REVISIONS TO THE 2007 MARYLAND OPINION REPORT

By Edward J. Levin*

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The Special Joint Committee (the "Committee") of the Section of Business Law and the Section of Real Property, Planning and Zoning of the Maryland State Bar Association, Inc. ("MSBA") recently revised its 2007 Report on Lawyers' Opinions in Business Transactions (the "2007 Report"), and the revisions were approved by the Section Councils of each of the sponsoring sections. The 2007 Report and the 2009 revisions to it are posted at http://msba.org/docs/opinionmatters.asp.[1]

The 2007 Report, which is more than 260 pages long, includes an illustrative certificate from a company officer to the opinion giver and four illustrative opinions – a business transaction opinion, a "long form" real estate loan opinion, a "short form" real estate loan opinion which does not include a number of implicit assumptions and qualifications, and a share issuance opinion. The 2007 Report updated, revised, and added to the Maryland Opinion Report that was written in 1989 and published at 45 Bus. Law. 705 (1990) (the "1989 Report"). As the law and practice have changed since the 1989 Report was issued, limited liability companies, business trusts, and REITs have come into existence or become more popular. The 2007 Report addressed opinion related issues concerning those entities, as well as evolving issues relating to partnerships and corporations. The adoption by Maryland and every other state of revisions to Article 9 of the Uniform Commercial Code made changes in the way in which security interests in personal property are created and perfected, and the 2007 Report discusses how these changes affect opinion practice. Additionally, the 2007 Report includes a section on equity issuances, which was not part of the 1989 Report.

The 1989 Report and its illustrative opinions were widely used by opinion givers and opinion recipients in Maryland because of the Report's balanced approach, and the 2007 Report has gained the same broad acceptance during the past two and one-half years. The illustrative opinion letters in the 2007 Report are particularly user-friendly because they note to which of the specific opinions the assumptions and qualifications relate, and they include footnotes that provide guidance to and alternatives for opinion givers. Maryland lawyers frequently used the 1989 Report as a reference source, and they now employ the 2007 Report in the same way because of the Reports' discussions regarding the due diligence that is necessary to render the various opinions that are addressed in them.

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[1] This site also includes separate postings of the four illustrative opinions and the illustrative certificate from the 2007 Report as revised in 2009 that are referenced herein. The 1989 Report referenced herein is also posted at this site.

For preparing the 2007 Report, the Sections of Business Law and Real Property, Planning and Zoning received the Presidential Best Section Project Award from the MSBA in June 2007. Further, the 2007 Report has been widely acclaimed by various opinion-related groups nationally, including the American College of Real Estate Lawyers (ACREL) and the Legal Opinions in Real Estate Transactions Committee of the Section of Real Property, Estates and Trust Law of the American Bar Association.

Last year Donald Glazer, one of the authors of Glazer and FitzGibbon on Legal Opinions, reviewed the 2007 Report in connection with a forthcoming supplement to his treatise. Although he praised the 2007 Report generally, he suggested that it should be changed in several ways. Mr. Glazer expressed a concern about the 2007 Report's position that all opinion letters rendered under Maryland law should be interpreted in accordance with the provisions of the 2007 Report, regardless of whether the opinion letters specifically incorporate the 2007 Report by reference.[2] Also, he recommended that this concept be addressed in a more conspicuous part of the 2007 Report.

The issue regarding the relationship of bar association reports with opinion letters rendered under the law of the states of those reports needs to be understood in context. After the issuance of the 2007 Report, 28 bar association groups, committees, and associations approved the "Statement on the Role of Customary Practice in the Preparation and Understanding of Third-Party Legal Opinions," which was published at 63 Bus. Law. 1277 (2008) (the "Statement"). The ABA Section of Business Law sponsored the Statement, and the signatories to it included the ABA Section of Real Property, Trust and Estate Law, the MSBA Section of Business Law, and the MSBA Section of Real Property, Planning and Zoning. The Statement explains the role of customary practice in the interpretation of opinion letters as follows: "Customary practice permits an opinion giver and an opinion recipient . . . to have common understandings about an opinion without spelling them out." The Statement concludes with the following language:

> The *Restatement* [referring to Sections 51, 52 and 95 of the American Law Institute's *Restatement (Third) of the Law Governing Lawyers*] treats bar association reports on opinion practice as valuable sources of guidance on customary practice. Customary practice evolves to reflect changes in law and practice.
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> Some closing opinions refer to the application of customary practice. Others do not. Either way, customary practice applies. 63 Bus. Law at 1278.

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[2] The last three sentences of the third paragraph on page 173, Section D.17, "Assumptions, Qualifications, and Other Limitations" provided:

> It is intended that, by using the sample language for assumptions and qualifications set forth in this Report, those assumptions and qualifications will have the meanings and be interpreted as discussed in this Report. In order to further this goal, the Committee has specified that, unless stated otherwise in an opinion letter, it is implicit in every opinion, which indicates in the opinion letter that it is given as to the laws of the State of Maryland, that the opinion is to be interpreted in accordance with this Report. Accordingly, to the extent any opinion letter given under Maryland law uses sample language from this Report to express an assumption, qualification or limitation, that sample language should be interpreted in accordance with the discussion set forth in this Report.

In light of the view of Mr. Glazer and the language of the Statement, the Committee deleted the language on page 173 of the 2007 Report that all opinions under Maryland law incorporate the 2007 Report by reference, whether or not they so specify, and it added a paragraph to Section B, "Statement of Policy" on page 6 of the 2007 Report. The new paragraph states that it is the Committee's belief that the 2007 Report reflects customary opinion practice in Maryland. It also states that, to the extent an opinion letter under Maryland law uses language from the 2007 Report to express an opinion, assumption, qualification, or limitation, such language should be interpreted as set forth in the 2007 Report. However, the language added to the Statement of Policy does not provide that all opinions under Maryland law incorporate the 2007 Report by reference.[3]

In reviewing the 2007 Report to update his treatise, Mr. Glazer made a number of other suggestions for changes to the 2007 Report, some of which were based on positions taken by other bar association opinion reports. The Committee considered all of Mr. Glazer's comments and agreed that some of them merited changes to the 2007 Report while others did not. As to the changes that the Committee did not make, it believed that certain of Mr. Glazer's recommendations were not consistent with Maryland law or practice, and the Committee decided to take a different position from Mr. Glazer on other points.

The additional changes that the Committee did make to the 2007 Report are as follows:

1. Pages 21 and 22, Section C.3.k. "Procedures / Foreign Law." In connection with the discussion about rendering an opinion when the law governing the transaction documents is other than Maryland law (and the opinion giver is not admitted to practice in the jurisdiction of the governing law), the Committee added as an option that the opinion giver may be permitted to render an "enforceability" opinion with the assumption that the documents in question are governed by the law of Maryland (in addition to the assumption that the laws of the state chosen to govern the transaction are identical to the laws of Maryland). The Committee also revised the illustrative share issuance opinion of the 2007 Report to reflect this change.

2. Page 51, Section D.4. "Authorization, Execution, Validity and Enforceability." The Committee revised the language of the "authorization" opinion to make it clear that this opinion means that all action has been taken at the entity level to authorize the company's execution, delivery, and performance of the transaction documents (as opposed to action that may have been taken by any other person, agency, or authority). The Committee also revised the four illustrative opinions of the 2007 Report to reflect this change.

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[3] The new language in Section B, "Statement of Policy," is:

> The Committee's view is that this Report reflects customary practice in Maryland with respect to issuing and receiving opinions on the matters addressed by this Report. Since the issuance of this Report on June 14, 2007, the Sections of Business Law and Real Property, Planning and Zoning, along with many other organizations and associations, adopted the Statement on the Role of Customary Practice in the Preparation and Understanding of Third-Party Legal Opinions dated August 1, 2008 (the "Statement of Customary Practice"). [63 Bus. Law. 1278 (2008)] The Statement of Customary Practice specifies that customary practice applies in determining the meaning of an opinion letter and that bar association reports, such as this Report, are valuable sources of guidance on customary practice. Accordingly, the Committee believes that to the extent any opinion letter given under Maryland law uses language from this Report to express an opinion, assumption, qualification, or limitation, that language should be interpreted in accordance with the meaning and discussion set forth in this Report.

3. Pages 52 and 53, Section D.4. "Authorization, Execution, Validity and Enforceability." The Committee changed the word "persons" to "individuals" in the commentary about the "execution" opinion to make it clear that opinion givers may assume that natural persons have the legal capacity to sign documents, but opinion givers may not make the same assumption about entities.

4. Page 65, Section D.5.1 "Equity Issuances / Corporation." The 2007 Report stated that an opinion that shares of a corporation have been "duly issued" could be rendered without regard to whether the shares were issued in violation of preemptive rights of existing stockholders. The Committee changed the discussion on this matter to provide that preemptive rights may be covered by "validly issued" opinions. The Committee provided that if a corporation's charter or bylaws restrict the issuance of stock that violates preemptive rights, a "validly issued" opinion cannot be rendered.

5. Page 145, Section D.9, "No Violations of Law." In the 2007 Report, the Committee strongly discouraged the requesting and giving of "no violations of law" opinions. The Committee revised the commentary about "no violations of law" opinions to indicate that such opinions may be given if the opinion letters contain substantial limitations and appropriate qualifications.

6. Pages 155 and 156, Section D.12, "No Litigation." The commentary to the 2007 Report stated that arbitrations and mediations were intended to be covered by "no litigation" opinions, but the form of "no litigation" opinion in the 2007 Report did not specifically refer to arbitrations or mediations. The Committee became concerned that opinion givers may inadvertently render "no litigation" opinions that implicitly include reference to arbitrations and mediations. Therefore, the Committee amended the form of "no litigation" opinion to explicitly refer to proceedings before arbitrators and mediators so that those who render "no litigation" opinions will be aware of the need to consider arbitrations and mediations. The Committee also revised the four illustrative opinions of the 2007 Report to reflect this change.

7. Pages 174 to 176, Section D.17, "Assumptions, Qualifications and Other Limitations." The lead-in language to the "assumption" section of the illustrative opinion letters that previously appeared in the 2007 Report provided: "In reaching the opinions set forth below, we have assumed, and to our knowledge there are no facts inconsistent with, the following: . . . ." (Underscore added.) The effect of the underscored language was to provide the opinion recipient with an implied negative assurance about the matters that were being assumed, which include the representations and warranties in the loan documents. This language could be a problem because the term "our knowledge" is defined in the illustrative opinions that are part of the 2007 Report to include the knowledge of specified lawyers in the firm of the opinion giver; however, it may be that not all of those lawyers will have reviewed the loan documents. If a lawyer who is included within the group whose knowledge is encompassed by the term "our knowledge" knows of a misstatement in the representations and warranties in the loan agreement, but that lawyer does not review the loan documents, the lawyer would not be aware of the need to call out the misstatement. In such a case, the opining firm would not want to render an opinion that it does not have knowledge of facts inconsistent with the loan documents. Therefore, the Committee deleted the underscored words. The Committee also revised the four illustrative opinions of the 2007 Report to reflect this change.

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