MEMORANDUM

TO:	The Opinions Standards Committee of the Business Law Section of the Florida Bar
FROM:	David E. Peterson of Lowndes, Drosdick, Doster, Kantor & Reed, P.A. (Orlando)
DATE:	January 24, 2022
RE:	Are Opinion Givers Required to Go "Up the Chain"?

Hypothetical Facts:

You have been asked to give an opinion in a loan transaction that the borrower has authorized the execution and delivery of the loan documents. The borrower is a Florida limited liability company. The borrower's operating agreement states that it is a manager-managed entity, or that it is a member-managed entity, and that the manager or member (as the case may be) is itself a limited liability company.

The Question:

In order to give the authority opinion for the borrower, do you need to review the operating agreement for the manager or member to confirm that the manager or member has also authorized the transaction?

Discussion:

The Florida Report provides a different answer to this question than does the TriBar.

I have attached a discussion of this issue copied from an old issue of the ABA Opinions Committee newsletter (Appendix 1). The part I have marked discusses the question of whether you need to "go up the chain" when you're giving an authority opinion for an LLC. It notes that the TriBar does not require that, and permits the opinion giver to assume that it is authorized at higher levels even though the assumption is not expressly stated. The ABA discussion states that while it is not required, attorneys giving an opinion typically nevertheless satisfy themselves that it is authorized at those levels. However, the import of all this, I believe, is that the opinion effectively excludes an opinion that the transaction is authorized at those higher levels.

The Florida Report, on the other hand, is more demanding. In Appendix 2, I have copied part of the discussion of the LLC authority opinion in the Florida Report. The part I have marked seems to suggest that yes, you do need to "go up the chain."

Unfortunately, that is oftentimes not so easy to do. There may be foreign jurisdiction entities in the chain, which could necessitate hiring out of state counsel. Also, if there are minority members at some of the levels, they may have consent requirements that further add to the scope of the opinion and it may be difficult to obtain copies of organizational documents for those entities, much less to have

them certified by the proper officers, who may be unaffiliated with your client. The greater the proliferation of entities, the more likely you will find that you have these problems.

Of course, you can add a carveout if your lender's counsel will permit it, but the TriBar seems to suggest you do not need a carveout so long as you do not have notice that reliance on the implied assumption is unreasonable.

Generally speaking, the Florida Report provides that there are no implied opinions. The requirement that you must go up the chain is really an implied opinion, which should follow the general rule of no implied opinions. You are giving an express opinion that the borrower has authorized the transaction, and you are giving an implied opinion that each of the entities in the chain whose consent is required has authorized the transaction. I think that if you do not list organizational documents for those higher level entities as documents you have reviewed, that ought to be a tip off to the lender that the opinion does not cover authorization at those levels. I therefore feel that the Florida Report should adopt the TriBar position on this issue.

Appendix 1

53 Bus. Law 591, 615 (1998).[5] This assumption is narrower than one assuming "due execution and delivery for value. . . ."

Several responders noted that the corporate action opinion should be given only when the "covered law" of counsel's opinion is also the law under which the client has been organized (with the possible exception of Delaware, where non-Delaware counsel often are familiar with Delaware law and comfortable giving the opinion on behalf of clients organized in Delaware). This problem can be particularly relevant for local counsel giving enforceability opinions under local law (Edward L. Wender, Venable LLP, Baltimore; Robert A. Grauman, Baker & McKenzie, LLP, New York). Adam W. Smith of Polsinelli PC, Kansas City, supplemented this caveat by noting that not only may the law of the jurisdiction of organization be relevant to the corporate action opinion but also the chosen law of the documents addressed by the opinion, adding that he usually adds an express qualification that he is "solely opining on those elements of execution and delivery related to the law of the opinion [covered] state."

Jaipat supplemented his inquiry asking whether his firm could properly assume that resolutions authorizing the transaction had been properly executed and delivered by remote directors or shareholders (or by members or managers with respect to alternative entities).

To this supplemental inquiry, Stan Keller replied that, as to director and shareholder actions of a client, the opinion preparers rely on their own knowledge, appropriate certificates, and unstated assumptions. A separate question arises as to whether to go "up the chain" when shareholders or, in the LLC/LP context, members, managers, or partners are themselves entities. Stan pointed to TriBar's conclusion in its report on LLC opinions that going up the chain (in the absence of knowledge to the contrary) was not necessary:

> "...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 which the opinion is given or they know it to be false."

TriBar Opinion Committee, *Third-Party Closing Opinions: Limited Liability Companies*, 61 Bus. Law 679, 689 note 52 (2006). Marshall Grodner demurred, stating his belief that going up the chain was required, but that he addresses the matter by stating an express assumption as to the requisite approvals from the parties up the chain.

Stan did note, however, that when the opinion giver represents parties up the chain, counsel will typically "satisfy themselves as to the adequacy of actions [taken] at those levels."

[5] Some opinion givers prefer to state the assumption of the genuineness of all parties' signatures to the relevant documentation particularly after the decision of the Appellate Division of the New York State Supreme Court in *Fortress Credit Corp. v. Dechert*, 89 A.D.3d 615, 934 N.Y.2d 119 (2011). The *Dechert* case involved a fraudulent $50 million loan transaction arranged by Marc Dreier. The defendant law firm (Dechert LLP) delivered a legal opinion that the loan documents had been duly executed and delivered and that the loan was a valid and binding obligation of the borrowers. The plaintiff/lenders sued Dechert after Dreier's arrest, asserting that they relied on Dechert's opinion. However, the New York Appellate Division of the Supreme Court (New York's trial court) dismissed the plaintiffs' complaint, primarily on the ground that the complaint failed to allege the necessary factual predicates to establish that Dechert breached any duty of care to plaintiffs. The Appellate Division also noted that "[t]he opinion was clearly and unequivocally circumscribed by the qualifications that defendant assumed the genuineness of all signatures and the authenticity of the documents, [that Dechert] made no independent inquiry into the accuracy of the factual representations or certificates, and undertook no independent investigation in ascertaining those facts." 89 A.D.3d at 617.

Appendix 2

organization or the operating agreement, if the members have appointed more than one manager to manage the business of the LLC, then decisions of the managers shall be made by majority vote of the managers at a meeting or by unanimous written consent. Section 608.422(4)(c) of the FLLCA provides that, in a manager-managed LLC, a manager: (i) must be designated, appointed, elected, removed, or replaced by a vote, approval, or consent of a majority-in-interest of the members; and (ii) holds office until a successor has been elected and qualified, unless the manager sooner resigns or is removed. The manager or managers may also hold the offices and have such other responsibilities accorded to them by the members and set out in the articles of organization or the operating agreement of the LLC.

With respect to the agency authority of members in a manager-managed LLC, Section 608.4235(2) of the FLLCA provides that in a manager-managed LLC, a member is not an agent of the company for the purpose of its business solely by reason of being a member. In a manager-managed LLC, each manager is an agent of the company for the purpose of its business, and an act of a manager, including the signing of an instrument in the company's name, for apparently carrying on in the ordinary course the company's business or business of the kind carried on by the company binds the company, unless the manager had no authority to act for the company in the particular matter and the person with whom the manager was dealing knew or had notice that the manager lacks authority. An act of a manager which is not apparently for carrying on in the ordinary course the company's business or business of the kind carried on by the company binds the company only if the act was authorized under Section 608.422 of the FLLCA. As noted in (3) below, however, the real estate rule set forth in Section 608.4235(3) of the FLLCA overrides these agency and authority rules for manager-managed companies.

To render an opinion that a manager-managed LLC has approved a Transaction, Opining Counsel should review the articles of organization and the operating agreement of the LLC, determine the requisite vote of managers (and, if applicable, the requisite vote of members) to approve the Transaction and then obtain evidence as to the approval by such requisite vote of managers (and, if applicable, members). Each requisite vote should be documented in writing. Additionally, Opining Counsel should review the FLLCA to determine whether the action to be taken by the manager-managed LLC nevertheless requires the LLC to obtain member approval for the particular Transaction even if not otherwise required by the operating agreement.

3. General Real Estate Rule. As an overriding rule applicable to real property held by an LLC, Section 608.4235(3) of the FLLCA provides that, unless the articles of organization or operating agreement limit the authority of a member or manager, any member of a member-managed LLC or manager of a manager-managed LLC may sign and deliver any instrument transferring or affecting the LLC's interest in its real property. The transfer instrument is conclusive in favor of a person who gives value without knowledge of the lack of the authority of the person signing and delivering the instrument. This provision in Section 608.4235(3) of the FLLCA expressly trumps the agency rules in other parts of Section 608.4235 of the FLLCA that are discussed above. However, the Committees recommend that, for opinion purposes, Opining Counsel should obtain and review the documents set forth in (1) above (for a member-managed LLC) or in (2) above (for a manager-managed LLC) before issuing an opinion regarding authorization of the Transaction by an LLC.

4. Authority. An opinion with respect to the authorization of a Transaction by an LLC reflects Opining Counsel's judgment that the persons or entities signing for the LLC have authority to execute the Transaction Documents. Although apparent authority may protect third parties who rely on the signature of a member or manager of the LLC, the Committees believe that it should not be the sole support relied upon by Opining Counsel in rendering an opinion on the authorization of a Transaction.

5. Other Entities. An opinion given with respect to an LLC may require Opining Counsel to look at the authorization of the Transaction by entities other than the LLC that is a party to the Transaction and the Transaction Documents. Opining Counsel should examine the structure of the LLC to determine what members or managers who have to approve the Transaction are entities. In reviewing authorization by the

LLC, Opining Counsel should also review the authorization by these other entities to a level where such Opining Counsel is comfortable, based on the particular facts and circumstances, that the requisite approval of the LLC entering into the Transaction and the Transaction Documents has, in fact, been obtained.

Opining Counsel should recognize that it is Opining Counsel's responsibility to become comfortable, based on the particular facts and circumstances, that the requisite approval of the other entities that are members and/or or managers of the LLC entering into the Transaction and the Transaction Documents has been obtained. If Opining Counsel cannot satisfy themselves in that regard, Opining Counsel should expressly set forth in the opinion letter any limitations on the scope of Opining Counsel's opinion as a result of not having been able to satisfy themselves regarding necessary approvals by other entities that are members and/or managers of the LLC.

6. Fiduciary Duties. The authorization opinion does not mean that the managers or the managing members, as applicable, of the LLC are in compliance with their fiduciary duties with respect to the Transaction and the Transaction Documents.

E. Trusts

Recommended opinion:
The Client, as trustee of the trust, has authorized the execution, delivery and performance of the [Transaction Documents] by all necessary action.

1. General

In the context of a trust, because it is not a separate statutory entity but rather a fiduciary relationship with respect to property, the authorization of the execution, delivery and performance of the Transaction Documents by the trustee on behalf of the trust requires not only basic diligence with respect to actions taken by the trustee but also certain additional diligence similar to the diligence required to determine entity power with respect to the trustee on behalf of the trust. Accordingly, there are likely to be two separate key inquiries required for Opining Counsel to render the recommended opinion.

A. Entity as Trustee. If the trustee is a corporation, partnership or LLC, Opining Counsel should first inquire as to what authorizations are required by that entity in order for that entity to have been authorized to serve as trustee and to take the actions necessary, in its capacity as trustee, to authorize the execution, delivery and performance of the Transaction Documents. In most cases, this analysis will be exactly the same as the analysis set forth above concerning steps that need to be taken for that type of entity, in its own capacity, to authorize such actions. This may involve, for example, adoption of resolutions at meetings of governing bodies of the entity or written consents in lieu of such meetings.

B. Trust Authorization. The second inquiry overlaps with the required inquiries described in the entity power discussion. The extent of the required inquiry is dependent upon: (i) whether the trust relationship is a Florida Land Trust that satisfies the requirements of Section 689.071, Florida Statutes, (ii) whether a separate written trust document or other agreement governing the trust relationship exists, and (iii) whether the beneficiaries of the trust need to consent to the execution, delivery and performance of the Transaction Documents in order for the trustee to have proper authorization to take such actions. If a trust document or other agreement governing the trust relationship is in existence, then even if the trust relationship is created pursuant to Section 689.071, Florida Statutes, a review of the trust document or other agreement governing the trust relationship should be made by Opining Counsel in order to render the opinion.

2. Florida Land Trust

(a) *Florida Land Trusts Without Written Trust Agreements*

If the trust satisfies the requirements of Section 689.071, Florida Statutes, it is possible for Opining Counsel to render the opinion even if there is no separate trust agreement governing the trust relationship. However,