

Third-Party Entity Opinions in Private Equity and Finance Transactions

Current Guidance under TriBar Opinion Committee Reports on Limited Partnerships and LLCs

WEDNESDAY, JUNE 12, 2019

1pm Eastern | 12pm Central | 11am Mountain | 10am Pacific

Today's faculty features:

J. Truman Bidwell, Jr., Partner, **Sullivan & Worcester**, New York

Bjorn Bjerke, Partner, **Shearman & Sterling**, New York

Sylvia Fung Chin, Partner Of Counsel, **White & Case**, New York

Ettore A. Santucci, Partner, **Goodwin Procter**, Boston & New York

The audio portion of the conference may be accessed via the telephone or by using your computer's speakers. Please refer to the instructions emailed to registrants for additional information. If you have any questions, please contact **Customer Service at 1-800-926-7926 ext. 1.**

Tips for Optimal Quality

FOR LIVE EVENT ONLY

Sound Quality

If you are listening via your computer speakers, please note that the quality of your sound will vary depending on the speed and quality of your internet connection.

If the sound quality is not satisfactory, you may listen via the phone: dial **1-866-961-8499** and enter your PIN when prompted. Otherwise, please send us a chat or e-mail sound@straffordpub.com immediately so we can address the problem.

If you dialed in and have any difficulties during the call, press *0 for assistance.

Viewing Quality

To maximize your screen, press the F11 key on your keyboard. To exit full screen, press the F11 key again.

Continuing Education Credits

FOR LIVE EVENT ONLY

In order for us to process your continuing education credit, you must confirm your participation in this webinar by completing and submitting the Attendance Affirmation/Evaluation after the webinar.

A link to the Attendance Affirmation/Evaluation will be in the thank you email that you will receive immediately following the program.

For additional information about continuing education, call us at 1-800-926-7926 ext. 2.

If you have not printed the conference materials for this program, please complete the following steps:

- Click on the ^ symbol next to “Conference Materials” in the middle of the left-hand column on your screen.
- Click on the tab labeled “Handouts” that appears, and there you will see a PDF of the slides for today's program.
- Double click on the PDF and a separate page will open.
- Print the slides by clicking on the printer icon.

THIRD-PARTY ENTITY OPINIONS IN PRIVATE EQUITY AND FINANCE TRANSACTIONS:

J. Truman Bidwell, Jr., Sullivan & Worcester
Bjorn Bjerke, Shearman & Sullivan
Sylvia Fung Chin, White & Case
Ettore Santucci, Goodwin Procter

June 12, 2019

Outline

- TriBar Opinion Reports on third-party closing opinions for LLCs and LPs
- Internal Affairs Doctrine
- Limiting opinions to the Delaware LLC/LP Act
- Sample Covered Law Qualifications/Assumptions
- Coverage of Delaware statutes – Delaware Law Amendments
- Status opinion
- Formation/Existence opinion
- Power opinion
- Action opinion - authorization, execution and delivery of agreements
- Valid issuance opinion
- Admission of purchasers opinion
- Purchasers obligations opinion
- Personal Liability opinion
- Enforceability opinion

Tribar Opinion Committee Reports

- Third Party Closing Opinions: Limited Liability Companies, 61 Bus. Law, 679 (February 2006)
- Supplemental Tribar LLC Opinion Report: Opinions on LLC Membership Interests, 66 Bus. Law. 1066 (August 2011)
- Third Party Closing Opinions: Limited Partnerships, 73 Bus. Law. 1107 (Fall 2018)
- Third Party Closing Opinions: Limited Liability Companies (Revised 20XX) to come

Internal Affairs Doctrine

- Law of the state in which an entity was formed governs the matters addressed by the status, power and action opinions.
- Unless expressly excluded, such opinions cover not only the applicable state law statute but also “general” law, including contract law and related court decisions to the extent that the specific opinion being given raises issues such as contract formation or contract interpretation.
- Some lawyers are willing to give opinions on the so-called “as if” basis (assuming that the covered law of the opinion applies instead of (or is the same as) the law of the state in which an entity was formed).
- *CTS Corp. v. Dynamics*, 481 U.S. 69 (1987); *In re Bay Hills Emerging Partners LLP*. C.A. 2018-0234-JRS.2018 WL 3217650 (Del. Ch. July 2, 2018).
- *Restatement of the Law (2d) Conflict of Laws* § 301.
- *Delaware LLC Act* §§ 18-109(d) and 18-1101(i) *Delaware RULP Act* §§ 17-109(d) and 17-1101(i).

Limiting Opinions to the Delaware LLC/LP Act

- Opinions on Delaware corporations include coverage of relevant case law unless the opinion letter expressly excludes these decisions.
- Difference between opinions on corporations versus LLCs and LPs.
- Some lawyers believe that a statement in an opinion limiting coverage of Delaware Law to the LLC Act means the opinion giver did not consider Delaware contract law when giving the opinion and may look to the law of the state where they are located.
- Other lawyers believe that a statement in an opinion letter limiting its coverage to the Delaware LLC Act does not entirely eliminate the need for the opinion preparer to consider Delaware contract law.
- If the opinion does not cover Delaware contract law, that limitation should be clearly set forth. A statement indicating that coverage of the opinion is limited to the Delaware LLC Act may suffice; consider whether sophistication of opinion recipient or its counsel may require further explanation.

Sample Covered Law Qualifications/Assumptions

- ***Our reference to the Delaware [LLC/LP] Act excludes, for the avoidance of doubt, any contract law.***
- ***Our reference to the Delaware [LLC/LP] Act is based solely on a review of the text of the Delaware [LLC/LP] Act and not on any judicial or administrative decisions interpreting the statute or any other matters of Delaware law.***
- ***Our review of any agreement not governed by [Covered State] law is conducted as if such agreement is governed by [Covered State] law.***

Coverage of Delaware Statutes – Delaware Law 2018 Amendments

- If limiting opinion law coverage to Delaware statutes, opinion givers must keep informed on statutory amendments.
- A number of amendments were made in 2018 to the Delaware LLC Act and General Corporation Law. Most do not have a substantial effect on opinion practice.
- However, one amendment permits a Delaware LLC to divide into two or more Delaware LLCs pursuant to a plan of division (“Plan”).
- Existing LLC either survives as one of the two or more LLCs or is terminated pursuant to a plan of division (“Division”).
- While a certificate is required to be filed with the Delaware Secretary of State to effectuate the Division, there is no requirement the Plan be filed or made publicly available.
- Certificate must be maintained by an individual (“Division Contact”) for six years and is available to creditors upon request.

Delaware LLC Division Amendments

- LLCs formed after July 31, 2018 can without the Lenders' consent or any notice to the Lenders divide and allocate the Lenders' collateral to a newly created LLC.
- Unless the loan agreement prohibits a Division, the Lenders would have to challenge the Division as a fraudulent transfer, not an easy task.
- For LLCs formed and a party to a written loan agreement existing prior to August 1, 2018 prohibiting assignments, transfers, etc., a Division would be a violation of the terms of the loan, but that safe harbor will be lost if the loan is extended or modified.
- While the adverse consequences of a Division may be avoided by provisions in the Loan Agreement, the only absolute protection is a provision in the relevant LLC agreements prohibiting the exercise of the power to divide.
- Opinion givers have to consider the impact of the legislation on the Lenders' rights and remedies when issuing an enforceability opinion.

Status Opinion

[Name of LLC/LP] has been duly formed and is validly existing [and in good standing] as a [limited liability company/limited partnership] under the law of the state of [●].

Timing of Status Opinion

- Formation
 - The LLC/LP was duly formed at some time before opinion is given.
- Existence
 - On the date of opinion letter, entity exists as LLC/LP under the statute under which formed.

Formation/Existence – Diligence Documents

- Check your State for legal requirements
- Good Standing/Valid Existence Certificate from Secretary of State
- Certificate of Formation/Certificate of Limited Partnership
- If LLC, operating agreement or limited liability company agreement
- If LP, limited partnership agreement

Formation/Existence - Review

- Documents meet requirements of applicable LLC/LP statute
- Any conditions have occurred or been satisfied, e.g., occurrence of effective date
- LLC must have at least one member
- LP must have at least one general partner and one limited partner
- Name of entity must be the same as in Good Standing Certificate and all organizational documents

Formation/Existence Unstated Assumptions

- Signers are who they purport to be
- Natural persons had legal capacity
- Entity signers are what they purport to be, had entity power and took the required internal actions to authorize the signing of the partnership documents

Power Opinion

The [name of LLC/LP] has the power to execute, deliver and perform its obligations under [the Agreements] to which it is a party.

- Confirmation that entity has the power under its certificate and applicable agreement to take the actions covered in the opinion.
- “Limited partnership” power / “limited liability company” power – qualifier not necessary.
- Entity may be dissolved but continue to exist. Generally power opinions should assume no dissolution of entity.

Action Opinion

The [Agreements] have been duly authorized, executed and delivered by the [name of LLC/LP].

- Entity exists
- Entity has power to enter into agreements under applicable statute and organizational documents
- Steps required by applicable statute and organizational documents to authorize have been taken
- Agreements have been executed and delivered in accordance with applicable statute and organizational documents

Action Opinion - Unstated Assumptions

- Presumption of regularity and continuity
- If signing member or partner is an entity, each entity up the chain had the entity power and took the internal steps required to approve the actions taken and to authorize those acting to do so

Valid Issuance Opinion

The [limited liability company interests/limited partnership interests] of [name of LLC/LP] have been validly issued.

- Creation and issuance of interests satisfied requirements of applicable statute and organizational documents
- Includes power and action opinion
- Does not address (1) enforceability of terms of LLC/LP interests, (2) compliance with other laws, or (3) UCC category of interests.
- “duly authorized” – same meaning as “validly issued”
- “fully paid and nonassessable” – not applicable to LLCs and LPs

Admission of Purchasers Opinion

The purchasers of the [LLC/LP] interests have been duly admitted as [members/limited partners] of the [name of LLC/LP].

- All requirements of applicable statute and organizational documents have been satisfied.
- Does not confirm other conditions, e.g., in Subscription Agreement, unless stated.
- Does not include opinion that (1) purchaser can enforce obligations under organizational documents, (2) purchaser is liable or has duties under organizational documents, or (3) purchaser has power under its law to be [member/partner].

Purchaser Obligations Opinion

Under [applicable statute], Purchasers have no obligation solely by reason of their ownership of LLC/LP interests [or their status as members/limited partners] of [name of LLC/LP] to make payments beyond those they have previously made for their purchase of their Interests in or their contributions to [name of LLC/LP] [except as provided in their Subscription Agreements or the entity's organizational documents] [and] [except for their obligation to repay any funds wrongfully distributed to them] [and except as they otherwise may have agreed].

Personal Liability Opinion

Assuming the Purchasers, as [members/limited partners] of [name of LLC/LP], do not participate in the control of the business of [name of LLC/LP] within the meaning of the [applicable statute] (the “Act”), the Purchasers will have no personal liability for the obligations of [name of LLC/LP] solely by reason of their ownership of [LLC/LP] Interests [or their being [members/limited partners] of [name of LLC/LP] [except in each case as provided in their Subscription Agreements or organizational documents] [and] [except for their obligation to repay any funds wrongfully distributed to them] [and except as they otherwise may have agreed]. The [Members/Limited Partners] will not be deemed to be participating in the control of the business of [name of LLC/LP] within the meaning of the Act if, as [members/limited partners] of [name of LLC/LP], they take no actions other than those permitted by the [organizational documents].

Personal Liability Qualification

The phrase “solely by reason of their ownership of [LLC/LP] Interests [or their being a member/limited partner]” has been included to make clear that the opinion is not intended to cover personal liability that a Purchaser may have that is not attributable solely to the Purchaser’s status as an owner of [LLC/LP] Interests or as a [member/limited partner] under the [applicable statute], such as the personal liability a Purchaser may incur as a result of (i) the Purchaser’s status as a controlling person under securities laws, environmental laws or other laws, (ii) the Purchaser’s service in another capacity, for example, as a general partner of a limited partnership or a director, officer or manager of a limited liability company or a general partner of a limited partnership, (iii) the Purchaser’s own tortious or wrongful conduct, or (iv) application of a piercing-the-veil or similar doctrines.

Enforceability Opinion on LLC/LP Agreement

The [LLC/LP] Agreement is valid, binding and enforceable against the parties in accordance with its terms.

- General remedies opinion.
- Usually only given by counsel qualified as to governing law of the LLC/LP agreement.
- In the unusual situation where the LLC/LP agreement chooses the law of a state other than the state under whose law the entity was formed, opinion preparers should bear in mind that the governance of the [LLC/LP] will generally be subject to the formation state's law by virtue of the "internal affairs doctrine".
- Subject to standard assumptions and qualifications, including bankruptcy and equitable principles limitation.

Thank you

J. Truman Bidwell, Jr.
jtbidwell@sandw.com

Bjorn Bjerke
bjorn.bjerke@shearman.com

Sylvia Fung Chin
schin@whitecase.com

Ettore Santucci
esantucci@goodwinlaw.com