

Third-Party Closing Opinions: Limited Liability Companies

By the TriBar Opinion Committee*

The TriBar Opinion Committee's 1998 report, "Third-Party Closing Opinions," ("TriBar 1998 Report") addressed opinions commonly included in a standard closing opinion relating to corporations.¹ This report supplements the TriBar 1998 Report by addressing opinions on limited liability companies ("LLCs"),² specifically the opinions on status, power and action and, in a limited way, enforceability

* The TriBar Opinion Committee (the "Committee" or "TriBar") currently includes designees of the following organizations functioning as a single Committee: (i) Special Committee on Legal Opinions in Commercial Transactions, New York County Lawyers' Association; (ii) Corporation Law Committee, The Association of the Bar of the City of New York, and (iii) Special Committee on Legal Opinions of the Business Law Section, New York State Bar Association. Members of the Allegheny County (Pittsburgh, Pa.), Atlanta, Boston, Chicago, District of Columbia and Ontario Bar Associations and of the state bars of California, Delaware, Georgia, North Carolina, Pennsylvania, and Texas are also members of the Committee. The members of the Committee and the Co-Reporters and Advisers for this Report are listed in Appendix A.

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

1. See TriBar Opinion Committee, *Third-Party Closing Opinions: A Report of the TriBar Opinion Committee*, 53 BUS. LAW. 591, 599 (1998) [hereinafter "*TriBar 1998 Report*"] (suggesting that application of report to non-corporate entities could be derived by analogy to corporate model).

2. Although LLCs have come into general use only relatively recently, LLCs have become the vehicle of choice in many transactions. Indeed, the number of LLCs organized in Delaware now exceeds the number of Delaware corporations. The popularity of LLCs is attributable to the fact that, unlike limited partnerships and corporations, LLCs allow all their owners ("members," in LLC parlance) both limited liability and flow-through tax treatment.

LLCs are used in a wide variety of transactions, including (i) joint ventures and strategic alliances, (ii) international investment transactions, (iii) structured financings, and (iv) leveraged buyouts. LLCs serve as vehicles for conducting manufacturing and professional service businesses, for research and development, and for exploring for and mining natural resources. They also serve as general partners of limited partnerships; as special purpose finance vehicles; as vehicles for holding real property, investment securities and intellectual property; and as bankruptcy remote entities in structured financings.

Because of the widespread practice of organizing LLCs in Delaware rather than in the state where they principally do business, this report uses Delaware LLC law as a paradigm for its analysis and provides extensive citations to the Delaware Limited Liability Company Act, DEL. CODE ANN. tit. 6, §§ 18-101—18-1109 (2005) [hereinafter the "Delaware LLC Act"]. LLC statutes of other states often do not contain provisions comparable to those of the Delaware statute. Thus, lawyers giving opinions on LLCs organized in other states should always consult the LLC statute and relevant law of the state in which the LLC was organized.

of operating agreements.³ Except as indicated, the terms used in this report have the same meanings as in the TriBar 1998 Report.

Like corporations and limited partnerships, LLCs are separate legal entities⁴ that are creatures of statute. Today, every state has an LLC statute. Those statutes, however, are not uniform.⁵ Some follow a corporation-law model, others a partnership-law model,⁶ and still others a combination of the two.⁷ Whatever model they follow, LLC statutes (like limited partnership statutes and unlike corporation statutes) typically provide an LLC's members broad contractual freedom⁸ to determine how the LLC will be managed⁹ and how the LLC's profits will be allocated and distributed. The contract governing the internal affairs of an LLC is commonly referred to as a limited liability company agreement or operating agreement ("operating agreement").¹⁰ Although operating agreements may be oral,

3. Although this report addresses opinions on LLCs, it also may be relevant to opinions on other non-corporate entities, such as general and limited partnerships and statutory trusts.

4. See Delaware LLC Act § 18-201(b) and § 17-201(b) of the Delaware Revised Uniform Limited Partnership Act, DEL. CODE ANN. tit. 6, § 17-101—17-1111 (2005) [hereinafter the "Delaware LP Act"].

5. Unlike the Revised Uniform Limited Partnership Act, the Uniform Limited Liability Company Act has not been adopted in many states. Only eight states, of which the largest is Illinois, have modeled their LLC Acts on the Uniform Limited Liability Company Act (1996). See UNIF. LTD. LIAB. CO. ACT, 6A U.L.A. 95 (Supp. 2005).

6. For example, the Delaware LP Act and not the Delaware General Corporation Law, DEL. CODE ANN. tit. 8, § 101—398 (2001, Supp. 2004 & Supp. 2005) [hereinafter the "Delaware GCL"], served as the principal model for the Delaware LLC Act, and many of the section numbers of the Delaware LLC Act and Delaware LP Act correspond. The Delaware bar association committee that has responsibility for the Delaware LLC Act and its amendment also has responsibility for the Delaware statutes governing general and limited partnerships.

7. For a compilation of the various state LLC statutes and various governance models, see 3 LARRY E. RIBSTEIN & ROBERT R. KEATINGE, RIBSTEIN AND KEATINGE ON LIMITED LIABILITY COMPANIES, Appendices A and B (2d ed. 2005).

8. The principle of freedom of contract is a core feature of LLCs. See, e.g., Delaware LLC Act § 18-1101(b) (policy is to give maximum effect to principle of freedom of contract and to enforceability of operating agreements). LLC statutes typically permit all but a handful of statutory provisions to be modified by the operating agreement. See, e.g., 805 ILL. COMP. STAT. ANN. 180/15-5 (West 2004); *Elf Atochem, N. Am., Inc. v. Jaffari*, 727 A.2d 286 (Del. 1999) (subject to a few non-waivable provisions, Delaware furnishes statutory answers only on matters not covered in an operating agreement).

9. Many LLC statutes, including Delaware's, permit LLCs to adopt virtually any management structure they desire. Some LLCs follow a corporate model under which management decisions are made by a board of managers subject to member approval for specified actions. Others follow a general or limited partnership model under which management decisions are made by the members or a designated manager (which may itself be an LLC or other entity). Many variations are possible—and common. Some states, including Delaware, expressly permit LLCs to delegate management rights to persons other than members and managers. See Delaware LLC Act § 18-407.

10. The Delaware LLC Act uses the term "limited liability company agreement." In Delaware that term means any agreement (whether referred to as a limited liability company agreement, operating agreement or otherwise), written or oral, of the member or members as to the affairs of the LLC and the conduct of its business. If written, the agreement may consist of a single document or multiple documents. See Delaware LLC Act § 18-101(7).

Operating agreements often address, *inter alia*: formation of the LLC; admission of members; appointment of managers (if any); purposes, powers and management structure; contributions by members; allocation of profits and losses; distributions to members; access to books and records and reporting requirements to members; fiduciary duties; related party transactions; exculpation; indemnification; assignment of membership interests; resignation and removal of members and managers; admission of substituted members and additional members; dissolution, winding up and termination;

opinion givers ordinarily insist that the operating agreement be reduced to writing before giving an opinion.¹¹

When engaging in a business transaction with an LLC, the other party to the transaction often requests opinions on the LLC's status as an LLC (the "status" opinion); its power to enter into and perform its obligations under the transaction documents (the "power" opinion); and its authorization, execution and delivery of those documents (the "action" opinion). This report addresses those opinions at length. In addition, this report addresses in a limited fashion opinions on the enforceability of the operating agreement.¹²

The law of the state in which the LLC was formed governs the matters addressed by LLC status, power and action opinions.¹³ Unless expressly excluded,¹⁴ these opinions cover not only the applicable LLC statute but also applicable contract law and case law, including cases applying fiduciary duty concepts.¹⁵

1.0 OPINIONS ON LLCs ORGANIZED IN DELAWARE

LLCs, like corporations, often are organized in Delaware rather than in the state where they and their principal counsel are located. A question, therefore, arises as to what opinions their counsel can give when a transaction in which they are engaged calls for delivery of a closing opinion.

As non-Delaware lawyers often do when giving opinions on Delaware corporations,¹⁶ lawyers who do not practice in Delaware routinely give status, power and action opinions on Delaware LLCs. As with Delaware corporations, they do so when in the specific circumstances of the transaction in question they regard themselves as competent to address the issues raised by those opinions.¹⁷

By analogy to opinion letters by non-Delaware lawyers on Delaware corporations, opinion letters by non-Delaware lawyers on Delaware LLCs often state that

amendment; and dispute resolution. When a matter is not addressed in an operating agreement, state LLC statutes typically provide default rules.

11. LLC statutes do not require the filing of operating agreements with the Secretary of State. Instead, LLC statutes ordinarily require the filing of a barebones document, often referred to as a certificate of formation, that does no more than provide notice to the public of the LLC's name and registered office and the name and address of its registered agent (and in some states (not Delaware) whether the LLC is member-managed or manager-managed).

12. Opinion recipients sometimes request opinions relating to the rights of equity holders, such as due admission of members, valid issuance of membership interests, and limited liability of members. These opinions are not addressed in this report.

13. For a discussion of opinions by non-Delaware lawyers on Delaware LLCs, see *infra* § 1.0.

14. For a discussion of the coverage of an opinion that states that it is limited to the Delaware LLC Act, see *infra* § 1.0.

15. For cases in Delaware applying fiduciary duty concepts, see *infra* note 64. Delaware case law on fiduciary duty draws on concepts developed not only in decisions on LLCs but also in decisions involving other entities, including corporations, partnerships and trusts. Coverage of fiduciary duties in LLC opinions is discussed in § 5.0, *infra*. Previous reports of the Committee have not addressed the contract law issues applicable to LLC status, power and action opinions. As indicated below, those issues often are not difficult.

16. See *TriBar 1998 Report*, *supra* note 1, § 4.1 n.85, at 631.

17. As discussed *infra*, opinions on an LLC's status, power and action cover not only the LLC statute and applicable case law but also, unless expressly excluded in the opinion letter, relevant Delaware contract law.

their coverage is limited to the Delaware LLC Act. When coverage is limited in that way, the question arises whether the opinions being given cover not only the statute but also applicable Delaware case law. Although the Delaware LLC Act is a relatively new statute and customary opinion practice is not as well established for opinions on Delaware LLCs as it is for opinions on Delaware corporations, the Committee believes that references to the Delaware LLC Act in opinion letters on LLCs, like references to the Delaware General Corporation Law in opinion letters on Delaware corporations, should be understood to encompass not only the Delaware statute but also relevant reported judicial decisions.¹⁸

Another question raised by a statement that coverage is limited to the Delaware LLC Act is whether it excludes from the status, power and action opinions issues of Delaware contract law that those opinions otherwise would cover. The Committee recognizes that a consensus currently does not exist on this question and that many lawyers may have read the statement as excluding those issues. The Committee believes, however, that a literal reading of the coverage limitation would be inconsistent with the approach taken in the LLC Act of relying heavily on the operating agreement, which is subject to contract law, for the matters addressed by the status, power and action opinions.¹⁹ Thus, the Committee believes that a statement limiting coverage to the Delaware LLC Act should not be read to exclude from the coverage of the status, power and action opinions those Delaware contract law issues that are applicable to the matters covered by those opinions. The Committee notes, however, that the contract law issues applicable to those opinions ordinarily will not be difficult²⁰ and will not vary significantly from state to state. In the case of Delaware specifically, a knowledge of traditional contract law principles usually will be all that is required to give routine status, power and action opinions on Delaware LLCs.²¹ Because of the uncertainty over

18. See TriBar Opinion Committee, *Special Report of the TriBar Opinion Committee: The Remedies Opinion—Deciding When to Include Exceptions and Assumptions*, 59 BUS. LAW. 1483, 1487 n.25 (2004) [hereinafter “*TriBar 2004 Remedies Opinion Report*”]. If acceptable to the opinion recipient, an opinion giver might exclude coverage of relevant judicial decisions by so stating in the opinion letter or, alternatively, as is often done for UCC opinions, it may limit the cases covered by stating that it is only covering the cases summarized in a specified annotated version of the statute.

19. LLC statutes look to the operating agreement, a contract, to establish rules that in the case of a corporation often are provided by the statute. Thus, contract law bears on the formation of the operating agreement (see *infra* text accompanying notes 35–37) and on construction of provisions in the operating agreement relating to matters addressed by the status, power and action opinions, such as provisions limiting the LLC’s power to engage in particular activities or requiring members’ approval of transactions that fall within specified categories. As discussed in Section 4.0, *infra*, operating agreements (and not the LLC statute) often determine the steps required to authorize various transactions.

20. An exception, however, is the law relating to fiduciary duties. See *infra* § 5.0.

21. Section 18-1101(b) of the Delaware LLC Act gives maximum effect to the principle of freedom of contract and the enforceability of operating agreements. In addition, concerns about how particular terms may be construed are ameliorated by the deference Delaware courts pay to the language of a contract and the plain meaning of its terms. See *Citadel Holding Corp. v. Roven*, 603 A.2d 818, 822 (Del. 1992) (“It is an elementary canon of contract construction that the intent of the parties must be ascertained from the language of the contract.”); *Boesky v. CX Partners, L.P.*, No. Civ. A. 9739, Civ. A. 9794, Civ. A. 9748, 1988 WL 42250, at *9 (Del. Ch. Apr. 28, 1988) (“There is great utility in the attempt by courts, when called upon to interpret . . . documents [drafted by sophisticated lawyers], to read the words used precisely.”); *Star Cellular Tel. Co. v. Baton Rouge CGSA, Inc.*, No. Civ. A.

whether a statement limiting an opinion to the Delaware LLC Act excludes applicable contract law, opinion recipients may properly ask opinion givers to confirm in their opinions that contract law, to the extent applicable, is being covered.

Section 6.0 of this report discusses in a limited way opinions on the enforceability of the operating agreement. Enforceability opinions are directed principally to issues of contract law. Thus, before giving an opinion on enforceability of the operating agreement of a Delaware LLC, non-Delaware lawyers need to ask themselves whether they have sufficient knowledge of Delaware contract law (as well as the LLC Act, including applicable case law) to address the issues raised by that agreement.²² If the opinion preparers are not willing to address Delaware contract law generally, they should not give an opinion on the enforceability of the operating agreement.²³

2.0 THE STATUS OPINION: FORMATION AND EXISTENCE

When engaging in a significant transaction with an LLC, the other party often requests an opinion from the LLC's counsel regarding its status as an LLC under the law of its state of formation. The LLC status opinion, like the corporate status opinion, appears as the first opinion in a typical closing opinion and serves as the cornerstone for many of the opinions that follow. The opinion customarily states that the LLC has been duly formed²⁴ and is validly existing as an LLC under the law of the state in which the LLC was formed. If the Secretary of State of that

12507, 1993 WL 294847, at *4 (Del. Ch. Aug. 2, 1993) (if a term "has a plain or generally prevailing meaning . . . then no other evidence need be considered"), *aff'd*, 647 A.2d 382 (Del. 1994).

If a term is ambiguous, Delaware courts may consider other evidence and under some circumstances construe it against the drafter. Delaware courts, however, do not construe ambiguous terms against the drafter when a partnership agreement has been negotiated by sophisticated parties. *Compare* *SI Mgmt, L.P. v. Winger*, 707 A.2d 37, 43 (Del. 1998) (court construed ambiguous terms against general partner who solicited investment by 1,850 investors who had no hand in drafting limited partnership agreement) *with* *U.S. West, Inc. v. Time Warner, Inc.*, No. Civ. A. 14555, 1996 WL 307445 (Del. Ch. June 6, 1996) (court applied customary rules of contract interpretation where negotiations were between arm's-length bargainers of great sophistication). Delaware courts regularly apply to LLCs principles adopted in cases on limited partnerships. *See Elf Atochem*, *supra* note 8.

22. The contract law issues addressed by an opinion on the enforceability of an operating agreement often will be broader than the contract law issues addressed by the status, power and action opinions. Non-Delaware lawyers ordinarily are unwilling to give opinions on the enforceability under Delaware law of contracts that select Delaware law as their governing law. *Cf. TriBar 2004 Remedies Opinion Report*, *supra* note 18, at 1487 n. 25. *See generally infra* note 76.

23. An alternative ordinarily will not be to give an opinion "as if" the law of the opinion preparers' own state governed. In light of the internal affairs doctrine (*see infra* note 76), an "as if" opinion on the enforceability of an operating agreement is unlikely to be helpful in most circumstances. "As if" opinions are discussed in the *TriBar 2004 Remedies Opinion Report*, *supra* note 18, at 1497 n.70.

24. The Committee recommends use of the phrase "duly formed" (which is analogous to "duly incorporated" in opinions on corporations) in LLC status opinions because of uncertainty over the meaning of "duly organized." *See TriBar 1998 Report*, *supra* note 1, § 6.1.1, at 642-43. (As a matter of customary practice, an opinion on formation is understood to have the same meaning whether or not it uses the word "duly.")

state issues good standing certificates, the opinion might also cover good standing in that state.²⁵

An opinion that an LLC has been duly formed means that the steps taken to create it satisfied statutory requirements in effect on the date of formation.²⁶ Those steps typically include (i) executing and filing a certificate of formation (referred to as a charter or articles of organization in some states) in a statutorily prescribed form and, if necessary, its acceptance by the Secretary of State, and (ii) adoption of an operating agreement by one or more members. In addition, in some states due formation of an LLC may be conditioned, among other things, on an LLC's having at least one member²⁷ who meets specified criteria.²⁸

To support an opinion that an LLC has been "duly formed and is validly existing," the opinion preparers ordinarily should obtain a legal existence certificate from the Secretary of State²⁹ and copies certified by the Secretary of State of the

25. When the opinion covers "good standing," the phrase "in good standing" normally is added after the phrase "validly existing." The Committee's comments on "good standing" opinions on corporations apply with equal force to "good standing" opinions on LLCs. See *TriBar 1998 Report*, *supra* note 1, § 6.1.4, at 645-46 (noting that good standing opinions usually add little of value analytically because they normally are based entirely on a Secretary of State's certificate).

26. In giving this opinion, the opinion preparers are entitled to disregard defects in the formation process that the state of formation would deem inconsequential for determining LLC status. The Delaware LLC Act provides that an LLC is formed if there has been substantial compliance with the requirements of Section 18-201 of the Delaware LLC Act. As discussed in the text, an opinion that a Delaware LLC has been duly formed requires more than mere compliance with Section 18-201. The New York LLC Act does not contain a provision comparable to Section 18-201 of the Delaware LLC Act.

27. Although most states initially required at least two members, almost all states, including Delaware and New York, now permit LLCs to have only one member. See Delaware LLC Act § 18-101(7); N.Y. LTD. LIAB. CO. LAW § 203(c) (McKinney 2006). See generally 1 LARRY E. RIBSTEIN & ROBERT R. KEATINGE, RIBSTEIN AND KEATINGE ON LIMITED LIABILITY COMPANIES, § 4:3 at 4-4 & Appendix 4-2 (2d ed. 2005).

28. See, e.g., Delaware LLC Act § 18-101 (11) and (12) (permitting natural persons and a broad range of associations, corporations, LLCs, partnerships, trusts and other legal entities to be members). The statute or operating agreement may specify when a person is admitted as a member and impose conditions on admission, for example, receipt by the LLC of a contribution in a specified amount. The Delaware LLC Act does not require that members make contributions unless the operating agreement, subscription agreement or similar agreement so provides. The Delaware LLC Act does specify that, in connection with the formation of an LLC, a person is admitted as a member of the LLC upon the later to occur of: (1) the formation of the LLC; or (2) the time provided in and upon compliance with the requirements of the operating agreement or, if the operating agreement does not so provide, when the person's admission is reflected in the records of the LLC (which records may include the operating agreement or a schedule or exhibit to the operating agreement). See Delaware LLC Act § 18-301.

Unless otherwise provided in the operating agreement, a person may be admitted as a member (including as sole member) of a Delaware LLC without acquiring an economic interest in the LLC. See Delaware LLC Act § 18-301(d). In structured finance and bankruptcy remote securitization transactions, operating agreements often provide for the admission of non-economic members as a mechanism for preventing an LLC from being inadvertently dissolved.

29. In Delaware, legal existence in the Secretary of State's Office normally is addressed in a Secretary of State's good standing certificate (even though an LLC may continue to exist while it is not in good standing). See Delaware LLC Act § 18-1107(h) and § 18-1108(a). Lawyers giving opinions on Delaware LLCs routinely obtain a good standing certificate to ascertain, among other things, that the certificate of formation for the LLC has not been cancelled for non-payment of annual taxes and penalties and interest or as a result of the resignation of the registered agent for non-payment of annual registered agent fees. If the Delaware Secretary of State cancels an LLC's certificate of formation for those reasons,

certificate of formation and all amendments, as well as copies of the operating agreement and all amendments.³⁰ The opinion preparers then should review the certificate of formation, as amended, to confirm that it satisfies statutory requirements³¹ and does not contain an effective date that has not yet occurred.

If the state in which the LLC was formed requires as a condition of formation or existence that an LLC have a member within the meaning of the applicable LLC Act,³² that it have an operating agreement,³³ or both, the opinion preparers should confirm that those requirements are satisfied. If the LLC has an operating agreement (as is required in Delaware), the opinion preparers should confirm compliance with any conditions in the operating agreement relating to the LLC's formation or continuing existence. The opinion preparers ordinarily will do this

the LLC will cease to exist as a separate legal entity unless and until the problem is rectified and the LLC is revived in the records of the Delaware Secretary of State. See Delaware LLC Act § 18-1109.

30. LLC statutes typically do not provide for the filing of operating agreements with the Secretary of State. Therefore, opinion preparers, when they are acting as principal counsel, ordinarily obtain from the person maintaining the LLC's records a copy of the LLC's operating agreement, often with a certificate confirming that the copy is accurate and complete. As with any information provided by an appropriate source, opinion preparers are entitled to rely on the copy of the operating agreement furnished to them unless reliance is unreasonable in the circumstances or they know it to be inaccurate or incomplete. See *TriBar 1998 Report*, *supra* note 1, § 2.1.4, at 610.

Some opinion preparers, particularly when they are not principal counsel, assume expressly in their opinions that the operating agreement furnished to them constitutes the entire agreement of the parties, that the operating agreement is in full force and effect, and that it has not been amended. Alternatively, they may state in their opinions that they have not reviewed any documents other than those listed, that they assume no provision or document exists that they have not reviewed that is inconsistent with the opinions they are giving, and that they have not conducted an independent factual investigation but have relied solely on the documents listed, all of which they assume to be true, complete and accurate in all material respects.

31. The duly formed opinion confirms compliance with the requirements in effect when the LLC was formed. The validly existing opinion confirms, *inter alia*, that no certificates have been filed terminating the LLC's existence.

32. Opinion givers are entitled to assume, without so stating and without further inquiry, that persons purporting to be members meet the requirements, if any, in the operating agreement and LLC law of the state in which the LLC was formed. For example, if a California corporation is listed as a member in the records of a Delaware LLC and executes the operating agreement as a member, the opinion preparers are not required to determine whether the California corporation is validly existing under California law. The opinion preparers only need to confirm that under the LLC law of Delaware and the LLC's operating agreement a California corporation is permitted to be a member.

If the operating agreement imposes any conditions on a person's becoming a member, the opinion also addresses satisfaction of those conditions by at least one member. Thus, if the operating agreement requires a person to make a contribution as a condition to being admitted as a member, the opinion preparers should confirm that the LLC has a member, for example, by obtaining a certificate from an appropriate person confirming that at least one member has met that condition, or they should expressly assume satisfaction of that condition.

33. See § 18-101(7) of the Delaware LLC Act and dicta in *Elf Atochem*, 727 A.2d at 291-93; *CAP-ROC Manager, Inc. v. Policemen's & Firemen's Ret. Sys. of City of Pontiac*, No. Civ. A. 1059-N, 2005 WL 937613, at *1 (Del. Ch. Apr. 18, 2005); *Walker v. Resource Dev. Co. Ltd., L.L.C.* (DE), 791 A.2d 799, 813 (Del. Ch. 2000). An opinion that a Delaware LLC has been duly formed or is validly existing requires that the opinion preparers confirm that the LLC has an operating agreement. That is so notwithstanding the use of the term "formed" in Section 18-201 of the Delaware LLC Act (discussed *supra* note 26). To avoid any question that an LLC has an operating agreement, opinion preparers often seek to have the operating agreement executed by all of an LLC's members and managers. See *infra* text accompanying notes 80-81.

In Delaware, a certificate of formation may be filed with the Secretary of State before an operating agreement is adopted. See Delaware LLC Act § 18-201(d).

by reviewing a copy of the operating agreement in effect at the time of formation and all amendments through the date of the opinion.³⁴ If formation and existence require compliance with other conditions, the opinion preparers also should confirm that those conditions have been satisfied.³⁵

In states such as Delaware in which an opinion on formation and existence requires that an LLC have an operating agreement,³⁶ the opinion preparers must satisfy themselves or assume expressly that the prerequisites for creating an operating agreement in the state in which the LLC is formed have been met. The prerequisites for creating an operating agreement are based on, but may be less stringent than, the traditional prerequisites for forming a contract. In the case of a one-member LLC, for example, an operating agreement can be created by a single party. In the case of an LLC with more than one member, however, creation of an operating agreement, like the creation of a limited partnership agreement, may require an agreement of all the initial members.³⁷ Ordinarily, the prerequisites for creating an operating agreement will be easy to satisfy.

An opinion on an LLC's valid existence also confirms that the LLC's existence has not terminated. This aspect of the opinion can be more of a challenge than an opinion on the existence of a corporation because LLCs may cease to exist in many ways. Operating agreements, for example, sometimes specify a termination date or state that an LLC will dissolve upon the occurrence of a specified event, for example, resignation of a particular manager or failure to achieve specified financing goals by a certain date.³⁸ In addition, an LLC's existence may terminate by operation of law.³⁹ Thus, to give a valid existence opinion, the opinion pre-

34. See *supra* note 30.

35. In Delaware, the certificate of formation must be executed and filed with the Secretary of State by one or more authorized persons. Who constitutes an authorized person is frequently designated in the operating agreement. However, it need not be, and the person authorized to execute and file a certificate of formation may be designated in a separate writing or orally. Delaware requires that a certificate of formation state the name of the LLC, its address in Delaware, and the name and address of its registered agent for service of process in Delaware. See Delaware LLC Act § 18-201. Delaware also requires that the name of the LLC appropriately identify it as a limited liability company. See Delaware LLC Act § 18-102. Like many states, Delaware does not require that the certificate of formation disclose an LLC's members and managers, the amount of their investment, the nature of the LLC's business or its capital structure, or whether the LLC is managed by its members or managers. See Delaware LLC Act § 18-201.

36. See *supra* note 33. Meeting the prerequisites for creating an operating agreement does not mean that all of the terms of the operating agreement are enforceable. When an opinion recipient wants an opinion on the enforceability of an operating agreement (or particular terms of an operating agreement), it should ask for that opinion expressly.

37. Whether the initial members have effectively bound themselves is a matter of the contract law of the state where the LLC is formed, supplemented, as in Delaware, by provisions in the applicable LLC statute that may override requirements that otherwise would be applicable. See Delaware LLC Act § 18-101(7) (member need not execute operating agreement to be bound by it).

38. Unlike most corporations, many LLCs do not have perpetual existence. Instead, their operating agreements contain provisions stating that they will dissolve upon the occurrence of specified events or on a date certain.

39. An LLC may dissolve, for example, automatically when it ceases to have at least one member who meets specified criteria unless its existence is continued in a manner permitted in the applicable LLC statute or its operating agreement. See Delaware LLC Act § 18-801(a)(4). Thus, if membership interests have been transferred, the opinion preparers may need to confirm that the LLC continues to

parers must consider the various ways an LLC's existence may terminate under the statute under which it was formed and confirm (or expressly assume) that none have occurred. The opinion preparers also must review the certificate of formation and operating agreement to identify any provisions that could result in the LLC's termination and again confirm (or expressly assume) that those have not occurred.⁴⁰ Finally, the opinion preparers should confirm (or expressly assume) that the LLC has not taken any voluntary action to dissolve,⁴¹ wind up or terminate or otherwise cease to exist, as it would have, for example, if it entered into a merger in which it was not the surviving party.

As in the case of a corporation, in some transactions opinion recipients are willing to accept an opinion that the LLC is "validly existing as an LLC" under the law of its state of formation without also receiving an opinion on the LLC's formation.⁴² Unlike a "duly formed" opinion, this opinion does not require that the opinion preparers address compliance with the requirements for formation in effect when the LLC was formed.

The LLC status opinion addresses an LLC's status as an LLC. It does not address the liability of members for an LLC's obligations.

3.0 LLC POWER TO ENTER INTO AND PERFORM ITS OBLIGATIONS UNDER TRANSACTION DOCUMENTS

The opinion that an LLC has the power to execute and deliver, and to perform its obligations under, an agreement means that the LLC has that power under (i) the statute under which it was formed and (ii) its certificate of formation and operating agreement, each as amended through the date of the opinion. By analogy to the corporate power opinion, the opinion often is worded to refer to "limited liability company" or "LLC" power, but it is understood to mean the same thing whether those qualifiers are used or not.⁴³

have at least one member because the mere assignment of LLC interests may not cause the assignees to be admitted as members. In Delaware, unless otherwise provided in an operating agreement, a member who assigns his entire LLC interest ceases to be a member, but the assignee is not admitted as a member without the consent of all members. See Delaware LLC Act §§ 18-301, 18-702, 18-704.

40. A Delaware LLC has perpetual existence if no time for dissolution is specified in its operating agreement. See Delaware LLC Act § 18-801(a)(1). However, a Delaware LLC that otherwise has perpetual existence may still be dissolved upon the occurrence of events specified in the operating agreement or the Delaware LLC Act. See Delaware LLC Act § 18-801.

41. An LLC may be dissolved and yet, so long as its certificate of formation has not been cancelled, still exist for purposes of winding up its affairs. See Delaware LLC Act §§ 18-201(b), 18-803 and 18-804. When giving an opinion on a dissolved LLC (for example, in a transaction in which the LLC is divesting itself of its remaining businesses), the opinion preparers should point out in the opinion letter that the LLC has been dissolved and exists solely for purposes of winding up its affairs. Note that a Delaware good standing certificate does not address dissolution because notice of dissolution is not required to be given to the Delaware Secretary of State when an LLC has dissolved.

42. See *TriBar 1998 Report*, *supra* note 1, at 644-45.

43. As with opinions on corporations, "full power" opinions should be avoided because of uncertainty regarding what "full power" might be interpreted to mean. See *TriBar 1998 Report*, *supra* note 1, § 6.3 n.138, at 652. "Full LLC power" opinions, however, are understood to have the same meaning as "LLC power" opinions.

Many LLC statutes permit LLCs to carry on any lawful business or purpose, subject to limited exceptions, and grant them broad powers to attain their purposes, subject to any limitations in their operating agreements.⁴⁴ The opinion means that the LLC has the power required, whether that power derives directly from the statute or, as permitted by the statute, from the operating agreement or some other document.

Even if the statute under which an LLC is formed grants it broad powers, the opinion preparers should confirm that neither the statute nor case law prohibits it from taking actions covered by the opinion.⁴⁵ In this regard, the considerations that come into play are the same as those for a corporate power opinion.⁴⁶

Normally, certificates of formation do not address an LLC's powers.⁴⁷ Instead, those powers ordinarily are addressed in an LLC's operating agreement. Unlike corporations, LLCs often are formed for particular purposes and are limited by their operating agreements to the powers necessary to accomplish those purposes.⁴⁸ Thus, to give an LLC power opinion, the opinion preparers must carefully review the LLC's operating agreement.⁴⁹ When the opinion preparers identify a possible problem, they often resolve it by arranging for the operating agreement to be amended.⁵⁰

Like an opinion on the power of a corporation, an opinion on the power of an LLC is understood as a matter of customary practice not to address restrictions on an LLC's power that do not derive from the statute under which the entity was formed (or its governing documents), such as laws requiring licenses or permits to engage in specified activities.

44. See, e.g., Delaware LLC Act § 18-106(a) (permitting LLC to carry on any lawful business, purpose or activity, subject to some limited exceptions, and granting LLC broad powers to attain its purposes, subject to any limitations in its operating agreement).

45. In Delaware, for example, an LLC is not permitted to engage in the business of banking. See Delaware LLC Act § 18-106(a).

46. See *TriBar 1998 Report*, *supra* note 1, § 6.3, at 653.

47. Of course, if a certificate of formation sets forth an LLC's powers, the opinion preparers must take those powers and any limitations on them into account in giving the opinion. Delaware does not require that an LLC's powers be set forth in its certificate of formation. Indeed, in Delaware a limitation on an LLC's powers set forth in its certificate of formation may not be effective in limiting the LLC's exercise of those powers. See Delaware LLC Act §§ 18-201(a) and 18-207.

48. The limitation may be general, for example, limiting the LLC to the powers required to further its stated purpose. This type of limitation requires the opinion preparers to satisfy themselves that the transaction furthers the stated purpose. Alternatively, a limitation may be specific, for example, prohibiting the LLC from investing in anything other than government securities.

49. In some transactions, preparation of the opinion can require extensive analysis of the operating agreement and, if it is unclear, documents bearing on its interpretation. For example, the operating agreements of many investment LLCs specify the purposes of the LLC, such as to invest in particular businesses, and then enumerate limitations on the LLC's powers. Those limitations in turn may be waivable in specified ways, for example, by action of an advisory committee of non-managing members. In addition, the operating agreement may grant the LLC other powers—e.g., the power to make or withhold distributions, the power to merge, the power to sell assets to affiliates, the power to contract for services from affiliates—and subject them to various restrictions that similarly are waivable upon compliance with specified procedures.

50. In the course of that review, the opinion preparers should consider whether any relevant terms are susceptible to more than one interpretation. See *supra* note 21 for a description of cases in Delaware on construing agreements.

The opinion that an LLC has the power to enter into a transaction (and perform the obligations it is undertaking) is not an opinion that the LLC has taken the action required for it to exercise that power. That opinion is discussed in the following section.

4.0 DUE AUTHORIZATION, EXECUTION AND DELIVERY (THE “ACTION OPINION”)

The opinion that an agreement has been duly authorized, executed and delivered by an LLC means that the steps required by the LLC statute under which the LLC was formed and its operating agreement to approve the agreement were taken,⁵¹ that the agreement was executed by persons with actual authority to act on the LLC’s behalf, and that the agreement was delivered in accordance with applicable legal requirements.

Operating agreements take many different approaches to decision making. Some adopt a corporate model, requiring approval of both members and managers for major transactions and managers alone for other transactions and specifying the manner in which approval is to be obtained and the percentage of votes required. Others adopt a limited partnership model, in which a single individual or entity such as a managing member has sole and exclusive power on all matters, and still others adopt a general partnership model, in which each member is entitled to participate in the management of the LLC (except as provided in the operating agreement).⁵² Often, in establishing the requirements for obtaining approvals, operating agreements permit less formality than corporation statutes.⁵³

In confirming that an agreement has been duly authorized, the opinion preparers must ascertain what approvals the operating agreement requires for the LLC to enter into the agreement and satisfy themselves that the specified approvals meet statutory requirements.⁵⁴ They then should confirm that those approvals

51. LLC statutes typically contain default provisions that establish the approvals required when an operating agreement is silent on a question. In Delaware, for example, unless otherwise provided in an operating agreement, management decisions must be made by members having more than a 50% interest in the profits of the LLC. See Delaware LLC Act § 18-402.

52. Whatever the model, the opinion preparers may assume, without so stating, that when an approval is given by a member or manager that is not a natural person, the member or manager is the type of entity it purports to be, that it was authorized to approve the transaction, and that those acting on its behalf had the approvals they required. As with any unstated assumption, opinion givers may not rely on this assumption if reliance is unreasonable under the circumstances in the opinion is given or they know it to be false. See *TriBar 1998 Report*, *supra* note 1, §§ 2.1.4, 2.3(c). To avoid any misunderstanding, some opinion givers choose to state the assumption expressly.

53. See Delaware LLC Act §§ 18-302, 18-404. The operating agreement, for example, might permit actions to be approved by a majority of the managers without a meeting or by a sole decision maker without formal action.

54. In some states, the statute may not permit decision-making authority to be given to certain classes of persons: for example, persons who are neither members nor managers. That is not the case in Delaware. See Delaware LLC Act § 18-407.

If the approval requirements in the operating agreement are unclear, the opinion preparers may require, as a condition to giving the opinion, that the operating agreement be amended to clarify the requirements or even to approve the transaction in question. If the LLC was formed in Delaware and the opinion preparers are not Delaware lawyers, they also may decide to consult with or obtain an opinion from Delaware counsel. See *supra* note 21.

For a discussion of the opinion’s coverage of fiduciary duties, see *infra* § 5.0.

were obtained in the manner, if any, specified in the operating agreement. That can be done by obtaining a certificate from an appropriate person⁵⁵ detailing the action taken or, if the action requires a meeting or written consent, confirming the adoption of specified resolutions.⁵⁶ If the operating agreement or LLC statute permits a decision maker to approve a transaction without formal action, the opinion preparers may be able to infer approval from the decision maker's execution of the agreement. The opinion preparers also must confirm that those who executed the agreement on behalf of the LLC were authorized to do so.⁵⁷ Sometimes the operating agreement itself expressly authorizes the LLC to enter into specified agreements and particular persons to execute those agreements on behalf of the LLC. The due execution and delivery opinions relating to an LLC generally have the same meaning as the analogous opinions on corporations.⁵⁸

5.0 FIDUCIARY DUTIES

When approving a transaction, the decision makers for an LLC are subject to fiduciary duties comparable to those applicable to directors of a corporation and general partners of a limited partnership.⁵⁹ Unlike corporations, however, LLCs in some states are permitted to include provisions in their operating agreements expanding or relaxing the fiduciary duties of their decision makers or even, in a few states such as Delaware, eliminating them (except for some fundamental duty such as, in Delaware, the implied contractual obligation of good faith and fair dealing).⁶⁰ Not all states permit LLCs that flexibility.⁶¹

55. The operating agreement may make clear who is an appropriate person by assigning a particular person, entity or designated official responsibility for the matter covered by the certificate. If the operating agreement does not, the opinion preparers will need to decide whom to look to for a certificate, for example, a manager or managing member. If the operating agreement provides for a secretary or similar recording officer, he or she normally will be an appropriate person. See *TriBar 1998 Report*, *supra* note 1, § 2.2.1, at 611–13.

56. Alternatively, in the case of a meeting, the opinion preparers could rely on a copy of the minutes.

57. The opinion preparers may, without so stating, rely on the assumptions described *supra* note 52 if the agreement was executed by a member or manager that is not a natural person.

58. See *TriBar 1998 Report*, *supra* note 1, § 6.4, at 653–54.

59. See, e.g., Delaware LLC Act § 18-1101(c).

60. Delaware LLC Act § 18-1101(c) permits LLCs to expand, restrict or eliminate fiduciary duties of members and managers. It does not, however, permit LLCs to eliminate the implied contractual covenant of good faith and fair dealing. See Delaware LLC Act § 18-1101(c). The Delaware courts have articulated the conditions that must be met to restrict or eliminate fiduciary duties. One requirement is that a provision for that purpose be clear, express and unambiguous. See *Miller v. American Real Estate Partners, L.P.*, No. Civ. A. 16788, 2001 WL 1045643, at *8 (Del. Ch. Sept. 6, 2001); *Brickell Partners v. Wise*, 794 A.2d 1, 3–4 (Del. Ch. 2001); *Sonet v. Timber Co., L.P.*, 722 A.2d 319, 322 (Del. Ch. 1998).

61. For example, the Illinois Limited Liability Company Act provides that a member's fiduciary duties may not be eliminated or reduced. That Act, however, does permit an LLC in its operating agreement to "identify specific types or categories of activities that do not violate these duties, if not manifestly unreasonable . . . and . . . specify the number or percentage of members or disinterested managers that may authorize or ratify . . . a specific act or transaction that otherwise would violate these duties." It also provides that while the obligation of good faith and fair dealing may not be eliminated or reduced, "the operating agreement may determine the standards by which the performance of the obligation is to be measured, if the standards are not manifestly unreasonable." 805 ILL. COMP. STAT. ANN. 180/15-5(b)(6)(A)(B) and (7) (West 2004).

As they do when giving opinions on corporations,⁶² opinion preparers ordinarily give opinions on LLCs without investigating whether decision makers violated their fiduciary duty in approving the transaction. Instead, they normally rely on an assumption, which ordinarily is unstated, regarding compliance with fiduciary duties.⁶³ If, however, the opinion preparers know of facts that in light of applicable case law cause them to question whether the assumption is reliable,⁶⁴ they are not permitted to rely on it without looking into the question further.⁶⁵

Unless further inquiry satisfies the opinion preparers that their concerns are unfounded, they must consider what disclosures to make and, indeed, whether they should give the opinion at all. What they do will depend on the circumstances of the particular case. For example, if they know that giving the opinion would further wrongful conduct by their client⁶⁶ or would mislead the recipient with regard to its subject matter,⁶⁷ they should not deliver an opinion even if it is technically correct.

Even when LLC statutes permit operating agreements to relax or eliminate fiduciary duties to which decision makers otherwise would be subject,⁶⁸ they ordinarily do not, as noted above, allow LLCs to grant decision makers unbridled discretion. Instead, they require satisfaction of some minimum standard of conduct, such as the implied contractual obligation of good faith and fair dealing.

62. See *TriBar 1998 Report*, *supra* note 1, § 6.4, at 654.

63. The Committee believes that the absence of improper conduct of decision makers as among themselves during the course of their approving a transaction is covered by the unstated assumption regarding compliance with fiduciary duties (see *TriBar 1998 Report*, *supra* note 1, § 3.3.4, at 625 n.77) or, alternatively, by a similar unstated assumption directed specifically to that conduct. See *infra* text accompanying note 70. The analysis in the text assumes that the absence of such conduct is covered by an unstated assumption.

64. See *TriBar 1998 Report*, *supra* note 1, § 6.4, at 654. Facts that raise concerns include, for example, self-dealing by decision makers, disparate treatment of the LLC's members, or conduct by decision makers (as discussed in the final paragraphs of this section) that works to undermine the process by which the approval was obtained. In *Gelfman v. Weeden Investors, L.P.*, 859 A.2d 89 (Del. Ch. 2004), for example, the court found that while decision makers had authority to approve a series of steps (including an amendment to a partnership agreement) resulting in a repurchase of limited partnership interests at less than fair market value, the decision makers had a conflict of interest and under the entire fairness standard could not eliminate the limited partners' economic rights for less than fair market value. See also *Solar Cells, Inc. v. True North Partners, LLC*, No. Civ. A. 19477, 2002 WL 749163 (Del. Ch. Apr. 25, 2002) (applying similar principles to block a merger, notwithstanding provisions in an operating agreement purporting to waive conflicts of interest). The principle underlying these cases, as the Delaware Supreme Court has made clear, is that technical compliance with the law is not an unassailable defense. See *Schnell v. Chris-Craft Indus. Inc.*, 285 A.2d 437, 439 (Del. 1971).

65. *TriBar 1998 Report*, *supra* note 1, § 2.3(c), at 616.

66. See MODEL RULES OF PROF'L CONDUCT R. 1.2(d), 1.13, 1.16(a), 4.1 (2002).

67. Opinion preparers are not permitted to give opinions, even if technically correct, that they recognize to be misleading to the recipient with regard to their subject matter. See *TriBar 1998 Report*, *supra* note 1, § 1.4(d), at 602–03.

68. See, e.g., Delaware LLC Act § 18-1101(c) (“To the extent that, at law or in equity, a member or manager or other person has duties (including fiduciary duties) to a limited liability company or to another member or manager or to another person that is a party to or is otherwise bound by a limited liability company agreement, the member’s or manager’s or other person’s duties may be expanded or restricted or eliminated by provisions in the limited liability company agreement; provided that the limited liability company agreement may not eliminate the implied contractual covenant of good faith and fair dealing.”).

Further, for a provision restricting or eliminating fiduciary duties to be given effect, the courts may require it to be clear, express and unambiguous.⁶⁹

When opinion preparers are concerned about the conduct of the decision makers, they should not automatically deliver an opinion in reliance on a provision in the operating agreement that by its terms permits that conduct. Rather, they should consider whether the courts will give the provision effect and, if so, who is affected by the conduct, whether disclosure of the issue in the opinion is sufficient to permit delivery of an opinion and, indeed, whether under the particular circumstances presented they should deliver an opinion at all.

In the case of both corporations and LLCs, the concept of fiduciary duty ordinarily is thought of as relating to the obligations of decision makers to the company and holders of equity interests in the company. A related basis for invalidating actions by decision makers, articulated in decisions in Delaware, involves trickery, other deceit or improper conduct by decision makers as among themselves in obtaining approval of a transaction.⁷⁰ If the opinion preparers know of conduct by decision makers that in light of applicable case law causes them to question the fairness of the decision makers' treatment of each other or the integrity of the process they have followed in approving a transaction,⁷¹ the opinion preparers should not rely on an unstated assumption⁷² but rather, as discussed above, should consider what disclosure to make and, depending on the circumstances, whether to deliver an opinion at all.

6.0 ENFORCEABILITY OF OPERATING AGREEMENT

An opinion that the operating agreement is valid, binding and enforceable (commonly referred to as a "remedies opinion")⁷³ may be requested when the

69. *Miller*, 2001 WL 1045643, at *8; *Brickell Partners*, 794 A.2d at 3–4; *Sonet*, 722 A.2d at 322. See *supra* note 60.

70. See *Adlerstein v. Wertheimer*, No. Civ. A. 19101, 2002 WL 205684, at *11–12 (Del. Ch. Jan. 25, 2002) ("[The former director and controlling stockholder] was disadvantaged 'by the other directors' failure to communicate their plans to him.' Had he known beforehand that [other directors] intended to approve the . . . proposal and to remove him from office at the . . . meeting, he could have exercised his legal right to remove one or both of them and, thus, prevented the completion of those plans . . . Adlerstein had a right to . . . advance notice in order that he might have taken steps to protect his interests . . . For all the foregoing reasons . . . the actions taken at the . . . meeting must be undone."); *VGS, Inc. v. Castiel*, No. Civ. A. 17995, 2000 WL 1277372, at *1 (Del. Ch. Aug. 31, 2000) ("Because the two managers acted without notice to the third manager under circumstances where they knew that with notice that he could have acted to protect his majority interest, they breached their duty of loyalty to the original member and their fellow manager by failing to act in good faith. The purported merger must therefore be declared invalid."), *aff'd*, 781 A.2d 696 (Del. 2001) (table decision).

71. A question might arise, for example, if an operating agreement permits a manager to enter into related-party transactions approved by an Advisory Committee, and the manager makes incomplete disclosure or calls a meeting of the Advisory Committee when a transaction's most outspoken critics are known to be unavailable.

72. As noted in the second paragraph of this Section 5.0, the absence of such conduct ordinarily is the subject of an unstated assumption.

73. A remedies opinion on an LLC's operating agreement typically states that the operating agreement is a valid and binding agreement, enforceable against the LLC's members and managers in accordance with its terms. Less frequently, it also states that the operating agreement is enforceable

opinion recipient is acquiring a membership interest or when investment banking firms, lenders or rating agencies in structured finance transactions are concerned about the enforceability of covenants, restrictions and internal governance provisions in an operating agreement.⁷⁴ This opinion is often more difficult to give than the status, power and action opinions because it requires the opinion preparers to consider issues of state contract law that are not necessarily straightforward⁷⁵ and because it covers all the provisions in the operating agreement rather than simply those applicable to status, power and approval.⁷⁶

The Committee discussed the remedies opinion in the *TriBar 1998 Report* and the *TriBar 2004 Remedies Opinion Report*.⁷⁷ The discussion in those reports applies to opinions on the enforceability of the operating agreement.⁷⁸ As indicated in those reports, the opinion addresses the legal effect of each of the contractual undertakings of the opinion preparers' client, subject to various assumptions and qualifications, express and implied. Two of the standard exceptions to the remedies opinion are the bankruptcy exception and equitable principles limitation.⁷⁹

Whenever they give a remedies opinion, the opinion preparers must satisfy themselves that the client has taken the steps required to enter into the agreement⁸⁰ or they must assume expressly in the opinion that it took those steps. When giving a remedies opinion on an LLC's operating agreement, the opinion preparers usually will seek to have the LLC's members and managers execute the operating agreement, even though the applicable LLC statute may establish other

against the LLC itself. In Delaware, an LLC is bound by its operating agreement. See Delaware LLC Act § 18-101(7). See also *Elf Atochem*, *supra* note 8.

74. In structured financings, for example, enforceability opinions on the operating agreement address lenders' concerns that restrictions in the operating agreement on the purposes and powers of the LLC are valid; that provisions that require a lender's or independent manager's consent to dissolve, amend the operating agreement, or engage in material transactions such as a merger are enforceable against the members; and that the covenants necessary to support a nonconsolidation opinion are enforceable obligations of the members. Opinions on the enforceability of an operating agreement are less common in conventional financing transactions.

75. Issues of fiduciary duty can be particularly troublesome. For example, the enforceability of a provision reducing or eliminating fiduciary duties may be open to question. See *supra* notes 60 and 61.

76. The enforceability of an operating agreement, or at least those terms relating to an LLC's internal affairs, is governed by the law of the state in which the LLC was formed. See, e.g., Delaware LLC Act § 18-901; *Elf Atochem, N. Am., Inc. v. Jaffari*, 727 A.2d 286 (Del. 1999). See also *VantagePoint Venture Partners 1996 v. Examen, Inc.*, 871 A.2d 1108 (Del. 2005).

Because of the more complex contract law issues often presented, lawyers who are willing to give status, power and action opinions on an LLC formed in a jurisdiction in which they do not practice often are unwilling to give opinions on the enforceability of the LLC's operating agreement. That, however, is not always the case. Some lawyers who practice in a state other than the state of the LLC's formation may be willing to give an opinion on enforceability when they are confident that the operating agreement does not raise any issues under the law of the state of formation (entity law, contract law and relevant case law) that they are not comfortable addressing. To limit the breadth of the opinion, opinion givers sometimes cover the enforceability of only specified provisions in the operating agreement.

77. See *supra* notes 1 and 18.

78. An exception is the discussion of the benefits of giving the opinion as if the law of another jurisdiction applied. See *TriBar 1998 Report*, *supra* note 1, § 4.6, at 635 and *supra* note 23.

79. See *TriBar 1998 Report*, *supra* note 1, § 3.3, at 622.

80. Often, this issue is addressed expressly in a separate opinion or in a separate part of the opinion that states that the agreement has been duly authorized, executed and delivered.

ways for members and managers to be bound.⁸¹ When a member or manager is a legal entity and not a natural person, the opinion preparers may assume without so stating that the member or manager is the type of entity it purports to be and that it was authorized, and obtained the approvals it needed, to enter into the operating agreement and to authorize the action of the persons who executed the operating agreement on its behalf.⁸²

A remedies opinion on an operating agreement means that the rights and obligations of the LLC and its members and managers (or other equity holders or decision makers) set forth in the operating agreement, the provisions specifying a remedy in the event of a breach, and the provisions relating to governance and administration will be given legal effect, subject to the standard bankruptcy exception and equitable principles limitation and any other exceptions expressly stated or understood as a matter of customary practice to apply.⁸³ Thus, for provisions in an operating agreement that obligate members or managers to perform an affirmative act, such as making a capital contribution upon the occurrence of a specified event, but that do not specify a remedy for a failure to perform, the opinion is understood to mean that in the event of a breach, a court applying applicable law either will require the member to perform that act (subject to standard exceptions) or will grant money damages or some other remedy. For a provision that does specify a remedy, such as a reduction of a member's interest in the LLC if the member fails to make a contribution, the opinion is understood to mean that a court (again subject to standard exceptions) will give effect to the specified remedy as written. Operating agreements often contain detailed provisions on how the LLC is to be governed, how the operating agreement is to be amended, and how disputes, including interpretive questions, are to be resolved. The opinion on these provisions means that a court will require the LLC and its members and managers to abide by their terms as written (again subject to standard exceptions).

CONCLUSION

Opinions on LLCs are becoming increasingly common. To date, however, little guidance has been available on how they should be worded, what they mean or what work opinion preparers should do to support them. The Committee is hopeful that this Report will facilitate the giving of opinions on LLCs and thus improve

81. See, e.g., Delaware LLC Act § 18-101(7) (stating that members, managers and assignees are bound by the operating agreement whether or not the member, manager or assignee executes the operating agreement).

82. When members or managers are natural persons, the opinion may be based on an assumption, which as a matter of customary practice need not be stated expressly, that they are competent to enter into the agreement. See *TriBar 1998 Report*, *supra* note 1, § 2.3(a), (c), at 615-16 (noting that opinion preparers may not rely on an unstated assumption if it is unreliable).

83. For a full discussion of the remedies opinion's coverage of various contractual provisions, see *TriBar 2004 Remedies Opinion Report*, *supra* note 18, § III and *TriBar 1998 Report*, *supra* note 1, § 3.1, at 619.

the opinion process. The Committee recognizes that custom is not a static concept and that customary practice with regard to LLC opinions is continuing to develop. Comments on this Report are welcome. Comments should be sent to Co-Chairs, TriBar Opinion Committee, c/o New York County Lawyers Association, 14 Vesey St., New York, NY 10007.

APPENDIX A

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