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From the Selected Works of Seth Barrett Tillman

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Extract from 1 Arthur N. Field & Jeffrey M. Smith, Legal Opinions in Business Transactions § 9:4:3 (3d ed. 2014), citing Bigler and Tillman's Void or Voidable? -- Curing Defects in Stock Issuances Under Delaware Law

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partner does not by itself provide a basis for requiring contributions beyond those specified in relevant agreements.⁶²

History plays a role as well. Stock investors seldom seek opinions that they have liability limited to third parties. But, while both the LLC and LP statutes provide for limited liability (unless a limited partner takes on a management role), opinions are often sought as to limited liability.

Similarly, stock investors seldom seek assurance that each provision of the certificate of incorporation is effective, except in some cases regarding preferred stock. LLC and LP investors, however, sometimes seek remedies opinions on the relevant entity agreement.

Various opinions about LLCs and LPs can only be given if there has been action by members, managers and partners. We believe that, as a matter of customary diligence, the opinion preparer may rely (unless reliance is not reasonable under the circumstances) on an unstated assumption that the member, manager or partner is the type of entity it purports to be and that those acting in its behalf had the power and were authorized to take the action they took. In this way, diligence ordinarily is avoided as to the other entities involved in the company.

But, customary practice for non-corporate entities is not yet fully developed. Some opinion preparers may therefore choose to state this assumption. There may be situations in which the opinion recipient will specifically require that diligence extend to these other entities.

Issuing equity interests involves a process. Mistakes are made. Courts differ on whether mistakes can be cured in some circumstances.⁶³ In those circumstances, it may be difficult to find a remedy for the purchaser. Thus, the opinion provided on issuance of the interest has great practical significance in assuring that there has been attention to the details of the issuance. Stock issued as a dividend and stock splits involve special rules not discussed in this text.

The diligence pattern also differs from entity-to-entity. The LLC and LP are relatively "fragile" entities. By that we mean that they can terminate inadvertently. A corporation continues to exist until either: (1) there is a voluntary dissolution; (2) any term set forth in the certificate of incorporation expires; (3) a court takes action to terminate the

62. See, e.g., Supplemental TriBar LLC Opinion Report, *Opinions on LLC Membership Interests*, 66 BUS. LAW. 1065, 1071 (2011), which is also in Appendix N.

63. See Bigler & Tillman, *Void or Avoidable?—Curing Defects in Stock Issuances Under Delaware Law*, 63 BUS. LAW. 1109 (2008).

§ 9:4.3 State Law Opinions on Entity Issuance of Equity Interests

[A] Overview

As reflected by the title, this section deals with state law applicable to issuing equity interests in entities. Other related state law issues are discussed in Volume 2, Chapter 3. Opinions regarding federal securities laws and state blue sky laws connected to issuing securities are discussed in Volume 2, Chapter 7.

The issuance of equity interests in entities is a familiar litigation battleground.⁵² There are a number of theories under which equity interests issuance can be declared void⁵³ or may be voidable. Some of these cases relate to fairness concepts applicable to the issuance and others relate to more formalistic issues. The opinion preparer will have responsibilities for these areas to the extent the preparer is aware of the relevant facts. In some situations, the opinion preparer will have the responsibility to develop the relevant facts.

In addition, in some cases, the issue may arise from an interpretation of an entity statute. That usually is within the scope of the opinion preparer's responsibilities.

As with other property, the transfer of equity interests in entities may be avoided where there is a violation of fiduciary obligations or of good faith and fair dealing obligations. Relatively few cases in this area result in published decisions, but it is a critical area.⁵⁴

Transactions with a director, general partner or manager are particularly vulnerable. Corporation statutes often contain provisions that allow such transactions to stand, if fully disclosed and approved by a vote that excludes the interested party.⁵⁵ In Delaware, by statute, fiduciary duties of a manager or general partner (but not the duty of good

52. See Bigler & Tillman, *Void or Avoidable?—Curing Defects in Stock Issuances Under Delaware Law*, 63 BUS. LAW. 1109 (2008). Stock issued as a dividend and stock splits involve special rules not discussed in this book. See Volume 1, Chapter 3, section 3:2.6[B].

53. The Delaware legislature enacted changes in the General Corporation Law in 2013 to avoid the harsh result of some cases in which stock has been declared void. See DGCL §§ 204 and 205.

54. See, e.g., *Adlerstein v. Wertheimer*, 2002 WL 205684 (Del. Ch. Ct.), limited by *Klaassen v. Allegro Dev. Corp.*, ___ A.3d ___, 2014 WL 996375 (Del. Sup. Ct.), regarding the action taken being voidable rather than void.

55. See, e.g., DGCL § 144.

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