From the Chair................................................................................................................. 1
Future Meetings............................................................................................................... 2
Practice Corner ................................................................................................................ 3
Notes From the Listserve................................................................................................. 4
Legal Opinion Reports................................................................................................... 12
Membership................................................................................................................... 20
Next Newsletter ............................................................................................................. 20
From the Chair

In recent years, we have seen a subtle change in the approach to legal opinion practice. I believe there has been a trend away from the “easier path” espoused by the TriBar Committee in its seminal 1979 report (“Legal Opinions to Third Parties: An Easier Path”) and reaffirmed in its 1998 report (“Third-Party ‘Closing’ Opinions”), and an increased concern over exposure to claims and liability, resulting in more defensive practice.

This trend has been reflected, for example, in greater use of express exceptions, assumptions and limitations and reduced reliance on customary practice, and in resistance to a greater number of particular opinions that historically were not of concern. It also is seen in a reduced willingness to make professional judgments and more of an eye on litigation outcomes, especially the question “will I be able to win on a motion to dismiss.”

Although this trend might be consistent with the desire of some to reduce or eliminate entirely third-party opinions or at least remedies opinions, to the extent that third-party opinion practice is to continue, this trend is not, in my judgment, helpful to the opinion process. This is because, when opinions are given, opinion givers and opinion recipients have nowhere to go but to give and receive third-party legal opinions based on a common understanding of customary practice and to exercise appropriate professional judgment in doing so.

This is not to say that some recalibration of opinion practice should not take place, both in the nature of the opinions given and in improving communications between opinion givers and recipients. For example, TriBar is revisiting its guidance on opinions on choice-of-law and forum selection provisions to see whether it might be better for some underlying assumptions to be stated expressly. Also, it is appropriate to revisit the care used in giving opinions and the procedures followed to assure their quality. Our Committee is in the process of analyzing the results of an opinion office practices survey we distributed, and these results should provide helpful insights on internal approaches to opinion practice. In addition, the Working Group on Legal Opinions has made a major contribution through its biannual seminars analyzing opinion practices and focusing awareness on the importance of risk mitigation.

These are healthy steps but they should take place in an overall context that recognizes the importance of customary practice as the bedrock of third-party legal opinions and the acceptability, and indeed necessity, of well-informed professional judgment. Only in this context can legal opinion practice operate effectively and efficiently for the benefit of our clients and to meet their legitimate expectations.

It is my expectation that the joint project of this Committee and WGLO, working with state and local bar groups, to seek to identify the breadth of consensus that exists regarding customary practice will make a major contribution to establishing a proper context for legal opinion practice and, by doing so, will move us further down, if not the “easier path,” then the “right path.”

- Stan Keller
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**Future Meetings**

**ABA Section of Business Law Spring Meeting**  
*Marriott Copley Place Hotel*  
*Boston, MA*  
*April 14-16, 2011*

**Committee on Legal Opinions**

Friday, April 15, 2011

- Committee Meeting. 8:30 a.m. – 10:30 a.m.
- Program: Ground Rules for Giving Outbound Cross Border Opinions. 3:00 p.m. – 4:30 p.m.
- Reception (sponsored by Edwards Angell Palmer & Dodge LLP). 5:00 p.m. – 6:30 p.m.

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

Friday, April 15, 2011

- Subcommittee Meeting. 2:00 p.m. – 3:00 p.m.

**Committee on Professional Responsibility**

Saturday, April 16, 2011

- Committee Meeting. 9:00 a.m. – 10:30 a.m.

**Committee on Audit Responses**

Saturday, April 16, 2011

- Committee Meeting. 10:00 a.m. – 11:00 a.m.

**Working Group on Legal Opinions**

*New York, New York*  
*May 3, 2011*

**ABA Annual Meeting**

*Westin Harbour Castle*  
*Toronto, Ontario*  
*August 5-8, 2011*
Practice Corner

We inaugurate with this issue practice pointers from experienced opinion givers and recipients on issues that frequently arise in opinion practice. The first practice pointer is from Lou Hering and Melissa DiVincenzo of the Morris Nichols firm, Wilmington, Delaware.

Opinion Considerations for Agreement Provisions

Extending Statutes of Limitations

Like the law in many other states, subject to the exception noted below for contracts under seal, Delaware law does not permit the extension of a statute of limitations by contract. See Shaw v. Aetna Life Insurance Co., 395 A2d 384, 386-387 (Del. Super. 1978). While many practitioners may be familiar with this prohibition, some may not have considered the types of provisions that could be construed to run afoul of the prohibition and the implications for certain legal opinions. Practitioners providing enforceability opinions on provisions that could be construed as contractual extensions of the statute of limitations should be aware of the prohibition and, more importantly, the ways in which the issue can arise. For example, many private company acquisition agreements require the seller to indemnify the buyer post-closing for losses arising from a breach of the seller’s representations and warranties. The parties may approach this through a combination of survival clauses and contractual indemnification obligations. Such indemnification obligations may, by their terms, extend for a number of years post-closing and, in the case of a breach of certain representations, such as authority and capitalization, may extend indefinitely.

For purposes of Delaware law, if practitioners are asked to provide enforceability opinions with respect to such agreements, they should be aware that provisions purporting to allow recovery for breaches of representations and warranties beyond the three-year statute of limitations applicable to contract claims may not be enforceable as a matter of public policy. Under Delaware law, a claim for breach of representations or warranties can accrue at closing, such that an agreement that obligates the seller to “indemnify” the buyer for losses arising from such a breach for more than three years could constitute an impermissible attempt to extend the statute of limitations by contract, absent a basis for tolling of the statute. See CertainTeed v. Celotex Corp., 2005 WL 217032 (Del. Ch. 2005) (distinguishing between direct claims for breach of representations and warranties between the contracting parties, which accrue at closing, and claims for reimbursement for third-party claims, which may not accrue until payment is made to the third party).

From an opinion standpoint, if the potential infirmity is not addressed in the agreement, practitioners should consider specifically qualifying the opinion as to such provisions or noting that they will be subject to the applicable statutes of limitations. One possible form of opinion qualification would be to include the following statement: “We express no opinion as to the enforceability of any provision in
the [Transaction Documents] to the extent it violates any applicable statute of limitations.” Alternatively, the opinion could identify the specific sections of the documents that raise the concern and note that the enforcement of those sections “would be subject to any applicable statute of limitations.” From a drafting standpoint, practitioners could consider drafting the obligation as a covenant requiring future performance as losses are incurred rather than as a provision requiring reimbursement for breach of representations and warranties. In addition, practitioners could consider following certain formalities to create a contact under seal because, under Delaware law, a contact under seal is subject to a twenty-year statute of limitations. See Whittington v. Dragon Group L.L.C., 991 A2d 1, 10-12 (Del. 2009). For a discussion of the formalities to be met in creating a contract under seal, see Sunrise Ventures, LLC v. Rehoboth Canal Ventures, LLC, 2010 WL 975581 at *1-*2 (Del. Ch. 2010); Kirkwood Kin Corp. v. Dunkin’ Donuts, Inc., 1995 WL 411319 at *4-*6 (Del. Super. 1995). However, to the extent that a court will apply the statute of limitations of the forum, rather than of the chosen law, it may be necessary to couple the provisions relating to a contract under seal with a forum selection clause agreeing to litigate exclusively in Delaware (which itself could possibly be subject to challenge). See “Special Report of the TriBar Opinion Committee: The Remedies Opinion – Deciding When to Include Exceptions and Assumptions,” 59 Bus. Law. 1483, 1498-1502 (2004) (forum selection clauses).

- Louis G. Hering and Melissa DiVincenzo
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[Editor’s Note: It is in part for the reasons discussed by Louis and Melissa that many opinion givers include express exceptions from their enforceability opinions for contractual waivers of statutes of limitations. Louis and Melissa have suggested two possible approaches. In Reade Ryan’s and Andy Kaufman’s excellent list of “Boilerplate Exceptions,” they include another regarding waivers of statutes of limitations: “We express no opinion as to any waiver of any statute of limitations.” As they note, “[m]any jurisdictions do not permit waivers of statutes of limitations, and in those that do the enforceability of such waivers is often limited or restricted. For example, in New York, Section 17-103 of the New York General Obligations law, and Kassner & Co. v. City of New York, 46 N.Y.2d 544, 415 N.Y.S.2d 785, 389 N.E.2d 99 (1979) and related case law, restrict the enforceability of such waivers.”]

Notes From the Listserve

[Editor’s Note: Dialogues 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. Members of the Committee may review the comments referred to below by clicking on the “Archives” link under “Listerves” on the Committee’s website.]

Attesting to the growing popularity of the Committee’s listserve, there have been 14 legal opinion queries from our members since our Fall 2010 issue. (Our “Notes from the Listserve” in the Winter 2010 issue was devoted solely to providing an index of listserve dialogues since commencement of this feature (October 2008) through our Fall 2010 issue.) Seven of the dialogues that generated numerous responses are summarized here.
1. “As If” Remedies Opinions on Loan Documents Drafted by Lender’s Counsel

Notwithstanding the passage of more than twelve years since TriBar’s acknowledgement of the “growing acceptance” of the “as if” remedies opinion (TriBar Report (1998), “Third-Party ‘Closing’ Opinions,” § 4.6), the topic continues to generate controversy. J.W. Thompson (“Topper”) Webb of Miles & Stockbridge P.C., Baltimore, by his inquiry of December 13, 2010 asked for the listserve’s reaction to a lender’s counsel’s refusal to accept his firm’s enforceability opinion on loan documents drafted by lender’s counsel. The loan documents designated the law of the lender’s firm’s home state, where Topper’s firm does not practice, as the “chosen” law of the loan documents. In addition to opinions on due authorization and execution and related “corporate” opinions, Topper’s firm offered to provide an opinion for its Maryland client that (i) a Maryland court, and a federal court sitting in Maryland applying Maryland choice of law principles, would respect the choice of law in the loan documents, and (ii) notwithstanding the choice of law in the loan documents, if the court were to apply Maryland law, then the loan documents would constitute enforceable obligations of Topper’s client, subject to normal exceptions (bankruptcy, equitable principles, etc.).

The consensus of those who responded to Topper’s inquiry is that his approach was standard and “market” and perhaps even generous in offering the choice-of-law opinion (Jon Cohen, Snell & Wilmer, Phoenix; Jerry Grossman, Luce, Forward, Hamilton & Scripps LLP, San Diego; and Joel Greenberg, Kaye Scholer LLP, New York), albeit this response was not unanimous. Charles Menges of McGuireWoods LLP, Richmond, Virginia, observed that, in his experience, the “predominant practice [is] to have a lawyer in the state whose law governs the transaction . . . issue the enforceability opinion.”

As Ed Wender of Venable LLP and Ed Levin of Gordon Feinblatt, Rothman, Hoffberger & Hollander, LLC, both of Baltimore, pointed out, if a lender insists upon an enforceability opinion on documents prepared by its own counsel whose chosen law is the state in which that counsel practices, then there is an argument that the lender should get the enforceability opinion from its counsel. Ed Levin cited in support of this position the observation of the Real Estate Opinion Letter Guidelines published by the American College of Real Estate Lawyers Opinion Committee and by the ABA’s Section of Real Property, Probate & Trust Law’s Legal Opinions Committee that requesting the enforceability opinion in such circumstances from borrower’s counsel “normally should not be necessary and may not be cost justified.”

Another common approach, noted by Tom Kearns of Olshan Grundman Frome Rosenzweig & Wolosky LLP, New York, is to assume “that for the purpose of our opinion, ____________ law [the chosen law of the loan documents] is the same as ____________ law [the law covered by the opinion] with respect to the Loan Docs.” Some noted that this is a less desirable form of the “as if” opinion because of the artificiality of the assumption.

Summing up, Chair Stan Keller observed that in his experience the “as if” remedies opinion is acceptable in most U.S. transactions and that sometimes the “as if” remedies opinion is coupled with a choice-of-law opinion. Typically, it is only when a matter justifies the extra expense entailed or the “as if” opinion is inadequate (e.g., when an opinion is required by an indenture or under federal securities law) that local counsel is retained to render the enforceability opinion under the chosen law.

2. Enforceability Opinion on a General Release

Tim Hoxie of Jones Day LLP, San Francisco, by his email of January 3, 2011, asked the listserve for its views about rendering an enforceability opinion on a general release or on a contract containing such a release. While Tim acknowledged the standard exceptions typically taken in an opinion letter for
broad waivers of statutory rights and future defenses, he observed that there should be no inherent reason one could not give such an opinion.

The consensus of the responders was to focus on what rights are being released. The more specific the release the better able the opinion giver should be to assess the validity of the release in terms of public policy, statutory limitations, and the consideration given for the release. Broadly-stated releases not specifically focused would require too many exceptions and investigation to be cost effective (Nelson Crandall, Enterprise Law Group, Inc., Menlo Park, California, Abigail Watts-FitzGerald, Hunton & Williams, LLP, Miami, and Kathleen Hopkins, Real Property Law Group, PLLC, Seattle). Cynthia Baker of Chapman and Cutler LLP, Chicago, concurred: “While I do think it is possible to give an opinion on enforceability of known, choate and specifically identified causes of action or rights, in most instances it is not worth the cost as the releasee could get that advice from its own counsel.” Moreover, noted Cynthia, in the context of releases of claims in an actual dispute, the custom is not to provide a legal opinion.

As Committee Chair Stan Keller summed up:

“The responses seem to indicate a consensus that opinions on the enforceability of releases, whether as standalone agreements or as provisions in other agreements on which opinions are typically given, can raise issues, and that the work required to give them, especially given the limitations that may be required, often make such opinions of doubtful benefit.”

3. UCC Security Interest Opinions & Assumptions about Chosen Law

Haywood Barnes of Poyner Spruill LLP, Charlotte, North Carolina, set off an important dialogue on UCC security interest opinions by his query of January 6, 2011. Haywood recited the practice of borrower’s counsel rendering both a remedies opinion and a security interest opinion under local law when the chosen law of the security agreement is that of another state. Should a firm in this situation, asked Haywood, “assume, for purposes of giving an opinion on perfection by filing, that a valid security interest exists under the law of the contract?” (Emphasis in original.) Steve Weise of Proskauer Rose LLP, Los Angeles, promptly responded that the “perfection opinion is based on the attachment opinion as given in the opinion letter under local (not contract) law and there’s no need to assume attachment under the law that actually applies to attachment.” Joseph Heyison of Daiwa Capital Markets, New York, concurred that “there is no need under conventional practice to consider the validity of the interest under the law of the contract,” but that the opinion giver should consider whether the “contract contains provisions that make it unenforceable under the assumed [local] law.”

Focusing on the two separate opinions — the remedies or enforceability opinion and the security interest opinion — Jack Burton of Rodey, Dickason, Sloan, Akin & Robb, Santa Fe, New Mexico, noted that separate assumptions apply to each. As to the remedies opinion, the opinion giver sometimes will assume, “contrary to [the] law chosen in the loan documents, [that] the law of [the] state where the borrower is located will govern the documents,” and, the opinion giver will separately assume, as to the security interest opinion, “that a valid, binding and enforceable security interest is created by the loan documents.” Charles Menges of McGuire Woods, LLP, Richmond, Virginia, concurred that “the perfection opinion should not be given unless it is assumed that a valid security interest was granted under the actual law governing the security agreement.” Evan Borenstein of Curtis, Mallet-Prevost, Colt & Mosle LLP, New York, added that “[i]n order to eliminate any doubt, the opinion giver can expressly assume that local law governs attachment for both the attachment and the perfection opinions.”
Steve Weise responded that an opinion recipient accepting an “as if” opinion on attachment cannot be expecting to get an opinion on attachment (via the perfection opinion or otherwise) under the chosen law of the contract. “So,” observes Steve, “while an assumption is harmless in that sense, it’s also duplicative.”

Jerry Grossman of Luce, Forward, Hamilton & Scripps, LLP, San Diego, helpfully closed with a form of his firm’s perfection opinion.

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[Editor’s Note: The TriBar security interest opinions report (“U.C.C. Security Interest Opinions — Revised Article 9,” 58 Bus. Law. 1449 (2003)) articulates principles and guidelines relevant to Haywood’s inquiry:

- The remedies opinion on a security agreement and the security interest opinion are separate opinions that address different subjects. The remedies opinion addresses the formation of a contract and the enforceability of the opinion giver’s client’s undertakings in that contract. The security interest opinion addresses the satisfaction of the U.C.C.’s requirements for establishing and preserving the secured party’s interest in the collateral. § 2.2.

- The remedies opinion should not be interpreted, in the TriBar Committee’s view, “to cover the attachment of the security interest.” § 2.2 n. 42.

- As TriBar noted,

  “Although lawyers often refer to the entire agreement as a ‘security agreement,’ . . . strictly speaking for purposes Article 9 the term ‘security agreement’ is limited to the relevant language creating or providing for the security interest. . . . A contract that includes a security agreement may be effective as a contract although it fails to create a security interest, . . . .” § 2.2 n. 42.

- A security interest opinion does not address which state’s law governs the perfection, the effect of perfection or non-perfection, or the priority of the security interest. § 2.1(d). A remedies opinion on the security agreement covers the enforceability of the choice-of-law provision in the security agreement. However, an opinion on the enforceability of a choice-of-law provision in the security agreement does not address what law governs the perfection, the effect of perfection or non-perfection, or the priority of the security interest. § 3.2.

Consistent with the observations of the TriBar report, but expanding them to presciently address Haywood’s query, the Uniform Commercial Code Committee of the Business Law Section of the California State Bar, in its June 2005 report on Legal Opinions in Personal Property Secured Transactions, notes:

“Consistent with the foregoing, a [security agreement remedies opinion] is customarily viewed as not implicitly containing an opinion as to
the creation, attachment, perfection or priority of a security interest (including any clause granting a security interest). Similarly, a [security interest opinion] is customarily viewed as not implicitly containing an opinion as to the enforceability of a security agreement against any particular party. Accordingly, except to the extent the same opinion letter expressly covers both opinions (a practice that is fairly common), (1) qualifications that are appropriate for a [security agreement remedies opinion] are unnecessary and need not be included in a [security interest opinion], and (2) a qualification that the opinion giver is assuming the enforceability against the parties of the relevant security agreement is unnecessary for purposes of a [security interest opinion]."

California Report at 7 (footnotes omitted).

4. Challenging an Opinion Giver’s Assumption as to the Genuineness of Signatures

As TriBar and this Committee (in its Legal Opinion Principles) note, opinion givers commonly assume, among other things, “that the original documents furnished them are authentic and that the signatures on executed documents are genuine,” and further note that this assumption is understood without being stated expressly in the opinion letter. TriBar, “Third-Party ‘Closing’ Opinions” (1998) § 2.3(a); Legal Opinion Principles III(D).

What should you do when lender’s counsel, notwithstanding this authority, insists that you as the opinion giver delete from your closing opinion an express assumption regarding the genuineness of signatures on the loan documents? This question was put to the listserv on February 18, 2011 by Evan Borenstein of Curtis, Mallet-Prevost, Colt & Mosle LLP, New York, and triggered a strong response. Evan expressed his concern that, under his circumstance where the express assumption was rejected, if the express assumption were omitted, in reliance upon customary practice, as articulated by TriBar and this Committee, then his omission of the assumption might be construed as an “implicit opinion that the signatures are in fact genuine.”

The overwhelming response was to encourage Evan to stick to his guns and retain the exception, notwithstanding the attention this issue has received since an action was filed in New York State Court (no. 603 819/2009) in December 2009 by Fortress Credit Corp. and an affiliate against Dechert LLP on a closing opinion rendered on loan documents that had been forged by Marc Dreier. As numerous responders pointed out, the genuineness of signatures and the authenticity of documents are factual matters that do not call upon the legal competence of counsel.

How about lenders that permit an express assumption as to the genuineness of all signatures, except those of the opinion giver’s client? As Michael Sherman of Cozen O’Connor, Philadelphia, noted, he always resists even that restriction, “unless there will be a physical closing (which rarely happens these days), I witness the signatures of the officers who sign on behalf of the borrower, and I know who they are.” If these conditions do not apply, then he explains that his client “doesn’t want to have to spend the extra money to have someone from our office travel to the client’s office (which is often in another city) to watch the officers sign,” and, reports Michael, that typically ends the discussion, with the lender acquiescing to the unlimited assumption.

On the other hand, John Hay of Gust Rosenfeld P.L.C., Phoenix, reported that he normally acquiesces in requests to remove the assumption as to the genuineness of the signatures on documents signed by his client. However, that means that he accepts the responsibility to satisfy himself that his firm’s clients have, in fact, signed the documents. Where he does not know the clients or otherwise
cannot verify personally that their signatures are genuine, he relies “on notarizations or statements by people who do know whether the signatures are genuine” (e.g., an incumbency and signature certificate). In such cases, he includes an express statement of such reliance in his opinion letter.

Dick Howe of Sullivan & Cromwell LLP, New York, commented that once the issue has been raised by the opinion recipient’s counsel, the opinion giver can no longer rely on the unstated assumption that the signatures to all documents are genuine, but must state the assumption (unless the opinion giver is prepared to verify the genuineness of signatures). Dick, however, makes the point that, once the issue is raised, the opinion giver needs “to find out from the lender why it is concerned.” It could be that it is simply a lawyer-raised point (familiarity with the Dechert case, perhaps) in which case raising the question may make the objection to the stated assumption go away. If the opinion recipient’s counsel persists, then “the only way to confront the issue is to make the lender resolve it. The lender is the one who decided to make the loan, and it necessarily had to decide to trust the borrower.”

5. Enforceability Opinions on Loan Documents in which MERS (Mortgage Electronic Registration Systems) Corporation is Named as Nominee for Lender

On February 21, 2011, Chair Stan Keller passed along a request from a member of the Committee for input on appropriate exceptions that should be taken when rendering enforceability opinions on loan documents in which MERS Corporation is named as the “nominee for the lender.” Several commentors agreed with Steve Weise of Proskauer Rose, LLP, Los Angeles, that since real estate enforceability opinions do not address perfection of the mortgage or deed of trust or compliance with the procedural rules that would govern any foreclosure of the mortgage or deed of trust, no exception need be taken. Others, referring to the significant publicity that residential foreclosures in general and MERS in particular have received (see, in this regard, Michael Powell’s and Gretchen Morgensen’s article on MERS (“MERS? It May Have Swallowed Your Loan,” New York Times, Sunday Business, March 6, 2011, page 1) and pointing to state law decisions holding a deed of trust or mortgage unenforceable where the beneficiary or mortgagee is not the lender (Douglas F. Landrum, Jackson DeMarco Tidus Peckenaugh, Irvine, California) suggested the inclusion of an explicit exception or assumption. Eric Marcus of Kaye Scholer LLP, New York, gave the following assumption he reported has been accepted by institutional lenders:

“We have assumed that in any foreclosure or other enforcement action under the Mortgage, the plaintiff in such action will be the true and lawful owner of the Mortgage and Note and will be able to demonstrate such ownership to the satisfaction of the applicable court or the plaintiff is [a] party . . . authorized to bring such action pursuant to applicable law and will be able to demonstrate such authorization to the satisfaction of the applicable court.”

6. Auditor Request for Opinion on Historical Compliance of Prior Issuances of Securities with Securities Laws

Brian Farmer of Hirschler Fleischer P.C., Richmond, Virginia asked the listserv on February 23, 2011 for its reaction to a request by a Big 4 accounting firm for an opinion from a private issuer’s counsel that all securities offerings made by the issuer have been in compliance with available exemptions under the Securities Act of 1933. Brian’s client had recently engaged the Big 4 accounting firm as its auditors. Its prior issuances of securities included both equity and debt offerings conducted with a view to compliance with applicable federal and state private placement exemptions. In addition, the client had issued restricted stock and granted stock options to its directors, officers, and employees under an equity incentive plan.
The consensus of the responders was that the opinion should be resisted. As all the responders noted, the amount of time and effort to render such an opinion can be substantial and therefore not cost justified, even when requested by later investors as to previous issuances of securities. Moreover, as noted by Committee Chair Stan Keller and Doug Landrum of Jackson DeMarco Tidus Peckenpaugh, Irvine, California, such a request coming from an auditor can raise disclosure and confidentiality issues under the ABA’s 1975 Statement of Policy Regarding Lawyers’ Responses to Auditors’ Requests for Information (“Statement”) if, as Stan noted, “there were faulty offerings for which the statute of limitations had not yet run.” For example, the Statement’s guidance on addressing “unasserted possible claims” is quite restrictive, counseling that such claims should be addressed by issuer’s counsel to the issuer’s auditors only at the request of the client and only if the client “has determined that it is probable that a possible claim will be asserted, that there is a reasonable possibility that the outcome (assuming such assertion) will be unfavorable, and that the resulting liability would be material to the financial condition of the client.” Statement — “Loss Contingencies.”

Even when such a broad “historical compliance with securities laws” opinion is requested by subsequent investors, experienced counsel in venture and high-tech financings resist rendering such broad opinions, a resistance endorsed by California’s Opinions Committee in its “Report on Selected Legal Opinion Issues in Venture Capital Financing Transactions,” 65 Bus. Law. 161, 179-180 (2009).

Note: This request should be distinguished from a request for an opinion on the company’s current capitalization (i.e., authorization, valid issuance, non-assessibility) that is sometimes requested by new auditors. This opinion can be handled like a third party capitalization opinion but should be considered from a cost/benefit perspective by the client.

7. Postscript: Curing Prior Deficiencies in Authorizations of Share Issuances

Jeffrey Ostrager of Curtis, Mallet-Prevost, Colt & Mosle LLP, New York, had what appeared to be a general housekeeping question by his inquiry of February 24, 2011 when he asked whether, for any “deficiencies” in prior board authorizations of share issuances and equity award grants, it would be “sufficient for the Board to adopt a general resolution authorizing all prior share issuances/equity awards,...” Several commenters suggested various techniques for the Board to pursue in providing the corrective authorization, including specifying varying amounts of detail as to the prior issuances. The dialogue turned more serious when Wena Poon, San Francisco, cited an important article by Stephen Bigler and Seth Tillman from the August 2008 issue of The Business Lawyer (“Void or Voidable?—Curing Defects in Stock Issuances Under Delaware Law, 63 Bus. Law. 1109). As that article develops at length, and as the authors/editors presciently noted in the headnote to the article, curing defective authorizations of share issuances is not as easy as it might first look, even to the experienced business practitioner:

“It is not unusual for a Delaware corporation’s stock records to have omissions or procedural defects raising questions as to the valid authorization of some of the outstanding stock. Confronted with such irregularities, most corporate lawyers would likely attempt to cure the defect through board and, if necessary, stockholder ratification. However, in a number of leading cases, the Delaware Supreme Court has treated the statutory formalities for the issuance of stock as substantive prerequisites to the validity of the stock being issued, and the court has determined that failure to comply with such formalities renders the stock in question void, i.e., not curable by ratification.”
Gail Suniga of Fenwick & West LLP, Palo Alto, brought Steve Bigler himself into the discussion to confirm that the void/voidable distinction retains its robustness in Delaware and continues as a trap for the unwary. To accentuate the point, Gail forwarded a copy of the then three-days’ old opinion of Vice Chancellor Laster in Olson v. EV3, Inc., 2011 WL 704409 (Del. Ch. Feb. 21, 2011). The decision is important reading for any counsel confronted with an opinion request to address the valid issuance of prior issuances of shares, and we thank Gail for bringing it to the listserv’s attention.

In his decision, Vice Chancellor Laster addresses the payment by ev3 for services rendered by plaintiff’s class-action counsel in securing corrective provisions and procedures in a two-step merger agreement between ev3, Inc. and Covidien Group S.a.r.l. The merger agreement provided for the grant of a top-up option by ev3 to Covidien, upon a successful tender offer for the outstanding shares of ev3, to effect a short-form merger under Delaware law. (By exercise of the top-up option, Covidien could acquire a sufficient number shares to effect a short-form merger.) The merger agreement initially presented by the parties provided for a top-up option with an exercise price equal to the share price offered by Covidien in its tender offer, and permitted Covidien to pay for the shares in cash or by the issuance of a promissory note “on terms as provided by [Covidien], which terms shall be reasonably satisfactory to [ev3].”

In the process of settling the case, plaintiff’s counsel negotiated revisions to these terms, including a specification of the material terms of the promissory note and a requirement that the par value of the shares subject to the top-up option be paid in cash in all events. Moreover, the agreement settling the litigation required that the amendments be approved by the ev3 board of directors at a meeting where the terms and operation of the top-up option were to be thoroughly reviewed and the necessary statutory determination of the sufficiency of the consideration payable for the shares would be made.

Vice Chancellor Laster concluded that the services rendered by plaintiff’s counsel justified the fee. His characterization of the deficiencies in the original terms of the top-up option should give pause to all counsel contemplating the giving of an opinion on prior issuances of shares:

“As originally structured in the Merger Agreement, the Top-Up Option and any shares issued upon its exercise likely were void. See STAAR Surgical Co. v. Waggoner, 588 A.2d 1130, 1137 (Del. 1991). To the extent a short-form merger closed in reliance on the resulting shares, the validity of the Merger could be attacked. The invalidity of that transaction in turn could have called into question subsequent acts by the surviving corporation.”

2011 WL 704409 at *11.

The ev3 decision did not directly address how or when defective share issuances could be cured or as of when a cure would be effective. The ability to cure defects may turn on the nature of the defect. For example, a defect in authorizing the corporation’s capital may not be subject to cure, while defects in board actions authorizing an issuance might more easily be dealt with. Sometimes, the situation may require extensive actions such as a curative merger, an exchange offer or even a bankruptcy filing. What the ev3 decision illustrates is that one should carefully consider the nature of the “deficiencies” in prior board authorizations of share issuances and equity award grants before crafting corrective measures.

Bigler – Tillman in their article (at pages 1144-1148 and see note 194 at page 1142) suggest that in many cases the UCC should provide a cure for shares in the hands of a “protected purchaser.” Unfortunately, an unreported bench decision by Chancellor Chandler of the Delaware Chancery Court handed down after publication of the Bigler – Tillman article held that a “protected purchaser” under the
UCC is not “protected” and has no interest in shares issued by a Delaware corporation whose issuance was void. *Noe v. Kropf* (no. 4050-CC) (Del. Ch. January 15, 2009), available here [Control + Click].

We have not been able to summarize all of the opinion dialogues that have occurred on the listserve since the Fall 2010 issue of the newsletter. Those not summarized here address opinions on a spouse’s community property exposure for pre-marital debts and on the propriety of assuming an original mortgage was duly recorded when rendering an opinion on an amendment to the mortgage; negative assurance letters on disclosure documents used in follow-on offerings when the precise underwriting discount is not disclosed to investors at the time of sale; customary diligence for LLC member or manager power and authority opinions; and enforceability opinions on “make-whole premiums” in convertible notes. To review these dialogues, go to the “Archives” link under “Listserves” on the Committee’s website.

As always, members are encouraged to raise legal opinion issues on the listserve and to participate in the exchange. Members also are encouraged to bring new developments (such as recent case law or newly identified issues) to the attention of Committee members through the listserve.

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**Legal Opinion Reports**

**Supplemental TriBar LLC Opinion Report: Opinions on LLC Membership Interests**

In 2006, the TriBar Opinion Committee (the “Committee”) published a report “Third-Party Closing Opinions: Limited Liability Companies”, 61 Bus. Law, 679 (2006) (the “TriBar LLC Report”) in which it discussed at length three opinions commonly given when a limited liability company (“LLC”) enters into a financial transaction: the opinions on an LLC’s formation, existence and good standing; power to enter into the transaction; and authorization, execution and delivery of the agreement governing the transaction. The Report also discussed, in a limited way, the opinion on the enforceability of an LLC’s operating agreement. A focus of the Report was the ability of non-Delaware lawyers to give these opinions on Delaware LLCs.

During the last few years, the 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”). Those include opinions on the issuance of LLC Interests, the admission of members to the LLC, and the payment obligations of purchasers and holders of LLC Interests resulting from their ownership of LLC Interests. The Supplemental LLC Report was completed in March 2011 and

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1 The URL is [http://works.bepress.com/seth_barrett_tillman/107/](http://works.bepress.com/seth_barrett_tillman/107/)
can be found in the ABA Legal Opinions Committee’s Opinion Resource Center. It uses Delaware LLCs for purposes of its analysis and discussion.

1. **Validly Issued.**

   The Supplemental LLC Report discusses the key similarities 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. In particular, the Report explains why some of the opinions traditionally given on corporate stock, such as the opinions that stock is duly authorized, fully paid and nonassessable, do not translate well into opinions on LLC Interests. The Report explains that a “duly authorized” opinion is not appropriate for an LLC because LLCs typically do not have a pool of interests for future issuance analogous to the authorized shares of a corporation and are not required to file a document analogous to a corporate charter with the Secretary of State showing the number and type of LLC interests authorized for issuance. (The reasons the Report offers for not giving the fully paid and nonassessable opinion are discussed below.) Thus, with regard to creation and issuance of LLC Interests, the Report suggests that the opinion simply state that “the LLC Interests have been validly issued.” According to the Report, a “validly issued” opinion means that LLC Interests have been issued in compliance with the requirements of the applicable LLC statute and the LLC’s operating agreement (and certificate of formation, if applicable) and that their terms do not violate any requirements in the applicable LLC statute or the operating agreement. The Report observes that a “validly issued” opinion does not address the enforceability of the terms of the LLC Interests.

2. **Admission As Members.**

   Purchasers sometimes request an opinion on their admission as members. They do so because, if not admitted as members, they normally are not entitled to exercise membership rights. This opinion, which the Report suggests be worded to say “Purchasers have been duly admitted as members,” is similar to the opinion given to purchasers of limited partnership interests confirming their admission as limited partners. Under many state LLC statutes, including Delaware’s, purchasing or otherwise acquiring an LLC Interest does not by itself make a person a member. Instead, the applicable LLC statute typically requires that specified conditions be satisfied unless the LLC’s operating agreement (and certificate of formation) otherwise provides. The Supplemental LLC Report notes that operating agreements often specify conditions for admission and that those conditions may differ depending on whether a member is being admitted when the LLC is being formed or at a later time. The “duly admitted” opinion means that purchasers of LLC’s Interests have been admitted as members of the LLC in compliance with the conditions in the operating agreement and any applicable statutory requirements (and, depending on the state, any conditions in the LLC’s certificate of formation). The opinion also means that if an entity is being admitted it meets the statutory definition of “member” in the applicable LLC statute. The Supplemental LLC Report also discusses when the opinion covers requirements for admission contained in purchasers’ subscription agreements.

3. **Additional Payments and Contributions.**

   Purchasers of LLC Interests sometimes request an opinion on their obligation to make payments and contributions to the LLC. In lieu of a “fully paid and nonassessable” opinion, the Supplemental LLC Report suggests the following:

   “Under [name of LLC statute under which LLC was formed], Purchasers have no obligation to make further payments for their purchase of LLC Interests or contributions to LLC solely by reason of their ownership of LLC Interests or [their status as members of LLC] [except as provided in their Subscription Agreements or the Operating
Agreement] [and except for their obligation to repay any funds wrongfully distributed to them].

The bracketed exception to this opinion for obligations arising under purchasers’ Subscription Agreements and the Operating Agreement excludes from the opinion’s coverage purchasers’ obligations to make future payments or contributions to the LLC under those documents. The Report comments that this exception often will be used because in many cases operating agreements will contain numerous post-closing payment obligations and purchasers ordinarily do not need an opinion to tell them what future payments they have agreed to make. The Report suggests that the quoted opinion be given in lieu of an opinion that LLC Interests “are fully paid and nonassessable” because it conveys its meaning more clearly and because, unlike in the corporate context, “fully paid” and “nonassessable” typically are not defined by statute.

4. Personal Liability For LLC Debts

Purchasers of LLC Interests sometimes also request an opinion analogous to the opinion often given to purchasers of limited partnership interests that as members of the LLC they will have no personal liability to third parties for the debts, obligations and liabilities of the LLC. The Report expresses the hope that over time this opinion will not be requested as recipients come to understand that purchasers of LLC Interests have no more liability for an LLC’s debts than stockholders have for a corporation’s debts. Recognizing, however, that requests will not stop being made any time soon, the Report suggests that the opinion, if given, be combined as follows with the opinion quoted above:

“Under [name of LLC statute under which LLC was formed] (“Act”), Purchasers have no obligation to make further payments for their purchase of LLC Interests or contributions to LLC solely by reason of their ownership of LLC Interests [or their status as members of LLC] and no personal liability for the debts, obligations and liabilities of LLC, whether arising in contract, tort or otherwise, solely by reason of being members of LLC [except in each case as provided in their Subscription Agreements or the Operating Agreement] [and except for their obligation to repay any funds wrongfully distributed to them].

The quoted opinion covers only liabilities arising under the LLC Act “solely by reason of being members” and no other liabilities. The phrase “solely by reason of being members,” which appears in Section 18-303(a) of the Delaware LLC Act, excludes from the opinion liabilities attributable to: (i) a purchaser’s status as a controlling person under the securities laws, environmental laws or other laws, (ii) a purchaser’s service in another capacity, for example, as a manager or an officer of the LLC, (iii) a purchaser’s own tortious or wrongful conduct, and (iv) application of a piercing-the-veil or similar doctrine.
Getting Out from Behind the [Article] 8 Ball: Special Report of the TriBar Opinion Committee: Opinions on Secondary Sales of Securities

For years many lawyers representing sellers of securities in private or public secondary sales have given opinions to buyers, often without the lawyers for the sellers or the buyers having an understanding of the relevant rules of Article 8 of the Uniform Commercial Code and the effect Article 8 has on these opinions. As a result, many opinions have been requested and given that do not tie to the provisions of Article 8. TriBar has taken up this matter and has just completed a report on these opinions, which will appear in the May 2011 issue of The Business Lawyer.

1. Focus on the Rights of the Acquirer.

As Jim Fuld suggested over thirty-five years ago in one of his seminal articles on legal opinions, the proper focus of these opinions should be not on what the seller has to sell but on what the acquirer receives. Fuld, “Legal Opinions in Business Transactions — An Attempt to Bring Some Order Out of Some Chaos,” 28 Bus. Law. 915, 935 (1973). A secondary sale opinion should therefore consider and address what the acquirer will receive. This approach conforms to the structure of Article 8 and makes the opinion a straightforward effort once one distinguishes between a security (and a certificated security and an uncertificated security) and a security entitlement. As is typically the case with a TriBar report, the report provides illustrative language on how secondary sale opinions and the related assumptions might be worded.

Under Article 8, a person can hold an interest in a security in one of two ways: directly or indirectly through a securities intermediary. When a security is held indirectly, it is referred to as a “security entitlement.”

An opinion on the rights of a buyer of a security addresses whether the buyer has acquired the security free of adverse claims. An opinion on the rights of an acquirer of a security entitlement addresses whether the acquirer has acquired a security entitlement and whether an action can be asserted against the acquirer based on an adverse claim to a financial asset (or alternatively to the “shares” being sold). A secondary sale opinion relies in large measure on express and implied factual assumptions, including assumptions concerning the acquirer’s lack of notice of adverse claims.
2. **Value of the Opinion.**

A secondary sale opinion typically requires little particularized legal analysis. The legal conclusions it expresses flow automatically from the assumptions on which it is based, and these assumptions are usually as apparent to the opinion recipient as they are to the opinion giver. The TriBar report suggests that the acquirer in a secondary sale should consider, therefore, whether a secondary sale opinion will meaningfully assist the acquirer given the time and expense involved in preparing the opinion. If not, the acquirer should consider foregoing the opinion.

3. **Use Article 8 Concepts.**

Article 8 provides one set of rules for securities held *directly* by a holder and a different set for interests in securities held *indirectly* through a securities intermediary. Following the terminology of Article 8, the report refers to the bundle of rights a holder has in interests held indirectly as a “security entitlement”, refers to a person who buys a security as the “buyer” or “acquirer,” and refers to a person who acquires a security entitlement as the “acquirer.” Similarly, the report uses the term “direct holding” to refer to a security held directly by a buyer and the term “indirect holding” to refer to the indirect interest with respect to a security that an acquirer has through ownership of a security entitlement. For example, the customer of a broker dealer whose securities are held in street name owns a security entitlement because shares held in street name are typically held of record by a nominee of Depository Trust Corporation (“DTC”).

*No title opinions.* The report concludes that title opinions regarding a security or a security entitlement should not be requested. Among other things, they are not necessary under the structure of Article 8. Further, the report states TriBar’s belief that an opinion giver should not be asked to confirm that it does not have knowledge of adverse claims that might be asserted with respect to the security or the security entitlement.

*The core of the opinion.* Whether a security is held directly or indirectly, Article 8 provides a buyer of a security or an acquirer of a security entitlement for value, who has no notice of adverse claims, with strong protection from adverse claims, if standard procedural steps are followed in connection with the acquisition of the security or the security entitlement.

4. **The Opinion to a Buyer of a Security.**

A “protected purchaser” under Article 8, in addition to acquiring the basic rights of a buyer of a directly held security (*i.e.*, all of the rights that its seller had or had the power to transfer), also acquires its interest free of any adverse claim to the security.

To be a “protected purchaser” of a security, a buyer is required to:

- give value;
- not have notice of any adverse claim to the security; and
- obtain “control” of the security.

In a secondary sale, a buyer of a certificated security obtains “control” of the security if the certificate has been delivered to the buyer and indorsed to the buyer or in blank pursuant to an effective indorsement. A buyer of an uncertificated security typically obtains “control” of the security by having the security registered in the buyer’s name on the records of the issuer.
5. The Opinion to an Acquirer of a Security Entitlement.

When the beneficial owner of a security does not hold the security directly, typically a “top-tier” securities intermediary (DTC for most publicly-traded securities) is the direct holder of the security and the beneficial owner is the holder of a security entitlement. A security entitlement holder has no direct rights under Article 8 against the issuer of the security. Article 8 refers to a person holding a security entitlement as the “entitlement holder.”

In a secondary sale where the seller holds a security entitlement, the acquirer does not acquire the seller’s security entitlement. Rather, the acquirer acquires a different security entitlement from the acquirer’s securities intermediary (even if the acquirer’s securities intermediary is the same as the seller’s). An acquirer can also receive a security entitlement even if its seller holds a security if the transfer is processed through a securities intermediary.

Because the acquirer of a security entitlement does not hold a “security,” it cannot be a “protected purchaser” of a security. Rather it acquires rights with respect to the security entitlement.

Similarly to a protected purchaser of a security, an acquirer of a security entitlement is protected from adverse claims if:

- the acquirer has no notice of an adverse claim; and
- gives value.

This is true even if the claim exists against the rights of the top-tier securities intermediary in the security, against the rights of the seller or another securities intermediary in the chain, or against the rights of anyone else to whom a property interest in the security might arguably be traced under non-Article 8 law.

Because an entitlement holder’s protection from an adverse claim depends only on its lack of notice of the adverse claim and its giving of value, and not on whether the top-tier securities intermediary is a “protected purchaser” of the security transferred to the intermediary, the TriBar Committee believes that an opinion addressing the rights of the top-tier securities intermediary is superfluous and should not be requested.

6. Other Matters Covered by the Report.

The report discusses in detail:

- How to confine the scope of the opinion to matters covered by UCC Article 8;
- How to deal with choice of law issues, including how to address those issues in the opinion letter;
- Which assumptions are implied and which should be stated expressly, including the express assumption on the buyer’s or acquirer’s lack of notice of adverse claims; and
- How to word the opinion itself.
In its simplest form the opinion to the buyer of a security may be worded as follows:

[Name of buyer] [will be] [is] a protected purchaser of the [Shares].

And one form of the basic opinion to the acquirer of a security entitlement may be worded as follows:

[Name of acquirer] has acquired a security entitlement with respect to [insert number] of securities [describe type] and, if [name of acquirer] does not have notice of an adverse claim to a financial asset to which the security entitlement relates, no action based on the adverse claim may be asserted against [name of acquirer] with respect to the security entitlement.

An opinion on the acquisition of an outstanding security or security entitlement with respect to an outstanding security is based on particular facts, most importantly the acquirer’s giving of value and lack of notice of adverse claims on the part of the acquirer that often are assumed in the opinion. The legal conclusions that flow from these facts permit lawyers to give secondary sale opinions without having to determine whether the seller had title to the security or security entitlement involved in the transaction.

The secondary sale opinion states what Article 8 provides based on facts that are at least as apparent to the acquirer (or its counsel) as they are to the opinion giver, and which are typically assumed by the opinion giver. In addition, Article 8 is the same for all practical purposes in every state. In view of these considerations, before requesting this opinion recipients should consider whether it adds sufficient value to justify the time and expense involved in preparing it.

ABA Real Property Committee on Legal Opinions in Real Estate Transactions:
Legal Opinions to Federal Agencies

The Committee on Legal Opinions in Real Estate Transactions (the “Real Estate Opinions Committee”) of the ABA’s Section of Real Property, Trust and Estate Law (“Section”) has formed a subcommittee to examine the various legal opinions that federal agencies require in real estate finance transactions. The initial focus of the subcommittee is the form of legal opinion required by the Department of Housing and Urban Development (“HUD”) in multifamily mortgage loans insured by the Federal Housing Administration. The subcommittee is also examining the opinion letters required by the Federal National Mortgage Association (“Fannie Mae”) and the Federal Home Loan Mortgage Corporation (“Freddie Mac”) in multifamily mortgage loan transactions that are originated by lenders in the private sector and sold to Fannie Mae or Freddie Mac, as well as legal opinions required by other federal agencies in other types of real estate-related transactions.
The HUD form of opinion has been a major source of frustration for real estate lawyers. According to the instructions that accompany HUD’s form of opinion letter, the HUD opinion language is non-negotiable, and HUD’s field counsel generally follow those instructions to the letter. This is true even though certain language in the form is no longer legally correct. Moreover, the form requires an opinion that most law firms are extremely reluctant to give, namely, a statement that the borrower has all governmental permits and licenses required for the construction and operation of the multifamily project.

Fortunately, HUD is currently in the process of revising its FHA-insured multifamily mortgage loan forms, including the form of legal opinion. In addition, the Real Estate Opinions Committee sponsored a CLE program on the subject of HUD, Fannie Mae and Freddie Mac opinions at the Section’s Spring Symposia in May 2010, and jointly sponsored with the Section of Business Law a CLE program on opinions to federal agencies at the ABA Annual Meeting in San Francisco in August 2010. A representative from HUD’s Office of General Counsel participated in both of these programs. In January 2011, the subcommittee met with the Office of the General Counsel to present the subcommittee’s views on the HUD form of opinion and followed this meeting by submitting written comments. At the time, HUD indicated that it intended to publish the final forms of the loan documents and legal opinions in February 2011 and to begin using the revised forms in May 2011, but so far nothing further has been published.

The Fannie Mae and Freddie Mac opinion forms generally are not as far removed from modern opinion practice as the HUD form and are somewhat negotiable. However, the subcommittee still intends to work with Fannie Mae and Freddie in improving the forms and their negotiability. Other federal agencies with opinion forms that the subcommittee will examine include the Rural Utilities Service of the Department of Agriculture, which provides financing for, among other things, biomass power plants, and which requires a form of opinion that has not been updated in many years.

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Document Review Reports to Third Parties

At the November 19, 2010 meeting of the Legal Opinions Committee, Jim Rosenhauer, Chair of the Business Law Section’s Task Force on Delivery of Document Review Reports to Third Parties, reported on the Task Force’s work and indicated that its report would be finalized in the first quarter of 2011. The report addresses the practice of sharing “diligence reports” prepared by counsel for a purchaser in an acquisition transaction with third parties, such as lenders to the purchaser, and the issues the sharing of such reports raises for counsel preparing diligence reports. (See the summary of Jim’s report in the Winter 2010 issue of the newsletter, at pages 5-6.) The report is now final and will be placed in the Committee’s Legal Opinion Resource Center on its website. Interested parties may also contact Jim at jjrosenhauer@hoganlovells.com.
Membership

If you are not a member of our Committee and would like to join, or 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.americanbar.org/groups/business_law.html, click “Committees,” and scroll to Legal Opinions. If you have not visited the website lately, we recommend you do so. Our mission statement, prior newsletters, and opinion resource materials are posted there. For answers to any questions about membership, you should contact our membership chair Anna Mills at amills@vwlawfirm.com.

Next Newsletter

We expect the Summer issue of the newsletter to be circulated in July of this year. Please forward cases, news and items of interest to Stan Keller (stanley.keller@eapdlaw.com) or Jim Fotenos (jfotenos@greeneradovsky.com).