,” and if the lender is an “alien corporation” under this statute or if the debt is held by an agent for a group of lenders that includes “alien corporations,” the Opinion Giver will be faced with a difficult issue if the alien corporations have not registered under this act. *See* O.C.G.A. § 16-14-15. This issue most often arises in large transactions involving a U.S. bank acting as an agent for a group of lenders, generally foreign banks. Almost invariably, the foreign banks have not registered as alien corporations and, frequently, are unwilling to do so. There are no supporting regulations and virtually no law. Under these circumstances, a qualification should be included in the small number of transactions where the statute is applicable.

document provisions requested by the Opinion Recipient may also warrant the addition of certain qualifications. The Opinion Giver should also consider the public policy implications of the Loan Transaction with regard to whether or not an exception for matters of public policy is appropriate.<sup>394</sup>

**18.05 Matters Not Covered by the Model Remedies Opinion.** The Model Remedies Opinion does not encompass opinions as to usury or personal property. These subjects are addressed by this Report in Section XIX, The Model Usury Opinion, and Section XX, The Model UCC Opinion.

**18.06 Practice Procedure for the Model Remedies Opinion.** To render the Model Remedies Opinion, the Opinion Giver must make a meaningful and comprehensive review of each Loan Document and the Guaranty and analyze each Loan Document and the Guaranty in light of the issues described in Section 18.02. Particular attention must be given to each of the four elements of the generic qualification assurance as to the Loan Documents and the Guaranty: (i) the judicial enforcement of the obligation of Borrower to repay the principal, together with interest thereon, both provided in the Note, subject to limitations on usury and the obligation to confirm an exercise of power of sale pursuant to O.C.G.A. Section 44-14-161 as a prerequisite to the collection of any deficiency judgment, (ii) the acceleration of the obligation of Borrower to repay such principal, together with such interest, upon a material default by Borrower in the payment of such principal or interest<sup>395</sup>, (iii) the non-judicial foreclosure of the security title to the Real Property by exercise of power sale pursuant to the Security Deed in accordance with Georgia law upon maturity of the note or upon acceleration pursuant to (ii) above, and (iv) the judicial enforcement of the obligation of Guarantor to repay the principal, together with interest thereon, both as provided in the Note, to the extent guaranteed by the Guaranty, subject to limitations on usury. In addition, the Opinion Giver will typically be required to render a remedies opinion as to usury and any personal property involved in the Loan Transaction; these subjects are covered in Sections XIX and XX, respectively, of this Report.

The Opinion Giver should also review the form of the Security Deed to confirm that the following items required under Georgia law are included:

1. Three inch margin of blank space at top of first page of Security Deed for notation of recording information pursuant to O.C.G.A. § 15-6-61(a)(10);
2. Name and mailing address of the natural person to whom the instrument is to be returned legibly printed, typewritten or stamped at the top of the first page thereof pursuant to O.C.G.A. § 44-2-14(b);
3. Grantee's mailing address pursuant to O.C.G.A. § 44-14-63(b);
4. Amount of the note secured by the Security Deed in words and figures and the date upon which the note falls due pursuant to O.C.G.A. § 48-6-66; and

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<sup>394</sup> See *Corporate Report*, *supra* note 1, at 84-85.

<sup>395</sup> Additionally, if the optional language (i.e. "or upon any other material default under the Loan Documents") is included in the Opinion, particular attention must also be given to this additional generic qualification assurance.

5. Attestation by one unofficial or lay witness and a notary public pursuant to O.C.G.A. §§44-2-14(a), 44-2-15 and 44-2-21.

The Opinion Giver should also review the Security Deed with respect to the following:

(a) Any statement that the Security Deed is effective as a financing statement or fixture filing. Pursuant to O.C.G.A. § 11-9-502(c), a mortgage is not effective as a fixture filing and separate filings for same must be made, as more particularly described in Section XX, The Model UCC Opinion.

(b) Whether the Security Deed recites that it is executed “under seal.” Pursuant to O.C.G.A. § 9-3-23, the statute of limitation for an action on an instrument executed under seal is twenty years from the date the right of action has accrued, as compared to only six years for an instrument not executed “under seal.”

It should also be emphasized that exceptions to the Model Remedies Opinion, in addition to those described in Section 18.03 set forth in Interpretive Standards 24 and 25, may be appropriate in certain real estate secured transactions. As noted in Section 18.04, leases, collateral assignments of partnership interests, letters of credit and other transaction-specific documents involving real estate are outside the scope of this Report. The Opinion Recipient may also request certain assurances as to specific document provisions, necessitating the Opinion Giver to consider additional qualifications in such instances.

## **XIX. THE MODEL USURY OPINION**

*The Loan Documents and the Interest Charges contracted for therein are in compliance with the Usury Laws of the State of Georgia; provided, however, that (i) no opinion is expressed with respect to the compliance with the Usury Laws of any provisions in the Loan Documents that purport to permit Interest Charges, however denominated and regardless of whether or not denominated as interest, to be charged, paid, collected or contracted for at a rate in excess of five percent (5%) per month if and to the extent a violation of O.C.G.A. Section 7-4-18 results (whether due to prepayment, acceleration, redemption, cancellation, termination or otherwise), and (ii) no opinion is expressed with respect to the compliance with the Usury Laws of any provisions in the Loan Documents that purport to permit interest to be charged or paid on interest if and to the extent such provisions result in a violation of O.C.G.A. Section 7-4-17.<sup>396</sup>*

### **COMMENT**

**19.01 Purpose and Background of the Model Usury Opinion.** The Model Usury Opinion provides assurance to the Opinion Recipient that the Loan Documents do not violate the

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<sup>396</sup> The Model Usury Opinion is to be given only as to loans in the amount of \$250,000 or more. For a discussion of opinions relating to loans of more than \$3,000 but less than \$250,000, see Section 19.02C.1(a). This Report does not address loans of \$3,000 or less as discussed in §19.02C.1(c).

Usury Laws of the State of Georgia.<sup>397</sup> This is important because the consequences for violating the Usury Laws include the forfeiture of all interest payable under the Loan Documents.<sup>398</sup>

**19.02 Elements of the Model Usury Opinion.** The Model Usury Opinion has the meaning described below and is subject to the assumptions, exceptions and limitations set forth below when used in an Opinion Letter that incorporates the Interpretive Standards by reference.

**A. General Meaning.** The Model Usury Opinion means that the Loan Documents and the Interest Charges contracted for therein are in compliance with the Usury Laws.

**B. Specific Elements.** Under the Usury Laws, the term “interest” is very broadly defined and, for certain purposes, could include any and all fees, charges or other consideration (however denominated) received by or payable to the Opinion Recipient in connection with the Loan Transaction.<sup>399</sup> Accordingly, to avoid any implication that the Model Usury Opinion addresses only those charges denominated as “interest,” the Model Usury Opinion uses the intentionally broad term “Interest Charges.” Interest Charges are defined as “all interest, fees or other charges for the use of money or extension of credit charged, paid, collected or contracted for under the terms of the Loan Documents.”

The Model Usury Opinion addresses only Usury Laws of the State of Georgia and does not address choice of law issues.<sup>400</sup> The Model Usury Opinion also does not address any applicable federal usury laws of the United States. Generally speaking, federal banking laws provide that a federally chartered bank or a thrift institution may charge interest at such rates as are authorized under the laws of the state where such financial institution is deemed located for purposes of federal banking laws.<sup>401</sup>

**C. Usury Laws.** Georgia law provides separate civil and criminal usury statutes.<sup>402</sup> The applicable civil usury law varies depending on the size of the loan. Separate limitations exist for loans of \$250,000 or more, for loans of more than \$3,000 but less than \$250,000, and for loans of \$3,000 or less.<sup>403</sup>

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<sup>397</sup> See O.C.G.A. §§ 7-4-1 to -21. For a comprehensive treatment of usury opinions in Georgia in the context of commercial transactions, see Hilary P. Jordan, *The Usury Opinion* (May 13, 1993) (unpublished Report of the Opinion Letter Subcommittee of the State Bar of Georgia Banking & Corp. Law Section).

<sup>398</sup> O.C.G.A. § 7-4-10(a).

<sup>399</sup> See O.C.G.A. § 7-4-2(a)(3).

<sup>400</sup> See *supra* § 18.03C.

<sup>401</sup> See 12 U.S.C. §§ 85-86 (1994) (applicable to national banks); 12 U.S.C. § 1463(g) (1994) (applicable to federal thrift institutions). See *BankWest, Inc. v. Oxendine*, 598 S.E.2d 343 (Ga. App. 2004) (“...parties to a private contract who admittedly make loans to Georgia residents cannot, by virtue of a choice of law provision, exempt themselves from investigation for potential violations of Georgia’s usury law.”)

<sup>402</sup> O.C.G.A. §§ 7-4-2, -18.

<sup>403</sup> O.C.G.A. § 7-4-2.

1. Civil Usury Laws. Effective as of March 31, 1983, the then-existing Georgia statutory regime providing separate interest rate limitations for different categories and sizes of loans was repealed and replaced with one comprehensive law regulating most types of loans made in Georgia. The apparent intent of the amendment was to simplify Georgia usury law and to allow parties to contract freely as to the rates of interest payable on commercial loans in excess of \$3,000. For purposes of the civil usury statute, “interest” is the amount charged for the use of money computed over the term of the loan.<sup>404</sup> The statute specifically allows the parties to agree that discount points and origination fees, constitute principal rather than interest.<sup>405</sup>

(a) Loans Between \$3,000 and \$250,000. As to loans of more than \$3,000 but less than \$250,000, the parties may establish any rate of interest provided the rate is *expressed in simple interest* terms as of the date of the evidence of the indebtedness.<sup>406</sup> The statute does not define “simple interest terms.”

There are a number of ambiguities inherent in the requirement that the interest rate be expressed in simple interest terms.<sup>407</sup> From a financial perspective, simple interest is to be contrasted with compound interest where interest is added to principal and accrues additional interest. Although there is no official legislative history with respect to the 1983 statute, the apparent intent of the simple interest requirement was to prohibit “add on interest” where the total interest payable over the life of the loan is added to the amount of the principal and included in the face amount of the loan.<sup>408</sup>

These ambiguities create a number of issues that complicate the process of rendering an opinion as to loans subject to the simple interest terms requirement. For instance, the failure to define simple interest terms creates a question as to whether or not computation of interest pursuant to the so-called “360-day banker’s year” is valid.<sup>409</sup> If so, must the interest rate be converted to the corresponding rate applicable to a 365 day year? Do interest rates which are not fixed amounts, but instead are tied to indices such as the prime or base rate, comply with the requirement that the interest rate is expressed in simple interest terms?<sup>410</sup> How does one state “in simple interest” terms the interest payable under “equity kicker” or shared appreciation loans? None of these issues is addressed by the statute, nor have any of these issues been addressed and resolved by any reported Georgia appellate case.

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<sup>404</sup> O.C.G.A. § 7-4-2(a)(3).

<sup>405</sup> *Id.*

<sup>406</sup> O.C.G.A. § 7-4-2(a)(1)(A).

<sup>407</sup> See John G. Aldridge & James A. Fleming, *Interest & Usury-House Bill No. 128*, 19 GA. ST. B.J. 150 (1983); Georgia Dep’t of Banking & Fin., *Interpretations of H.B. 128-Interest*, GA. DEP’T BANKING & FIN. BULL., April 23, 1983, ¶ 1.

<sup>408</sup> See Aldridge & Fleming, *supra* note 407, at 151.

<sup>409</sup> Georgia Dep’t of Banking & Fin., *supra* note 407, ¶ 6(c).

<sup>410</sup> See Aldridge & Fleming, *supra* note 407, at 151; Georgia Dep’t of Banking & Fin., *supra* note 407, ¶ 6(a).

Many real estate loans of less than \$250,000 are closed using the lender's form loan documents without the requirement of a legal opinion. In any event, in light of the uncertainties and ambiguities inherent in the simple interest terms requirement, the Committee does not believe that an unqualified opinion should be given in the case of loans of more than \$3,000 but less than \$250,000. Instead, the Committee believes that the Opinion Giver can provide only a reasoned opinion to the effect that a Georgia court *should* rule that the loan does not violate the usury laws. This is consistent with the practice that developed after the enactment of the 1983 statute revising the usury laws where reasoned opinions, rather than unqualified opinions, were customarily provided with regard to all loans over \$3,000. As discussed in Section 19.02C.1(b) below, the 1983 statute was amended in 1988 to permit the interest rate for loans in excess of \$250,000 to be expressed in other than simple interest terms.

The qualified and reasoned opinion for loans of more than \$3,000 but less than \$250,000 should also be premised on the following assumptions, which should be expressly set forth in an opinion letter containing this opinion: (i) the only interest, fees or other charges contracted or collected are those described in the Loan Documents, and such interest, fees and other charges have been and will be applied for the purposes described in the Loan Documents, and (ii) all charges which are not denominated as interest, including without limitation, commitment fees, loan fees, facility fees, default and late charges, constitute principal rather than interest. This qualified opinion should also be made expressly subject to the limitations as to criminal usury and interest on interest described in Sections 19.02C.2 and 19.02C.3, respectively.

(b) Loans of \$250,000 or More. Prior to 1988, the civil usury statute did not establish a separate classification for loans in excess of \$250,000. As in the case of loans of more than \$3,000 but less than \$250,000, the parties could establish by written contract any rate of interest, but the rate of interest agreed was required to be expressed in "simple interest terms." In 1988, the usury laws were amended to provide that for loans in the amount of \$250,000 or more, the parties may establish by written contract any rate of interest, *expressed in simple interest terms or otherwise*, and charges to be paid by the borrower.<sup>411</sup> The apparent attempt of the amendment establishing a new category of loans in excess of \$250,000 was to avoid the uncertainties inherent in the simple interest requirement and to free larger commercial loans from the requirement that interest be stated in "simple interest terms".

Section 7-4-2(a)(1)(B) of the Georgia Code, which permits interest to be stated in other than simple interest terms, apparently applies in the case of a loan pursuant to which the lender has committed to lend \$250,000 or more, even if a lesser sum is actually advanced at closing. Presumably this would mean that a construction loan would be subject to the terms of this provision even if less than \$250,000 were funded at closing, provided that the lender had committed to loan \$250,000 or more. The statute, however, does not define the term "committed," and there are no reported Georgia cases on this issue. Accordingly, some uncertainty exists as to the meaning of this term.

The Committee believes that in light of the absence of the simple interest requirement, it is appropriate for the Opinion Giver to provide an unqualified opinion as to loans of \$250,000 or more, subject to the limitations as to criminal usury and interest on interest discussed in Sections 19.02C.2 and 19.02C.3, respectively. Moreover, in light of the absence of

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<sup>411</sup> O.C.G.A. § 7-4-2(a)(1)(B).

the simple interest requirement, there is no need to incorporate the express assumptions referenced above in section 19.02C.1(a) above.

(c) Loans of \$3000 or Less. This Report does not address loans of \$3,000 or less, the third category of loans established by the Georgia civil usury laws. The Committee believes that the cost of rendering a legal opinion is typically not justified in the case of a loan of this magnitude.

2. Criminal Usury Law. Georgia law establishes a separate criminal usury statute which prohibits interest of more than 5% per month.<sup>412</sup> The violation of this statute is a misdemeanor.<sup>413</sup> This statute was in existence prior to the revision to the civil usury laws in 1983 and expressly survives such revision. The criminal usury statute applies to all sizes and types of loans.

The definition of interest for purposes of the criminal usury statute is broad and inclusive. The statute states that any person “who shall reserve, charge, or take for any loan or advance of money, or forbearance to enforce the collection of any sum of money, any rate of interest greater than 5% per month, either directly or indirectly, by way of commission for advances, discount, exchange or the purchase of salary or wages; by notarial or other fees; or by contract, contrivance, or device whatsoever, shall be guilty of a misdemeanor.”<sup>414</sup>

The more narrow definition of interest established by the civil usury statute discussed above does not apply to the criminal usury statute.<sup>415</sup> A number of uncertainties regarding the criminal usury statute have been resolved by the Georgia courts. One such uncertainty is the issue of whether or not a loan is usurious if the amount of interest in a particular month exceeds 5%, but the average interest per month over the term of the loan is less than 5%. The Georgia Supreme Court has held that, in determining if the 5% per month limitation is exceeded, up-front charges should be spread over the loan.<sup>416</sup> Consequently, the payment at the closing of discount points, loan origination fees and similar charges in an amount in excess of 5% of the loan balance will not violate the criminal usury statute, provided that such charges and interest, when spread over the life of the loan, do not exceed 5% per month.

Another issue resolved by the courts relates to whether or not the 5% per month limitation is to be measured with respect to the scheduled term of the loan or the actual term of the loan in the event of prepayment or acceleration on account of default. A federal court

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<sup>412</sup> O.C.G.A. § 7-4-18(a).

<sup>413</sup> *Id.*

<sup>414</sup> *Id.*

<sup>415</sup> Section 7-4-18(c) provides expressly that the civil usury statutes do not amend or modify the criminal usury statutes. Moreover, a party’s freedom to contract for any interest rates pursuant to the civil usury statute expressly excludes the prohibitions of the criminal usury statute. O.C.G.A. § 7-4-2(a)(1)(A). *See also* Moore v. Comfed Savings Bank, 908 F.2d 834 (11th Cir. 1990); Norris v. Sigler Daisy Corp., 392 S.E.2d 242 (Ga. 1990).

<sup>416</sup> Fleet Fin. Inc. of Ga. v. Jones, 430 S.E.2d 352 (Ga. 1993).

applying Georgia law has held that the 5% per month limitation is computed with reference to the scheduled term of the loan rather than the shorter term that may result from prepayment or acceleration upon default.<sup>417</sup>

Although judicial decisions have resolved some of the uncertainty inherent in the criminal usury statute, given the breadth and ambiguity of the term “interest” for purposes of the criminal usury statute, the Committee believes that it is not appropriate for the Opinion Giver to render an opinion that the Loan Documents do not violate the criminal usury statute. This is consistent with the present custom in rendering opinions regarding commercial real estate loan transactions in Georgia. The Model Usury Opinion includes a limitation with respect to the criminal usury statute.

3. Interest on Interest Limitation. A loan that provides for interest on previously accrued but unpaid interest may violate Georgia usury law.<sup>418</sup> Section § 7-4-17 of the Georgia Code provides that when a payment is made, it is applied first to interest and then to principal, and if the payment does not extinguish interest then due, no interest shall be calculated on the balance of such unpaid interest. The statute provides that this prohibition as to interest on interest does not apply to loans having a first priority in real estate and loans secured by the assignment of instruments evidencing first priority real estate loans.<sup>419</sup> Since the Model Opinion given pursuant to this Report does not include an opinion as to the priority of the lien created pursuant to the Loan Transaction,<sup>420</sup> the Committee believes that regardless of the amount of the loan and regardless of the intended priority of the lien, it is not appropriate for an Opinion Giver to render an opinion that the Loan Transaction does not violate the interest on interest prohibition. The Model Usury Opinion establishes an express limitation as to the interest on interest prohibition.

**19.03 Matters Not Covered by the Model Usury Opinion.** The Model Usury Opinion addresses only matters relating to the Usury Laws and Interest Charges.

Unless otherwise addressed in the Opinion Letter, the Model Usury Opinion may be based on the implied assumption that the Model Corporate, Partnership or Limited Liability Company Status, Powers and Acts Opinions and the Model Remedies Opinion could be given with respect to Borrower and the Loan Documents.

The Model Usury Opinion does not address the compliance of the Loan Documents with other applicable laws or the enforceability of Borrower’s obligations under the Loan Documents to pay Interest Charges.

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<sup>417</sup> Johnson v. Fleet Fin. Inc. of Ga., 785 F. Supp. 1003 (S.D. Ga. 1992). *See also* S&A Industries v. Bank Atlanta, 543 S.E.2d 743 (Ga. App. 2000).

<sup>418</sup> O.C.G.A. § 7-4-17; *but see* O.C.G.A. § 7-4-15 (providing that “[a]ll liquidated demands” shall bear interest from the date the debtor is “bound to pay them”). Since past due interest constitutes a liquidated demand, it would appear that past due interest may be added to the principal and thereafter accrue additional interest. It is unclear as to whether § 7-4-17 has priority over § 7-4-15 or *vice versa*.

<sup>419</sup> O.C.G.A. § 7-4-17.

<sup>420</sup> *See infra* § 22.01.

The Model Usury Opinion is also not intended to address other legal issues relating to other terms of the Loan Transaction, such as those pertaining to the enforceability of provisions describing the order of application of payments, imposing increased interest rates or late payment charges upon delinquency and payment or default, or providing for liquidated damages or for penalties, charges, or premiums on prepayment, acceleration, redemption, cancellation or termination. Such provisions may not be enforceable under applicable laws to the extent they are deemed to be penalties or forfeitures.<sup>421</sup>

The Model Usury Opinion is given as of the closing of the Loan Transaction and pertains to the Loan Documents as they exist when the Model Usury Opinion is given. Accordingly, the Model Usury Opinion does not encompass any discretionary actions taken by the Opinion Recipient in the future which could result in a violation of any Usury Laws. Similarly, the method of rebating precomputed, unearned interest in the event of an acceleration of the maturity of a loan is not encompassed by the Model Usury Opinion.<sup>422</sup>

**19.04 Additional Notes Regarding the Model Usury Opinion.** As stated in Section 18.02 of this Report, an opinion as to compliance with the Usury Laws is not implicit in the Model Remedies Opinion. An opinion which contains the Model Remedies Opinion, but does not contain a usury opinion, does not address compliance with the Usury Laws.

Paragraph (2) of Interpretive Standard 2 of the Corporate Report provides that an opinion given pursuant to the Corporate Report does not include an opinion as to laws relating to permissible rates, computation or disclosure of interest, e.g., usury.<sup>423</sup> The Committee believes that opinions as to usury are customarily given in commercial real estate loans of more than \$250,000 and thus consciously deviated from the treatment accorded usury by the Corporate Report.

**19.05 Practice Procedure for the Model Usury Opinion.** Rendering the Model Usury Opinion requires the Opinion Giver to analyze each of the Loan Documents and all aspects of the Loan Transaction in light of the various issues described in Section 19.02 regarding the Usury Laws. Particular attention needs to be given in the event that the Opinion Giver is rendering a reasoned opinion as to a loan in an amount less than \$250,000. In such event, the Opinion Giver needs to scrutinize all aspects of the Loan Documents to identify and consider all interest-type consideration that may be contracted for in the Loan Transaction.

## **XX. THE MODEL UCC OPINION**

*The Security Deed creates in favor of Lender, as security for all obligations of Borrower purported to be secured thereby, a security interest in the*

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<sup>421</sup> See *Camilla Cotton Coil Co. v. Spencer Kellogg & Sons*, 257 F.2d 162 (5th Cir. 1958) (applying Georgia law); *Clark Austin & Smith v. Kay*, 26 Ga. 403 (Ga. 1858); *Adams v. D&D Leasing Co.*, 381 S.E.2d 94 (Ga. Ct. App. 1989); *Mathis v. Rome Tractor Co.*, 349 S.E.2d 82 (Ga. Ct. App. 1986); *Krupp Realty Co. v. Joel*, 309 S.E. 2d 641 (Ga. Ct. App. 1983).

<sup>422</sup> See O.C.G.A. § 7-4-2(b)(1).

<sup>423</sup> See *Corporate Report*, *supra* note 1, at 141.

*UCC Collateral. To the extent that a security interest may be perfected by the filing of a financing statement in the State of Georgia, (i) the effective filing of the Financing Statement in the UCC records of the Office of the Clerk of the Superior Court of any county in the State of Georgia will result in the perfection of such security interest in the UCC Collateral (other than fixtures, as-extracted collateral, crops or timber to be cut) described in the Financing Statement, and (ii) the further recordation of the Fixture Filing in the real property records of the Office of the Clerk of the Superior Court of the county in which the Real Property is located will result in the perfection of such security interest in the UCC Collateral described in the Fixture Filing that consists of goods that are or are to become fixtures.*

## COMMENT

**20.01 Purpose and Background of the Model UCC Opinion.** The purpose of the Model UCC Opinion is to provide assurance to the Opinion Recipient that the Security Deed contains the necessary provisions to create a security interest under the UCC<sup>424</sup> and that the necessary steps are being taken to perfect such security interest.

As discussed in more detail below, the Model UCC Opinion covers only UCC security interests and not those created under common law or under non-UCC statutory law. This limitation is appropriate given that in most real estate secured transactions the principal collateral is of a type to which the Opinion Recipient may obtain valid security title under a security deed, which is covered by the Model Remedies Opinion or in which the Opinion Recipient may obtain a valid security interest under the UCC. The most notable exception is rents.<sup>425</sup>

Moreover, as to perfection, the Model UCC Opinion covers only those security interests that may be perfected by the filing of a financing statement. Again, because furniture, fixtures and equipment are the personal property collateral types that generally are most important to real estate lenders and because the filing of a financing statement is the proper method of perfection for these classes of collateral, it is appropriate for the Model UCC Opinion to be limited to perfection by filing.

**20.02 Elements of the Model UCC Opinion.** The Model UCC Opinion has two elements, creation and perfection, as well as certain express limitations.

**A. Creation.** Under Section 9-203(b) of the UCC, three elements must be present for a valid security interest to be created: (i) value must be given; (ii) the debtor must have rights in the collateral or the power to transfer rights in the collateral to a third party; and (iii) either (a) the debtor must authenticate a security agreement that provides a description of the collateral and, if the security interest covers timber to be cut, a description of the land concerned, (b) the collateral is not a certificated security and is in the possession of the secured party under Section 9-313 pursuant to the debtor's security agreement, (c) the collateral is a certificated security in

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<sup>424</sup> See Uniform Commercial Code, O.C.G.A. §§ 11-1-101 to -12-102.

<sup>425</sup> By virtue of the generic qualification, the Model Remedies Opinion does not contain an opinion as to the validity and enforceability of an assignment of rents as discussed in Section 18.02D of this Report. See also *Report on Adaptation of Accord*, *supra* note 4, at 597.

registered form and the security certificate has been delivered to the secured party under Section 8-301 pursuant to the debtor's security agreement, or (d) the collateral is deposit accounts, electronic chattel paper, investment property or letter-of-credit rights, and the secured party has control under Section 9-104, 9-105, 9-106 or 9-107 pursuant to the debtor's security agreement.<sup>426</sup>

Although the secured party's possession or control, or delivery to the secured party, of the collateral pursuant to an oral security agreement in certain circumstances will satisfy the requirement of clause (iii) above, a secured party rarely maintains possession or control (or takes delivery) of the collateral in real estate transactions. Moreover, given the difficulties of establishing the existence of an oral agreement between the debtor and the secured party, it is recommended that the security interest creation opinion be based solely on the debtor's executing a written security agreement. The Model UCC Opinion is drafted for transactions in which the Security Deed is intended to serve as the security agreement. The Opinion Giver should make appropriate modifications to the Model UCC Opinion if the Loan Transaction includes a separate security agreement.

To qualify as a valid security agreement, the Security Deed must contain language granting a security interest. The most common language is "Borrower hereby grants a security interest in..." Although any conveyancing language that is intended by the parties to grant a security interest will suffice, because the Opinion Giver cannot ascertain the intention of the parties other than from the four corners of the Security Deed, it is recommended that clear language granting a security interest be present in the Security Deed as a prerequisite to the rendering of the Model UCC Opinion. As noted below, the Model UCC Opinion does not cover the adequacy of any collateral description, and therefore the Opinion Giver need not reach any legal conclusion with respect to this requirement.

Under the provisions of the UCC, in a loan transaction a person gives value for rights if he acquires them in return for a binding commitment to extend credit or for the extension of immediately available credit whether or not drawn upon.<sup>427</sup> Because the Model UCC Opinion assumes that contemporaneously with the delivery of the Opinion Letter to the Opinion Recipient, the Opinion Recipient will have either advanced to Borrower the proceeds of the Loan to be secured by the security interest or entered into a commitment to make the Loan, as discussed below in Section 20.03, the value requirement is assumed to be satisfied. Because the Model UCC Opinion assumes that Borrower has rights in the collateral, as discussed below in Section 20.03, the Opinion Giver also need not reach any legal conclusion with respect to this requirement.

**B. Perfection.** The perfection opinion is limited only to those security interests for which the filing of a financing statement is a proper method of perfection. Therefore, the Opinion Giver's role is to review the Financing Statement and the Fixture Filing and to determine that the Secured Party is authorized to file them<sup>428</sup> and that they contain the necessary information to

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<sup>426</sup> O.C.G.A. § 11-9-203(b)(1)-(3).

<sup>427</sup> O.C.G.A. § 11-1-201(44)(a).

<sup>428</sup> By executing a security agreement, a debtor authorizes the filing of an initial financing statement covering the collateral described in the security agreement. *See* O.C.G.A. § 11-9-509(b) (2002). Alternatively, a debtor may authorize such a filing in a signed writing or other authenticated record. *See* O.C.G.A. § 11-9-509(a) (2002).

satisfy the requirements of the UCC with respect to the required contents of financing statements and fixture filings as discussed in Section 20.05.

It should be noted that under the amendments to the UCC adopted effective January 1, 1995 and under Revised Article Nine of the UCC, a deed to secure debt, mortgage or other real estate security instrument no longer qualifies as a fixture filing. This change is important because in a number of real estate secured transactions, the only UCC Collateral in which a lender obtains a security interest is fixtures. Under prior law, it was not necessary in these transactions to file a financing statement. The recordation of the Security Deed fulfilled the dual function of conveying security title to the real estate and creating a perfected security interest in fixtures (assuming it contained the necessary fixture filing information). Under current law, a secured party must record a financing statement in the real property records to perfect a security interest in fixtures.

Although the filing of a financing statement in the UCC records of the Office of the Clerk of the Superior Court of any county in the State of Georgia may, as a technical matter, result in the perfection of a security interest in fixtures, it will not obtain for the Secured Party the priority which would result from the recording of a fixture filing in the real property records of the county in which the Real Property is located.<sup>429</sup> Because secured lenders in most real estate transactions will record a financing statement as a fixture filing in the real property records of the subject county, the opinion as to perfection of the Secured Party's security interest in fixtures by its terms is limited solely to perfection as result of that fixture filing. If the Lender's only collateral will be goods that are or are to become fixtures, no filing in the UCC records is necessary, as the making of the proper fixture filing (or filings) in the real property records of the appropriate county (or counties) is sufficient to perfect the Lender's security interest. To ensure proper perfection, the prevailing custom is that if there is any concern that any collateral described in the Fixture Filing may not be or become a fixture, a financing statement covering such collateral should be filed in the UCC records as well.

The perfection opinion by its terms also excludes perfection of security interests in extracted collateral, crops or timber to be cut, since the filing of the Financing Statement in the UCC records of a county clerk's office in Georgia would not result in the perfection of security interests in such collateral. The Opinion Giver should make appropriate modifications to the Model UCC Opinion if the Opinion Recipient requires an opinion as to the perfection of security interests in these classes of collateral.

**C. Express Limitations.** The Model UCC Opinion is limited by its terms only to that collateral in which a security interest may be created under the UCC in effect in the State of Georgia and, as to perfection, only to that collateral in which a security interest is perfected by the filing of a financing statement in the State of Georgia. It therefore is subject to the following express limitations:

1. **Jurisdiction Covered.** The only law covered by the Model UCC Opinion is the UCC in effect in the State of Georgia. Therefore, to the extent that the creation or perfection of a security interest in any particular collateral is governed by the UCC in effect in a jurisdiction

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<sup>429</sup> See O.C.G.A. § 11-9-334 (priority of a security interest in fixtures over the conflicting interest of the encumbrancer or owner of the related real property is determined by the recording of a fixture filing). See also O.C.G.A. § 11-9-301(3)(A) (the local law of the jurisdiction governs the perfection of a security interest in the goods by the filing a fixture filing)..

other than Georgia, such creation and perfection is excluded from the Model UCC Opinion. For example, if Borrower is a corporation or other registered organization organized in a U.S. state other than Georgia, then perfection of a security interest in Borrower's equipment (other than fixtures located in Georgia as to which a fixture filing is made), inventory, accounts, and general intangibles (among others) would not be governed by the Georgia UCC.

2. Type or Class of Collateral Covered. The Model UCC Opinion also does not cover the creation or perfection of a security interest in any collateral that is of a class or type that is excluded from the coverage of the UCC, such as real property, rents, leases, and deposit accounts in consumer transactions.

3. Limitation on Perfection. With respect to perfection, the Model UCC Opinion covers only that collateral in which a security interest may be perfected by the filing of a financing statement in the State of Georgia. Security interests in certain types of UCC Collateral (such as deposit accounts) may not be perfected by filing. In cases where perfection is effected by another method (such as by control or by possession of the collateral), no perfection opinion is given.

4. Collateral Covered. The Model UCC Opinion covers only that collateral that is described in the Security Deed, the Financing Statement and the Fixture Filing and therefore does not cover any collateral that is described in the Security Deed but that is not also described in both the Financing Statement and the Fixture Filing. It is the responsibility of the Opinion Recipient to satisfy itself that the Financing Statement and the Fixture Filing do not omit collateral that the Security Deed covers or include collateral that the Security Deed does not cover.

**20.03 Implied Assumptions and Exceptions to the Model UCC Opinion.** The Model UCC Opinion is subject to the implied assumptions and exceptions described below in this Section 20.03. These assumptions and exceptions are set forth primarily in Interpretive Standard 27, and a Model UCC Opinion that incorporates the conventions of this Report as reflected in the Interpretive Standards will be deemed to include and be subject to such assumptions and exceptions.

**A. Rights in Collateral.** The Model UCC Opinion assumes that Borrower has sufficient rights in the UCC Collateral for the Opinion Recipient's security interest to attach to the UCC Collateral. The Model UCC Opinion therefore does not provide assurances that Borrower has title to the UCC Collateral or otherwise has any rights in the UCC Collateral. However, with respect to UCC Collateral consisting of after-acquired property, the Model UCC Opinion does assure that under present law and subject to the other express and implied limitations and qualifications set forth in this Report, once Borrower has sufficient rights in the property for a security interest to attach, the Opinion Recipient will have a valid and perfected security interest in the property.

**B. Consideration.** The Model UCC Opinion assumes that contemporaneously with the delivery of the opinion to the Opinion Recipient, the Opinion Recipient will have either advanced to Borrower the proceeds of the Loan to be secured by the security interest or entered into a commitment to make the Loan. This assumption is necessary for satisfaction of the legal requirement that value be given as a prerequisite for the creation of a valid security interest.

**C. Name and Address of Secured Party and Name of Record Owner.** The Model UCC Opinion assumes that the name and mailing address of the secured party and the name of the record owner or lessee, if any, set forth in the Financing Statement and the Fixture Filing are accurate.

**D. Description of Real Property.** The Model UCC Opinion assumes that the description of the Real Property is accurate. Interpretive Standard 22 contains an assumption as to the accuracy and sufficiency of the description of the Property, which is comprised of the Real Property and the Personal Property. Also the Model UCC Opinion is subject to the implied qualification that it does not assure that the form of the real estate description is adequate. The UCC requires that the Fixture Filing contain a description of the real estate sufficient to give constructive notice of a mortgage under Georgia law.<sup>430</sup> It is inappropriate for an Opinion Recipient to request an opinion that a particular description of real estate would be sufficient to give constructive notice of a mortgage under Georgia law.<sup>431</sup>

**E. Effective Filing.** The Model UCC Opinion assumes that the Financing Statement is or will be filed and that such filing is effective. The UCC defines filing as “communication of a record to a filing office and tender of the filing fee or acceptance of the record by the filing office”<sup>432</sup>. To be effective, such filing must not be refused by the filing office.<sup>433</sup> Because in most real estate transactions, UCC filings occur subsequent to the delivery of the opinion by Opinion Giver, it is appropriate for the Opinion Giver to assume the filing and effectiveness of the Financing Statement.

**F. The Bankruptcy Exception.** The Model UCC Opinion is subject to the effect of bankruptcy, insolvency, reorganization, moratorium or other similar laws affecting the rights and remedies of creditors. The exception includes the effect of the Federal Bankruptcy Code in its entirety, including matters of contract rejection, fraudulent conveyance and obligation, turn-over, preference, equitable subordination, automatic stay, conversion of a non-recourse obligation into a recourse obligation, and substantive consolidation. It also includes state laws regarding fraudulent transfers, obligations and conveyances, including Sections 18-2-20 through 18-2-80 of the Georgia Code,<sup>434</sup> and state receivership laws.

**G. The Equitable Principles Exception.** The Model UCC Opinion is subject to the effect of general principles of equity, whether applied by a court of law or equity. The equitable principles exception includes the following concepts: (i) principles governing the availability of specific performance, injunctive relief or other traditional equitable remedies; (ii) principles

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<sup>430</sup> O.C.G.A. § 11-9-502(b)(3) (2002).

<sup>431</sup> A description of real property in a mortgage, in order to be valid, must identify the land or must contain a key by the use of which the description may be applied by extrinsic evidence. *See* Brasher v. Tanner, 353 S.E.2d 478 (Ga. 1987). The question of the sufficiency of description of property in a mortgage is one of law, for the court; that of the identity of the property mortgaged is one of fact, to be decided by the jury. *See* Chapman v. Bank of Cumming, 270 S.E.2d 4 (Ga. 1980).

<sup>432</sup> O.C.G.A. § 11-9-516(a) (2002).

<sup>433</sup> O.C.G.A. § 11-9-516(b).

<sup>434</sup> *See* O.C.G.A. §§ 18-2-20 to -80 (2004).

affording traditional equitable defenses (e.g., waiver, laches and estoppel); (iii) good faith and fair dealing; (iv) reasonableness; (v) materiality of the breach; (vi) impracticability or impossibility of performance; (vii) the effect of obstruction or failure to perform or otherwise act in accordance with an agreement by a person other than Borrower; (viii) the effect of Section 1-102(3) of the UCC; and (ix) unconscionability.

**H. Adequacy of Collateral Description.** The Model UCC Opinion assumes that the descriptions of the collateral contained in the Security Deed, the Financing Statement and the Fixture Filing reasonably identify such collateral, except to the extent that the collateral is described by reference to the types of collateral defined in the UCC, other than commercial tort claims and, in consumer transactions, consumer goods, a security entitlement, a securities account, or a commodity account. Where collateral other than that falling within the above-listed exceptions is described by reference to the types of collateral defined in the UCC,<sup>435</sup> such descriptions are deemed automatically to be reasonable for purposes of the UCC.<sup>436</sup> A description of collateral in a Security Deed as “all of debtor’s assets” or “all of debtor’s personal property” or similar words does not reasonably identify the collateral.<sup>437</sup> As discussed below, the determination of the adequacy of a collateral description other than by reference to UCC collateral types is largely a question of fact, and therefore it is inappropriate for the Opinion Giver to provide opinion assurance on this issue.<sup>438</sup> Interpretive Standard 22 includes an assumption as to the adequacy and sufficiency of the description of the Property, which is comprised of the Real Property and the Personal Property.

**I. Conversion into Proceeds.** The Model UCC Opinion is subject to the implied qualification that perfection of a security interest may be lost under the circumstances set forth in Section 9-315 of the UCC with respect to UCC Collateral that is converted into proceeds.<sup>439</sup>

**J. Filing of Continuation Statements.** The Model UCC Opinion is subject to the implied qualification that perfection of the security interest terminates unless appropriate

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<sup>435</sup> Such defined UCC collateral types include accounts (including healthcare receivables), chattel paper (whether tangible or electronic), deposit accounts, documents, fixtures, general intangibles (including payment intangibles and software), goods (including inventory, equipment and fixtures), instruments (including promissory notes), investment property, letter-of-credit rights, letters of credit, proceeds (including cash proceeds and non-cash proceeds), and supporting obligations. *See* O.C.G.A. § 11-9-102.

<sup>436</sup> *See* O.C.G.A. §§ 11-9-108 and -504 (2002).

<sup>437</sup> O.C.G.A. § 11-9-108(c)

<sup>438</sup> Under Georgia law, a collateral description in a financing statement is sufficient if “the description provides such a key to the identity of the property as would enable a person of ordinary business prudence, upon inquiry, to discover the actual identity of the property described.” *In re* Env'tl. Elec. Payment Sys., Inc., 11 B.R. 965, 966 (Bankr. N.D. Ga. 1981) (citations omitted). *See also* Trust Co. Bank v. Walker, 35 B.R. 237, 240 (Bankr. N.D. Ga. 1983) (description in security agreement must reasonably describe the collateral). The Financing Statement and the Fixture Filing need not restate verbatim the collateral description contained in the Security Deed, so long as the description provides constructive notice of the collateral.

<sup>439</sup> O.C.G.A. § 11-9-315.

continuation statements are filed within six months prior to the end of each successive five year period from the date of the original filing of the Financing Statement.<sup>440</sup>

**K. Future Events.** The Model UCC Opinion does not cover future events that might affect perfection, such as changes in a debtor's name that make the Financing Statement or the Fixture Filing seriously misleading,<sup>441</sup> or the change of the debtor's location to a new jurisdiction outside the State of Georgia.<sup>442</sup>

**L. Fixtures.** With respect to fixtures, the Model UCC Opinion covers only those fixtures that are attached to the Real Property covered by the Security Deed.

**M. Building Materials.** The Model UCC Opinion does not cover any security interest in ordinary building materials that are incorporated into an improvement on the Real Property.<sup>443</sup>

#### **20.04 Matters Not Covered by the Model UCC Opinion.**

**A. Priority.** The Model UCC Opinion does not address the priority of any security interest. It is customary for the Opinion Recipient to obtain a title examination and lien search reports<sup>444</sup> as well as representations from Borrower, to provide the Opinion Recipient with the necessary assurances that its liens and security interests have the requisite priority.

**B. Form of Financing Statement.** The Model UCC Opinion does not include an opinion as to the form of the Financing Statement. An Opinion Recipient may request an opinion to the effect that the Financing Statement is in proper form for filing in the appropriate records. Although the Model Opinion does not include such an opinion, an Opinion Giver may give such an opinion after review of the Financing Statement and determination that it meets the requirements for sufficiency of a financing statement set forth in O.C.G.A. § 11-9-502. The Committee neither endorses nor opposes the inclusion in the Opinion Letter of an opinion as to the compliance with such requirements for sufficiency of the Financing Statement.

**20.05 Practice Procedure for the Model UCC Opinion.** Described below are the steps to be taken by the Opinion Giver in reviewing the Financing Statement and the Fixture Filing

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<sup>440</sup> O.C.G.A. § 11-9-515 (2002).

<sup>441</sup> O.C.G.A. § 11-9-506.

<sup>442</sup> *See* O.C.G.A. § 11-9-307.

<sup>443</sup> Once building materials become so incorporated, they lose their character as personal property. O.C.G.A. § 11-9-334(a) (2002) ("A security interest does not exist under this article in ordinary building materials incorporated into an improvement on land.").

<sup>444</sup> Most lenders obtain lien search reports from commercial lien search companies. Certified UCC index searches may be obtained from the Georgia Superior Court Clerks' Cooperative Authority's website ([www.gsccca.org](http://www.gsccca.org)). It should be noted that such lien and UCC searches will not necessarily uncover all competing interests in the personal property collateral that might prime the lender's security interest. For an excellent, though somewhat dated, discussion of the limits of lien searches, *see* Gerald T. McLaughlin, "Seek But You May Not Find": *Non-UCC Recorded, Unrecorded and Hidden Security Interests Under Article 9 of the Uniform Commercial Code*, 53 *FORDHAM L. REV.* 953 (1985).

in connection with the Model UCC Opinion. Until such time, if any, that the Georgia Superior Court Clerks' Cooperative Authority prescribes additional official forms, both the Financing Statement and the Fixture Filing must be only on the national Uniform Commercial Code financing statement form (Form UCC1), as set out in Section 9-521(a) of official text of Revised Article 9 of the Uniform Commercial Code, 2000 Revision.<sup>445</sup> The Fixture Filing must include the UCC Financing Statement Addendum.<sup>446</sup>

**A. Financing Statement.** Under Section 9-502 of the UCC, a Financing Statement must contain:

- (i) the legal name of Borrower (debtor),<sup>447</sup> which, if Borrower is a registered organization, must be the name of Borrower shown on the public record of Borrower's jurisdiction of organization,<sup>448</sup> and, if Borrower is an individual, should include Borrower's last name,<sup>449</sup>

*Note:* The name on the Financing Statement must be the exact legal name of Borrower.<sup>450</sup> A trade name or assumed name is not sufficient unless the trade name or assumed name is so similar to the legal name of Borrower that a search of the records office under the debtor's correct name, using the filing office's standard search logic, if any, would disclose a financing statement using such trade name or assumed name, so as to make the use of such trade name or assumed not seriously misleading.<sup>451</sup> The Opinion Giver should determine the legal name of an entity Borrower from a certified copy of Borrower's Organizational Documents or from a certificate of Borrower. In the case of an individual Borrower, the Opinion Giver should verify the legal name of such Borrower from a government-issued identification. Suggested forms of identification include, without limitation, driver's license, passport, voter registration card or other official identification document.

- (ii) the secured party's name,<sup>452</sup>

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<sup>445</sup> See O.C.G.A. § 11-9-521 (2002).

<sup>446</sup> Required UCC filing forms may be obtained from the Georgia Superior Court Clerks' Cooperative Authority website ([www.gscca.org](http://www.gscca.org)).

<sup>447</sup> O.C.G.A. § 11-9-502(a)(1) (2002).

<sup>448</sup> O.C.G.A. § 11-9-503(a).

<sup>449</sup> O.C.G.A. § 11-9-516(b)(3)(C) (2002).

<sup>450</sup> Filing in the name "Net work Solutions, Inc." rather than correct name "Network Solutions, Inc." held to be "seriously misleading". See *Receivables Purchasing Co. v. R & R Directional Drilling, LLC*, 588 S.E.2d 831 (Ga. 2003); Filing in name "Gu, Sang Woo" instead of correct name "Sang Woo Gu" held to be "seriously misleading." See *All Business Corp. v. Choi*, 634 S.E.2d 400 (Ga. 2006).

<sup>451</sup> O.C.G.A. § 11-9-506(c) (2002).

<sup>452</sup> O.C.G.A. § 11-9-502(a)(2).

*Note:* Because the Model UCC Opinion assumes that the name in the financing statement is accurate, the Opinion Giver need not verify the accuracy of the secured party's name.

- (iii) an indication of the collateral covered by the financing statement;<sup>453</sup> and

*Note:* Because the Model UCC Opinion is subject to the implied qualification that, except for collateral (other than commercial tort claims and, in consumer transactions, consumer goods, a security entitlement, a securities account, or a commodity account) which is described by reference to types of collateral defined in the UCC, it does not assure that the Financing Statement adequately describes the collateral that it purports to cover, the Opinion Giver need not determine whether the collateral description is adequate

- (iv) where the collateral described consists only of consumer goods and the secured obligation is originally \$5000.00 or less, the maturity date of the secured obligation or a statement that such obligation is not subject to a maturity date.<sup>454</sup>

In addition, in order for the Financing Statement to be in a form which the filing office is not entitled to refuse to accept, it must contain:

- (v) a mailing address of Borrower (debtor),<sup>455</sup>

*Note:* The address need not be the address of Borrower's chief executive office; any valid mailing address of Borrower is permissible.

- (vi) a mailing address of the secured party,<sup>456</sup> and

*Note:* Because the Model UCC Opinion assumes that the address in the financing statement is accurate, the Opinion Giver need not verify the accuracy of the secured party's address.

- (vii) an indication of whether Borrower (debtor) is an individual or an organization, and if Borrower is an organization, Borrower's type of organization and jurisdiction in which it was organized.<sup>457</sup>

*Note:* The Opinion Giver should determine the type of organization and jurisdiction of organization of Borrower from a certified copy of Borrower's Organizational Documents or from a certificate of Borrower.

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<sup>453</sup> O.C.G.A. § 11-9-502(a)(3) (2002).

<sup>454</sup> O.C.G.A. § 11-9-502(a)(4).

<sup>455</sup> O.C.G.A. § 11-9-516(b)(5)(A) (2002) .

<sup>456</sup> O.C.G.A. § 11-9-516(b)(4).

<sup>457</sup> O.C.G.A. §§ 11-9-516(b)(5)(B)-(C) (2002).

**B. Fixture Filing.** Under Section 9-502 of the UCC, a Fixture Filing must contain:

- (i) the legal name of Borrower (debtor), which, if Borrower is a registered organization, must be the name of Borrower shown on the public record of Borrower's jurisdiction of organization, and, if Borrower is an individual, must include Borrower's last name;
- (ii) the secured party's name;
- (iii) an indication of the collateral covered by the financing statement;
- (iv) where the collateral described consists only of consumer goods and the secured obligation is originally \$5000.00 or less, the maturity date of the secured obligation or a statement that such obligation is not subject to a maturity date;
- (v) an indication that the Fixture Filing covers goods that are or are to become fixtures;<sup>458</sup>
- (vi) an indication that the Fixture Filing is to be filed for record in the real property records;<sup>459</sup>
- (vii) a description of the Real Property to which fixtures are attached sufficient to give constructive notice of a mortgage under Georgia law if the description were contained in a record of the mortgage of the real property;<sup>460</sup> and

*Note:* Because the Model UCC Opinion assumes that the description of the Real Property is accurate, the Opinion Giver need not independently verify the accuracy of the real estate description. The Model UCC Opinion also is subject to the implied qualification that it does not assure that the form of the description of the Real Property is adequate.

- (viii) if Borrower (debtor) does not have an interest of record in the real estate, the identity of the record owner or record lessee of the Real Property.<sup>461</sup>

*Note:* For the Opinion Recipient to obtain valid security title under the Security Deed to Borrower's (debtor's) interest in the Real Property that is enforceable against third parties, Borrower must have an interest of record in the Real Property, and therefore it should not be necessary to identify in

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<sup>458</sup> O.C.G.A. 11-9-502(b)(1). The requirement is satisfied by checking the box on the UCC-1 financing statement form which indicates that the financing statement is to be recorded in the real estate records. In an abundance of caution, it may also be helpful to include the word "fixtures" in the collateral property description.

<sup>459</sup> O.C.G.A. 11-9-502(b)(2) (2002).

<sup>460</sup> O.C.G.A. 11-9-502(b)(3).

<sup>461</sup> O.C.G.A. 11-9-502(b)(4).

the Fixture Filing the record owner or record lessee of the Real Property. Nonetheless, to the extent that the financing statement identifies the record owner or record lessee, the Model UCC Opinion assumes that the identification is accurate, and therefore the Opinion Giver need not independently verify the accuracy of the identity of the record owner or record lessee.

In addition, in order for the Fixture Filing to be in a form which the filing office is not entitled to refuse to accept, it must contain:

- (ix) a mailing address of Borrower (debtor);
- (x) a mailing address of the secured party; and
- (xi) an indication of whether Borrower (debtor) is an individual or an organization, and if Borrower is an organization, Borrower's type of organization and jurisdiction in which it was organized.

The due diligence, if any, required of the Opinion Giver with respect to Items (i) through (iv) and (ix) through (xi) above is the same as for the corresponding items in the Financing Statement.

## XXI. THE MODEL LITIGATION CONFIRMATION

*[Optional: To our knowledge, except as set forth on Exhibit \_\_ hereto, there is no litigation or other proceeding pending before any court or administrative agency against Borrower or the Property which, if it were adversely determined, would have a material adverse effect on the Property or the financial condition of Borrower.]*

### COMMENT<sup>462</sup>

**21.01 Purpose and Background of the Model Litigation Confirmation.** The Model Litigation Confirmation is not a legal opinion, but is a statement of fact as to whether or not actions are pending and involves little or no legal analysis.<sup>463</sup> For this reason, this Report refers to the "Model Litigation Confirmation" rather than the "Model Litigation Opinion," and the Committee recommends that the Opinion Giver put this and other confirmations in a separate paragraph of the Opinion Letter set forth apart from the opinions with the introductory language: "Based upon and subject to the foregoing and to the matters stated below, we confirm to you that."<sup>464</sup>

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<sup>462</sup> The Comment to Section XXI is based on the Comment to the Model Litigation Confirmation in Section XV of the *Corporate Report*, *supra* note 1, at 133-38, with appropriate modifications and additional commentary to reflect differences in real estate secured transactions.

<sup>463</sup> See FitzGibbon & Glazer, *supra* note 79, at 438; Field & Bidwell, *supra* note 77, at 22; Committee on Corps. of the State Bar of Cal., *Report of the Committee on Corporations Regarding Legal Opinions in Business Transactions*, 14 PAC. L.J. 1000, 1057 (1983).

<sup>464</sup> FitzGibbon & Glazer, *supra* note 79, at 442.

As a general rule, attorneys should not opine as to matters of fact; however, Opinion Givers are often asked to give this confirmation.<sup>465</sup> Opinion Recipients seek assurance that they are not “buying lawsuits” and ask for the confirmation, in addition to representations in the Loan Documents, because of an assumption that the Opinion Giver representing Borrower has a special awareness of pending actions, a special ability to verify their existence or nonexistence through client records, or a special ability to ask the right questions of the appropriate people to determine that the certificate provided by authorized representatives of Borrower includes and appropriately describes all pending actions.<sup>466</sup> This assumption is not necessarily true, of course, particularly for counsel employed only for purposes of the Loan Transaction or in the case of a large organization that uses a number of different law firms to handle its litigation.<sup>467</sup> Accordingly, Opinion Givers often advise Opinion Recipients if the Opinion Giver has been employed by Borrower only for a limited purpose or purposes. The TriBar 1998 Report stated that “in most cases the no litigation opinion could be omitted with no real loss to opinion recipients.”<sup>468</sup> The TriBar reached that decision even before recent cases such as *Dean Foods Co. v. Pappathanasi* and *National Bank of Canada v. Hale & Dorr*, rendered against lawyers as to litigation aspects of legal opinions, *inter alia*.<sup>469</sup> Given these recent opinions, the expansion of law firms in terms of size and geographic diversity, and other factors, many firms today have established policies against giving litigation confirmations. The Committee supports the trend toward omitting the litigation confirmation and concludes that it would be a reasonable approach for the Opinion Giver to omit this litigation confirmation. However, the Committee neither endorses nor opposes the inclusion in the Opinion Letter of the litigation confirmation and the Committee does not expect that this confirmation would be included in all Opinion Letters. The Committee has retained the litigation confirmation as an option in order to provide guidance on the content and limitations of the litigation confirmation for an Opinion Giver who chooses to include it.

## 21.02 Elements of the Model Litigation Confirmation.

**A. Knowledge Limitation.** The Model Litigation Confirmation includes a knowledge limitation because it is primarily factual.<sup>470</sup> See the discussion of knowledge and its relationship to the scope of due diligence in Section 2.07 and Section III.

**B. Materiality and the Litigation Exhibit.** The Model Litigation Confirmation refers to an exhibit listing pending litigation and proceedings. The referenced exhibit is usually an

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<sup>465</sup> See FitzGibbon & Glazer, *supra* note 79, at 442; Committee on Corps. of the State Bar of Cal., *supra* note 463, at 1057-58; FIELD & RYAN, *supra* note 21, § 6.02[2][a].

<sup>466</sup> See Field & Bidwell, *supra* note 77, at 23; FitzGibbon & Glazer, *supra* note 79, at 437; FIELD & RYAN, *supra* note 21, § 6.02[2][a]; Committee on Corps. of the State Bar of Cal., *supra* note 463, at 1057-58.

<sup>467</sup> FitzGibbon & Glazer, *supra* note 79, at 438.

<sup>468</sup> TriBar Opinion Committee, Third Party “Closing” Opinions, 53 BUS. LAW. 591 (1998) [hereinafter *TriBar 1998 Report*].

<sup>469</sup> *National Bank of Canada v. Hale & Dorr*, 17 Mass. L. Rptr. 681, 2004 WL 1049072 (Mass. Super. Apr. 28, 2004) and *Dean Foods Co. v. Pappathanasi*, 18 Mass. L. Rptr. 598, 2004 WL 3019942 (Mass Super. Dec. 3, 2004).

<sup>470</sup> Babb et al., *supra* note 136, at 561; FIELD & RYAN, *supra* note 21, § 6.02[2].

exhibit to a Loan Document, but, in the event of different approaches to disclosure, a separate exhibit to the Opinion Letter may be appropriate. In contrast to the Corporate Report, the Committee has determined that the Model Litigation Confirmation should be subject to a materiality qualification.<sup>471</sup> In many real estate loan situations, it would be impractical to include all known litigation and proceedings. For example, in the case of a client which owns and manages numerous apartment complexes or shopping centers, a limitation on the basis of materiality is appropriate and reasonable.

**C. Litigation or Other Proceedings.** The Committee believes that the scope of the Model Litigation Confirmation should be limited to judicial and administrative proceedings. The Corporate Report states that the scope of its litigation confirmation also extends to mediation, arbitration and other alternative dispute resolution proceedings, as well as any adversarial or sanction-oriented proceedings before governmental agencies and self-regulatory organizations.<sup>472</sup> The Committee consciously elected to deviate from the Corporate Report in this respect.

**D. Pending Litigation.** The Committee has determined that “pending” litigation includes only litigation in which the claimant has taken some formal step to commence the action, such as the filing of a complaint.<sup>473</sup> The Committee has considered and rejected the position of the Corporate Report that the Model Litigation Confirmation also extend to litigation which is “overtly threatened by a written communication”<sup>474</sup> because of concerns with the difficulty in determining whether or not written communications constitute an overt threat of litigation.

**E. Scope of the Model Litigation Confirmation.** The scope of the Model Litigation Confirmation is restricted to litigation or other proceedings against Borrower or the Property. The Corporate Report extends its litigation confirmation to any of the properties of the client.<sup>475</sup> In light of the fact that the focus in a real estate secured transaction is the Property and the fact that the Opinion Recipient may also obtain the warranties and representations of Borrower regarding such matters, the Committee has determined that the scope of the confirmation should be limited to the Property rather than all properties of Borrower.

**F. Evaluation of Litigation.** The Committee believes that it is inappropriate to ask the Opinion Giver to evaluate the possible outcome of litigation as part of the standard legal opinion.<sup>476</sup>

**21.03 Additional Notes Regarding the Model Litigation Confirmation.** A Georgia lawyer may give the Model Litigation Confirmation even if litigation and proceedings are pending in states other than Georgia because the Model Litigation Confirmation is primarily a statement of

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<sup>471</sup> See *Corporate Report*, *supra* note 1, at 134-35.

<sup>472</sup> *Id.* at 133.

<sup>473</sup> FitzGibbon & Glazer, *supra* note 79, at 444.

<sup>474</sup> See *Corporate Report*, *supra* note 1, at 135-36.

<sup>475</sup> *Id.* at 133.

<sup>476</sup> See Garrett, *supra* note 81, at 26; Lochner, *supra* note 85, at 117 (if audit opinions are available to the other party in a transaction, there should be no need for a lawyer to opine on such matters).

fact as to whether or not suits are pending, rather than a legal opinion. Language normally used in the introduction to an opinion limiting the opinion to laws of particular jurisdictions does not limit the scope of this confirmation because the language excludes the laws of other states, not facts, whether or not occurring in other states.<sup>477</sup>

**21.04 Practice Procedure for the Model Litigation Confirmation.** The Committee recommends that the Opinion Giver complete the following due diligence procedures prior to giving the Model Litigation Confirmation:

A. Obtain from one or more appropriate and knowledgeable representatives of Borrower and review a certificate listing and describing all actions pending against Borrower or the Property.<sup>478</sup> The certificate should state, “The following is a complete and accurate list of all litigation and other proceedings pending before any court or administrative agency against Borrower or the Property which, if adversely determined, would have a material adverse affect on the Property or the financial condition of Borrower.”

B. The Opinion Giver should check with all lawyers in the Primary Lawyer Group to determine whether or not they are aware of any litigation or proceeding not shown on the certificate. In addition, if the Opinion Giver represents Borrower in matters of litigation, the lawyers who are in charge of litigation for Borrower should be contacted to determine whether or not they are aware of any litigation or proceeding not shown on the certificate.<sup>479</sup>

The Committee believes that the two steps set forth above are sufficient to support the Model Litigation Confirmation. The second step requires the Opinion Giver to go beyond reliance on the certificate of a representative of Borrower. Relying solely on the certificate is inappropriate for the Model Litigation Confirmation if there has been a historical relationship between Borrower and the lawyers of the Opinion Giver who have handled its litigation. The purpose of the Opinion Recipient in requesting the Model Litigation Confirmation is to elicit some investigation of factual matters by the Opinion Giver.<sup>480</sup> The confirmation would lose much of its significance if only the knowledge of the lawyers working on the transaction (who may have little knowledge of litigation the Opinion Giver is handling) is imputed to the Opinion Giver.<sup>481</sup> While some law firms as a matter of prudence canvas all attorneys within the firm who have provided legal services to Borrower, more extensive investigation than the two steps set forth above is normally not expected by the Opinion Recipient, is not in accordance with current practice in many law firms, and would be both impractical (under the time pressures of most transactions) and expensive.<sup>482</sup> If the Opinion Recipient desires more extensive investigation, the Opinion

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<sup>477</sup> FIELD & RYAN, *supra* note 21, § 3.05[5]; FitzGibbon & Glazer, *supra* note 79, at 452 n.10.

<sup>478</sup> *See Corporate Report*, *supra* note 1, at 136 & n.288.

<sup>479</sup> Special Joint Committee of the Maryland State Bar Association & the Bar Association of Baltimore City, *supra* note 153, at 42; Field & Bidwell, *supra* note 77, at 19 and 446; JACOBS, *supra* note 138, at 11-5.

<sup>480</sup> Glazer & Macedo, *supra* note 52, at 492.

<sup>481</sup> *Id.*

<sup>482</sup> *Id.* at 491.

Recipient should request the extra investigation at an early stage of the Loan Transaction, the parties should specifically negotiate the cost of the additional investigation, and the confirmation should specifically set forth the extent of the additional investigation. As indicated below, checking the opening firm's litigation docket or billing records is not required. If these records are computerized, however, and in a form that makes identification of pending litigation against Borrower readily identifiable, the Opinion Giver consider checking these records as a matter of prudence, particularly in light of recent cases such as those referenced in Section 21.01.

In the absence of explicit agreement to the contrary, the Committee believes that the following steps are *not* required in connection with the Model Litigation Confirmation:

- (i) examination of court records to determine whether or not litigation is pending;<sup>483</sup>
- (ii) polling of attorneys or other employees of the firm, except the Primary Lawyer Group and if the Opinion Giver represents Borrower in matters of litigation, the lawyers who are in charge of litigation for Borrower;<sup>484</sup>
- (iii) review of firm files;<sup>485</sup>
- (iv) review of firm billing or time records;
- (v) review of files of Borrower in which Borrower would normally record pending litigation, such as Borrower's representation letters to auditors, responses of inside and outside counsel to auditors, correspondence between Borrower and its insurers or customer complaint files; or<sup>486</sup>
- (vi) contacting other firms that have handled litigation for Borrower.

## XXII. QUALIFICATIONS AS TO TITLE, PRIORITY AND RECORDING

### COMMENT

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<sup>483</sup> Babb et al., *supra* note 136, at 562; Holcomb T. Green, The Corporate Attorney's Opinion (unpublished outline by Holcomb T. Green of Hansell & Post, predecessor to the Atlanta, Georgia, office of Jones, Day, Reavis & Pogue); George L. Cohen, The Corporate Attorney's Opinion-Attorney's Responsibility (unpublished outline of George L. Cohen of Sutherland, Asbill & Brennan, Atlanta, Georgia); FitzGibbon & Glazer, *supra* note 77, at 446-47.

<sup>484</sup> JACOBS, *supra* note 138, at 11-7; Field & Bidwell, *supra* note 77, at 19. *But cf.* Babb et al., *supra* note 138, at 561.

<sup>485</sup> Field & Bidwell, *supra* note 77, at 19; FitzGibbon & Glazer, *supra* note 77, at 446.

<sup>486</sup> Green, *supra* note 483, at 24; Cohen, *supra* note 483, at 9.

**22.01 Title and Priority.** Most opinions in real estate secured transactions expressly exclude any opinion as to matters of title or priority. The Real Estate Adaptation and virtually all state bar real estate opinion projects agree that it is inappropriate to express an opinion as to title to real estate or as to priority of the real estate security instrument.<sup>487</sup> The rationale for this conclusion is expressed at some length in the various state bar reports, but the obvious explanation is the one given in the Real Estate Adaptation that title insurance is now the customary and sole assurance regarding real estate titles.<sup>488</sup> Although the Corporate Report does not address real property transactions, Interpretive Standard 16 of the Corporate Report contains an assumption that Borrower owns its assets.<sup>489</sup> Interpretive Standard 2 of the Corporate Report also specifically excludes “law concerning creation, attachment, perfection or priority of a security interest.”<sup>490</sup>

The Committee has determined that no opinion should be given as to title or priority and has provided a qualification to this effect in Interpretive Standard 2 (19), which excludes any opinion as to “the status of title to the Property or the priority of any lien on or security title to the Property.”<sup>491</sup> An Opinion Letter that incorporates the conventions of this Report as reflected in the Interpretive Standards will be deemed to exclude any opinion as to title or priority.

The Committee also believes that it is inappropriate to give an opinion as to title or priority “in reliance on” a title insurance owner’s or mortgagee’s policy or to include any other reference to title insurance, such as “We understand that you are relying on title insurance.” This latter statement adds nothing to the effect of the qualification and may not, in fact, be precisely true.

Interpretive Standard 22 includes an assumption that “[t]he description of the Property is accurate and sufficient under Georgia law to provide notice to third parties of the liens, security title and security interests provided by the Loan Documents and to create a binding contractual obligation.” Similarly, the Real Estate Adaptation sets forth a specific assumption that the description of the real and personal property is accurate and sufficient for purposes of notice and contract law.<sup>492</sup>

## 22.02 Recording.

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<sup>487</sup> See *Report on Adaptation of Accord*, *supra* note 4, at 603-04; see, e.g., Real Property Law Committee of the Association of the Bar of the City of N.Y. & Attorney Opinion Letter Committee of the N.Y. State Bar Association, *Joint Mortgage Loan Opinion Report*, N.Y. ST. B.J., July 1990, at 55, 57; Committee on Opinion Letters of the Real Estate & Land Use Section of the Or. State Bar, *Lawyers’ Opinions in Oregon Real Estate Transactions*, at 34-35 (Oregon State Bar ed., 1992).

<sup>488</sup> See *Report on Adaptation of Accord*, *supra* note 4, at 604.

<sup>489</sup> *Corporate Report*, *supra* note 1, at 144.

<sup>490</sup> *Id.* at 141.

<sup>491</sup> The Model UCC Opinion in Section XX includes an opinion as to the perfection of a security interest in the Personal Property, but gives no opinion as to priority.

<sup>492</sup> See *Report on Adaptation of Accord*, *supra* note 4, at 580.

**A. Location of Filing and Recording.** The Committee has adopted an express assumption in the Interpretive Standard 21 as to the location of filing and the recording of the Loan Documents that are to be recorded as well as the payment of applicable taxes and fees. The Committee believes that opinions as to these matters are generally inappropriate and not commonly given.<sup>493</sup>

The Real Estate Adaptation also treats filing and recording by an express assumption stating that “The Security Documents 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.”<sup>494</sup> Although the commentary to this provision indicates that the use of the word “duly” connotes a further assumption that any taxes and fees due upon recording or filing have been or will be paid,<sup>495</sup> the Committee has determined to state this expressly in Interpretive Standard 21. This is similar to the form recommended by the New York State Bar Association and the Association of the Bar of the City of New York. This form states that “We have assumed that the Mortgage will be duly recorded in the Office of the Bar [Clerk] [Register] of the county in which the Premises are located and that all applicable mortgage recording tax imposed thereon will be paid.”<sup>496</sup>

**B. Intangible Recording Tax.** As discussed in Section 22.02A above, Interpretive Standard 21 includes an assumption that all taxes imposed on the Loan Documents that are to be recorded have been or will be paid. However, an out-of-state Opinion Recipient will frequently require an opinion with respect to taxes payable solely by virtue of the execution, delivery and recording of the Security Deed. If such an opinion is given, the following language may be appropriate depending on the circumstances:

Except for the Georgia intangible recording tax described below, no taxes, including, but not limited to, transfer, excise, mortgage, intangible, documentary stamp or similar taxes (but excluding income or franchise taxes, as to which we express no opinion), shall be payable to the State of Georgia or to any jurisdiction therein on account of the execution, delivery, recording or filing of the Security Deed, the Financing Statement or the Fixture Filing except for per page filing or recording fees. Pursuant to O.C.G.A. Section 48-6-61, the State imposes an intangible recording tax on “long-term notes secured by real estate” at the rate of \$1.50 per \$500 or fraction thereof of the face amount of the note, subject to a maximum tax on any single note of \$25,000.<sup>497</sup> A “long-term note secured by real estate” is defined as “any note representing credits secured by real estate when any part of the principal of the note falls due more than three years from the date of the

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<sup>493</sup> Section 22.02B discusses those situations in which an opinion as to the Georgia intangible recording tax may be required and the parameters of such an opinion.

<sup>494</sup> *Report on Adaptation of Accord*, *supra* note 4, at 580.

<sup>495</sup> *Id.*

<sup>496</sup> Real Property Law Committee of the Association of the Bar of the City of N.Y. & Attorney Opinion Letter Committee of the N.Y. State Bar Association, *supra* note 487, at 57.

<sup>497</sup> Contrary to the literal terms of the statute, Regulation 560-11-8-.02 of the 1996 Regulations provides the maximum tax of \$25,000 relates to an individual deed to secure debt and not to an individual note.

note or from the date of any instrument executed to secure the note.” Failure to pay the intangible recording tax when due does not invalidate the Security Deed or, if accepted for recording by the Clerk, affect its priority; however, the Security Deed may not be initially accepted for recording and such failure to pay the tax constitutes a bar to collection by any action, foreclosure, the exercise of any power of sale or otherwise until the tax, together with penalties and interest, has been paid.

**[IF THE SECURED INSTRUMENT IS A GUARANTY]:** Based upon Regulations issued by the State Department of Revenue, a guaranty is not considered to be a long-term note, and no intangible recording tax is due with respect to a security deed securing a guaranty. [Ga. Comp. R. & Regs. r. 560-11-8-.14(d) (1996)].

The foregoing provisions highlight to out of state practitioners the importance of paying the intangible recording tax. For simple loan transactions, determining whether or not and how much intangible recording tax to pay is generally easy. However, for more complex transactions, the language above protects the Opinion Giver from speculation as to how a court, or the tax commissioner, might assess a particular transaction. This language calls attention to the Georgia intangible recording tax issue and provides the Opinion Recipient with the appropriate statutory rule by which to determine the tax due, if any.

Larger loans, often involving (i) multiple lenders, (ii) a single “agent” for multiple lenders, and (iii) multiple notes or “tranches”, raise at least two significant issues regarding the proper amount of intangible recording tax to be paid on any particular Security Deed. Although there is no definitive case or ruling from the Department of Revenue, the existence of multiple lenders and multiple notes (or other evidences of indebtedness) in a lending transaction may not preclude treatment of the debt instruments as a single “long-term note secured by real estate” so long as the indebtedness has been solicited, negotiated, documented and closed as a single, integrated credit transaction. The Committee believes that no opinion should be given as to this issue in view of the absence of any definitive case or ruling. However, it is prudent in any complex transaction involving multiple notes or lenders to obtain an advance ruling from the Department of Revenue, a process which can require at least six weeks, and possibly more.

As to a second issue relating to the intangible recording tax, in 1996 the Department of Revenue adopted new Regulations (the “1996 Regulations”), which alter the interpretation by the Department of prior Regulations dealing with apportionment of the intangible recording tax, in those transactions where the secured indebtedness is held by one or more non-resident lenders and is secured, in part, by real property security outside the State of Georgia.<sup>498</sup> Apportionment is not available for Georgia resident lenders, notwithstanding that a majority of the security for the debt may be located outside the state.<sup>499</sup> Under the previous Regulations, if a \$20,000,000 indebtedness was secured by two real property assets having a value of \$15,000,000 each, one inside Georgia and one in another state, the intangible recording tax would have been apportioned on the basis of 50% of the maximum tax of \$25,000, or \$12,500. Under the new Regulations, the

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<sup>498</sup> GA. COMP. R. & REGS. r. 560-11-8-.07(2) (1996).

<sup>499</sup> *Id.* r. 560-11-8-.07(1).

Department of Revenue has taken the position that apportionment does not reduce the tax itself, but will instead only reduce the amount of indebtedness that is the basis- for calculation of the maximum tax payable. In the above example, the Department of Revenue takes the position that the Georgia real property, standing alone, has sufficient value to justify imposition of the maximum \$25,000 tax. Although the reasoning for the change is somewhat difficult to follow, the following is an excerpt from a letter dated September 23, 1996, from the Department of Revenue, responding to a comment letter which objected to the proposed change in the apportionment Regulations:

O.C.G.A. Section 48-6-69(b) requires the payment of “that proportion of the tax that would otherwise be required under this article,” and 48-6-61 establishes the tax to be “\$1.50 for each \$500.00 or fraction thereof of the face amount of the note.” The cap does not reduce the tax itself, rather it limits the maximum amount of the tax otherwise due that is payable on a single indebtedness, to wit: “The maximum amount of any intangible recording tax *payable* shall be \$25,000.” The cap language was clearly meant to establish the maximum amount of tax payable once the total tax due has been calculated.

Because of the change of the position of the Department of Revenue regarding apportionment, because the calculation of the total tax due is, in part based upon the relative real property values, and because of the difficulty in calculating the maximum tax payable, the Committee recommends that no opinion be given in transactions involving security outside the State of Georgia held by non-resident lenders. Whenever possible, the Committee recommends that an advance ruling be obtained.

### **XXIII. RELATED ISSUES IN OPINIONS FOR REAL ESTATE SECURED TRANSACTIONS**

**23.01 Zoning, Land Use and Development.** No model opinion is recommended by the Committee with regarding to zoning, land use and development. Interpretive Standard 2(9) contains an express exclusion as to matters of local law, zoning, land use and development laws. Accordingly, any opinion given pursuant to this Report will exclude an opinion as to these matters.

An important purpose of a model opinion is to establish uniformity; however, uniformity does not exist in the context of zoning, land use or development. Moreover, real estate lawyers are not generally retained or qualified to provide assurance of compliance with all zoning requirements and regulation of land use and development.

Local governments develop a wide variety of controls on land use and development to meet local needs, and differences in these controls are significant from jurisdiction to jurisdiction. The unique nature of real property is a basic tenet of real estate law, and there are a myriad of common uses even for similar properties. Each real estate transaction raises different questions regarding zoning, subdivision, tax lots, annexation, permits, private restrictions and statutory requirements.

There are a number of persuasive reasons why the Opinion Giver is not qualified to insure compliance with zoning, land use or development requirements. There are relatively few judicial

decisions regarding land use and development issues, and the Opinion Giver's comfort in relying upon the few decisions available for review is diminished in view of the lack of uniformity of governmental regulations. Governing bodies often have overlapping jurisdictions and may hold differing views with regard to the state of the law. Administrative policies are often not published, and policies and records of authorities are often not available; the use of informal interpretations routinely creates uncertainty. Laws and ordinances often use ambiguous language and are not internally consistent. A lawyer's interpretation is often irrelevant due to deference to interpretive and political decisions of local governments and administrative officials. Lack of expertise usually constrains lawyers' due diligence efforts. Issues tend to involve skills lawyers do not have and services lawyers are not licensed to perform. The technical nature of the due diligence required often necessitates the employment of experts or specialists and usually requires reliance upon facts that are subject to change over time.

Counsel can add value to a transaction with respect to zoning, land use and development on a case-by-case basis outside the context of an opinion by addressing specific issues, identifying laws applicable in unusual circumstances, and reviewing and analyzing laws to determine the information needed to evidence compliance. Counsel may also assist in determining the level of investigation or verification that should be required, reviewing and analyzing the reports of other professionals, necessary unless significant cost can reasonably be saved for Borrower by relying upon its counsel. The Opinion Recipient should be better served by its lawyer's evaluation conducted for its benefit than by an opinion of the counsel for Borrower.

In lieu of an opinion of Borrower's counsel, the Committee recommends that counsel for the Opinion Recipient consult with any construction consultant or other professionals retained by the Opinion Recipient. Based on this consultation, counsel for the Opinion Recipient should determine the scope of due diligence and the extent of analysis of information submitted by Borrower that is to be performed by such counsel, given the nature of the loan and the property. Appropriate due diligence in many cases includes the following:

- (i) an as-built survey of the Real Property in the case of improved property;
- (ii) representations and warranties from Borrower as appropriate given the nature of the Loan, Borrower, the Property and the occupancy of the Real Property;
- (iii) certificates of professional architects, engineers, contractors and surveyors given the nature of the Loan and the Real Property;
- (iv) confirmation of zoning by the applicable governmental authority as appropriate given the nature of the Loan and the Real Property (including obtaining available zoning endorsements from any title insurance provider);
- (v) governmental permits and approvals for land use and development as necessary given the nature of the Loan and the Real Property;
- (vi) confirmation of availability from utility providers as appropriate given the nature of the Loan and the Real Property;

- (vii) to the extent available, confirmation that any subdivision requirements have been satisfied;
- (viii) identification of any laws applicable in unusual circumstances and identification and review of required confirmation of compliance; and
- (ix) a zoning endorsement to the lender's title insurance policy.

The recommendation of no model opinion is consistent with the Legal Opinion Accord. The Legal Opinion Accord contains an express exclusion of opinions on federal and state land use and subdivision laws and regulations and local law unless the opining attorney has explicitly addressed the specific legal issues in the opinion letter.<sup>500</sup> The Real Estate Adaptation concurs with this conclusion and cautions that the use of a legal opinion to provide assurance on matters of local law should be carefully considered, particularly in the context of cost effectiveness.<sup>501</sup>

**23.02 Environmental Compliance.** No model opinion is recommended by the Committee with regard to environmental matters. Interpretive Standard 2(8) contains an express exclusion as to environmental laws. Accordingly, an Opinion Letter given pursuant to this Report will exclude an opinion as to environmental law.

Although the Opinion Recipient acquiring a security interest in real property has a legitimate interest in determining the environmental conditions of the property at time the Loan is made, real estate lawyers are not generally qualified to provide assurance of compliance with environmental laws and regulations. The factual and technical determinations concerning environmental issues are usually extensive and beyond the expertise or scope of employment of Borrower's counsel. Environmental laws are in a state of fluctuation due to judicial and administrative interpretation as well as legislative efforts to amend or clarify laws. In addition, the enforcement of environmental laws is subject to unpublished internal policies of the regulating agencies, and Borrower's counsel may not be able to render opinions as a matter of law as to how certain environmental laws may be applied or enforced in a particular case.<sup>502</sup>

An Opinion Letter based on reports from environmental experts generally is inappropriate because the Opinion Giver does not have the expertise needed to evaluate the reports. The degree of due diligence required for a lawyer who has not been involved in the permitting process of many environmental laws may make an opinion by Borrower's counsel extremely burdensome and expensive. Even a lawyer who has been involved extensively in the permitting process may not be able to opine on many issues implicitly included in a request for an opinion.<sup>503</sup> When the

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<sup>500</sup> *Third-Party Legal Opinion Report, supra* note 3, at 503-04.

<sup>501</sup> *Report on Adaptation of Accord, supra* note 4, at 579-80.

<sup>502</sup> See Joint Committee of the Real Property Law Section of the State Bar of Cal. & the Real Property Section of the Los Angeles County Bar Association, *Legal Opinions in California Real Estate Transactions*, 22 REAL PROP. PROB. & TR. J. 373, 426 (1987).

<sup>503</sup> *Id.* at 427-28.

Opinion Giver relies on the expert opinions of others, the Opinion Recipient cannot determine upon what information the Opinion Giver is relying or who provided the information.<sup>504</sup>

In lieu of an opinion of Borrower's counsel in a real estate secured transaction, it may be appropriate in certain circumstances for the Opinion Recipient and its counsel to require some or all of the following:

(i) an environmental audit report prepared by a qualified professional as well as copies of any environmental permits, such as air quality permits, water quality permits, land disturbance permits and stormwater discharge permits, required for Borrower's use of the Real Property;

(ii) representations and warranties of Borrower to the effect that the Real Property complies with all applicable environmental laws and regulations, that all permits have been secured for the lawful construction, operation and use of the Real Property, and that no violation notices have been received;

(iii) where the Real Property is to be used for an activity governed by environmental laws and Borrower's counsel has been involved in the permitting process, performance by Borrower's counsel of a limited investigation as to the applicability and status of such permits and approvals for the particular project and preparation of a report to the Opinion Recipient;

(iv) an indemnification by Borrower with respect to environmental liabilities;  
and<sup>505</sup>

(v) an ALTA 8.1 environmental protection lien endorsement to the lender's title insurance policy.

**23.03 Building Code and Disability Access Compliance.** No model opinion is recommended by the Committee with regard to building code or disability access compliance, including compliance with the Americans with Disabilities Act.<sup>506</sup> Interpretive Standard 2(20) contains an express exclusion as to building codes and disability access laws. Accordingly, any opinion given pursuant to this Report will exclude an opinion as to building codes and disability access laws.

As in the case of opinions concerning zoning, land use and development, opinion letters concerning building code and disability access compliance require the Opinion Giver to make

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<sup>504</sup> Alan Joel Robin & Edward M. Pollack, *An Approach to Opinion Letters - The Silverado Accord and Other Model Forms from a Recipient's Perspective*, 29 REAL PROP. PROB. & TR. J. 611, 623 (1994).

<sup>505</sup> Lenders' counsel often require that environmental indemnifications made by a borrower survive the payment of the loan and therefore are not included in or secured by the deed to secure debt in order that such indemnities will not be terminated upon cancellation of the deed to secure debt. This approach may also protect the lender from the extinguishment of liability subsequent to foreclosure if the lender does not confirm the sale under power pursuant to O.C.G.A. § 44-14-161 (1982).

<sup>506</sup> Americans with Disabilities Act, 42 U.S.C. §§ 12101-23 (1994).

factual and technical determinations that are beyond the lawyer's expertise or scope of representation. In addition, there are relatively few judicial decisions regarding building code issues, and there is a lack of uniformity of governmental regulations. Administrative policies are often not published, and policies and records of authorities are often not available; the use of informal interpretations may create uncertainty. Issues tend to involve skills lawyers do not have and services lawyers are not licensed to perform. The technical nature of the due diligence required typically necessitates the employment of experts or specialists.

In lieu of an opinion of Borrower's counsel, it may be appropriate in certain circumstances for a the Opinion Recipient to look to professionals such as licensed architects to render reports or statements regarding the compliance of the improvements securing a loan with building codes and disability access laws.

## APPENDIX I

### INTERPRETIVE STANDARDS

#### APPLICABLE TO CERTAIN LEGAL OPINIONS TO THIRD PARTIES IN GEORGIA REAL ESTATE SECURED TRANSACTIONS

Effective March 17, 2009

#### **Purpose and Scope of Interpretive Standards**

The purpose of these Interpretive Standards is to explain the meaning of Opinion Letters (which incorporate these Interpretive Standards by reference) addressed to non-client third parties in connection with real estate secured transactions. Included in these Interpretive Standards are general qualifications to legal opinions, common assumptions as to fact and law, standards governing an opinion that a Loan Document is “enforceable” and interpretations of certain recurring legal opinions and confirmations of fact. Incorporation in an Opinion Letter of these Interpretive Standards is intended to shorten the content of the letter while expanding the mutual understanding of its meaning. Any part of these Interpretive Standards, however, may be overridden by a specific statement in an Opinion Letter which supersedes a contrary Interpretive Standard.

#### **Definitions of Terms Used in Interpretive Standards**

The following terms have the following meanings when used in these Interpretive Standards:

*Borrower* means the entity which is the client of the Opinion Giver and on whose behalf the Opinion Letter is given.

*Committee* means the Legal Opinion Committee of the Real Property Law Section of the State Bar of Georgia.

*Federal Bankruptcy Code* means the federal statutes governing bankruptcy in effect as of the date of the Opinion Letter.

*Financing Statement* means the UCC financing statement to be filed for the purpose of perfecting the Opinion Recipient’s security interest in the Personal Property (other than fixtures, as-extracted collateral, crops or timber to be cut).

*Fixture Filing* means a UCC financing statement that is filed as a fixture filing for the purpose of perfecting the Opinion Recipient’s security interest in the Property consisting of goods that are or are to become fixtures.

*GBCC* means the Georgia Business Corporation Code in effect on the date of the Opinion Letter.

*GLLCA* means the Georgia Limited Liability Company Act in effect on the date of the Opinion Letter.

*GRULPA* means the Georgia Revised Uniform Limited Partnership Act in effect on the date of the Opinion Letter.

*Guarantor* means the person or entity guaranteeing the payment and performance of some or all Borrower's obligations under the Loan Documents pursuant to the terms of the Guaranty.

*Guaranty* means the instrument whereby Guarantor guarantees the payment and performance of some or all of Borrower's obligations under the Loan Documents.

*Interest Charges* means all interest, fees or other charges for the use of money or extension of credit charged, paid, collected or contracted for under the terms of the Loan Documents.

*Interpretive Standards* means these Interpretive Standards Applicable to Certain Legal Opinions to Third Parties in Georgia Real Estate Secured Transactions.

*Law(s)* means the constitution, statutes, judicial and administrative decisions, and rules and regulations of governmental agencies of the Opining Jurisdiction and, unless otherwise specified, federal law.

*Loan* means the indebtedness incurred by Borrower in connection with the Loan Transaction.

*Loan Documents* means the instruments evidencing and securing the Loan Transaction and identified in the Opinion Letter, which contain one or more obligations of Borrower related to the Loan Transaction.

*Loan Transaction* means the real estate secured transaction with respect to which the Opinion Letter is given.

*Local Law* means the statutes, administrative decisions, and rules and regulations of any county, municipality or subdivision, whether created at the federal, state or regional level.

*Note* means the legal instrument evidencing the obligation of Borrower to repay the loan.

*Opining Jurisdiction* means a jurisdiction, the law of which the Opinion Giver addresses.

*Opinion* means a legal opinion contained in an Opinion Letter.

*Opinion Giver* means the law firm or lawyer giving an Opinion.

*Opinion Letter* means the letter containing one or more Opinions or confirmations of fact by the Opinion Giver.

*Opinion Recipient* means the person or persons to whom the Opinion Letter is addressed.

*Organizational Documents* means Borrower's articles of incorporation and bylaws (if Borrower is a corporation) or Borrower's partnership agreement and certificate (if Borrower is a partnership) or Borrower's articles of organization and operating agreement (if Borrower is a limited liability company).

*Other Agreement* means a document (other than the Loan Documents and the Guaranty) to which Borrower is a party or by which Borrower is bound.

*Other Counsel* means counsel (other than the Opinion Giver) providing a legal opinion or confirmation of fact on aspects of the Loan Transaction directed to the Opinion Recipient or the Opinion Giver or both.

*Other Jurisdiction* means any jurisdiction (other than the Opining Jurisdiction) the law of which is stipulated to be the governing law.

*Personal Property* means the tangible and intangible personal property of Borrower that is security for the Loan.

*Primary Lawyer Group* has the meaning defined by Interpretive Standard 7.

*Property* means the Real Property and the Personal Property of Borrower that is security for the Loan.

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

*Real Property* means the real property of Borrower that is security for the Loan.

*Report* means this Amended and Restated Report on Legal Opinions to Third Parties in Georgia Real Estate Secured Transactions.

*Security Deed* means the deed to secure debt and security agreement conveying security title to and a security interest in the Real Property and granting a security interest in the Personal Property for the purpose of securing the obligations of Borrower evidenced by the Note and certain of the other Loan Documents.

*UCC* means the Uniform Commercial Code in effect in the State of Georgia on the date of the Opinion Letter.

*UCC Collateral* means such of the Personal Property and fixtures described in the Security Deed as collateral in which a security interest may be created under the UCC in effect in the State of Georgia on the date of the Opinion Letter.

*ULPA* means the Uniform Limited Partnership Act in effect in the State of Georgia on the date of the Opinion Letter.

*UPA* means the Uniform Partnership Act in effect in the State of Georgia on the date of the Opinion Letter.

*Usury Laws* mean the laws governing interest and usury in effect in the State of Georgia on the date of the Opinion Letter.

### **Qualifications to Each Opinion**

1. Law Addressed by Opinion.

If an Opinion Letter is expressly limited to the Law of one or more specified jurisdictions or to one or more discrete laws within one or more jurisdictions, an Opinion with respect to any other law, or the effect of any other law, is disclaimed.

2. Scope of Opinion.

An Opinion covers only those matters both essential to the conclusion stated by the Opinion and, based upon prevailing norms and expectations found among experienced legal practitioners in the Opining Jurisdiction, reasonable in the circumstances. Other matters are not included in an Opinion by implication. The following matters, including their effects and the effects of noncompliance, are not covered by implication or otherwise in any Opinion, unless coverage is specifically addressed in the Opinion Letter as provided by Interpretive Standard 11:

- (1) Local law
- (2) Antitrust and unfair competition law
- (3) Securities law
- (4) Fiduciary obligations
- (5) Pension and employee benefit law, e.g., ERISA
- (6) Regulations G, T, U and X of the Board of Governors of the Federal Reserve System
- (7) Fraudulent transfer law
- (8) Environmental law
- (9) Zoning, land use, subdivision and other development laws
- (10) Hart-Scott-Rodino, Exon-Florio and other laws related to filing requirements, other than charter-related filing requirements, such as requirements for filing articles of merger
- (11) Bulk transfer law
- (12) Tax law
- (13) Patent, copyright, trademark and other intellectual property law
- (14) Racketeering law, e.g., RICO
- (15) Criminal statutes of general application, e.g., mail fraud and wire fraud
- (16) Health and safety law, e.g., OSHA
- (17) Labor law

- (18) Law concerning national or local emergency
- (19) The status of title to the Property or the priority of any lien on or security title to the Property
- (20) Law concerning access by the disabled and building codes
- (21) Laws concerning anti-terrorism or money laundering, and the rules, regulations, and policies promulgated thereunder, including the USA PATRIOT Act of 2001, 107 Public Law 56 (October 26, 2001), Executive Order 13224 effective September 24, 2001, and the International Emergency Economic Power Act, 50 U.S.C. §1701 et seq., and any foreign asset control regulations of the United States Treasury Department

3. Unwarranted Reliance.

The Opinion Giver may not rely for purposes of the Opinion Letter upon information, whether or not in a Public Authority Document, or upon an assumption otherwise appropriate (except in the case of arbitrary or hypothetical assumptions contained in an overriding agreement referred to in Interpretive Standard 11 or as stated in Interpretive Standard 24 with respect to choice of law) if the Opinion Giver has knowledge that such information or assumption is false, or recognizes factors that compel the conclusion that reliance upon such information or assumption would be unreasonable. “Knowledge” or “recognizes” for purposes of the foregoing sentence and wherever used in these Interpretive Standards means the current awareness of information by any lawyer in the Primary Lawyer Group.

4. Reliance on Other Sources of Information.

Subject to Interpretive Standard 3, the Opinion Giver may rely, without investigation, upon facts established by a Public Authority Document, facts provided by an agent of Borrower or others and, if disclosed in the Opinion Letter, facts asserted by a party to the Loan Transaction in a representation or warranty embodied in the Loan Documents, provided:

- (1) if not established by a Public Authority Document, the facts do not constitute a statement, directly or in practical effect, of the legal conclusion in question;
- (2) the person providing facts is, in the Opinion Giver’s professional judgment, an appropriate source; and
- (3) if the facts are set forth in a certificate, the Opinion Giver has used reasonable professional judgment as to its form and content.

5. Scope of Opinion Giver’s Inquiry.

The Opinion Giver is presumed to have reviewed such documents and given consideration to such matters of law and fact as the Opinion Giver deemed appropriate in order to give an Opinion or confirmation of fact, unless the Opinion Giver has expressly limited the scope of inquiry in the Opinion Letter. A recital of specific documents reviewed or specific procedures followed, without more, is not a limitation on the scope of the Opinion Giver’s inquiry for purposes of the foregoing presumption.

6. Opinion or Confirmation Qualified by Knowledge of The Opinion Giver.

Whenever an Opinion Letter qualifies an Opinion or confirmation of fact by the words “to our knowledge,” “known to us” or words of similar meaning, the quoted words mean the current awareness by lawyers in the Primary Lawyer Group of information such lawyers recognize as relevant to the Opinion or confirmation so qualified. The quoted words do not include information not within such current awareness that might be revealed if a canvass of lawyers outside the Primary Lawyer Group were made, if the Opinion Giver’s files were searched or if any other investigation were made.

7. “Primary Lawyer Group.”

“Primary Lawyer Group” means that lawyer in the Opinion Giver’s organization who signs the Opinion Letter and, solely as to information relevant to an Opinion or confirmation issue, any lawyer in the Opinion Giver’s organization who is primarily responsible for providing the response concerning the particular issue.

8. Who May Rely On Opinion.

The Opinion Recipient and designated principals of the Opinion Recipient, if the Opinion Recipient is identified in the Opinion Letter as an agent for designated principals, are the only persons entitled to rely upon any Opinion or confirmation of fact contained in the Opinion Letter, and then only for purposes of the Loan Transaction.

9. Other Counsel.

The Opinion Giver’s responsibility for the opinion of Other Counsel depends upon what is stated in the Opinion Letter. A statement that the Opinion Giver has relied on an opinion of Other Counsel means only that the Opinion Giver believes that (i) based upon Other Counsel’s professional reputation, it is competent to render such opinion, and (ii) such opinion on its face appears to address the matters upon which the Opinion Giver places reliance. A statement that the Opinion Giver believes that the Opinion Recipient is justified in relying on an opinion of Other Counsel means only that the Opinion Giver believes that, based upon Other Counsel’s professional reputation, it is competent to render such opinion. A statement that the Opinion Giver concurs in an opinion of Other Counsel or the addressing of the Other Counsel’s opinion to the Opinion Giver and the Opinion Giver’s remarking such opinion means that the Opinion Giver has assumed the responsibility for verifying the accuracy of the opinion of Other Counsel. If no concurrence by the Opinion Giver is expressed, no concurrence is implied. If the Opinion Giver merely identifies or remains silent with respect to the opinion of Other Counsel, the Opinion Giver assumes no responsibility for Other Counsel’s opinion, and the Opinion Recipient may not assume that the Opinion Giver has relied upon Other Counsel’s opinion.

10. Updating.

An Opinion Letter speaks as of the date of its delivery, and the Opinion Giver has no obligation to advise the Opinion Recipient or anyone else of any matter of fact or law thereafter occurring, whether or not brought to the attention of the Opinion Giver, even though that matter affects any analysis or conclusion in the Opinion Letter.

11. Overriding Agreement.

The Opinion Giver and the Opinion Recipient may agree upon arbitrary or hypothetical assumptions that may not be true and upon qualifications, standards or interpretations inconsistent with these Interpretive Standards. Any such agreement with respect to such assumptions, qualifications, standards or interpretations, when described with reasonable particularity in the Opinion Letter, will supersede any contrary provision of these Interpretive Standards.

**Assumptions to Each Opinion**

12. Assumptions As To Parties Other Than Borrower.

The Opinion Recipient in the Loan Transaction has acted in good faith and without notice of any defense against enforcement of rights created by, or adverse claim to any property transferred as part of, the Loan Transaction. Each party to the Loan Transaction other than Borrower and any Guarantor has (a) complied with all laws applicable to it that affect the Loan Transaction, and (b) duly and validly authorized, executed and delivered the Loan Documents. The Loan Documents are valid and enforceable in accordance with their respective terms as to each party to the Loan Documents other than Borrower and any Guarantor.

13. Assumptions As To Natural Persons and Documents.

Each natural person acting on behalf of any party to the Loan Transaction has sufficient legal competency to carry out such person's role in the Loan Transaction. Each Loan Document submitted to the Opinion Giver for review is accurate and complete, each Loan Document purporting to be original is authentic, each Loan Document purporting to be a copy conforms to an authentic original, and each signature of any party on a Loan Document is genuine.

14. Assumptions As To Loan Transaction.

The Loan Transaction complies with any test required by law of good faith or fairness. Each party will act in accordance with the terms and conditions of the Loan Documents.

15. Assumption As To Accessibility of Laws.

Each Law for which the Opinion Giver is deemed to be responsible is published, accessible and generally available to lawyers practicing in the Opining Jurisdiction.

16. Assumptions As To Borrower.

No discretionary act of Borrower or on its behalf will be taken after the date of the Loan Transaction if such act might result in a violation of law or breach or default under any agreement, decree, writ, judgment or court order. Borrower will obtain all permits and governmental approvals and take all other actions which are both (i) relevant to performance of the Loan Documents or consummation of the Loan Transaction, and (ii) required in the future under applicable law. Borrower holds requisite title and rights to the Property. Borrower is engaged only in a lawful business.

17. Assumptions As To Other Agreement.

Any Other Agreement will be enforced as written.

18. Assumption As To Understandings.

There is no understanding or agreement not embodied in a Loan Document among parties to the Loan Transaction that would modify any term of a Loan Document or any right or obligation of a party.

19. Assumption As To Absence of Mistake, Fraud or Duress.

With respect to the Loan Transaction and the Loan Documents, there has been no mutual mistake of fact and there exists no fraud or duress.

20. Assumption As To Invalidity.

No issue of unconstitutionality or invalidity of a relevant Law exists unless a reported case has so held.

21. Assumption as to Recordation.

The Loan Documents which are to be recorded have been or will be recorded and/or filed in all places necessary to create the lien and security title as provided therein, and all necessary taxes and fees due upon recording or filing have been or will be paid.

22. Assumption as to Description of the Property.

The description of the Property is accurate and is sufficient under Georgia law to provide notice to third parties of the liens, security title and security interests provided by the Loan Documents and to create a binding contractual obligation.

### **Remedies Opinion Standards**

23. Meaning of Model Remedies Opinion - Generic Qualification and Generic Qualification Assurance.

A. General Meaning. The Model Remedies Opinion, with respect to the Loan Documents, to which Borrower is a party, and the Guaranty, to which the Guarantor is a party, subject to the limitations contained in these Interpretive Standards, means that:

(1) As to each Loan Document and as to the Guaranty, a contract has been formed under the law of Georgia.

(2) Under laws applying to contracts like the Loan Documents, to parties like Borrower, and to transactions like the Loan Transaction, although certain obligations imposed on and agreements of Borrower and certain rights, benefits and remedies conferred by

Borrower may not be given effect, effect will be given to those remedies in the Loan Documents providing for (i) judicial enforcement of the obligation to repay the principal of the Loan, together with interest thereon, subject to limitations of usury and subject to the requirement of confirmation of a foreclosure, conducted prior to obtaining a judgment on the note, as a prerequisite to an action to obtain a deficiency judgment, (ii) the acceleration of the obligation to repay such principal and interest upon a material default in the payment of principal or interest, and (iii) the non-judicial foreclosure by exercise of power of sale in accordance with Georgia law of the security title to the Real Property upon maturity or upon acceleration pursuant to (ii) above.

(3) Under laws applying to contracts like the Guaranty, to parties like Guarantor, and to transactions like the Loan Transaction, although certain obligations and agreements of Guarantor, certain waivers and consents made by Guarantor, and certain rights, benefits and remedies conferred by Guarantor may not be given effect, effect will be given in the Guaranty to that remedy providing for the judicial enforcement of Guarantor's obligation to pay the principal together with interest thereon, both as provided in the Note, to the extent guaranteed pursuant to the Guaranty, subject to limitations of usury.

(4) The Security Deed is in a form sufficient to create a lien on or security title in all right and interest of Borrower in the Real Property.

B. Existence of Contract. The professional judgment reflected in subparagraph A(1) above requires the Opinion Giver to conclude that:

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

(2) The Loan Documents do not, or the Guaranty does not, as applicable, violate law as to formation of contracts that would prevent a court presented with the Loan Documents or the Guaranty, as applicable, from enforcing them.

(3) Borrower does not presently have available any contractual defenses as to the enforceability of those remedies of the Loan Documents specified in (i) - (iii) of Paragraph A(2) above.

(4) Guarantor does not presently have available any contractual defenses as to the enforceability of the remedy specified in Paragraph A(3) above.

#### 24. Choice of Law in Model Remedies Opinion.

If a Loan Document or the Guaranty, as applicable, covered by the Model Remedies Opinion contains no governing law provision, or contains a governing law provision which names the Opining Jurisdiction, the Model Remedies Opinion means that if Borrower or Guarantor, as applicable, is brought before a proper court of the Opining Jurisdiction to enforce rights under the Loan Document or the Guaranty, as applicable, and if such court applies the substantive law of

the Opining Jurisdiction, the result will be as stated in the Opinion and these Interpretive Standards.

If the Loan Document or the Guaranty, as applicable, contains a governing law provision which names a jurisdiction other than the Opining Jurisdiction, or if the Loan Document or the Guaranty, as applicable, contains a governing law provision which names a jurisdiction other than the Opining Jurisdiction as to certain provisions and which names the Opining Jurisdiction as to other provisions, the Model Remedies Opinion does not opine whether any court of any jurisdiction will give effect to the governing law provision in the Loan Document or the Guaranty, as applicable, but assumes that if Borrower or Guarantor, as applicable, is brought before a proper court of the Opining Jurisdiction to enforce rights under the Loan Document or the Guaranty, as applicable, such court will apply the substantive law of the Opining Jurisdiction, notwithstanding the governing law provision in the Loan Document or the Guaranty, as applicable, and based upon such assumption the result will be as stated in the Opinion and these Interpretive Standards.

The Model Remedies Opinion does not extend to the content or effect of any law other than the law of the Opining Jurisdiction and federal law.

25. Exceptions to Model Remedies Opinion in Addition to Generic Qualification.

Any Model Remedies Opinion contained in an Opinion Letter which incorporates these Interpretive Standards by reference will be deemed not to address the matters excluded in Interpretive Standard 2 and is subject to the following exceptions:

(1) The effect of bankruptcy, insolvency, reorganization, moratorium and other similar laws affecting the rights and remedies of creditors. This includes the effect of the Federal Bankruptcy Code in its entirety, including matters of contract rejection, fraudulent conveyance and obligation, turn-over, preference, equitable subordination, automatic stay, conversion of a non-recourse obligation into a recourse obligation, and substantive consolidation. This also includes state laws regarding fraudulent transfers, obligations, and conveyances, including O.C.G.A. Sections 18-2-20 to 18-2-80, and state receivership laws.

(2) The effect of general principles of equity, whether applied by a court of law or equity. This includes the following concepts: (a) principles governing the availability of specific performance, injunctive relief or other traditional equitable remedies; (b) principles affording traditional equitable defenses (e.g., waiver, laches and estoppel); (c) good faith and fair dealing; (d) reasonableness; (e) materiality of the breach; (f) impracticability or impossibility of performance; (g) the effect of obstruction, failure to perform or otherwise to act in accordance with an agreement by any person other than Borrower or Guarantor, as applicable; (h) the effect of Section 1-102(3) of the UCC; and (i) unconscionability.

(3) The effect and possible unenforceability of contractual provisions providing for choice of governing law.

(4) As to the Guaranty, the possible unenforceability of provisions purporting to waive certain rights of Guarantor.

26. Model Usury Opinion

The Model Usury Opinion means that the Loan Documents and the Interest Charges provided for therein are in compliance with the Usury Laws, subject to the following exceptions: (i) no opinion is expressed with respect to the compliance with the Usury Laws of any provisions in the Loan Documents that purport to permit Interest Charges, however denominated and regardless of whether denominated as interest, to be charged, paid, collected or contracted for at a rate in excess of 5% per month if and to the extent a violation of O.C.G.A. Section 7-4-18 results (whether due to prepayment, acceleration, redemption, cancellation, termination or otherwise), and (ii) no opinion is expressed with respect to the compliance with the Usury Laws of any provisions in the Loan Documents that purport to permit interest to be charged or paid on interest if and to the extent such provisions result in a violation of O.C.G.A. Section 7-4-17.

The Model Usury Opinion does not address legal issues relating to terms of the Loan Transaction other than those pertaining to Interest Charges, such as those pertaining to the enforceability of provisions describing the order of application of payments, imposing increased interest rates or late payment charges upon delinquency and payment or default, or providing for liquidated damages or for penalties, charges, or premiums on prepayment, acceleration, redemption, cancellation or termination.

Note: The Model Usury Opinion pertains only to loans of \$250,000 or more governed by O.C.G.A. Section 7-4-2(a)(i)(B).

27. Model UCC Opinion.

A. General Meaning. The Model UCC Opinion, subject to the limitations contained in these Interpretive Standards, means that:

(1) The Security Deed creates in favor of the Opinion Recipient a security interest in such of the Personal Property and fixtures described in the Security Deed as collateral in which a security interest may be created under the UCC in effect in the State of Georgia (the “UCC Collateral”).

(2) To the extent that a security interest may be perfected by the filing of a financing statement in the State of Georgia, (i) the effective filing of the Financing Statement in the UCC records of the Office of the Clerk of the Superior Court of any county in the State of Georgia will result in the perfection of such security interest in the UCC Collateral (other than fixtures, as-extracted collateral, crops or timber to be cut) described in the Financing Statement, and (ii) the further recordation of the Fixture Filing in the real property records of the Office of the Clerk of the Superior Court of the county in which the Real Property is located will result in the perfection of such security interest in the UCC Collateral described in the Fixture Filing that consists of goods that are or are to become fixtures.

B. Implied Assumptions and Exceptions. The Model UCC Opinion is subject to the following implied assumptions and exceptions:

(1) The Model UCC Opinion assumes that Borrower has sufficient rights in the UCC Collateral for the security interest of the Opinion Recipient to attach thereto.

The Model UCC Opinion does not provide assurances that Borrower has title to the UCC Collateral.

(2) The Model UCC Opinion assumes that contemporaneously with the delivery of the opinion to the Opinion Recipient, the Opinion Recipient will have either advanced to Borrower the proceeds of the Loan to be secured by the security interest or entered into a commitment to make the Loan.

(3) The Model UCC Opinion assumes that the name and address of the secured party and the name of the record owner or lessee set forth in the Financing Statement and the Fixture Filing are accurate.

(4) The Model UCC Opinion assumes that the description of the Real Property is accurate (as provided in Interpretive Standard 22).

(5) The Model UCC Opinion assumes that the Financing Statement is or will be filed and that such filing is effective.

(6) The Model UCC Opinion assumes that the security interest is subject to the effects of bankruptcy and insolvency law (as provided in Interpretive Standard 25(l)).

(7) The Model UCC Opinion assumes that the security interest is subject to equitable principles (as provided in Interpretive Standard 25(2)).

(8) The Model UCC Opinion does not assure that the Security Deed, the Financing Statement or the Fixture Filing adequately describes the collateral they purport to cover, except to the extent that the Personal Property collateral is described by reference to the types of collateral defined in the UCC, other than commercial tort claims and, in consumer transactions, consumer goods, a security entitlement, a securities account, or a commodity account.

(9) The Model UCC Opinion is subject to the implied qualification that the perfection of a security interest may be lost under circumstances set forth in Section 9-315 of the UCC with respect to UCC Collateral that is converted into proceeds.

(10) The Model UCC Opinion is subject to the implied qualification that perfection terminates unless appropriate continuation statements are filed within six months prior to the end of each successive five year period from the date of filing.

(11) The Model UCC Opinion does not cover future events that might affect perfection.

(12) With respect to fixtures, the Model UCC Opinion covers only those fixtures that are attached to the Real Property covered by the Security Deed.

(13) The Model UCC Opinion does not cover any security interest in ordinary building materials that are incorporated into an improvement on the Real Property.

## **Interpretations**

### 28. Model Corporate Status Opinion.

An Opinion to the effect that Borrower was duly organized as a corporation and is existing in good standing under the laws of the State of Georgia (Model Corporate Status Opinion) is subject to the following understandings:

(1) “was incorporated” means that Borrower properly complied with Georgia’s statutory requirements for incorporation;

(2) “duly organized as a corporation” means that Borrower properly complied with Georgia’s statutory requirements for organization.

(3) “is existing” means that Borrower is a corporation which has not ceased to exist under the GBCC;

(4) the Opinion refers to the status of Borrower only for purposes of and under the GBCC; and

(5) “good standing” has no official meaning under the GBCC, and for purposes of any Opinion with respect to a corporation subject to the GBCC means:

(i) Borrower has filed no notice of intent to dissolve under Section 1403 of the GBCC;

(ii) the Secretary of State has signed no certificate of dissolution with respect to Borrower;

(iii) the Superior Court of the county of Borrower’s registered office has entered no decree ordering Borrower dissolved; and

(iv) Borrower has satisfied its tax and annual registration requirements under Section 1420 of the GBCC.

An Opinion limited to the conclusion that Borrower “is a corporation” means that third parties may not challenge Borrower’s corporate existence, the State of Georgia recognizes such existence, and the state may challenge Borrower’s incorporation only under the circumstances described in Section 203(b) of the GBCC.

### 29. Model Corporate Powers Opinion.

An Opinion to the effect that Borrower has the power to execute and deliver a Loan Document, to perform its obligations under a Loan Document, to own and use the Property and to conduct its business (Model Corporate Powers Opinion) is subject to the following understandings:

(1) the Opinion refers only to the GBCC and Borrower's articles of incorporation as sources of corporate power;

(2) "power" refers only to whether or not the acts referenced in the Opinion are *ultra vires*;

(3) the Opinion is built upon an assumption that the Model Corporate Status Opinion could also be given;

(4) "own and use" refers to every right Borrower has in the Property, and the Opinion does not address corporate assets other than the Property; and

(5) the Opinion refers to the Property owned and used and business conducted on the date of the Opinion, and not those contemplated for future ownership, use or conduct except to the extent the acquisition of the Property or conduct of its business is concurrent with, and recognized by, the Opinion Giver, as constituting part of, the consummation of the Loan Transaction.

30. Model Corporate Acts Opinion.

An Opinion to the effect that Borrower has duly authorized the execution and delivery of, and performance by Borrower under, the Loan Documents and has duly executed and delivered the Loan Documents (Model Corporate Acts Opinion) is subject to the following understandings:

(1) the Opinion affirms compliance with all corporate action necessary under the GBCC, Borrower's articles of incorporation and bylaws and, if applicable, Borrower's duly adopted policies and practices for delegation of authority in order to authorize the execution and delivery of, and performance under, the Loan Documents;

(2) the Opinion affirms that the execution and delivery of the Loan Documents was, and Borrower's performance of its obligations under the Loan Documents in accordance with the Loan Documents as written will be, in accordance with the authorization;

(3) the Opinion is built upon an assumption that the Model Corporate Status Opinion and the Model Corporate Powers Opinion could also be given; and

(4) the Opinion addresses no law other than the GBCC and applicable law of agency.

31. Model Partnership Status Opinion.

A. Limited Partnerships.

An opinion to the effect that Borrower was formed as a limited partnership and is existing in good standing under the laws of the State of Georgia (Model Partnership Status Opinion) is subject to the following understandings:

(1) “was formed” means that Borrower properly complied with the Georgia statutory requirements for formation as a limited partnership;

(2) “is existing” means that Borrower is a limited partnership which has not been terminated pursuant to applicable Georgia law; and

(3) “good standing” has no official meaning under Georgia law applicable to limited partnerships and for purposes of any Opinion with respect to a limited partnership governed by GRULPA means:

(i) Borrower has not filed a certificate of cancellation or other notice of intent to dissolve with the Secretary of State;

(ii) to the knowledge of the Opinion Giver, no event of voluntary or statutory dissolution has occurred with respect to Borrower and a court with applicable jurisdiction has not entered a decree ordering the dissolution of Borrower;

(iii) Borrower has completed all applicable filing and registration requirements under Section 206 of GRULPA; and

(iv) Borrower is not on “inactive filing status” pursuant to Section 206.7 of GRULPA.

No good standing opinion should be rendered as to limited partnerships not governed by GRULPA in light of the absence of any requirement that the limited partnership make periodic filings with the Secretary of State.

#### B. Limited Liability Limited Partnerships.

An opinion to the effect that Borrower was formed as a limited liability limited partnership and is existing in good standing under the laws of the State of Georgia (Model Partnership Status Opinion) is subject to the following understandings:

(1) “was formed” means that Borrower properly complied with the Georgia statutory requirements for formation as a limited liability limited partnership;

(2) “is existing” means that Borrower is a limited liability limited partnership which has not been terminated pursuant to applicable Georgia law and has not cancelled its limited liability limited partnership election; and

(3) “good standing” has no official meaning under Georgia law applicable to limited liability limited partnerships and for purposes of any Opinion with respect to a limited liability limited partnership means:

(i) Borrower has not filed a certificate of cancellation or other notice of intent to dissolve with the Secretary of State;

(ii) to the knowledge of the Opinion Giver, no event of voluntary or statutory dissolution has occurred with respect to Borrower and a court with applicable jurisdiction has not entered a decree ordering the dissolution of Borrower;

(iii) Borrower has completed all applicable filing and registration requirements under Section 206 of GRULPA; and

(iv) Borrower is not on “inactive filing status” pursuant to Section 206.7 of GRULPA.

C. General Partnerships.

An Opinion to the effect that Borrower is a general partnership existing under the laws of the State of Georgia (Model Partnership Status Opinion) means that Borrower was formed as a general partnership and has not been terminated pursuant to applicable Georgia law. No due organization opinion should be rendered as to a general partnership in light of the absence of any filing or registration requirements as to general partnerships. No good standing opinion should be rendered as to a general partnership in light of the absence of any requirements that the general partnership make filings with the Secretary of State.

D. Limited Liability Partnerships.

An Opinion to the effect that Borrower is a limited liability partnership existing under the laws of the State of Georgia (Model Partnership Status Opinion) means that Borrower was formed as a limited liability partnership and has not been terminated pursuant to applicable Georgia law and has not cancelled its limited liability partnership election. No due organization opinion should be rendered as to any limited liability partnership in light of the absence of any filing or registration requirements as to the underlying general partnership. No good standing opinion should be rendered as to any limited liability partnership in light of the absence of any requirements that the limited liability partnership make filings with the Secretary of State.

32. Model Partnership Powers Opinion.

An Opinion to the effect that Borrower has the power to execute and deliver the Loan Documents, to perform its obligations under the Loan Documents, to own and use the Property and to conduct its business (Model Partnership Powers Opinion) is subject to the following understandings:

(1) the Opinion refers only to applicable Georgia partnership law and Borrower’s partnership agreement and certificate (if applicable) as sources of power;

(2) “power” refers only to whether or not the acts referenced in the Opinion are outside the scope of Borrower’s powers pursuant to its partnership agreement and certificate (if applicable) and applicable partnership law;

(3) the Opinion is built upon an assumption that the Model Partnership Status Opinion could also be given;

(4) “own and use” refers to every right Borrower has in the Property, and the Opinion does not address partnership assets other than the Property; and

(5) the Opinion refers to the Property owned and used and business conducted on the date of the Opinion, and not those contemplated for future ownership, use or conduct except to the extent the acquisition of the Property or the conduct of its business is concurrent with, and recognized by the Opinion Giver as constituting part of, the consummation of the Loan Transaction.

33. Model Partnership Acts Opinion.

An Opinion to the effect that Borrower has duly authorized the execution and delivery, of and performance by Borrower under, the Loan Documents and has duly executed and delivered the Loan Documents (Model Partnership Acts Opinion) is subject to the following understandings:

(1) the Opinion affirms compliance with all partnership action necessary under applicable partnership law, Borrower’s partnership agreement, and, if applicable, Borrower’s established policies and practices for delegation of authority, in order to authorize the execution and delivery of, and performance under, the Loan Documents;

(2) the Opinion affirms that the execution and delivery of the Loan Documents was, and Borrower’s performance of its obligations under the Loan Documents in accordance with the Loan Documents as written will be, in accordance with the authorization;

(3) the Opinion is built upon an assumption that the Model Partnership Status Opinion and the Model Partnership Powers Opinion could also be given; and

(4) the Opinion addresses no law other than the applicable partnership law and applicable law of agency.

34. Model Limited Liability Company Status Opinion. An Opinion to the effect that Borrower was formed and duly organized as a limited liability company and is existing and in good standing under the laws of the State of Georgia (Model Limited Liability Company Status Opinion) is subject to the following understandings:

(1) “formed and duly organized” means that Borrower properly complied with Georgia statutory requirements for formation as a limited liability company;

(2) “is existing” means that Borrower is a limited liability company which has not ceased to exist under the GLLCA; and

(3) “good standing” has no official meaning under the GLLCA, and for purposes of any opinion with respect to a limited liability company subject to the GLLCA means:

(i) to the knowledge of The Opinion Giver, none of the events of dissolution set forth in Section 602 of the GLLCA has occurred;

(ii) to the knowledge of The Opinion Giver, the Superior Court of the county in which the limited liability company's registered office is located has not entered a decree of judicial dissolution;

(iii) the Secretary of State has signed no certificate of dissolution with respect to Borrower; and

(iv) Borrower has satisfied its filing and registration requirements under Section 1103 of the GLLCA.

35. Model Limited Liability Company Powers Opinion. An Opinion to the effect that Borrower has the power to execute and deliver Loan Documents, to perform its obligations under the Loan Documents, to own and use the Property and to conduct its business (Model Limited Liability Company Powers Opinion) is subject to the following understandings:

(1) the Opinion only refers only to the GLLCA and Borrower's articles of organization as sources of power;

(2) "power" refers only to whether or not the acts referenced in the Opinion are outside the scope of Borrower's powers pursuant to its articles of organization or operating agreement and the GLLCA;

(3) the Opinion is built upon an assumption that the Model Limited Liability Company Status Opinion could also be given;

(4) "own and use" refers to every right Borrower has in the Property, and the Opinion does not address limited liability company assets other than the Property; and

(5) the Opinion refers to the Property owned and used and business conducted on the date of the Opinion, and not those contemplated for future ownership, use or conduct except to the extent the acquisition of the Property or conduct of its business is concurrent with, and recognized by, The Opinion Giver, as constituting part of, the consummation of the Loan Transaction.

36. Model Limited Liability Company Acts Opinion. An Opinion to the effect that Borrower has duly authorized the execution and delivery of, and performance by Borrower under, the Loan Documents and has duly executed and delivered the Loan Documents (Model Limited Liability Acts Opinion) is subject to the following understandings:

(1) the Opinion affirms compliance with all limited liability company action necessary under the GLLCA, Borrower's articles of organization and, if applicable, Borrower's duly adopted policies and practices for delegation of authority in order to authorize the execution and delivery of, and performance under, the Loan Documents;

(2) the Opinion affirms that the execution and delivery of the Loan Documents was, and Borrower's performance of its obligations under the Loan Documents in accordance with the Loan Documents as written will be, in accordance with the authorization;

(3) the Opinion is built upon an assumption that the Model Limited Liability Company Status Opinion and the Model Limited Liability Company Powers Opinion could also be given; and

(4) the Opinion addresses no law other than the GLLCA and applicable law of agency.

37. Model No Violation Opinion.

An Opinion to the effect that Borrower's execution and delivery of the Loan Documents do not result in a violation of Borrower's Organizational Documents and do not (i) violate any constitution, statute, regulation, rule, order or law known to the Opinion Giver to which Borrower or the Property is subject, (ii) constitute a breach or default under any other material written agreements known to the Opinion Giver to which Borrower is a party or by which Borrower or the Property is bound, or (iii) violate any judicial or administrative decree, writ, judgment or order known to the Opinion Giver to which Borrower or the Property is subject (No Violation Opinion) is subject to the following understandings:

(1) a "violation" or "breach" or "default" means any act or omission that, by itself or upon notice or the passage of time or both, would constitute a violation, breach or default giving rise to a remedy under the document or law in question;

(2) the Opinion addresses only the relevant facts and law as they exist on the date of the Opinion Letter;

(3) "agreements" refers to agreements, indentures, documents and other instruments in writing which are known to the Opinion Giver;

(4) references to any law or to "decree, writ, judgment or order" or the like include only those (i) which either prohibit performance by Borrower under the Loan Documents or subject Borrower to a fine, penalty or other similar sanction and (ii) which are known to the Opinion Giver;

(5) the Opinion addresses only whether or not the specific terms of the relevant Loan Document violate laws known to the Opinion Giver or cause a breach of or default under the specific terms of an obligation known to the Opinion Giver;

(6) the Opinion does not address acts permitted or contemplated but not required, or inferred but not set forth, by the relevant Loan Document, except to the extent such acts are concurrent with, and recognized by the Opinion Giver as constituting part of, the consummation of the Loan Transaction; and

(7) to the extent the interpretation of words in described agreements requires resort to law, the law is that of the Opining Jurisdiction.

38. Model Litigation Confirmation.

A confirmation regarding litigation or other proceedings pending before any court or administrative agency against Borrower or the Property derives from the Opinion Giver's knowledge as defined at Interpretive Standard 6 and certificate reliance discussed at Interpretive Standard 4, but not from any reviews of public or court records or files of the Opinion Giver or others.

**Incorporation by Reference Accord**

These Interpretive Standards may be incorporated by reference in the Model Opinion by a statement similar to the following:

This Opinion Letter is limited by, and is in accordance with, the March 17, 2009, edition of the Interpretive Standards applicable to Legal Opinions to Third Parties in Georgia Real Estate Secured Transactions adopted by the Legal Opinion Committee of the Real Property Law Section of the State Bar of Georgia and approved by the Executive Committee of the Real Property Law Section of the State Bar of Georgia, and such Interpretive Standards are incorporated in this Opinion Letter by this reference.

**APPENDIX II**  
**MODEL OPINION**

DATE

The Opinion Recipient  
Street Address  
City, State Zip

Ladies and Gentlemen:

We have acted as counsel to \_\_\_\_\_ (“Borrower”), a Georgia corporation/general partnership/limited partnership/limited liability partnership/limited liability limited partnership/limited liability company, and \_\_\_\_\_ (“Guarantor”)<sup>1</sup>, a resident of the State of Georgia in connection with the closing of a \$ \_\_\_\_\_ loan (the “Loan”) from \_\_\_\_\_ (“Lender”), secured by certain real property (the “Real Property”) located in \_\_\_\_\_ County, Georgia, and related personal property (the “Personal Property”) (the “Real Property” and the “Personal Property” hereinafter collectively referred to as the “Property”).

This Opinion Letter is limited by, and is in accordance with, the March 17, 2009 edition of the Interpretive Standards applicable to Legal Opinions to Third Parties in Georgia Real Estate Secured Transactions adopted by the Legal Opinion Committee of the Real Property Law Section of the State Bar of Georgia and approved by the Executive Committee of the Real Property Law Section of the State Bar of Georgia, and such Interpretive Standards are incorporated in this Opinion Letter by this reference. Capitalized terms used in this opinion letter (and any attachments hereto) and not otherwise defined herein shall have the meanings assigned to such terms in the Interpretive Standards.

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

The opinions set forth herein are limited to the laws of the State of Georgia and applicable federal laws.<sup>2</sup>

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<sup>1</sup> For purposes of the Model Opinion it is assumed that Guarantor is an individual; if Guarantor were an entity, the Model Opinion should be modified to include as to Guarantor parallel opinions to the opinions as to Borrower set forth in Paragraphs 1-4 of the Model Opinion and the opinions set forth in Paragraphs 5 and 6 of the Model Opinion should be omitted. Similarly, it is assumed that Borrower is not a natural person; if Borrower were an individual, the Model Opinion should be modified to include as to Borrower parallel opinions to the opinions as to Guarantor set forth in Paragraphs 5 and 6 and the opinions as to Borrower set forth in Paragraphs 1-4 of the Model Opinion should be omitted.

<sup>2</sup> The Model Opinion does not include alternative provisions referenced in the Amended and Restated Report on Legal Opinions to Third Parties in Georgia Real Estate Secured Transactions that may, with the consent of the Opinion Giver and the Opinion Recipient, be included in the Opinion Letter.

In connection with the Loan, we have examined the following documents (the “Loan Documents”), executed by Borrower:

- (a) Promissory Note in the original principal amount of \$ \_\_\_\_\_ (the “Note”);
- (b) Deed to Secure Debt and Security Agreement (the “Security Deed”);
- (c) Assignment of Rents and Leases;
- (d) UCC-1 Financing Statement (the “Financing Statement”); and
- (e) UCC-1 Financing Statement to be filed as a fixture filing (the “Fixture Filing”).

Each of the Loan Documents, other than the Financing Statement and the Fixture Filing, is dated as of \_\_\_\_\_.

We have also examined the Guaranty (the “Guaranty”), executed by Guarantor and dated as of \_\_\_\_\_.

Based upon and limited by the foregoing, it is our opinion that:

1. Borrower was incorporated and duly organized as a corporation under the laws of the State of Georgia. Borrower is existing and in good standing under the laws of the State of Georgia.

[or]

Borrower was formed as a limited partnership/ limited liability limited partnership under the laws of the State of Georgia. Borrower is existing and in good standing under the laws of the State of Georgia.

[or]

Borrower is a general partnership/ limited liability partnership existing under the laws of the State of Georgia.

[or]

Borrower was formed and duly organized as a limited liability company under the laws of the State of Georgia. Borrower is existing and in good standing under the laws of the State of Georgia.

2. Borrower has the power to execute and deliver the Loan Documents, to perform its obligations under the Loan Documents, to own and use the Property and to conduct its business.
3. Borrower has duly authorized the execution and delivery of the Loan Documents and the performance by Borrower thereunder. Borrower has duly executed and delivered the Loan Documents.

4. The execution and delivery by Borrower of the Loan Documents do not violate Borrower's Organizational Documents, do not violate any applicable constitution, statute, regulation, rule, or law to which Borrower or the Property is subject, and do not, to our knowledge, (i) constitute a breach or default under any other material written agreements known to us to which Borrower is a party or by which Borrower or the Property is bound, or (ii) violate any judicial or administrative decree, writ, judgment or order known to us to which Borrower or the Property is subject.
5. Guarantor has executed and delivered the Guaranty.
6. The execution and delivery by Guarantor of the Guaranty do not violate any applicable constitution, statute, regulation, rule, or law to which Guarantor is subject, and do not, to our knowledge, (i) constitute a breach or default under any other material written agreements known to us to which Guarantor is a party, or (ii) violate any judicial or administrative decree, writ, judgment or order known to us to which Guarantor is subject.
7. The Loan Documents are valid and enforceable against Borrower in accordance with their respective terms.

The enforceability opinion set forth above is subject to the qualification that certain provisions of the Loan Documents may not be enforceable; nevertheless, such unenforceability will not render the Loan Documents invalid as a whole or preclude (i) the judicial enforcement of the obligation of Borrower to repay the principal, together with interest thereon, both as provided in the Note, as limited by the usury opinion set forth below and subject to the obligation to confirm an exercise of power of sale pursuant to O.C.G.A. Section 44-14-161 as a prerequisite to an action to obtain a deficiency judgment, (ii) the acceleration of the obligation of Borrower to repay such principal, together with such interest, upon a material default by Borrower in the payment of such principal or interest, and (iii) the non-judicial foreclosure of the security title to the Real Property by exercise of power of sale pursuant to the Security Deed in accordance with Georgia law upon maturity of the Note or upon acceleration pursuant to (ii) above.

The Guaranty is valid and enforceable against Guarantor in accordance with its terms.

The enforceability opinion set forth above with respect to the Guaranty is subject to the qualification that certain provisions of the Guaranty may not be enforceable; nevertheless, such unenforceability will not render the Guaranty invalid as a whole or preclude the judicial enforcement of Guarantor's obligation to pay the principal together with interest thereon, both as provided in the Note, to the extent guaranteed pursuant to the Guaranty, as limited by the usury opinion set forth below.

8. The Loan Documents and the Interest Charges contracted for therein are in compliance with the Usury Laws of the State of Georgia; provided, however, that (i) no opinion is expressed with respect to the compliance with the Usury Laws of any provisions in the Loan Documents that purport to permit Interest Charges, however denominated and regardless of whether or not denominated as interest, to be charged, paid, collected or contracted for at a rate in excess of five percent (5%) per month if and to the extent a violation of O.C.G.A. Section 7-4-18 results (whether due to prepayment, acceleration, redemption, cancellation, termination or otherwise), and (ii)

no opinion is expressed with respect to the compliance with the Usury Laws of any provisions in the Loan Documents that purport to permit interest to be charged or paid on interest if and to the extent such provisions result in a violation of O.C.G.A. Section 7-4-17.<sup>3</sup>

9. The Security Deed creates in favor of Lender, as security for all obligations of Borrower purported to be secured thereby, a security interest in the UCC Collateral. To the extent that a security interest may be perfected by the filing of a financing statement in the State of Georgia, (i) the effective filing of the Financing Statement in the UCC records of the Office of the Clerk of the Superior Court of any county in the State of Georgia will result in the perfection of such security interest in the UCC Collateral (other than fixtures, as-extracted collateral, crops or timber to be cut) described in the Financing Statement, and (ii) the further recordation of the Fixture Filing in the real property records of the Office of the Clerk of the Superior Court of the county in which the Real Property is located will result in the perfection of such security interest in the UCC Collateral described in the Fixture Filing that consists of goods that are or are to become fixtures.

This Opinion Letter is provided to you for your exclusive use solely in connection with the Loan and may not be relied upon by any other person or for any other purpose without our prior written consent.

Very truly yours,

[Signature of the Lawyer/  
Law Firm Representing Borrower]

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<sup>3</sup> The Model Usury Opinion is to be given only as to loans in the amount of \$250,000 or more. For a discussion of opinions relating to loans of more than \$3,000 but less than \$250,000, see Section 19.02C.1(a). This Report does not address loans of \$3,000 or less as discussed in Section 19.02C.1(c).

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