In this issue:

Chair’s Letter

Future Meetings

Michigan Bar Reconstitutes Legal Opinions Committee

Lessons from the Listserve

Recent Developments

Membership

Next Newsletter

Draft Agenda for April 17, 2009 Committee Meeting

Background Statement Regarding Michigan Ad Hoc Committee on Legal Opinions
Chair’s Letter

Legal Opinions Committee members:

I look forward to seeing you at our spring meeting in Vancouver. Here is a sketch of what our busy Committee is currently doing.

Committee Structure

Membership. Our committee is only 16 short of 1,000 members. We will have a huge, meaningful gift for the 1,000th member. Please ask your friends and colleagues to join. Greater membership increases resources for the Committee’s work and permits broader distribution of information about legal opinions and Committee work product.

We are looking for a membership chair to help us attract and maintain our membership in coordination with the Section of Business Law’s Membership Committee. Please drop me an email if you are interested in filling this position (johnpower@earthlink.net). This is a good way to become more active.

Subcommittee on Cross-Border Legal Opinions. Ettore Santucci of Goodwin Procter has agreed to serve as co-chair of the cross-border subcommittee. Sylvia Chin has ably chaired the subcommittee for several years and will continue as co-chair. Ettore serves as reporter for the subcommittee’s report on outbound cross-border legal opinions, currently in process. Ettore and Sylvia invite Committee members to join the subcommittee (easily done on the Committee’s home page) and encourage your participation in the subcommittee’s listserv.

Diversity Chair. Peter Munoz of the San Francisco office of Reed Smith has agreed to serve as the Committee’s diversity chair. Greater diversity is a specific objective of the ABA, the Section of Business Law and our Committee. Peter will interact with the Section’s Diversity Committee, and will advise us of ways to further diversify our membership.

Meetings and Programs.

Spring Committee Meeting. The Section of Business Law’s spring meeting in Vancouver is almost upon us. I strongly urge you to attend. Our Committee meeting there has a full agenda, including a discussion led by Ettore Santucci of progress on our cross-border opinions project, reports by Arthur Cohen and Carolan Berkley on our office practice survey project, by Jim Rosenhauer on the diligence memorandum task force, by Stan Keller on developments in audit responses, and by Don Glazer on his review of recent bar reports, as well as discussion of recent developments. Have a look at the draft agenda attached at the end of this issue and let me know if you have items to add.
Attendance by telephone will be available; the dial-in information is below. We expect better quality telephone service than we had at the annual and fall meetings. I will circulate the final agenda on the Committee’s listserve.

The Committee will co-sponsor two programs you will not want to miss. One, co-sponsored with the Section’s Committee on Professional Responsibility, is a revised version of a wonderful ethics program presented at the last meeting of the Working Group on Legal Opinions. It features Don Glazer and Bob Mundheim exploring realistic scenarios involving possible misconduct by an opinion giver’s client. The other, co-sponsored with the Subcommittee on Securities Law Opinions of the Committee on Federal Regulation of Securities, will discuss that group’s excellent, important recently published report on negative assurance (see 64 Bus. Law. 395 (Feb. 2009)). For further information on these programs, see below under “Future Meetings.”

We also will have a Committee reception on Friday, April 17 from 5:00 to 7:00 p.m. All members of the Committee, participants in the Working Group on Legal Opinions, and members of the TriBar Opinion Committee are invited. It is generously hosted by a small group of members of the Committee and their law firms.

**Hong Kong Program.** Don Glazer and I, along with prominent Hong Kong lawyers William Chua and John Shum, will present a program on customary practice in cross-border opinions in June at the Section’s Global Business Law Forum. We hope too see you there.

**Publications and Listserve**

**Opinion Reports Compendium.** Committee member Carol Lucas is working with the ABA staff to publish a new edition of collected ABA and TriBar opinion reports. Having these important reports together in a single volume facilitates their use as references and provides lawyers in the opinion practice with a ready source of guidance. Watch listserve messages for news of the volume’s publication.

**Committee Listserve.** Jim Fotenos has written in this issue another valuable column on “Lessons from the Listserve,” summarizing an August exchange about including an “anti-sandbagging” statement in legal opinions. I continue to be surprised that more of our members do not make use of the listserve. Try it the next time you have an opinion practice issue; you will find it worthwhile.

**Bar Association Reports**

We are advised of developments in several state bars. Within the last several weeks, the North Carolina Bar Association Business Law Section’s Legal Opinion Committee and the Texas State Bar Business Law Section have published supplements to their respective comprehensive opinion report. The Florida Bar Opinion Committee is nearing completion of a revision of its comprehensive report. We look forward to providing more information on these developments in future issues of the Newsletter.
The Special Report on the Preparation of Substantive Consolidation Opinions of The Committee on Structured Finance and the Committee on Bankruptcy and Corporate Reorganization of the Association of the Bar of the City of New York was published in the February 2009 issue of *The Business Lawyer* (64 Bus. Law. 411), which should have recently reached your desk. That issue of *The Business Lawyer* also included the 2008 revision of the report on negative assurance of the Securities Law Opinions Subcommittee of the Committee on Federal Regulation of Securities, and the Statement on FIN 48 of the Committee on Audit Responses, both of which were discussed in earlier issues of the Newsletter.

The Michigan State Bar Business Law Section has re-formed its study group on legal opinions as an ad hoc committee. The committee has decided not to issue a new comprehensive opinion report, but rather to focus on other tasks, including making recommendations on opinion issues under Michigan law and reviewing and recommending as appropriate national literature on opinion practice. Elsewhere in this issue is a report by Justin Klimko, chair of the Michigan committee, and attached to this issue is Michigan’s statement on these matters.

**Recent Developments**

This issue contains brief articles on three recent cases. None involves a closing opinion directly (few such decisions are published), but all are of interest. One of the cases (reported on by Arthur Field) addresses issues that could impact New York law enforceability opinions on assignments of debt. Another (reported on by Jim Leyden and Don Glazer) points out a pitfall in rendering due authorization opinions on agreements entered into by Delaware limited partnerships or limited liability companies. The third case (reported on by Stan Keller) discusses the protected status of communications to auditors; although mainly germane to the work of other committees (including our sister Committee on Audit Responses), we believe it will be of interest to opinion practitioners. We plan to touch on these cases at our meeting in Vancouver.

And special thanks to Martin Brinkley and Jim Fotenos for their usual terrific work editing this issue.

See you in Vancouver.

- John B. Power, Chair

**Future Meetings**

*ABA Section of Business Law Spring Meeting*
Vancouver Convention & Exhibition Center West
Vancouver, B.C.
April 16-18, 2009
Thursday, April 16:

- Program: “You Can’t Say That!” “Watch Me.” Client Fraud and the Ethics Rules, jointly sponsored by the Committee on Professional Responsibility and the Committee on Legal Opinions. 10:30 a.m.-12:30 p.m., Rooms 208 & 209, Level Two.

Friday, April 17:

- Committee on Legal Opinions Meeting. 8:30 - 10:30 a.m., Rooms 208 & 209, Level Two.

  Dial in access: Domestic (800) 937-4597 / International (416) 620-2001
  Pass code: 5539409

- Program: Update on Negative Assurance, jointly sponsored by the Subcommittee on Securities Law Opinions of the Committee on Federal Regulation of Securities and the Committee on Legal Opinions. 10:30 a.m.-12:30 p.m., Rooms 208 & 209, Level Two.

- Committee on Federal Regulation of Securities, Subcommittee on Securities Law Opinions Meeting. 2:00 - 3:00 p.m., Room 121, Level One.

- Committee on Professional Responsibility Meeting. 3:00 - 4:30 p.m, Room 121, Level Two.

- Legal Opinions Committee Reception, 5:00 – 7:00 p.m., Room 109, Level One.

Saturday, April 18:

- Committee on Audit Responses Meeting. 8:00 - 9:00 a.m., Room 122, Level Two.

Working Group on Legal Opinions
New York
May 19, 2009

Global Business Law Forum
Hong Kong
June 10-12, 2009

  - Program: Toward One World: Customary Practice in Cross-Border Legal Opinions, sponsored by the Committee on Legal Opinions. June 11, 2009, 1:00-3:00 p.m.

ABA Annual Meeting
Chicago
July 31-August 3, 2009
**Michigan Bar Reconstitutes Legal Opinions Committee**

The Business Law Section of the State Bar of Michigan has reconstituted its opinion study group for a new initiative. The group, renamed the “Michigan Ad Hoc Committee on Legal Opinions,” does not intend to issue a comprehensive new state report but rather will concentrate on the following tasks: (1) reviewing Michigan’s 1991 legal opinions report to identify any provisions that have become obsolete or inoperative in light of developments since its issuance; (ii) reviewing and, to the extent the committee deems appropriate, recommending the existing national literature as useful guidance to Michigan attorneys involved in the preparation and delivery of third party closing opinions; (3) identifying and making recommendations regarding areas of Michigan law requiring additional consideration or treatment in preparing third party closing opinions; and (4) providing information to Michigan lawyers on aspects of Michigan law that underlie or affect typical opinions. The committee anticipates issuing a report addressing these topics, probably in 2010. Any questions may be directed to the chair, Justin Klimko, at 313-225-7037 or klimkojg@butzel.com.

- Justin G. Klimko
  Butzel Long
  Detroit

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**Lessons from the Listserve**

[Editor’s Note: Dialogues on the listserve are not intended to be authoritative pronouncements of customary opinion practice, but represent the views of individual lawyers on opinion topics of current interest. Subscribers to the listserve may review the comments referred to below by clicking on the “Archives” link under “listerves” on the Committee’s website. If you do not currently subscribe to the listserve, go to [http://www.abanet.org/buslaw/home.html](http://www.abanet.org/buslaw/home.html), click “Committees,” and scroll to “Legal Opinions.” Once you are on the Legal Opinions Committee website, scroll to “listerves” and click on “subscribe.” You must be a member of the Committee to subscribe.]

**Include an “Anti-Sandbagging” Provision In a Closing Opinion?**

In its Private Target Mergers & Acquisitions Deal Points Study (v2) (2007, revised August 8, 2008), the Section of Business Law’s Committee on Mergers & Acquisitions (formerly known as the Committee on Negotiated Acquisitions) reports that of transactions reviewed for 2006, 9% included an anti-sandbagging provision in the acquisition agreement (up from 5% in 2004) (50% of the deals reviewed included a pro-sandbagging provision (i.e.,
buyer’s remedies are not affected by buyer’s due diligence or knowledge). The example of an anti-sandbagging provision included in the Study is the following:

The Buyer shall have no right to indemnification under this Agreement in respect of any inaccuracy or breach of any representation or warranty of the Sellers to the extent that [any specified executive officer] has actual knowledge on the date of this Agreement that such representation or warranty is inaccurate as of the date of this Agreement.

Deal Points Study, slides 63-65.

Last August Douglas Haas asked the members of the Legal Opinions Committee’s listserv whether they had experience with similar anti-sandbagging provisions in a legal opinion, an example of which was cited by Doug:

This letter is being delivered to and accepted by [opinion recipient] with the understanding that (a) prior to its acceptance of this letter, [opinion recipient] and its counsel have examined and approved the same, (b) [opinion recipient] and its counsel, do not have any actual knowledge (without the obligation to make any independent investigation or inquiry) of any incorrect statement or omission relating to the matters set forth in this letter, and (c) if, prior to [opinion recipient's] acceptance of this letter, [opinion recipient or its counsel] has or acquires actual knowledge that any such opinions or any of the assumptions set forth in this letter are erroneous (without the obligation to make any independent investigation or inquiry), [opinion recipient or its counsel] will notify us and provide us with a reasonable opportunity to correct any such erroneous opinions and any opinions affected by any such erroneous assumptions. For purposes of this paragraph, “[opinion recipient]” and “its counsel” are limited to those persons in the referenced entities who have directly participated in this engagement.

Listserve subscribers’ responses were uniformly negative. Arthur Field captured the concerns of the responders:

I have no experience with this kind of provision. This would make a great exam question if there were a law school course on legal opinions. First, the proposal is contrary to a basic notion of customary practice, that the recipient and its counsel [have] no responsibility to take action with respect to an opinion that is received, other than to accept it or reject it. One should not lightly abandon this notion. There may be unintended consequences. What is the requested provision worth to the opinion giver? Without the provision, if the recipient or its counsel knows the
opinion is wrong when received, they cannot rely on it. Without the provision, if they know that an assumption is wrong, they will be accepting an opinion that does not relate to the deal at hand and have no one to blame. Thus, I question what is achieved with such a provision. From the opinion recipient viewpoint, acceptance of the opinion letter with the provision in it may be effective to bind the recipient. If it is, the recipient seems to give a kind of negative assurance to the opinion giver. Outside the SEC opinion context where there has been significant general diligence, customary practice strongly discourages negative assurance by the opinion giver. Why should negative assurance by the recipient, without a thorough diligence effort, make any more sense than it does for the opinion giver? The provision uses a knowledge concept broader than the standard ‘opinion preparer’ concept and uses the term ‘omission’ without any guidance as to what that might mean in this context. You will have sensed by now that I am not a booster of this new (to me) provision. It does not seem to help the opinion giver in a significant way and does seem to upset a variety of time tested ideas that guide recipient conduct.

Stan Keller agreed with Arthur, and added that by attempting to build in protections for the opinion giver, the opinion giver may find itself “by contract with less protection than customary practice would afford.” Mike Wolfson likewise did not see any benefit to the provision, “which any informed opinion recipient would reject in any event,” noting that an opinion giver’s assumptions, if reasonable and not contrary to the knowledge of the opinion giver, should limit the liability of the opinion giver.

Dick Howe concurred that any opinion with such a provision would not be accepted and, in all events, even if included, would have to be interpreted as dealing strictly with factual matters as opposed to legal matters. Dick characterized the attempt to include such language as “an example of pure gamesmanship, not serious opinion giving.” Lawyers giving opinions are responsible for determining what the relevant facts are for purposes of the opinion; if they cannot do so, then they should not give the opinion. They do not satisfy their obligations by giving the opinion but telling the recipient that the opinion is inoperative if the facts are incorrect.

Steve Weise concluded the discussion by contrasting opinions and warranties, noting that the recipient of a warranty has contractual rights under the warranty even if it knows of defects or potential defects (citing Rogath v. Siebenmann, 129 F.3d 261(2d Cir. 1997), and CBS, Inc. v Ziff-Davis Publishing Co., 553 N.E.2d 997 (N.Y. 1990)). An opinion letter, by contrast, is not a warranty – an opinion recipient would have a hard time demonstrating reasonable reliance on an opinion that the recipient knew was incorrect.
So while anti-sandbagging provisions may be appropriate in an acquisition agreement, the view from the listserv is unanimous: They do not belong in a closing opinion.

- James F. Fotenos
  Greene Radovsky Maloney
  Share & Hennigh LLP
  San Francisco

Recent Developments

Champerty – Is It a New York Law Opinion Problem?

Not many transactional lawyers in New York have had Section 489 of the Judiciary Law in mind as they advise clients and give third party opinions. That is changing. Section 489 specifically prohibits buying a bond, note or claim for the purpose of bringing an action on it. The exceptions are narrow. The section has been narrowly construed by the courts so as not to have application to a “plain vanilla” transfer of a note, bond or claim, even a defaulted one.

In February 2007, a federal district court judge in the Southern District of New York (in Trust for Certificate Holders of Merrill Lynch Mortgage Investors, Inc. Mortgage Pass-Through Certificates Series 1999-C1 ex rel. ORIX Capital Markets, LLC v. Love Funding Corp., 499 F. Supp. 2d 314) entered findings of fact that were deemed sufficient to establish champerty in a transfer of rights which was therefore voided. Prior to the transfer, the trust owned the note in question. It had sued a prior holder (UBS) as to a group of loans it had purchased. It settled for cash as to the other loans. As to this loan, it settled for an assignment of rights against Love Funding. The district court saw this assignment of rights as champertous. The district court decision noted that the trust sued Love Funding two days before it made formal demand for payment and stated that “the record is devoid of evidence suggesting why the Trust would consider the Assignment adequate consideration if its primary purpose was not to sue Love Funding thereunder.” The district court analyzed why the trust might collect more from Love Funding in damages than it might have gotten from UBS. On appeal to the Second Circuit, the court deferred any decision pending the determination (by certified question procedure) by the New York Court of Appeals of the following questions:

1. Is it sufficient as a matter of law to find that a party accepted a challenged assignment with the “primary” intent proscribed by New York Judiciary Law § 489(1), or must there be a finding of “sole” intent?

2. As a matter of law, does a party commit champerty when it “buys a lawsuit” that it could not otherwise have pursued if its purpose is thereby to collect damages for losses on a debt instrument in which it holds a pre-existing proprietary interest?

3. (a) As a matter of law, does a party commit champerty when, as the holder of a defaulted debt obligation, it acquires the right to pursue a lawsuit against a third party
in order to collect more damages through that litigation than it had demanded in settlement from the assignor?

(b) Is the answer to question 3(a) affected by the fact that the challenged assignment enabled the assignee to exercise the assignor’s indemnification rights for reasonable costs and attorneys’ fees?

The Second Circuit noted that on the champerty issue New York courts have “not always been clear or consistent.” Questions 2 and 3 involve only a situation in which the transferee had an interest in debt that pre-existed the transfer in question.

The question seems to be, what are the limits of “plain vanilla?” Another Second Circuit decision (that makes no reference to the pending certified questions) bears on that question. The court in *SCR Joint Venture L.P. v. Warshawsky*, 2009 U.S. App. LEXIS 5159 (2d Cir. March 12, 2009), affirmed a District Court decision granting summary judgment on (1) a champerty issue and (2) the claim for repayment of the note on which the champerty issue was raised. A transferee of a note (SCR) guaranteed (by Warshawsky) sued on the guaranty. The guarantor defended on the basis of champerty citing New York Judiciary Law Section 489. The Second Circuit stated that when the holder only intends to bring suit absent full performance of the valid debt, the statute is not violated. Thus, the court seemed to see this transfer as “plain vanilla.”

This is an era when transactions in defaulted assets seem necessary for national economic recovery. Even in less stressful times, such transactions seem to be for a valid commercial purpose. The language of the statute is overly broad, encouraging challenges. Placement in the Judiciary Act suggests that it was intended to deal with something more than buying debt to try to collect it by enforcement or otherwise.

This legal puzzle is at least inconvenient, and at worst a serious impediment to the necessary disposition of these assets. Is there a “work-around?” Is any opinion impacted by the problem? Is there a responsibility of a transaction lawyer to face the problem in any case, and to whom does that responsibility extend and when? No answers yet. The only advice for now is to keep an eye out for transfers that a court might deem not to be “plain vanilla.”

- Arthur Norman Field
New York

* * *

Requirements for Approval of a Matter by Limited Partners, or Members of an LLC, Are Not Always Straightforward

In *In re LJM2 Co-Investment, L.P. Limited Partnership Litigation*, 866 A.2d 762 (Del. Ch. 2004), the Delaware Court of Chancery considered whether limited partners of a Delaware limited partnership had properly approved an amendment to the limited partnership agreement canceling their obligation to make a capital contribution. The case underscores the point that the opinion that limited partners (or LLC members) have duly authorized a transaction can require
consideration not only of the limited partnership agreement (or LLC operating agreement) but also of the default rules in the Delaware limited partnership statute.

The defendants in this case were limited partners of LJM2 Co-Investment, L.P., a Delaware limited partnership that had filed for bankruptcy. The plaintiffs (standing in the shoes of the bankrupt partnership) sought to enforce against the limited partners a capital call made under the limited partnership agreement (the “LJM2 Agreement”). Instead of making the payments required by the capital call, the limited partners had replaced the general partner and then with the consent of the new general partner and by majority (but not unanimous) vote had approved an amendment to the LJM2 Agreement (the “Amendment”) canceling the capital call. The plaintiffs challenged the validity of the Amendment.

The court noted that under Section 17-502(b)(1) of the Delaware Revised Uniform Limited Partnership Act (the “Delaware LP Act”), a partner’s obligation under a partnership agreement to make a contribution to a limited partnership requires approval by all the partners unless the partnership agreement otherwise provides. The limited partners argued that the amendment section of the LJM2 Agreement, which provided that “the Majority Limited Partners may, with the concurrence of the General Partner, vote to amend [the LJM2 Agreement] in any respect,” granted them broad authority to amend the LJM2 Agreement and that, in approving the Amendment, they had acted pursuant to that authority. The plaintiffs argued that the unanimity requirement set forth in Section 17-502(b)(1) should be read into the LJM2 Agreement because the LJM2 Agreement did not specify the vote required to cancel obligations of limited partners to make contributions.

The court agreed with the limited partners that the amendment section of the LJM2 Agreement granted the “Majority Limited Partners” broad authority to amend the LJM2 Agreement. The court also observed that the Delaware LP Act’s policy of freedom of contract mandates caution when “engrafting default statutory provisions onto [a] partnership agreement.” Nevertheless, the court pointed out that the LJM2 Agreement did not contain a provision specifically relating to cancellation of partners’ obligations to meet capital calls. In the absence of such a provision, the court concluded that the statutory requirement of unanimity applied and that, because all of the limited partners did not consent to the Amendment’s adoption, the Amendment was not validly adopted and the capital call was not cancelled.

For opinion preparers, an important lesson of LJM2 is that the requirements for approval of a matter by limited partners (or members of a limited liability company) are not always straightforward despite broad language in the partnership agreement. Thus, when giving an opinion that a limited partnership (or limited liability company) has “duly authorized” an agreement, opinion preparers need to consider not only the authorizing provisions in the agreement but, if those provisions are not directly on point, the interplay between them and the default rules in the governing statute.

- James G. Leyden, Jr.
  Richards, Layton & Finger, P.A.
  Wilmington
Protected Status of Communications to Auditors

A significant issue, on which there have been conflicting decisions even in the same jurisdiction, is the protected status of information provided to auditors, either as a matter of attorney-client privilege or under the work product doctrine. This often arises in connection with tax materials sought by taxing authorities, but also is an issue with litigation information sought by adversaries. To the extent there is uncertainty in the law, the purposes of these protections are undermined because, as the United States Supreme Court said in *Upjohn Co. v. United States*, 449 U.S. 383 (1981), an uncertain privilege is no privilege at all.

Two recent decisions involving this issue are noteworthy. In *United States v. Textron, Inc.*, 553 F.3d 87 (1st Cir. 2009), decided Jan. 21, 2009, the First Circuit affirmed in part and vacated and remanded in part the decision of the district court in 507 F. Supp. 2d 138 (D.R.I. 2007). The district court held that tax workpapers shared with the auditor remained protected as work product and could not be discovered by the IRS. The district court found that the protection was not waived inasmuch as the auditor was not an adversary. The First Circuit upheld the district court’s finding that the tax workpapers were protected as work product, applying a broad definition of what is protected work product, and their disclosure to the auditors in connection with the audit did not, itself, waive the work product protection. However, the First Circuit remanded the case to the district court to consider whether the auditor could be a conduit to the IRS as the adversary for the protected workpapers, since the auditor’s workpapers may be discoverable by the IRS. It also instructed the district court to determine whether there is a waiver. The First Circuit’s decision thus introduced uncertainty to the ostensibly protected nature of the tax workpapers. In a further development, on Mar. 25, 2009, the First Circuit withdrew its decision and scheduled a rehearing en banc for June 2, 2009.

In *Commissioner of Revenue v. Comcast Corp.*, 453 Mass. 293 (Mar. 3, 2009), the Massachusetts Supreme Judicial Court addressed the effort of a state taxing authority to obtain a tax memorandum and related drafts prepared by an outside accountant at the request of the company’s in-house counsel regarding the tax treatment of the divestiture of stock of a subsidiary under an antitrust decree. The court held that, while attorney-client privilege protection did not apply, the memorandum was protected as work product. The Supreme Judicial Court, citing *Textron*, applied a broad definition to what constitutes protected work product, using the more expansive “because of” test used by some courts.

Both decisions reflect the difference between attorney-client privilege and work product protection. Attorney-client privilege is easier to obtain because it just requires an expectation of confidentiality, but is easier to lose through disclosure that undercuts confidentiality. Work product only applies to material produced “in anticipation of litigation,” but is lost only if handled in a way that makes the material available to adversaries. As noted above, courts have
differed in the meaning of “in anticipation of litigation,” with some courts requiring that litigation be the primary or exclusive reason for which the material was prepared, while others use the broader test of prepared because of the prospect of litigation.

- Stanley Keller
  Chair, Committee on Audit Responses
  Boston

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**Membership**

If you know someone who would like to join the Committee and receive our Newsletter, please direct him or her to the ABA Section of Business Law website: [http://www.abanet.org/buslaw/home.html](http://www.abanet.org/buslaw/home.html), click “Committees” and scroll to Legal Opinions. If you haven’t visited the website lately, we recommend you do so. Our mission statement and prior Newsletters are posted there.

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**Next Newsletter**

We expect to circulate the next Newsletter in July. Please forward cases, news and items of interest to John Power ([johnpower@earthlink.net](mailto:johnpower@earthlink.net)), Martin Brinkley ([mbrinkley@smithlaw.com](mailto:mbrinkley@smithlaw.com)) or Jim Fotenos ([jfotenos@greeneradovsky.com](mailto:jfotenos@greeneradovsky.com)).
American Bar Association
Section of Business Law
Committee on Legal Opinions

AGENDA

Meeting of Friday, April 17, 2009
Vancouver Convention Exhibition Centre West
Vancouver, BC
. Room 208 & 209, Level Two

Domestic dial-in: (800) 937-4597
International dial-in: (416) 620-2001
Pass code: 5539409

8:30 - 10:30 a.m.

1. Introduction                                  John Power

2. Reports and Announcements
   - WGLO                                        Arthur Field
   - TriBar                                       Richard Howe
   - Change the Committee Name?
   - Other

3. Discussion: Report on Outbound Cross-Border Legal Opinions           Ettore Santucci


5. Task Force Report on Diligence Memoranda           Jim Rosenhauer
6. Audit Letter Responses
   Stan Keller

7. Comments on Recent Bar Opinion Reports
   Don Glazer

8. Bar Opinion Reports
   - Michigan Statement
     Justin Klimko
   - Pending Florida Update
     Phil Schwartz
   - North Carolina Supplement
     TBD
   - Texas Supplement
     Steve Tarry

9. Recent Developments
   - Love Funding Corp. Champerty case
     Arthur Field
   - LJM2 case
     Jim Leyden and Don Glazer
   - Textron and Comcast cases
     Stan Keller
   - Brack (California fundamental policy case)
     Jim Fotenos and John Power
   - Opinions in TARP transactions
   - Other

10. Next Meeting
    Location: Chicago
    Date: ABA Annual Meeting, August 2, 2009
BACKGROUND STATEMENT REGARDING
THE MICHIGAN AD HOC COMMITTEE ON LEGAL OPINIONS

SUMMARY

The Business Law Section’s Ad Hoc Committee on Legal Opinions in Business Transactions has been revised under the name “Michigan Ad Hoc Committee on Legal Opinions.” The Committee developed and published an August 1, 1991 document entitled “Report of the Ad Hoc Committee of the Business Law Section of the State Bar of Michigan on Standardized Legal Opinions in Business Transactions” (the “1991 Report”). The revived Ad Hoc Committee will study and report on closing opinion matters in the wake of the substantial activity in this area at the state and national level since the issuance of the 1991 Report. The Committee does not intend to issue a new comprehensive report but rather will attempt to further the goal of development of national standards for delivery and interpretation of opinions while identifying Michigan-specific issues that state lawyers should consider.

BACKGROUND

Issuance of the 1991 Report was made in the context of widespread activity at the time among state and local bar associations as well as the national “Silverado” project. These activities involved study and reporting on the forms and meanings of legal opinion letters typically delivered at the closing of business transactions. There was significant sentiment, first crystallized in a 1973 article by James J. Fuld,¹ that while such opinion letters tended to follow fairly routine forms, there was no consensus among practitioners as to the specific meanings of key provisions included in the letters, the level of investigation and responsibility attached to delivering those opinions or the appropriateness of requesting various specific opinions.

The Ad Hoc Committee had been appointed in 1989 to study the issue with regards to Michigan. Other bar associations and professional organizations had issued reports on opinion practice, some of which were quite lengthy. Also, at the time the 1991 Report’s release, the ABA Legal Opinion Accord had been published in draft form. The Accord was an ambitious undertaking arising from the so-called “Silverado” project and promulgated by the ABA Legal Opinions Committee. The Accord contained a comprehensive explication of opinion issues with the goal that opinion givers and recipients would routinely incorporate it by reference into transaction opinions. This, it was hoped, would standardize both the form and interpretation of such opinions as well as streamlining them by allowing elimination of the many assumptions and qualifications that had come to be incorporated into opinions as a matter of customary practice.

The 1991 Report consisted of Part I, a 30-page discussion of issues arising in connection with transaction opinions, and Part II, a 3-page set of interpretative guidelines intended to be incorporated by reference into opinions. The 1991 Report was designed to be used in tandem with the ABA Accord or on a stand-alone basis.

The ABA Accord never achieved widespread acceptance as a document to be incorporated by reference into legal opinions. Part of the problem was the length and complexity of the Accord, which limited its practical usefulness, as opinion recipients did not want to have to study and become familiar with it. Money-center banks especially refused to accept Accord-based opinions. While the Accord continued to be consulted as a resource by opinion givers and recipients, it never achieved its originally intended use. Incorporation by reference of the much-shorter Part II of the 1991 Report did gain some acceptance in the 1990’s, but it is no longer used in that fashion.

Since the release of the 1991 Report, there have been numerous other efforts to inform lawyers regarding practices and interpretations applicable to legal opinions in business transactions. The ABA Legal Opinions committee has grown into quite a large and active body and has published several documents relating to opinion practice. Chief among these have been the opinion principles, the opinion guidelines and the recently-published statement on customary practice. These documents have been much shorter statements of general applicability to opinion practice. They have noted the existence and importance of the customary practice of lawyers involved in the giving and receipt of transaction opinions in interpreting the meaning of opinion language and defining the traditional scope of opinions and the work that opinion givers are expected to perform in preparing opinions.

Also particularly influential in this area have been the reports generated by the so-called “Tri-Bar Committee.” This Committee has issued several reports, some directed to specific aspects of opinions. Its 1998 report relating to opinion practice is considered one of the most influential reports among the outstanding literature.

RECENT DEVELOPMENTS

The Working Group on Legal Opinions (“WGLO”) was formed in 2007 as a “big tent” organization devoted to matters related to legal opinions in business transactions. As described on its web site, the mission of the WGLO is “to provide a national forum for the discussion of important issues relating to closing opinions. Participants in the Working Group on Legal Opinions include opinion givers, opinion recipients, the ABA, State and local bars as well as rating agencies and law firm malpractice insurers.” The WGLO includes a Law Firm Advisory Board, consisting of law firms that join and pay to participate, and an Association Advisory Board, which includes representatives from state and local bar associations, counsel associations and organizations of entities that are typically opinion recipients. The WGLO aims to promote national standards for opinion practice and help identify customary practice as in use in various jurisdictions.

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As noted above, numerous state and local bar organizations in other states published their own opinion reports, and a number have been updated or replaced in recent years. Among states that have done so recently are California, Pennsylvania and Maryland. North Carolina and Florida currently have comprehensive reports or updates in process. Some of these updates or new reports are very lengthy documents, running to up to 200 pages.

**PROPOSAL**

While the 1991 Report is now very old, the Committee does not intend to create a comprehensive update or new report. Though the other state reports are very thoroughly researched and prepared and very well done, we believe that a multiplicity of state reports is not helpful to the goal of developing national standards for the delivery of opinions. Either they agree with the existing literature and therefore do not add usefully to the discussion, or they diverge from the existing literature and defeat the goal of normalization of approaches. This is not to say that there is no role for state input. There are some opinion practices that are unique to state law, and it is highly useful to have a source that identifies and describes these distinctions for the benefit of practitioners in those jurisdictions and opinion recipients receiving opinions from those practitioners. In our view, however, this does not require a comprehensive report that devotes considerable time and effort to treading the same ground, typically with the same results, as the existing literature.

The Committee intends to pursue the following tasks:

- Review the 1991 Report and identify any provisions that have become obsolete or inoperative in light of developments since its issuance.
- Review the existing national literature and, to the extent the Committee judges it appropriate, recommend that literature as useful guidance to Michigan attorneys involved in the preparation and delivery of transaction opinions.
- Determine and make recommendations regarding those areas unique to Michigan law which may require additional consideration or treatment.
- Provide information to Michigan lawyers on Michigan law underlying some of the typical provisions found in transaction opinions. Examples might include the law supporting choice of jurisdiction clauses or the ability to waive jury trial provisions.

The end product would be a report to be published in either the Michigan Business Law Journal or the Michigan Bar Journal and otherwise made available for distribution to Michigan business lawyers, including through the Business Law Section’s web site.