Agenda for Meeting of the Opinion Standards Committee
of the Business Law Section of the Florida Bar
Thursday, June 27, 2019
1:30 a.m. to 2:30 p.m.
Boca Raton Resort & Club
Boca Raton, Florida
Royal Palm Ballroom X

I. Welcome Robert W. Barron, Chair
Giacomo Bossa, Vice Chair

II. Pro Bono Reminder

III. Business Law Section Update & Welcome from Section Chair

IV. First Supplement to December 3, 2011 Third Party Legal Opinion Customary Practice in Florida Report. Update on the First Supplement.

V. Statement of Opinion Practices and Core Opinion Principles approved September 14, 2018 by the Legal Opinions Committee of the Business Law Section of the ABA and by the Working Group on Legal Opinions ("WGLO") Board on October 29, 2018. Current update.

VI. Miscellaneous Florida Opinion Issues for Discussion

A. Opinions on Delaware LLCs by non-Delaware lawyers

a. Status, power and action opinions – do they cover general contract law in Delaware or do they just cover the Delaware LLC Act and case law arising under the Delaware LLC Act?

B. Existence and Good Standing/Active Status Opinions

a. Impact of the entity's failure to file annual report on a timely basis, but before administrative dissolution

b. Impact of dissolution, but still during the wind down period

c. How does dissolution, for opinions given during wind down, affect enforceability opinions as to contracts entered into after the articles of dissolution are filed?

C. Impact of director vacancies on ability to act by unanimous written consent

a. What if the number of directors in place constitute fewer than a quorum?

D. Effectiveness of less than unanimous shareholder written consents if the 10 day notice has not been given – how does this impact the ability to give the proper action opinion?

E. Enforceability of advance waivers of appraisal rights by shareholders of corporations

a. Direct waiver

b. Indirect waiver by way of a drag along

F. Opinions Rendered to Freddie Mac and Fannie Mae

G. The Material Breach Qualification – what kind of feedback are opinion givers getting?

H. Guaranty Enforceability Opinions

VII. Update Regarding Working Group on Legal Opinions Foundation

VIII. New Committee Positions for 2019-2020

Gary I. Teblum	Co-Chair
Robert W. Barron	Co-Chair

IX. Good and Welfare

ENFORCEABILITY OPINIONS

PRACTICAL REALIZATION VS. MATERIAL BREACH

Under the "**practical realization**" qualification, the remedies opinion should be understood to mean that a contract has been formed and that, if inconsistent or legally defective remedies are set forth in a Transaction Document, the remedial provisions taken as a whole will nevertheless provide the Opinion Recipient, in the event of a material default by the Client, the benefit of its bargained-for ability to realize upon security or leased property or to realize the benefits of the Transaction, as the case may be, and to pursue a claim for damages.

In addition, certain of the provisions in the [Transaction Documents] might not be enforceable; nevertheless, subject to the bankruptcy exception and the equitable principles limitation, such unenforceability: (i) will not render the [Transaction Documents] invalid as a whole, or (ii) substantially interfere with the practical realization of the principal benefits (or security) purported to be provided by the [Transaction Documents].

On the other hand, the "**material breach**" qualification (which is often included in opinion letters relating to loan transactions) reduces the scope of the remedies opinion to the Opinion Recipient's ability: (i) to obtain judicial enforcement of the Client's principal obligations under the Transaction Documents (such as the Client's obligation to repay the principal and interest of a loan), (ii) to accelerate the particular obligation (i.e., to pay principal and interest) in the event of a material default under the Transaction Documents, and (iii) to foreclose on any security under such circumstances.

In addition, certain remedies, waivers and other provisions of the Transaction Documents might not be enforceable; nevertheless, subject to the bankruptcy exception and the equitable principles limitation, 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 [Transaction Documents/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 [or upon a material default in any other material provision of the Transaction Documents,] or (iii) the foreclosure in accordance with [applicable laws] of the lien on and security interest in the [collateral] created by the Security Documents upon maturity or upon acceleration pursuant to (ii) above.

SELECTED FLORIDA STATUTES

605.0714 Administrative dissolution.—

(1) The department may dissolve a limited liability company administratively if the company does not:

(a) Deliver its annual report to the department by 5:00 p.m. Eastern Time on the third Friday in September of each year;

(b) Pay a fee or penalty due to the department under this chapter;

(c) Appoint and maintain a registered agent as required under s. 605.0113; or

(d) Deliver for filing a statement of a change under s. 605.0114 within 30 days after a change has occurred in the name or address of the agent unless, within 30 days after the change occurred:

1. The agent filed a statement of change under s. 605.0116; or

2. The change was made in accordance with s. 605.0114(4).

(2) Administrative dissolution of a limited liability company for failure to file an annual report must occur on the fourth Friday in September of each year. The department shall issue a notice in a record of administrative dissolution to the limited liability company dissolved for failure to file an annual report. Issuance of the notice may be by electronic transmission to a limited liability company that has provided the department with an e-mail address.

(3) If the department determines that one or more grounds exist for administratively dissolving a limited liability company under paragraph (1)(b), paragraph (1)(c), or paragraph (1)(d), the department shall serve notice in a record to the limited liability company of its intent to administratively dissolve the limited liability company. Issuance of the notice may be by electronic transmission to a limited liability company that has provided the department with an e-mail address.

(4) If, within 60 days after sending the notice of intent to administratively dissolve pursuant to subsection (3), a limited liability company does not correct each ground for dissolution under paragraph (1)(b), paragraph (1)(c), or paragraph (1)(d) or demonstrate to the reasonable satisfaction of the department that each ground determined by the department does not exist, the department shall dissolve the limited liability company administratively and issue to the company a notice in a record of administrative dissolution that states the grounds for dissolution. Issuance of the notice of administrative dissolution may be by electronic transmission to a limited liability company that has provided the department with an e-mail address.

(5) A limited liability company that has been administratively dissolved continues in existence but may only carry on activities necessary to wind up its activities and affairs, liquidate and distribute its assets, and notify claimants under ss. 605.0711 and 605.0712.

(6) The administrative dissolution of a limited liability company does not terminate the authority of its registered agent for service of process.

History.—s. 2, ch. 2013-180; s. 135, ch. 2014-17.

605.0709 Winding up.—

(1) A dissolved limited liability company shall wind up its activities and affairs and, except as otherwise provided in ss. 605.0708 and 605.0715, the company continues after dissolution only for the purpose of winding up.

(2) In winding up its activities and affairs, a limited liability company:

(a) Shall discharge or make provision for the company's debts, obligations, and other liabilities as provided in ss. 605.0710-605.0713, settle and close the company's activities and affairs, and marshal and distribute the assets of the company; and

(b) May:

1. Preserve the company's activities, affairs, and property as a going concern for a reasonable time;

2. Prosecute and defend actions and proceedings, whether civil, criminal, or administrative;

3. Transfer title to the company's real estate and other property;

4. Settle disputes by mediation or arbitration;

5. Dispose of its properties that will not be distributed in kind to its members; and

6. Perform other acts necessary or appropriate to the winding up.

(3) If a dissolved limited liability company has no members, the legal representative of the last person to have been a member may wind up the activities and affairs of the company. If the legal representative does so, the person has the powers of a sole manager under s. 605.0407(3) and is deemed to be a manager for the purposes of s. 605.0304(1).

(4) If the legal representative under subsection (3) declines or fails to wind up the company's activities and affairs, a person may be appointed to do so by the consent of the transferees owning a majority of the rights to receive distributions as transferees at the time the consent is to be effective. A person appointed under this subsection has the powers of a sole manager under s. 605.0407(3) and is deemed to be a manager for the purposes of s. 605.0304(1).

(5) A circuit court may order judicial supervision of the winding up of a dissolved limited liability company, including the appointment of one or more persons to wind up the company's activities and affairs:

(a) On application of a member or manager if the applicant establishes good cause;

(b) On the application of a transferee if:

1. The company does not have any members;

2. The legal representative of the last person to have been a member declines or fails to wind up the company's activities and affairs; or

3. Within a reasonable time following the dissolution a person has not been appointed pursuant to subsection (3);

(c) On application of a creditor of the company if the applicant establishes good cause, but only if a receiver, custodian, or another person has not already been appointed for that purpose under this chapter; or

(d) In connection with a proceeding under s. 605.0702 if a receiver, custodian, or another person has not already been appointed for that purpose under s. 605.0704.

(6) The person or persons appointed by a court under subsection (5) may also be designated trustees for or receivers of the company with the authority to take charge of the limited liability company's property; to collect the debts and property due and belonging to the limited liability

company; to prosecute and defend, in the name of the limited liability company, or otherwise, all such suits as may be necessary or proper for the purposes described above; to appoint an agent or agents under them; and to do all other acts that might be done by the limited liability company, if in being, which may be necessary for the final settlement of the unfinished activities and affairs of the limited liability company. The powers of the trustees or receivers may be continued as long as the court determines is necessary for the above purposes.

(7) A dissolved limited liability company that has completed winding up may deliver to the department for filing a statement of termination that provides the following:

(a) The name of the limited liability company.

(b) The date of filing of its initial articles of organization.

(c) The date of the filing of its articles of dissolution.

(d) The limited liability company has completed winding up its activities and affairs and has determined that it will file a statement of termination.

(e) Other information as determined by the authorized representative.

(8) The manager or managers in office at the time of dissolution or the survivors of such manager or managers, or, if none, the members, shall thereafter be trustees for the members and creditors of the dissolved limited liability company. The trustees may distribute property of the limited liability company discovered after dissolution, convey real estate and other property, and take such other action as may be necessary on behalf of and in the name of the dissolved limited liability company.

History.—s. 2, ch. 2013-180.

607.0803 Number of directors.—

(1) A board of directors must consist of one or more individuals, with the number specified in or fixed in accordance with the articles of incorporation or bylaws.

(2) The number of directors may be increased or decreased from time to time by amendment to, or in the manner provided in, the articles of incorporation or the bylaws.

(3) Directors are elected at the first annual shareholders' meeting and at each annual meeting thereafter unless their terms are staggered under s. 607.0806.

History.—s. 70, ch. 89-154.