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**Third-Party Legal Opinions Regarding
Limited Liability Companies**

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THIRD-PARTY LEGAL OPINIONS REGARDING LIMITED LIABILITY COMPANIES

Limited liability companies (“LLCs”) formed and existing under the Texas Business Organizations Code (the “TBOC”) now far out-number for-profit corporations formed and existing under the TBOC. Transactions involving LLCs may call for the preparation and delivery of third-party closing opinion letters.

Third-party legal opinions regarding for-profit corporations, including the language used and corresponding opinion practices, have developed over a number of years and have now become relatively standardized. Opinions regarding LLCs – which do not have the same history – have been based on opinions regarding corporations and, therefore, have tended to use the same or substantially similar language. Nevertheless, the use of such language may not always be appropriate, and opinion givers should be aware that, even when such use is appropriate, it may mask some fundamental differences between LLCs and corporations.

LLCs, like corporations, are governed by and subject to statute. But LLCs are governed primarily by contract, because the LLC statute (which is primarily Chapter 101 of the TBOC) grants broad contractual freedom to the LLC’s members regarding the management and affairs of the LLC. The management or governance principles, the economic arrangements, and the other internal affairs of an LLC are not largely dictated by statute, and therefore standardized, like they are for corporations. Instead, most of the statutory provisions regarding an LLC are “default” rules that can be, are expected to be, and usually are overridden by the LLC’s governing documents. (Section 101.054 of the TBOC indicates that most provisions of the TBOC regarding LLCs may be altered and describes in detail those relatively few provisions that may not be altered.) The formation document that is filed to form an LLC – which is referred to as a “certificate of formation” in the TBOC – is an abbreviated or “bare-bones” document that typically does not contain any provision other than those required by statute. The management or governance principles, the economic arrangements, and the other internal affairs of an LLC will almost always be the subject of a governing agreement of the LLC’s members, which is referred to in Section 101.001(1) of the TBOC as a “company agreement” (an “**LLC Agreement**”).

This is important for a lawyer giving opinions regarding an LLC in the following three respects:

1. Because the provisions of a particular LLC Agreement will be critical in determining the opinions that can be given regarding the LLC, the opinion giver’s review and understanding of the LLC Agreement will be critical.
2. Because an LLC Agreement is a contract, subject to contract-interpretation principles, the review of an LLC Agreement must be conducted in light of applicable contract law.
3. Because of contractual freedom, there can be significant differences between the terms of LLCs, as reflected in their respective LLC Agreements. Accordingly, an opinion giver cannot assume, as he could regarding a corporation, that the decision-making and other operational matters regarding a particular LLC will follow a mandated or typical pattern.

The contract law applicable to or governing an LLC Agreement is the contract law of the state of formation of the LLC. This is an element of the so-called “internal affairs doctrine” reflected in Sections 1.101 and 1.102 of the TBOC, which provide that the law of the state of formation of an entity – whether Texas or another jurisdiction – governs the formation and internal affairs of the entity. Therefore, an opinion giver who is opining regarding an LLC should be knowledgeable about, and consider or address, not only the applicable provisions of the statute governing the LLC, but also the contract law of the state of formation of the LLC. This does not appear to pose an issue if the opinion giver is licensed to practice in, and has the requisite knowledge about the statutory and contract laws of, the state of formation of the LLC (e.g., a Texas lawyer opining as to a Texas LLC). This does, however, pose an issue if the opinion giver is not licensed to practice in, and may not or does not have the requisite knowledge about the statutory and contract laws of, the state of formation of the LLC (e.g., a Texas lawyer opining as to a Delaware LLC).

This issue was one of the key issues raised and addressed by the TriBar Opinion Committee (“**TriBar**”) in its report on third-party closing opinions regarding LLCs issued in 2006 and published in *The Business Lawyer* (a publication of the American Bar Association’s Business Law Section): *Third-Party Closing Opinions: Limited Liability Companies*, 61 Bus. Law. 679 (the “**2006 Report**”). TriBar – which derives most of its membership from the New York State Bar Association, the New York County Lawyers’ Association, and the Association of the Bar of the City of New York – is a group of lawyers who frequently participate in preparing, delivering, and receiving third-party legal opinions; and it is generally acknowledged as the foremost authority in the United States on legal opinions.

The 2006 Report acknowledges the widespread practice of non-Delaware lawyers, who are knowledgeable about the Delaware General Corporation Law and the case law interpreting that statute, giving third-party closing opinions regarding Delaware corporations. But the 2006 Report questions whether, even though Delaware LLCs (like Delaware corporations) are often used, the same practice should apply to opinions regarding Delaware LLCs. The crucial difference is that many of the matters typically addressed in opinion letters regarding LLCs are not matters of statute, but depend on contract terms specified in an LLC’s company or operating agreement. Many of the typical opinions regarding Delaware LLCs – of the sort described below in this paper – rely on Delaware contract law, which is primarily Delaware case law.

The 2006 Report states that a lawyer giving an opinion regarding a Delaware LLC’s status, power and authority, and authorization of a transaction is giving an opinion not merely as to the Delaware Limited Liability Company Act (the “**DLLCA**”), but also as to Delaware contract law applicable to the Delaware LLC. TriBar indicated that the contract-law issues in most Delaware LLC operating agreements may be sufficiently simple or fundamental, and non-Delaware lawyers may be sufficiently aware of Delaware contract law, that many non-Delaware lawyers may be comfortable giving opinions regarding a Delaware LLC’s status, power, and authorization. TriBar distinguished that circumstance with the considerably greater knowledge of Delaware contract law that would typically be required to give an opinion regarding the enforceability of a Delaware LLC’s operating agreement. Nevertheless, TriBar’s position is that

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