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Chair’s Letter

Dear Legal Opinions Committee members:

**Spring Meeting.** At our spring meeting on April 23 in Denver, we will hear updates on our progress on the cross-border opinions report, survey of law office opinion practices, and project on opinions to federal governmental agencies. We will also discuss other recent developments in opinion practice. A draft agenda is attached to this issue. I welcome suggestions for other agenda items. I hope you will attend in person, but if you are unable to do so, please participate by telephone (see the dial-in information under “Future Meetings” below).

In other Committee-sponsored events at the Denver meeting, Committee members Steve Weise and Jim Leyden will co-chair an informative program on Thursday, April 22 at 10:30 a.m. The panel will address two forthcoming reports by the TriBar Opinion Committee, one on opinions on secondary sales of securities and the other on opinions on the issuance of membership interests of limited liability companies. Additional panelists include committee members Don Glazer, Elisa Maas and Sandra Rocks.

Please also attend our Committee’s fourth reception on Friday evening, April 23. Invitees include all Committee members, participants in the Working Group on Legal Opinions, and members of the TriBar Opinion Committee and other state and local bar opinion committees. The reception is generously hosted by Burns, Figa & Will, P.C., represented by Herrick Lidstone. Our sincere thanks to them and to committee member Gail Merel, as well as to Mark Page and Donna Nesbit of the ABA staff, for their hard work in planning this event.

For more information on the times and locations of all these events, see “Future Meetings” below.

**Section Leadership Retreat; Remarks of Jerry Hyman.** I was pleased to attend the Section of Business Law’s leadership retreat in January, and to exchange ideas with Section leaders, including chairs of other committees.

At the meeting of the Section’s Council (its governing body), I was privileged to introduce our Committee advisor, Jerry Hyman. Section advisors are senior lawyers with national reputations who inform and educate younger members of the profession and share the wisdom and knowledge they have accumulated over many years of practice. It is the Section’s custom to ask each advisor to share professional reflections of her or his choosing with the Council. Jerry’s talk reflected thoughtfully on his career, with grace, insight and modesty, and it was quietly inspiring. I encourage you to read his remarks online at [http://www.abanet.org/buslaw/newsletter/0089/materials/pp4.pdf](http://www.abanet.org/buslaw/newsletter/0089/materials/pp4.pdf).

**New Committee Appointments.** I am pleased to announce that Carol Lucas has agreed to serve as chair of the Committee’s listserv subcommittee, which has responsibility to encourage members to use our listserv and to enhance its convenience. Mark James will serve as our new
technology subcommittee chair, with responsibility for improving the Committee’s use of technology, interacting with the ABA’s Technology Committee, and coordinating with Carol Lucas and Christina Houston in their respective roles as leaders of our listserv and website efforts. Importantly, Martin Brinkley and Jim Fotenos are now co-chairs of our newsletter subcommittee (they were formerly respectively chair and vice chair of the subcommittee).

**Bar Reports.** A flurry of bar opinion reports is in or near publication:

- The Section of Business Law’s Mergers and Acquisitions Committee revised its form of stock purchase agreement, to which are attached two sample opinion letters. Stan Keller, Steve Weise, Carolan Berkley and Don Glazer reviewed these samples for our Committee. For more, see Tom Thompson’s summary elsewhere in this issue.

- The TriBar Opinion Committee is about to issue two new reports, one on opinions on secondary sales of securities under Article 8 of the UCC, and the second on valid issuance of limited liability company membership interests and related matters. For summary coverage of these new reports, see the contributions of Steve Weise (secondary sales of securities), and of Jim Leyden and Don Glazer (on LLC membership interests) in this issue.

- Florida has posted an exposure draft of a comprehensive report, nearing completion of a huge effort.

- The National Venture Capital Association has published a sample opinion letter for use by company counsel in venture capital financing transactions. Mike Kendall offers a summary elsewhere in this issue.

While there is remarkable consensus on positions taken in bar reports on most issues, that is not always true. A difference with California’s position on giving enforceability opinions on choice of law provisions is raised by Don Glazer in his comments on *Feeney v. Dell Computer* in the “Recent Developments” portion of this issue (see “Some Thoughts on Choice of Law Opinions”). Jerome Grossman and Steve Weise respond with the California perspective (“California Replies”), and Don offers a brief rebuttal.

**Newsletter.** The Section of Business Law’s February issue of *e-source* had this to say about the January 2010 issue of our Committee’s newsletter:

“The January 2010 Edition of the newsletter of the Legal Opinions Committee is a magnificent, thoughtful read regarding that Committee’s deliberations, programs, and thinking on a wide variety of matters that will be of interest to every business lawyer who has ever had to prepare and sign an opinion.”

Thanks as always to Martin Brinkley and Jim Fotenos, our newsletter co-chairs, for their wonderful work on our newsletter. This issue was very ably edited by Martin, with substantial help from Jim.
Future Meetings

ABA Section of Business Law Spring Meeting
Sheraton Denver Downtown Hotel
Denver, Colorado
April 22-24, 2010

Committee on Legal Opinions

Thursday, April 22, 2010

• Program: Opinion Letters on Securities: Secondary Sales (UCC Article 8) and LLC Membership Interests. 10:30 a.m. – 12:30 p.m., Governor's Square 17, Concourse Level, Plaza Building. Co-chaired by Steven O. Weise and James G. Leyden, Jr.

Friday, April 23, 2010

• Committee Meeting. 8:30 – 10:30 a.m. Denver Room, Mezzanine Level, Tower Building. (Dial in access: Domestic 888-209-3767; International +1 416 641 6373; passcode 2755996)

• Legal Opinions Committee Reception hosted by Burns, Figa & Will, P.C., 5:30 – 7:00 p.m. Tower Court A, 2nd Floor, Tower Building

Committee on Federal Regulation of Securities, Subcommittee on Securities Law Opinions

Friday, April 23, 2010

• Subcommittee Meeting. 2:00 – 3:00 p.m. Tower Court C, 2nd Floor, Tower Building.
Committee on Audit Responses

Saturday, April 24, 2010

• Committee Meeting. 8:00 – 9:00 a.m. Director’s Row E, Lobby Level, Plaza Building

Committee on Professional Responsibility

Saturday, April 24, 2010

• Committee Meeting. 9:00 – 10:30 a.m. Director’s Row E, Lobby Level, Plaza Building

Working Group on Legal Opinions
New York, New York
May 11, 2010

ABA Section of Business Law Annual Meeting
San Francisco
August 5-10, 2010

Program Summary: Should Legal Opinion Letters in Real Estate Transactions Differ from Opinions in Other Business Transactions?

Our Committee and the Opinions Committee of the ABA’s Real Property, Trust and Estate Law Section, together with the ABA’s Center for Continuing Legal Education, sponsored a webinar on February 24, 2010 addressing the above topic. John Power moderated the session, with a faculty of Sandra M. Rocks, Cleary Gottlieb Steen & Hamilton LLP, New York; Reade H. Ryan, Jr., Shearman & Sterling LLP, New York; and Robert A. Thompson, Sheppard Mullin Richter & Hampton LLP, San Francisco.

After brief histories of the evolution of opinion practice among business lawyers (given by John Power) and the evolution of opinion practice among real estate lawyers (given by Bob Thompson), the speakers discussed similarities and differences between business and real estate practice with respect to the following matters commonly covered in third-party closing opinions: entity opinions (including due formation, valid existence, due authorization, and qualification to do business), execution and delivery of documents, enforceability, conflicts with organizational documents, conflicts with other agreements, legal compliance, governmental consents, no litigation, choice of law, UCC security interests and guaranties.
Panelists agreed that, while business and real estate opinion practice is similar or the same in many areas, there are some significant differences. Opinions in business law transactions typically rely on customary practice to provide guidance as to the scope and meaning of opinions, having abandoned the incorporation by reference approach identified with the 1991 ABA Accord. In enforceability opinions, business lawyers generally use a process that relies on customary practice to provide many exceptions and assumptions without expressly stating them, and therefore usually opt for shorter “laundry lists” of exceptions and assumptions. They tend not to use any generic qualification except the "practical realization" qualification, which is generally used only for complex leases, security agreements and mortgages.

Bob Thompson reported that some in the real estate bar prefer the old California position that the remedies opinion addresses only the “essential provisions” of the agreement. Most real estate lawyers rely on, or incorporate by reference, real estate reports (listed in an Appendix to the program materials and including the 1998 Inclusive Opinion Report and 2003 Real Estate Opinion Letter Guidelines of the American College of Real Estate Lawyers (“ACREL”) and the Real Property Section), tend to state a long list of exceptions and assumptions, and use a restrictive form of generic exception.

The panelists devoted considerable time to addressing the generic exception (both the “practical realization” form and the ACREL “material breach” form, as described in clauses (i) and (ii) below) to the remedies opinion in real estate opinions. The generic exception takes two general forms, each of which first states that certain unidentified remedies, waivers, and other provisions of the transaction documents addressed by the opinion might not be enforceable, but that the lender (i) will be accorded the right to the “practical realization of the principal benefits of the transactional documents,” or (ii) will have the right to “acceleration of the debt and foreclosure of the collateral” in the event of a “material breach of a [material] [payment] covenant.”

For an excellent discussion of variations in the generic exception and its use, see Reade Ryan’s summary of the WGLO breakout session entitled “The ‘Practical Realization’ Qualification or the ‘Generic’ Qualification—Take II,” in the Addendum (pages A-3 through A-5) to the Committee’s January 2010 newsletter.

The program was helpful in clarifying similarities and differences in practice, although the panelists were unable to reconcile all the differences. Perhaps progress on that front will follow. Bob Thompson prepared an extensive bibliography of bar association opinion reports, broken out between business law reports and real estate reports, which is included as part of the outline of the program. A CD of the program and the outline that accompanied it are available through the ABA Web Store at http://www.abanet.org/cle/programs/t10slo1.html (click on “Pre-order the Audio CD Package”), or by calling 800.285.2221 (refer to product code CET10SLOC).

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Bar Opinion Reports

TriBar Opinion Committee: Supplemental LLC Opinion Report

Due to the frequent use of LLCs in business transactions, in 2006 the TriBar Opinion Committee published a report, “Third-Party Closing Opinions: Limited Liability Companies,” 61 Bus. Law. 679 (2006) (the “TriBar 2006 LLC Report”). The TriBar 2006 LLC Report discussed opinions on LLCs commonly given in transactions in which limited liability companies (“LLCs”) frequently engage. Those opinions include the LLC status opinion (due formation, valid existence and good standing), the LLC power opinion and the LLC action opinion (authorization of the transaction). The report also discussed, in a limited way, opinions on the enforceability of LLC operating agreements.

During the last two years, the TriBar Committee has been working on a supplemental report (the “Supplemental LLC Report”) that deals with opinions sometimes given to purchasers of interests in an LLC (“LLC Interests”), such as opinions on the valid issuance of LLC Interests, due admission of members, and limited liability of members. The TriBar Committee hopes to complete the Supplemental LLC Report in 2010.

The Supplemental LLC Report discusses the key similarities with and differences between opinions on the stock of a corporation and opinions on LLC Interests, and the relevance to opinions on LLC Interests of opinions commonly given on the interests of limited partners in limited partnerships. The Supplemental LLC Report will recommend wording for opinions on LLC Interests in both registered public offerings and private placements (such as sales of interests in private equity funds and hedge funds). In particular, the Supplemental LLC Report will explain why some of the opinions traditionally given on corporate stock, such as the opinion that the stock is “duly authorized, validly issued, fully paid and nonassessable,” do not translate well into the LLC opinion context. In addition, the Supplemental LLC Report will recommend language for opinions on due admission of members to an LLC and the personal liability of members for the debts and other liabilities of an LLC.

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[Editor’s Note: Jim Leyden and Don Glazer will present a program sponsored by the Legal Opinions Committee on the Supplemental LLC Report on Thursday, April 22, at the Section of Business Law’s spring meeting in Denver. For more details, see “Future Meetings” elsewhere in this issue of the newsletter.]
TriBar Opinion Committee: Opinions on Secondary Sales of Securities

The TriBar Opinion Committee is finishing up a report on “Opinion Letters in Secondary Sales of Securities” that is expected to be published in the October edition of The Business Lawyer. Steve Weise (Reporter for the report) and Sandy Rocks (a member of the drafting group) will present a program sponsored by the Legal Opinions Committee on the near-final report on Thursday, April 22, at the Section of Business Law’s spring meeting in Denver. For more details, see “Future Meetings” elsewhere in this issue of the newsletter.

A secondary sale of a security is a sale of an outstanding security or of a security entitlement. The report discusses third-party legal opinions on the rights of purchasers in secondary sales. The matters that these opinions address are governed by Article 8 of the Uniform Commercial Code.

A secondary sale opinion relies in large measure on factual assumptions (stated and unstated). In the case of a purchase of a security, the opinion states that the purchaser has acquired a security free of adverse claims. In the case of a purchase of a security entitlement, the opinion states that the purchaser has acquired a security entitlement and that no action can be asserted against the purchaser based on an adverse claim to the related security or the security entitlement.

The report highlights the importance of understanding that, because of the way a purchaser’s rights are protected under Article 8, opinions on secondary sales of a security or security entitlement are based on the existence of particular facts, e.g., the giving of value and the absence of notice of adverse claims on the part of the purchaser. The existence of these facts is, as a matter of customary practice, often assumed (expressly or implicitly).

The legal conclusions that flow from the existence of these facts permit the secondary sale opinion to be given without the opinion preparers having to determine whether the seller had title to the securities or security entitlements being acquired. The TriBar Committee believes that title opinions with respect to a security or a security entitlement should not be requested and that counsel should not be expected to give them. Nor should a confirmation be requested that the opinion giver does not have knowledge of adverse claims that might be asserted with respect to the security or the security entitlement.

The report provides extensive illustrative opinion language, including assumptions, for preparing a secondary sale opinion.

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Committee on Mergers and Acquisitions: Model Stock Purchase Agreement  
Illustrative Opinion

The Section of Business Law’s Mergers and Acquisitions Committee expects to publish its Revised Model Stock Purchase Agreement with Commentary (“MSPA”) this summer. The revised MSPA will update the 1995 Model Agreement (which is presented as a buyer’s first draft) and expand the commentary to address in greater depth the possible responses of counsel for the seller. The MSPA contains a number of exhibits and ancillary agreements, including illustrative opinion letters from both seller’s and buyer’s counsel. The illustrative opinion letters and commentary are intended to guide M&A lawyers on basic considerations of opinion practice in the context of acquisitions.

The illustrative opinion letters were developed by a task force of M&A Editorial Committee members who are also active in the Legal Opinions Committee and the Working Group on Legal Opinions: Tom Thompson of Buchanan Ingersoll & Rooney PC; Tom Hyman of Sutherland Asbill & Brennan LLP; and Bruce Cheatham of Bracewell & Giuliani LLP, with helpful input and guidance from a task force of the Legal Opinions Committee appointed by John Power and consisting of Carolan Berkley, Don Glazer, Stan Keller and Steve Weise.

The illustrative opinion letters in the revised MSPA have been significantly changed from the illustrative opinion letters in the 1995 MSPA, which were based on the 1991 ABA Accord. The commentary in the revised MSPA references various bar association opinion reports published since 1995. The new MSPA illustrative opinion letters and commentary largely track the suggested language of those reports and draw upon the 1998 TriBar Report (Third-Party “Closing Opinions,” 53 Bus. Law. 591), the Boston Bar’s short form opinion (A Streamlined Form of Closing Opinion Based on the ABA Legal Opinion Principles, 61 Bus. Law. 389 (Nov. 2005), and several state bar association opinion reports in the context of M&A transactions.

The illustrative seller’s counsel opinion letters in the revised MSPA contain suggested opinion language and commentary on:

- corporate status and power;
- authorization, execution, delivery and enforceability of the transaction documents;
- “no breach or default” under organizational documents or agreements to which the client is a party;
- governmental consents or filings;
- capitalization of the target company and characteristics of its issued and outstanding stock; and
- the effect of the receipt of the target stock by the buyer (but not as to title to that stock).
In addition, the illustrative seller’s counsel opinion letter contains suggested language and commentary addressing no litigation confirmations, no violation of law, involvement of local or specialty counsel, and other language commonly used in M&A opinions. The commentary also discusses the trend toward requiring opinions in a decreasing percentage of M&A transactions and the importance of cost-benefit analysis in deciding whether to require an opinion.

The Legal Opinions Committee expects to include the MSPA illustrative opinion letters and commentary in its Legal Opinion Resource Center website following their publication by the Mergers and Acquisitions Committee.

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National Venture Capital Association Form Opinion

In November 2009, the National Venture Capital Association published a Form of Legal Opinion (available at www.nvca.org) for use by company counsel in rendering closing opinions in venture capital financing transactions. The Form of Legal Opinion is part of a set of model investment documents produced by a working group of lawyers acting under the auspices of the NVCA. The NVCA Form was drafted, reviewed and revised over approximately 18 months by lawyers from across the country and reflects a broad consensus regarding the opinions that are appropriate to give and receive in the context of a venture capital financing.

Notably, while the NVCA Form was in process, the Report on Selected Legal Opinion Issues in Venture Capital Financing Transactions produced by the Opinions Committee of the Business Law Section of the State Bar of California (the “CA VC Opinion Report”) was also being prepared and was ultimately published the same month as the Form of Legal Opinion. Several of the authors of the Form of Legal Opinion were also either authors of the CA VC Opinion Report or commentators on it. The judgments reached regarding the inclusion or exclusion of certain opinions in the Form of Legal Opinion are consistent with the CA VC Opinion Report.

Highlights of the NVCA Form include:

- A recommendation that no opinion be requested or given on outstanding options, warrants and other derivative securities, even if only to the opinion giver’s knowledge, because such an opinion could be read as negative assurance as to a factual matter.

- The inclusion of a footnote explaining the circumstances in which giving an opinion on the voting of shares might be appropriate.

- Discussion of the meaning of the “duly authorized” opinion as it relates to preferred stock.
- A narrow formulation of “no litigation” confirmation.

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**Florida Bar: “Report on Standards for Third-Party Legal Opinions of Florida Counsel”**

**Editor’s Note:** The Florida Bar’s Section of Business Law has posted an exposure draft of its comprehensive legal opinion report. You can review it by going to the following link: http://flabizlaw.org/index.php?option=com_groupjive&task=showgroup&groupid=43&Itemid=12. Comments should be addressed to Philip Schwartz (philip.schwartz@ackerman.com), Chair of the Florida Bar’s Committee on Legal Opinion Standards, or Robert Barron (rbarron@bergersingerman.com), Vice Chair. We plan to publish an article on this report in the summer issue of the newsletter.

**Lessons from the Listserve**

[Editor’s Note: Dialogue on the Committee’s 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 “listserves” on the Committee’s website. If you do not currently subscribe to the listserve, and would like to do so, go the text box (“Join the Committee’s Listserve”) at the end of this summary of the listserve dialogues. You must be a member of the Committee to subscribe.]

Since the publication of our January 2010 issue, there have been five opinion issues raised by our members on the Committee’s listserve, two of which I summarize here.

1. **Bondholder Reliance Upon Opinions Addressed to Bond Trustee**

   On January 20, 2010, one of our members asked for the listserve’s reaction to this viewpoint, expressed by opposing counsel:

   “Opposing counsel on a bond financing has told me that, in his view and the view of most lawyers, any legal opinion that is addressed to the Bond Trustee may be relied on by all bondholders, because the Trustee is acting on their behalf. In addition, bondholders may rely on such opinion letter (and therefore sue the opinion provider) even if the opinion letter expressly states that only the named addressees (and no other parties) can rely on it.”
This viewpoint drew some vigorous dissents, including from Michael Kaplan of Davis Polk & Wardwell LLP, New York (“I have never heard that and would be very surprised to have anyone take that view”) and Stan Farrar of Sullivan & Cromwell LLP, New York (“Seems a crazy view to me”). On the other hand, those practicing in municipal finance cited instances where bondholders may rely upon issuer’s counsel’s opinion. As noted by John A. Eckstein of Fairfield and Woods, P.C., Denver, “[i]f the opinion is of the type to be printed on the bonds, then the bondholders may rely upon it.” On the other hand, noted John, if “the opinion is to the Bond Trustee and has to do with the scope of the Trustee’s powers under the Bond Indenture and relates to a specific inquiry of the Trustee as to the exercise of those powers, that may be an opinion which runs only to the Trustee and not to the Trust.”

Stan Keller of Edwards Angell Palmer & Dodge LLP, Boston, and Jefferson V. Wright of Miles & Stockbridge P.C., Baltimore, each noted that where the opinion is required by the indenture, the indenture will provide for enforcement of the terms of the indenture by the trustee (including against counsel) “on behalf of bondholders and not by individual bondholders (except in limited circumstances and then as a group).” Thus, noted Stan, “these opinions don’t run to bondholders individually.”

Perspective from municipal bond practice was given at some length by Stephen A. Keen of Reed Smith LLP, Pittsburgh. Quoting from the National Association of Bond Lawyers’ Model Bond Opinion Report, Steve noted:

“Practice varies regarding the addressees of the opinion. Frequently, the opinion is addressed to the issuer, the underwriters (or other original purchasers), or both. Occasionally, the opinion is addressed to an appropriate officer of the issuer or to another party (such as the paying agent). Sometimes the opinion is not addressed to anyone.

Unless otherwise stated, subsequent owners of the bonds are also intended to rely on the opinion distributed with or printed on the bond.”

Observed G. Allen Bass of Lewis & Munday, P.C., Detroit: “Municipal traditions differ greatly from corporate traditions in certain respects and this is one of them . . . . The bond counsel opinion customarily is addressed to the issuer, and the customary practice is that all bondholders may rely on it.”

Arthur Field made the sensible point that if a bondholder does not have the opinion at the time of purchase, reliance would be difficult to establish. On the other hand, if purchasers have the opinion at the time of purchase, but it is not addressed to them, then relevant considerations would be “were the holders warned that they could not rely and how sophisticated were the purchasers.” If the opinion contains no disclaimer about reliance, a court reviewing the matter might very well ask “why the opinion was made available to folks who could not use it.”

The TriBar illustrative opinions include an express statement precluding reliance by persons other than the addressee, e.g., “[t]his opinion letter may not be relied on ... or furnished to any other Person without our prior written consent.” (TriBar Report, 53 Bus. Lawyer 591, 668, App. A-1 (1998)). See also our Committee’s Guidelines for the Preparation of Closing Opinions ¶ 1.7 (“Reliance”).
2. Patent Opinions to Underwriters in the IPO Context

George K. Fogg of Perkins Coie, LLP, Portland, in his email of February 18, 2010, asked the listserv for its reaction to broad opinion/assurance requests from the underwriter to patent counsel to an issuer in an IPO (not acting as general company counsel). George listed the 10 requested opinions/confirmations which, to employ understatement, are extremely broad, including assurance on the correctness “in all material respects” of the company’s description of its patent rights throughout the prospectus; negative assurance on any “pending legal or governmental proceedings” relating to the issuer’s patent rights; negative assurance on the company’s infringement of patents held by third parties; negative assurance on third parties’ infringement of the issuer’s patent rights; negative assurance on knowledge of any facts precluding the company’s ownership of “valid license rights” or “clear title” to the issuer’s United States and foreign patents; and on and on and on. For those of you who are not familiar with these types of requests, you should review George’s email listing.

It took Stan Keller less than 24 hours to reply, citing the Negative Assurance in Securities Offerings (2008 Revision) report of the Subcommittee on Securities Law Opinions of the ABA’s Committee on Federal Regulation of Securities (64 Bus. Law. 395 (2009)) for its discussion of the inappropriateness of requesting general negative assurance from specialized counsel. While specialized counsel may provide assurance on “portions of the offering document to which its expertise relates,” and “might cover other matters targeted to that expertise,” the requests cited by George “seem[s] over the top.” If the underwriter wants representations, it should seek them from the issuer, not counsel. Generally, noted Stan, “comfort on the relevant sections of the offering document should cover what is necessary and be sufficient.”

Consistent with Stan’s comments, Ettore A. Santucci of Goodwin Procter LLP, Boston, noted that George’s example is one of many “extravagant” IP opinion requests he has seen lately, ranking them “among the top 3 in terms of outrageous reaching.” Ettore, noting the literature cautioning against such assurance, relates that he has been “willing to give a targeted negative assurances letter limited to specific IP content in a disclosure document, so long as we have had meaningful involvement in the drafting and due diligence process, have been allowed to comment on the prospectus language and have a broad enough view of the company’s business (albeit from an IP vantage point only) to feel comfortable with materiality judgments and context.”

Steve Chameides of Foley + Lardner, LLP, Washington, D.C., responded that he generally declines to provide such an opinion when acting only in the limited context described by George, and that it usually takes discussions at a level or two above the requesting counsel to resolve the issue satisfactorily.

Jim Rosenhauer of Hogan & Hartson LLP, Washington, D.C., also supported the “don’t give the assurance” view, noting that “it is the rare matter where the parties will be willing to pay for the ongoing involvement throughout the disclosure process by the IP lawyer and that lawyer’s securities partners, that would allow appropriate negative assurance.”

3. Other Topics Addressed

Other issues addressed on the listserv since the January 2010 issue were the frequently-raised topic of the difficulty of negotiating variations in opinion language in opinions addressed
to HUD; the appropriateness of a remedies opinion on an indorsement delivered for accommodation under Section 3-416 of the New York Uniform Commercial Code (which, Steve Weise pointed out, is the only state with the pre-1990 version of UCC Article 3); and giving title opinions in connection with Home Equity Lines of Credit. Readers are invited to the archives section of the listserve to review the discussions on these topics (see Editor’s Note above for the location of the archives section).

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Listserves – BL-Opinions/Subscribe

You must be a member of the Legal Opinions Committee to join.

Listserve subscribers may access the comments referred to in this note under “Archives.”

*The URL is http://www.abanet.org/dch/committee.cfm?com=CL510000
**Recent Developments**

**Some Thoughts on Choice of Law Opinions**

In *Feeney v. Dell Computer*, 454 Mass. 192, 908 N.E.2d 753 (2009), the Supreme Judicial Court of Massachusetts declined to give effect to the parties’ choice of Texas law in a contract between a Massachusetts purchaser and a Texas seller and held invalid an arbitration provision that apparently was valid under the chosen law but that was invalid under Massachusetts law. In *Feeney*, the plaintiff, a Massachusetts resident, purchased a computer from affiliates of Dell, a company headquartered in Texas, pursuant to a contract that chose Texas law as its governing law and required that disputes relating to the contract be submitted to individual arbitration. When Feeney sued Dell in Massachusetts, the Massachusetts Superior Court held that Feeney’s claim was required to be arbitrated. On appeal, the Massachusetts Supreme Judicial Court disagreed with that holding. Applying the choice of law principles set forth in the Restatement (Second) of Conflicts of Law, the court took as a given that Massachusetts law would apply in the absence of a governing law clause (a point uncontested by the parties). The court then determined (i) that the arbitration provision, in requiring individual arbitration, violated a Massachusetts fundamental policy favoring the right of purchasers to bring class actions in consumer transactions, (ii) that Massachusetts had a materially greater interest in the issue than Texas, and (iii) therefore, that the choice of Texas law was ineffective and the prohibition in the arbitration provision on class arbitrations was invalid. The court further held that the arbitration provision as a whole was invalid because the requirement of individual arbitration was central to the mechanism for resolving disputes between the parties.

The court’s analysis in *Feeney* is straightforward and uncontroversial (except perhaps for its invalidation of the arbitration provision as a whole). What it means for opinion practice, however, is worth exploring. Consider first what a Massachusetts lawyer would have done if, when the contract was entered into, the lawyer had been asked to give an opinion to Dell that the choice of Texas law in the contract was effective under Massachusetts law. If that lawyer had followed the approach proposed in the TriBar Remedies Opinion Report, 59 Bus. Law. 1483 (Aug. 2004), the lawyer would have determined that giving effect to the arbitration clause would violate a fundamental policy of Massachusetts, the state whose law was covered by his opinion, and, thus, would have advised the recipient that he could not give a favorable opinion. The opinion process would have done its job by alerting Dell to the fact that under Massachusetts law the contractual choice of Texas law was ineffective and the arbitration provision would not be enforced.

Now consider what the lawyer would have done if the lawyer instead had followed the approach proposed in Appendix 10 (at B-2 to B-3) to the California Remedies Opinion Report. Under that approach a lawyer can give an opinion on the effectiveness of a governing law clause without considering the fundamental policies of any state, including the state whose law is covered by the opinion – and may do so without stating in the opinion letter. If the Massachusetts lawyer had taken the California approach, the lawyer could have given an unqualified opinion that the governing law clause was effective under Massachusetts law.
Now let’s step back and look at the situation from the standpoint of the opinion recipient and a court. If you were Dell and had received an unqualified opinion from a Massachusetts lawyer on the effectiveness under Massachusetts law of the governing law clause, how would you have felt after *Feeney* was decided? My guess is that you would have been unhappy to say the least – maybe so unhappy, in fact, that you would have considered suing the opinion giver for negligent misrepresentation. Now consider what, if Dell did sue, you would have done if you were the judge? How would you have viewed an opinion that expresses a conclusion that is directly contrary to how the courts of your state would rule? Would you have let the lawyer off the hook by deferring to an appendix to a bar association report, especially one that takes a position that is inconsistent with other reports? My guess is that you would not.

Finally, where does this leave us as opinion givers? *Feeney* highlights, I believe, the risk a lawyer runs in taking the California approach. It suggests to me that in states that have adopted the Restatement approach, lawyers run a meaningful risk of liability if, without saying so in the opinion letter, in factual situations such as the one presented in *Feeney*, they do not consider whether the agreement violates the policies of the state whose law they are covering in the opinion. What I take from *Feeney*, therefore, is that, if a possibility exists that the Restatement test will look to the fundamental policies of the state whose law is being covered in the opinion and the lawyers giving the opinion do not wish to consider them, those lawyers should expressly exclude coverage of the fundamental policies of that state from the opinion (and, to state the obvious, they should not give the opinion at all – even with an express exclusion – and thereby risk misleading the recipient if, even without research, they are aware of a policy in their state that might be violated if the agreement were enforced).

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**California Replies**

We would like to comment on our friend Don Glazer’s position on the approach to choice-of-law opinions taken in the California Remedies Opinion Report (2007 update) (available at the Section’s Legal Opinion Resource Center; http://www.abanet.org/buslaw/tribar/statelocal.shtml). We disagree with Don’s belief that using the approach suggested in the California Report creates more risk than anything else in an opinion letter, because: (i) an opinion that follows the California approach is analytically correct, (ii) to take any other approach is to embrace the dreaded kitchen sink, and (iii) Don misreads the California Report.

*The California approach is analytically correct.* As discussed in Don’s note, one of the issues involved in a choice-of-law analysis under the Restatement (Second) of Conflicts of Laws § 187 (“Restatement”) is whether the application of the law of the state specified in the agreement (the “Chosen State”) to a particular issue in the agreement (i) would be “contrary” to a “fundamental policy” of the state whose law would apply in the absence of the choice-of-law clause (the “Default State”), and (ii) if so, whether the Default State has a “materially greater interest” in the determination of the issue than does the Chosen State (“(i)” and “(ii)” are...
collectively referred to as the “Fundamental Policy Issue”). The California Report states “The Subcommittee does not believe the inclusion of this exception [the Fundamental Policy Issue] to be necessary”.

The law covered by the choice-of-law opinion (“Covered Law”) (i.e., the law addressed in the opinion letter by the opinion giver in determining whether the choice-of-law clause is enforceable) will determine the test for determining whether to enforce the choice-of-law clause (presumed by Don and us to be the Restatement test when the law of the Chosen State is not the Covered Law). So, for example, a California lawyer asked to render an opinion where California law is the Covered Law on a loan agreement whose Chosen State is New York will look to California law to assess the enforceability of that choice. But key parts of the application of that test under the Covered Law (California) require knowledge of the law of the Default State and the law of the Chosen State. The Covered Law determines the “fundamental” and “materiality” portions of the Fundamental Law Issue, but those rules are applied to the actual content of the Default State’s law and the Chosen State’s law (in the case of the materiality component). The content of the law of the Chosen State and the law of the Default State and the application of that law to the terms of the agreement are questions of the law of those respective states. Restatement § 187, comment g; see also Restatement § 202, comment c, Korea Life Insurance Co, Ltd. v. Morgan Guaranty Trust Company of New York, 269 F. Supp. 2d 424, 438 (S.D.N.Y. 2003).

If an opinion giver were to undertake the Restatement analysis necessary to give an opinion on the Fundamental Policy Issue, the opinion giver would have to make a several-step analysis, with each step dependent on the determination made in each of the earlier steps:

<table>
<thead>
<tr>
<th>Step</th>
<th>Issue to determine</th>
<th>Relevant Law</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>Which state is the Default State?</td>
<td>Covered Law</td>
</tr>
<tr>
<td>2</td>
<td>Content of the law of the Default State and the law of the Chosen State (in each case, applicable to the agreement)</td>
<td>Default State and Chosen State, respectively</td>
</tr>
<tr>
<td>3</td>
<td>Of the law identified in step 2 as the law of the Chosen State, would the application of that law be contrary to the law identified in step 2 as the law of the Default State (in each case, applicable to the agreement)?</td>
<td>Default State</td>
</tr>
<tr>
<td>4</td>
<td>Of the law of the Chosen State identified in step 3 as “contrary” (if any), which aspects involve a fundamental policy of the Default State?</td>
<td>Covered Law</td>
</tr>
</tbody>
</table>
The law of neither, or one or both of the Default State and the Chosen State may be identified in the opinion as a Covered Law. If the Covered Law (in our example, California) is also the law of the Chosen State, then in the normal case there would not be an analysis under the Restatement (even if California is also the Default State). Rather (as discussed in the TriBar Report on the Remedies Opinion (available at the Legal Opinion Resource Center)) the opinion would customarily be given under statutes, such as those that exist in New York, Delaware, Illinois, and California, that automatically enforce inbound choice-of-law clauses in commercial transactions involving stated minimum amounts of money.

Or, for example, our California opinion giver may be opining on an agreement where New York is the Chosen State and the opinion giver might identify California as the Default State (which is often the case). In that case the Covered Law and the law of the Default State are the same law. But that does not mean that the choice-of-law opinion can address the Fundamental Policy Issue. The Fundamental Policy Issue analysis cannot be made unless the law of both the Default State and the law of the Chosen State have been determined, and (by definition) the law of one or both of those states is expressly not covered by the opinion because it is not included in the Covered Law. Accordingly, it is impossible to analyze the Fundamental Policy Issue and there is no reasonable basis for the opinion recipient to believe that the opinion addresses the Fundamental Policy Issue.

The kitchen sink. But, Don argues, an opinion that takes the California approach would allow the opinion giver to say in the opinion that the choice-of-law clause is enforceable, even when (i) the law of the Default State is the Covered Law, and (ii) the choice-of-law clause is not enforceable as to a particular issue. But it’s always true that the opinion stated may not be correct in all cases if a law or subject not covered by the opinion makes the agreement unenforceable. Exclusions matter only when that’s the case. That’s one of the points of exclusions from the opinion. Whether the exclusion is the law of a jurisdiction or a body of law (e.g., antitrust law or securities law), the opinion says, expressly or implicitly, that the opinion giver takes no responsibility for the effect of the excluded law. The exclusion here is explicit - the law of any uncovered state is expressly excluded by the coverage clause in the opinion letter. See TriBar Opinion Committee, Third-Party Closing Opinions, 53 Bus. Law. 591, 632 (Feb. 1998) (inclusion of the law of one state “excludes” the law of all other states and coverage limitation “limit[s] the meaning of the opinions given”).

But what if an opinion recipient, or, more importantly, a judge or jury, doesn’t understand all of this analysis? Don suggests that to guard against that risk the opinion giver “should expressly exclude” the Fundamental Policy Issue. Yes, that can be done, and the California
Report acknowledges that possibility – an opinion giver can always add more relevant exclusions. However, as discussed in the TriBar Report on the Remedies Opinion, when an exclusion already in the opinion letter covers an issue, the opinion giver does not have to clutter the opinion with another exclusion that excludes the same issue by another method. Thus, where the Covered Law does not include the law of one or both of the Default State and the Chosen State, the law of those states has already been expressly excluded and there's no need for yet another exclusion that refers expressly to the Fundamental Policy Issue.

What the California Report says. Don observes that “under [the California] approach a lawyer can give an opinion on the effectiveness of a governing law clause without considering the fundamental policies of any state, including the state whose law is covered by the opinion – and may do so without so stating in the opinion letter.” (Emphasis in original.) But that overstates what the California Report says. The California Report says that the Fundamental Policy Issue does not have to be mentioned “if the opinion giver is not asked to render an opinion with respect to the enforceability of an agreement under California law . . ..” California Remedies Report, Appendix 10, page B-2 (emphasis added). As stated in the California Report, if the opinion letter includes a full remedies opinion (probably given “as if” the Covered Law were the law chosen to govern the agreement), then the opinion will (or should) include the necessary exclusions and exceptions to indicate which provisions of the agreement are not enforceable under the law addressed by the remedies opinion. The exceptions to that opinion will necessarily include anything that could be a fundamental policy under that law.

Conclusion. As discussed above, an opinion can be given on the Fundamental Policy Issue only when both the Default State and the Chosen State are included in the Covered Law. However, when the law of the Default State or the law of the Chosen State, or both, is not included within the Covered Law, the opinion on the Fundamental Policy Issue cannot be given and cannot reasonably be expected to have been given.

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A Brief Reply from Don

I agree with much of what Jerry and Steve have written, including their assertion that opinion givers should not necessarily have to cover fundamental policies. But they fail to address my key point – which is that the opinion letter should make clear that the opinion is not covering the fundamental policies of the Covered Law state when under the choice-of-law rules of that state those policies might be considered and when, nonetheless, the opinion giver does not wish to cover them. In my example, the opinion letter covers Massachusetts law, and hence the coverage limitation does not excuse the opinion preparers from having to consider Massachusetts fundamental policies. In that circumstance, I continue to believe – and find nothing in Jerry and Steve’s piece to dissuade me – that an opinion giver would be much safer stating in the opinion
letter that it is not covering the fundamental policies of Massachusetts and that it would be running a real risk if on the basis of the California report it does not make that disclosure in the opinion letter.

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Bankruptcy Court Invalidates Springing Subordination Provisions in Credit Default Swap Transaction

A federal bankruptcy court in New York has struck down “springing” subordination provisions in a credit default swap transaction. The case raises the possibility that a contract provision stating that the parties’ rights will change in the event of bankruptcy (a so-called “ipso facto” clause) may be unenforceable if an affiliate or credit support provider of the contract party seeks bankruptcy protection, even though it is not the same entity as the contract party. The court’s decision may interest lawyers who give substantive consolidation and enforceability opinions in structured financings.

The case arose from the bankruptcy of Lehman Brothers Holdings Inc. (“LBHI”) and its subsidiaries, including Lehman Brothers Special Financing Inc. (“LBSF”) – “the largest business bankruptcy in history.” The litigants held competing interests in collateral securing obligations of an issuer of credit-linked synthetic portfolio notes issued by a Lehman special purpose entity (the “Notes”). LBSF was a credit default swap counterparty and LBHI provided credit support for the transaction. Under a provision in the loan documents (which were governed by English law), payment priority shifted from LBSF to the holder of the Notes (the “Noteholder”) upon the bankruptcy of LBSF or LBHI. (LBHI entered bankruptcy in September 2008, followed shortly thereafter by LBSF). LBSF commenced litigation in bankruptcy court against the trustee for the Noteholder, seeking a declaration that the priority shifting provision was unenforceable under the Bankruptcy Code and that LBSF retained senior rights in the collateral. The Noteholder had earlier brought suit in England and had prevailed before both the trial and appellate courts there.

In January 2010, the New York bankruptcy court reached a contrary result. The court declared that provisions of the loan documents purporting to shift payment priority in the event of LBSF’s or LBHI’s bankruptcy are unenforceable ipso facto clauses, and that an attempt to enforce such provisions would violate the automatic stay imposed by Section 362(a) of the Bankruptcy Code. (Section 365(e)(1) of the Bankruptcy Code generally invalidates ipso facto clauses – contract provisions that purport to terminate or modify a debtor’s rights based solely on financial condition or bankruptcy). Importantly, the court stated that its conclusion would not change regardless of whether LBSF’s bankruptcy or that of its affiliate, LBHI, was the relevant priority shifting event. Viewing the Lehman entities as an “integrated enterprise,” the court reasoned that “the financial condition of one affiliate affects the others.” Exercising judicial discretion, the court refused to recognize the English court’s judgment because doing so would

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1 Lehman Brothers Special Financing Inc. v. BNY Corporate Trustee Services Limited (In re Lehman Brothers Holdings Inc.), 422 B.R. 407, 420 (Bankr. S.D.N.Y. 2010).
be contrary to fundamental policies of the United States. Furthermore, the bankruptcy court held inapplicable certain Bankruptcy Code provisions that recognize the validity of “subordination agreements” enforceable outside bankruptcy or create a “safe harbor” permitting *ipso facto* termination of derivatives contracts, since those provisions do not expressly address shifting priorities. Acknowledging that the trustee holding the collateral had been placed in a difficult (if not untenable) position by conflicting directives of the English and U.S. courts, the bankruptcy court called upon the parties to work cooperatively and ordered a status conference for the purpose of exploring means to harmonize the decisions. Three months after issuing its decision, the court has not entered an implementing order, and it is likely that any such order will be appealed.

It is unclear what the long-term impact of the court’s decision will be. The court invited speculation as to the circumstances under which the bankruptcy case of one entity might be sufficiently related to the bankruptcy of an affiliate to invoke the Bankruptcy Code’s *ipso facto* provision on behalf of the second debtor, but left the question open to case-by-case determination. Despite the singular nature and complexity of the Lehman case and the unprecedented circumstances surrounding the filings, the novelty of the issues decided, the uncertainty resulting from the court’s unwillingness to state a limiting principle and the high profile of this bankruptcy case suggest that the decision may have far-reaching effect. As the bankruptcy court observed:

> No case has ever declared that the operative bankruptcy filing is not limited to the commencement of a bankruptcy case by the debtor-counterparty itself but may be a case filed by a related entity – in this instance the counterparty’s parent corporation as credit support provider. Because this is the first such interpretation of the *ipso facto* language, the Court anticipates that the current ruling may be a controversial one, especially due to the resulting conflict with the decisions of the English courts.

The court correctly anticipated that its decision would prove controversial: ratings agencies promptly warned of possible downgrades, and commentators predicted that in the future structured notes may receive ratings no higher than those of a counterparty or credit support provider. Some commentators advised forming securitization vehicles under English law to safeguard them from attack by U.S. bankruptcy courts or incorporating *ipso facto* clauses in swap agreements rather than loan documents to take advantage of the statutory “safe harbor”. Attempts to structure or draft around the Bankruptcy Code are likely to be unsuccessful, however, since the *Lehman* court determined that the statutory safe harbor does not extend to shifting priorities. Moreover, any entity with substantial assets in the United States, regardless of its place of formation, may invoke the jurisdiction of U.S. bankruptcy courts.

Regarding substantive consolidation, *Lehman* may be viewed as part of a line of cases in which bankruptcy courts have focused on the needs of a corporate group to impose a decision affecting creditors of one debtor based on the status of another, without substantively consolidating the entities.\(^2\) Although the *Lehman* court was careful to say that “[n]othing in this

decision is intended to impact issues of substantive consolidation,” lawyers who give substantive consolidation opinions in complex structured financings should be aware of the decision and consider expressly disclaiming any opinion as to whether a bankruptcy court would enter orders determining the validity and enforceability of the rights of one entity (including a “special purpose entity” or “SPE”) in and to its assets (including contract rights), or allowing the sale, use or lease of an SPE’s assets by an affiliate, based upon the status of the affiliate or the needs of the corporate group of which the SPE and the affiliate are a part, and without making appropriate findings and effecting a formal substantive consolidation.

Regarding enforceability opinions (in this case, enforceability of loan documents or swap agreements containing subordination provisions), Lehman undercuts the common assumption that ipso facto clauses are in all cases enforceable against non-debtors, such as guarantors of a debtor’s obligations. The court noted that the language of Section 365(e)(1) of the Bankruptcy Code, which invalidates ipso facto clauses, is not limited to the commencement of a bankruptcy case “by or against the debtor”, and concluded that “the absence of such precise limiting language is significant.” Opinion givers may wish to consider whether, in interpreting this statutory language, the persuasive authority of Lehman may extend beyond the bankruptcy courts to other courts considering bankruptcy principles. Even before Lehman, some non-bankruptcy courts refused to enforce similar clauses, citing Congressional policy or anti-forfeiture principles.3

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**Membership**

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Next Newsletter

We expect the next newsletter to be circulated in July 2010. Please forward cases, news and items of interest to John Power (johnpower@earthlink.net), Martin Brinkley (mbrinkley@smithlaw.com), or Jim Fotenos (jfotenos@greeneradovsky.com).
AGENDA

Friday, April 23, 2010
8:30 – 10:30 a.m.

Sheraton Denver Hotel
Denver, Colorado

Domestic dial-in: 888-209-3767
International dial-in: +1 416 641 6373
Access code: 2755996

1. Introduction
2. Report on Outbound Cross-Border Legal Opinions
5. Programs
6. Bar Reports
7. Recent Developments
   - Lehman Brothers (Pamela Smith Holleman)
   - New York Powers of Attorney (Richard R. Howe)
   - Other
8. Next Meeting
   Location: San Francisco
   Date: Annual Meeting, August 5-10, 2010