For easy access to current reports of the Legal Opinions Committee and TriBar Opinion Committee reports, visit the Legal Opinion Resource Center at http://www.abanet.org/buslaw/tribar/home.shtml

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**John Power Appointed Vice Chair**

I am pleased to report that John Power has agreed to serve as Vice Chair of the Committee on Legal Opinions. John, who is retired from O’Melveny & Myers, has been a long time participant in our committee. He is a member of TriBar and was chair of the Steering Committee for the California Business Law Section 2004 Report on Third-Party Remedies Opinions. That Report, which was described in a prior newsletter, included a report titled “Threshold Question” When Should A Remedies Opinion be Requested,” which is a thoughtful analysis of the costs and benefits of giving and receiving remedies opinions and a consideration of alternatives. The Report also confirmed that customary practice is the unifying tenet of third-party opinion literature and suggests that opinion givers and lawyers representing opinion recipients should seek a common understanding of applicable customary opinion practice.

**Committee News**

The committee will meet on Friday, April 7 from 10 a.m. to 10:30 a.m. at the Spring Meeting in Tampa. Immediately following the meeting, we will present two-hour program on Be Law Office Opinion Practices - Policy and Process. Art Field will discuss the Law Office Opinion Practices report published by the Committee in November 2004. We never gave the report a full airing because the Dean Foods decision intervened and became the major focus of our programs in 2005. Art, Larry Safran, Tim Hoxie, Amy Williams and a member of the Florida bar will engage in a dialogue on law office practices and whether and how practices have changed since the report in response to Dean Foods. Come prepared to participate.

We are also co-sponsoring a program to be held at the Annual Meeting in Hawaii with the Partnerships and Unincorporated Business Organizations and Small Business Committees on “Practice and Perils of Opinions on Alternative Entities.” We will cover legal opinions for limited liability companies and limited partnerships focusing on the soon to be published TriBar Opinion Committee report on "Third-Party Closing Opinions: Limited Liability Companies"; customary practice regarding due diligence; assumptions, qualifications, limitations or exclusions; consideration of fiduciary duty; and rendering opinions on Delaware entities by non-Delaware lawyers.
TriBar Report on Limited Liability Company Opinions

The TriBar Report on Third-Party Closing Opinions: Limited Liability Companies is complete and should be published before the Annual Meeting in Hawaii at which it will be discussed.

Streamlined Form of Closing Opinion, Boston Bar Association Business Law Section

The final version of the Boston Streamlined Opinion Form, with an introduction by Don Glazer and Stan Keller is scheduled to appear in the November issue of The Business Lawyer, which is expected to be distributed sometime after the new year.

Subcommittee on Securities Law Opinions

The following is a report that was circulated by Dick Howe of Sullivan & Cromwell LLP following the meeting of the Subcommittee on Securities Law Opinions of the Federal Regulation of Securities Committee. Dick is chair of the subcommittee. The meetings described were held in Washington, D.C. in November as part of the Fall CLE Meetings. Following the meetings, there has been discussion on the Listserv referred to in the report regarding the precise language of the sample attached at the end of the report, for example, the "any part of the Registration Statement" formulation. As noted in the report, the Subcommittee plans to issue an update to its Report on Negative Assurance in Securities Offerings (59 Bus. Law 1513 August 2004 and also available at the Legal Opinion Resource Center), which will contain suggested language.

Report on Subcommittee Meeting

This is a brief report to the members of the Subcommittee on Securities Law Opinions regarding the meeting held on Saturday, November 19, 2005, in Washington, D.C. Two topics were discussed at the meeting, namely, negative assurance in light of securities offering reform, and the forms of “no registration” opinions that were distributed prior to the meeting. The “no registration” opinions will be revised and distributed for discussion at our next meeting, which will be in Tampa, Florida, in connection with the spring 2006 meeting of the ABA Business Law Section on April 6-9, 2006, and I will not discuss that subject here. However, as promised at the meeting, I am sending a brief report on the discussion at the meeting concerning negative assurance in light of securities offering reform, which becomes effective on December 1.
In view of the interest in the subject of negative assurance in light of securities offering reform, the Subcommittee has opened its Listserv at the ABA to enable members of the Subcommittee to send questions, comments or general observations on this subject to the entire Subcommittee and
the members to respond individually to these messages. In order to do this, you should send an email addressed to the following:

bl-securitieslawopin@mail.abanet.org

I encourage members to try this out when they have an important point to share with the Subcommittee, and I predict that members will be interested in the outcome of this process. If you send in a message, please note that there may be some delay before it is sent out by the ABA to the entire Listserv. [If you are not a member of the Federal Regulation of Securities Committee and the Subcommittee on Securities Law Opinions you can join by going to the Business Law Section website.]

Our program was held immediately after the program on the “Nuts and Bolts” of Securities Offering Reform and was intended to provide an opportunity to discuss negative assurance in greater detail than was possible at the program. It was intended to enable members of the Subcommittee to discuss the issues with each other before most people have figured out the implications of these developments for their opinion practice. The Subcommittee plans to revisit the form of negative assurance letter that it published in the August 2004 Business Lawyer (59 Bus.Law. 1513) after there has been some experience with the new regime.

Presentation at Program on Securities Offering Reform

Following are several points that were made at the program that occurred before the meeting of the Subcommittee:

In the SEC’s view and under new Rule 159, underwriters have Section 12(a)(2) liability based upon the package of information (the “disclosure package”) “conveyed” to the investor at the “time of sale.” The time of sale is when the investor becomes legally committed to purchase the securities, and it will usually precede the time when the investor receives a confirmation. It is believed that underwriters will request issuer’s and underwriter’s counsel to add to their negative assurance letter a statement that nothing came to their attention that caused them to believe that as of a specified time the disclosure package did not meet the §12(a)(2) standard.

The time would be specified by the underwriters (e.g., 4:00 pm on the date of pricing) and would presumably be some time shortly after pricing and before the first oral confirmation of sale.

The documents included in the disclosure package would be agreed to by counsel and the underwriters and listed in the underwriting agreement and negative assurance letter or annexes thereto. They would represent the basic modicum of information that an underwriter should be conveying to investors, and would not include optional marketing documents. For example, in a shelf takedown they would include the basic prospectus (including any documents incorporated by reference), any preliminary prospectus supplement, any issuer free writing prospectus (“FWP”) distributed to convey recent developments (unless filed by Form 8-K and thereby incorporated by reference into the prospectus), any preliminary term sheet and a final term sheet.
Counsel would not be asked to address in the negative assurance letter any live road show (including slides), electronic road show or FWP prepared by an underwriter. Counsel may be asked informally to comment on the content of these materials, as sometimes happens today under the current rules.

Counsel would not be asked to address whether the specified disclosure package had been conveyed to investors, just as under the prior rules counsel did not address whether the prospectus had been delivered to investors.

Attached at the end of this report is a sample provision for a negative assurance letter that was included in the program materials on the CD-ROM distributed at the meeting.

Discussion at Subcommittee Meeting

Some of the questions that came up in the course of the discussion at the meeting of our Subcommittee included the following:

Should the negative assurance letter assume conveyance of the disclosure package to investors or expressly disclaim any view on it? Should counsel seek assurances from underwriters that the information has been conveyed? Most people felt that the negative assurance letter should not address questions of conveyance at all, just as today it does not address delivery of the prospectus. Conveyance is a technical question, and practices may differ from underwriter to underwriter and from customer to customer. Suppose, e.g., that an underwriter is comfortable saying to a customer that terms are the same as a recent deal, but the terms are actually not identical. Some practitioners remain undecided and indicated that they might, under certain circumstances, address the question whether portions of the disclosure package had been conveyed to investors or may seek to add a statement to their negative assurance letters indicating that they are not addressing the question. Concerns about adequate conveyance could, as a practice policy matter, lead a practitioner not to give a negative assurance letter in a particular case.

Should the negative assurance letter expressly disclaim any view regarding road shows, optional FWPs used as supplemental sales material or other information? Many practitioners felt that this was also not necessary, because the letter by its terms does not address information that may be conveyed in addition to the basic disclosure documents. For example, under the prior rules, it has not been the practice to disclaim communications made during road shows or salesmen’s oral conversations with customers. Some people mentioned that they have already been asked to address documents beyond those that would be included in a basic disclosure package, including in one case an electronic road show. However, most indicated that they would endeavor to confine their comments to the basic disclosure package, at least until practice develops further in this area. It is expected that underwriting agreements will often endeavor to restrict or prohibit the use of FWPs outside the agreed disclosure package.

Should counsel decline to give a negative assurance letter if there is a last-minute 8-K containing arguably material developments? In other words, does the lawyer need to be concerned that investors may not have been informed of a material fact even if there has been
technical disclosure by means of an 8-K? Some people indicated that in appropriate circumstances they would ask the underwriter to call all customers, or send an email, alerting them to the issue. Most people indicated that this issue is real but should be dealt with outside the negative assurance letter.

Should a negative assurance letter be given if, looking at the whole collection of documents in the disclosure package, the disclosures are not in the right places? It is recognized that disclosure of information in the collection of documents must be fairly balanced and that is up to the lawyers participating in the process to see that this is done, as at present — this is not a new issue. However, most people felt that the letter should address the disclosure package “as a whole” and not consider the individual documents separately. Thus, the letter would not give any assurance that any one document included in the disclosure package is not misleading considered by itself, in that it may leave out material included in other documents. Several practitioners indicated that their negative assurance letters do not address the particular location of documents in the package, while others said they were troubled by these issues.

In addition to covering the disclosure package at the time of sale, negative assurance letters will also continue to address the Registration Statement as of the effective date. Correcting the disclosure in the final prospectus will not cure to a deficient disclosure package as of the time of sale.

Amy Williams, one of our members has sent the following message to summarize her thoughts about the implications of the new rules for asset-backed transactions. She says the following:

The securitization industry has used terms sheets and similar materials to market transactions for a number of years, relying on a series of no action letters that permitted the use of these materials without having to send a Section 5 prospectus with those materials. Accordingly, for at least some types of securitizations, the use of a full blown red herring preliminary prospectus is not typical. A typical terms sheet in this area might span only 10 to 30 pages, whereas the final prospectus supplement might span 100 to 200 pages. Absent from the terms sheet would be risk factor disclosure, as well as definitions and explanations of terms of art. The missing pieces are not all found in the base prospectus, either. Moreover, it is common for several versions of terms sheets to be provided to potential investors, with each new terms sheet showing changes to the securities structure. This industry has always operated on the notion that anything can be updated or corrected in the final prospectus.

Now we are faced with the changes brought about with the Offering Reform. Lawyers representing issuers and underwriters are struggling with the concept that there could be 12(a)(2) liability with respect to a terms sheet. But, given that the final prospectus is expected to be 10 times as long as the terms sheet, is it reasonable to ask issuer’s counsel to provide a negative assurance letter with respect to the terms sheet?

Although we have no final word, some law firms have decided that they cannot render a negative assurance letter unless investors are given a full blown red herring prospectus supplement (or equivalent information in some other form). It of course will be up to the clients whether they wish to prepare such red herrings or if they are comfortable proceeding on the basis of terms sheets for which there is no negative assurance letter.
I have heard some preliminary feedback that some in the auto securitization industry, where the terms of the securities do not vary greatly from one deal to the next, will respond to this conundrum by using red herrings now. Other parts of the industry, such as residential mortgage-backed securities issuers, will find it harder to prepare full red herrings in the usual time frame for such transactions, so they may choose to continue using terms sheets without insisting upon negative assurance letters.
EXEMPLARY SAMPLE NEGATIVE ASSURANCE LETTER
(new language underlined)

As counsel to the Company, we reviewed the Registration Statement, the Basic Prospectus, the Prospectus Supplement and the documents listed in Schedule A (those scheduled documents, taken together with the Basic Prospectus, the “Pricing Disclosure Package”) and participated in discussions with your representatives and those of the Company and its accountants. On the basis of the information that we gained in the course of the performance of the services referred to above, considered in the light of our understanding of the applicable law (including the requirements of Form S-3 and the character of prospectus contemplated thereby) and the experience we have gained through our practice under the Securities Act, we confirm to you that, in our opinion, each part of the Registration Statement, when such part became effective, and the Basic Prospectus, as supplemented by the Prospectus Supplement, as of the date of the Prospectus Supplement, appeared on their face to be appropriately responsive, in all material respects relevant to the offering of the Securities, to the requirements of the Act[, the Trust Indenture Act of 1939] and the applicable rules and regulations of the Securities and Exchange Commission thereunder. Further, nothing that came to our attention in the course of such review has caused us to believe that, insofar as relevant to the offering of the Securities,

(a) any part of the Registration Statement, when such part became effective, contained any untrue statement of a material fact or omitted to state any material fact required to be stated therein or necessary to make the statements therein not misleading, or

(b) the Pricing Disclosure Package, as of [__ :00] [A/P], on ____, ____, 200_ (which you have informed us is a time prior to the time of the first sale of the Securities by any Underwriter), [when considered together with the statements made under the caption “Description of Securities” in the Prospectus Supplement,] contained any untrue statement of a material fact or omitted to state any material fact necessary in order to make the statements therein, in the light of the circumstances under which they were made, not misleading.

* Include the bracketed phrase if it is agreed that the disclosure letter need not address pricing information at the time of sale, for example because that information will be conveyed to investors only orally at the time of sale. If the bracketed phrase is not included, the Pricing Disclosure Package will need to include a final term sheet or other free writing prospectus that describes the final terms. In deciding which approach to take, the parties should weigh the potential “speed bump” implications of creating and conveying at or prior to the time of sale a final term sheet or similar written communication against the practicality of orally conveying the final terms in light of their complexity, the nature and number of investors and other factors.
(c) the Basic Prospectus, as supplemented by the Prospectus Supplement, as of the date of the Prospectus Supplement, contained any untrue statement of a material fact or omitted to state any material fact necessary in order to make the statements therein, in the light of the circumstances under which they were made, not misleading.

Legal Opinions: Exceptions For Waivers Of Jury Trial in California

By Jerome Grossman, Luce, Forward, Hamilton & Scripps LLP, and Steve Weise, Heller Ehrman LLP

The California Supreme Court, in Grafton v. Superior Court, 36 Cal.4th 944 (2005), held that pre-dispute jury trial waivers—even in the commercial context—were unenforceable. The California Supreme Court with no dissent and one concurrence reasoned as follows:

- The California Constitution declares the right to trial by jury to be “inviolate”, and permits it to be waived only “by the consent of the parties expressed as prescribed by statute.”

- California Code of Civil Procedure (“CCP”) Section 631, which addresses the waiver of trial by jury, clearly requires the existence of a pre-existing dispute. (The Supreme Court found no indication that the Legislature intended to permit parties to enter into pre-dispute contract waivers, noting that the statutory provisions authorizing arbitration and judicial reference (CCP Sections 1281 and 638, respectively) expressly refer to agreements entered into before the existence of any dispute.)

- Any doubts should be resolved in favor of preserving the right to jury trial.

The court declared that its decision applies retrospectively: “The decision in Trizec, supra [Trizec Properties, Inc. v. Superior Court (1991) 229 Cal.App.3d 1616], a single Court of Appeal decision that erroneously interpreted our state Constitution, is hardly the kind of ‘uniform body of law that might justifiably relied on . . . ’ [citation omitted] . . . Our decision simply will deny to those who might have acted in reliance upon [Trizec] a benefit that they never had the right to obtain—that is, a pre-dispute waiver of the right to a jury trial.”

In a concurring opinion, Justice Chin took note, as did the majority, that the Court’s decision was “out of step with the authority in other state and federal jurisdictions,” and urged the Legislature to enact legislation expressly authorizing pre-dispute jury waivers. Unless the Legislature acts, however, pre-dispute jury trial waivers will not be enforceable under California law, and opinion givers rendering a remedies opinion covering California law with respect to an agreement should consider including an express exception with respect to any such waiver included in the agreement unless the opinion giver concludes that another exception covers the issue.
Membership

If you know anyone who would like to join the Committee and receive our Newsletter, please direct them to the ABA Business Law Section website: http://www.abanet.org/buslaw/home.html, click “Committees” and the Legal Opinions Committee. If you haven’t visited the website lately, I recommend you do so. Our mission statement and prior newsletters are posted there.

Next Newsletter

The next newsletter will be circulated sometime in March. Please forward cases, news and items of interest to berkley@ballardspahr.com.

Happy New Year!