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As we approach the Fall Meeting on Friday, November 18, there is a lot going on with the Committee. We continue to make progress on our two principal projects. Ettore Santucci and the drafting group are moving towards completion of the outbound cross-border opinion report. It has been a challenging effort because this is the first time the nature of outbound cross-border opinions has been analyzed in depth. It has been a learning experience for everyone involved and the report, when issued, will provide invaluable guidance to practitioners that will go beyond just cross-border issues.

The opinion practice survey group, led by John Power, is making good progress analyzing the responses to the Committee’s survey, drawing conclusions and setting forth the results and conclusions for a report. When the survey report is issued, it will provide very helpful guidance on trends in opinion practice and internal law firm opinion policies.

Another Committee initiative is participating with WGLO in the joint project to identify and describe common opinion practices. This project has proceeded on a very constructive basis with broad participation, and I am hopeful that a draft of the initial statement will be available for consideration by the Committee sometime in 2012. The joint project’s objective is to obtain wide participation to ensure the broadest possible consensus.

Our initiative to educate less experienced lawyers in opinion practice is gaining momentum. As an example, we include in this issue of the newsletter an article on basic opinion practice written by a young lawyer, Ariel Philip Sloan of Smith, Katzenstein & Jenkins, Wilmington, for lawyers who are not experienced opinion givers. We and the profession all can benefit from focusing on how we can increase the opinion practice knowledge and interest of our more junior lawyers. As one step, think about inviting a younger colleague to become a member of our Committee.

On administrative matters, we continue to be the most important source for opinion information and developments generally available to practitioners. Our newsletter, under the leadership of Jim Fotenos, continues to be an important resource for opinion practice developments. Your contributions to it are welcome. Our listserv continues to be active and is the only place for a broad exchange of views on opinion issues. (See the summary of recent listserv activity elsewhere in this newsletter.) Keep your questions and responses flowing. We have opportunities for involvement in Committee leadership for those interested in playing a greater role, and I welcome thoughts on subgroups within the Committee that would be of interest, as well as on projects and programs you think we might undertake. Please do not hesitate to let me know of your interest and to let me have your thoughts.

I am looking forward to a productive meeting at the Section’s Fall Meeting and to our carrying on the good work of the Committee. I hope to see many of you there and hear from others on the phone.

- Stanley Keller
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Future Meetings

ABA Section of Business Law Fall Meeting
Ritz-Carlton Hotel
Washington, D.C.
November 18 – 19, 2011

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

Friday, November 18, 2011

- Subcommittee Meeting: 8:00 a.m. — 9:00 a.m.

Law & Accounting Committee

Friday, November 18, 2011

- Committee Meeting: 8:00 a.m. — 9:30 a.m.
- Program: Key Accounting and Auditing Issues for 2012: 9:30 a.m. — 11:00 a.m.

Committee on Legal Opinions

Friday, November 18, 2011

- Committee Meeting: 9:00 a.m. — 11:00 a.m.

Committee on Audit Responses

Friday, November 18, 2011

- Committee Meeting: 2:00 p.m. — 3:00 p.m.

Professional Responsibility Committee

Saturday, November 19, 2011

- Committee Meeting: 9:00 a.m. — 11:00 a.m.

ABA Section of Business Law Spring Meeting
Caesar’s Palace, Las Vegas, NV
March 22-24, 2012
Future Meetings (Con’t)

Working Group on Legal Opinions
New York, New York
May 22, 2012

May 21, 2012

Related Meetings of the Steering Committee, Association Advisory Board and Law Firm Advisory Board

ABA Section of Business Law Annual Meeting
Chicago, Illinois
August 2-7, 2012

ABA 2011 Annual Meeting

The ABA held its Annual Meeting in Toronto, Ontario from August 5 to 8, 2011. The Section of Business Law had a full complement of meetings and programs. Following are reports on meetings and programs at the Annual Meeting of interest to members of the Committee on Legal Opinions.

Meeting of the Committee on Legal Opinions

The Committee met on August 7, 2011. Committee Chair Stan Keller welcomed everyone and thanked various members of the Committee for their contributions to the work of the Committee. He again expressed special appreciation to Jim Fotenos for his work on the Legal Opinion Newsletter, the latest issue of which was made available prior to the meeting. He also thanked immediate past-Chair John Power for continuing to play a leadership role and assisting with the newsletter.

Survey of Law Firm Opinion Practices. John Power reported on the Committee’s survey of law firm opinion practice. As previously reported, about 250 completed surveys have been received compared to about 50 in the Committee’s 2002 survey, with the number, range and depth of questions much greater in this survey than in the 2002 survey. The responses are from law firms that vary greatly in size, geographical location and number of offices. The survey working group continues to analyze the responses and prepare information to be shared with members of the Committee. He reviewed some preliminary observations from the survey.

Cross-Border Project. Ettore Santucci, the reporter for the Committee’s outbound cross-border legal opinions report, described that group’s work to date. The group has made good progress in its analysis of forum selection provisions, and is focusing on the last few sections of the planned report. He repeated his expectation that, with the progress made on the choice-of-law and forum selection sections, the report should move quickly to completion.

Audit Responses Committee. Jim Rosenhauer reported on the upcoming meeting of the Audit Response Committee, which he chairs, at which there will be a presentation on the Canadian approach to
audit responses and an update on SEC comments on loss contingency disclosures and their impact, if any, on the audit response process.

Law & Accounting Committee. Tom White, Chair of the Law & Accounting Committee, reported on his committee’s upcoming meeting at which the experience with SEC comments on loss contingencies will be discussed, among other developments.

WGLO. It was reported that the Fall seminar of the Working Group on Legal Opinions (“WGLO”) is planned for October 18, 2011.

Joint Project on Common Opinion Practices. Steve Weise reported on the status of the joint project undertaken by the Committee with WGLO, which includes the involvement of state and other bar groups in preparing a description of common opinion practices. He stated that an initial working draft of a statement has been circulated to the committee charged with reviewing it, and that a series of conference calls has been scheduled to review the draft, with a meeting scheduled at the WGLO Fall seminar. The initial working draft reflects provisions of the Legal Opinion Principles and the Guidelines for the Preparation of Closing Opinions, both of which are products of this Committee.

Annotated Real Estate Finance Opinion; Opinions to Government Agencies. Steve next reported on the ongoing project of several real estate lawyer groups to develop an annotated real estate finance closing opinion. A draft report was recently circulated and is being reviewed. Also noted was the project of the ABA’s Real Property, Trusts and Estates Section, led by Charles Menges, to comment on opinion requirements of governmental agencies in principally real estate financing transactions. The Committee has been involved on a liaison basis. The group has commented on HUD’s proposed required opinions and is reviewing the Fannie Mae and Freddie Mac forms of opinions.

Transfers of Mortgage Notes. The Chair reported that Noel Para and Rick Goldfarb prepared comments on behalf of the Committee to the Permanent Editorial Board for the UCC, which circulated a draft report on certain UCC issues relating to the transfer of mortgage notes.

TriBar Projects. Dick Howe and Don Glazer reported on activities at TriBar. They noted that the Reports on Opinions on Secondary Sales of Securities and Opinions on LLC Membership Interests have been issued and are being published in the May and August 2011 issues of The Business Lawyer, respectively. (Summaries appeared in the Spring 2011 issue of this newsletter and the reports have been posted in the Legal Opinion Resource Center.) They indicated that TriBar is revisiting the guidance it provided in its remedies report on choice-of-law opinions and may issue a report amplifying on that guidance, as well as its guidance on opinions on forum selection clauses. It also is considering a report on arbitration provisions and evaluating whether there is anything useful it can say about “misleading opinions.” In addition, it is considering a new report on opinions on limited partnerships to follow its report on LLC opinions.

Dealing with Arbitration Provisions. Steve Weise and Don Glazer then had an exchange of views on dealing with arbitration provisions in opinions. It was noted that, although the U.S. Supreme Court ruled in AT&T Mobility LLC v. Concepcion, 131 S.Ct. 1740 (Apr. 27, 2011), that state law permitting class arbitrations is preempted by the Federal Arbitration Act, the application of that decision is uncertain and there are still issues regarding the enforceability of various aspects of arbitration provisions and the effect of invalidity of any such aspect on the provision in its entirety. Don Glazer expressed a preference to exclude arbitration provisions totally from enforceability opinions because of these uncertainties, especially given the lack of expertise in this area by business lawyers who give opinions. If pressed to give an opinion on the arbitration provision, its enforceability can then be considered by those with expertise. Steve Weise expressed the view that it should be possible to give an
opinion on the overall agreement to submit disputes to arbitration, which is what the recipient is most interested in, and to exclude any opinion on specific terms or the effect of the invalidity of any term on the provision as a whole. As noted, TriBar will be considering whether to address opinions on arbitration provisions.

**Canadian Opinion Practice.** In anticipation of the Committee’s program later in the day, Jillian Swartz of Blakes made a presentation on Canadian opinion practice entitled “Opinions in the Context of Cross-Border M&A Transactions: What You Can Expect from Canadian Counsel.” (The slides used in this presentation are on the Committee’s website.) She analyzed typical opinions given in these transactions with emphasis on differences from U.S. practice, and focused on opinions relevant to cross-border transactions, such as choice-of-law and enforceability of judgments opinions. She noted that Canadian counsel eschew hypothetical “as if” opinions.

**Application of Dodd-Frank to Swaps.** The Chair reported that the Committee had provided comments to the Derivatives and Futures Law Committee of the ABA’s Section of Business Law on proposed disclaimer language prepared for opinions on swap transactions regarding the application of the Dodd-Frank Act. (Subsequent to the meeting, it was learned that the Derivatives and Futures Committee had abandoned its effort in view of reservations expressed by this Committee.)

**Membership.** There was then a discussion of membership efforts. The Chair emphasized the importance of the planned initiative to educate and train less experienced lawyers about opinion practice. (In this connection, see the article “Introduction to Third-Party Opinion Practice: Basic Questions and Answers” in this newsletter.)

**Committee Structure.** The Chair concluded by repeating his request that members of the Committee let him know areas of opinion practice that they consider worthy of separate focus through a subcommittee. He reminded attendees of the program later that day on opinion issues from both sides of the border that the Committee is sponsoring with the Toronto Opinions Group. (See summary of the program below.) Finally, he invited everyone to the Committee’s reception later that day sponsored by Blakes, and said that the Committee would meet next at the ABA’s Section of Business Law’s Fall Meeting in Washington, D.C. (November 18).

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Program Summary: “Current Legal Opinion Topics from Both Sides of the Border”

The Committee on Legal Opinions sponsored one program at the ABA’s 2011 annual meeting in Toronto. A summary of the program follows.

Don Glazer, Stan Keller and Steve Weise, on behalf of the Committee, and Simon Chester of Heenan Blaikie SRL/LLP and Susan Zimmerman of Goodmans LLP, on behalf of the Toronto Opinions Group (TOROG), presented a program at the Annual Meeting on “Current Legal Opinion Topics from Both Sides of the Border.” The program focused on what U.S. lawyers need to know about the Canadian legal system and Canadian opinion practice in order to understand opinions from Canadian counsel. With that background, it then explored the respective approaches of lawyers in each country to several substantive opinions and special aspects of U.S./Canadian cross-border opinions. It was noted that there are considerable similarities between legal systems but also significant differences, including different concepts of “federalism.” Quebec presents special issues because of the civil law roots of its legal system. Although the approaches to opinion practices of lawyers in each country are similar, the differences in legal systems and the nature of legal practice lead to some differences in opinion practice. (The program materials are on the Committee’s website, http://www2.americanbar.org/calendar/2011-aba-annual-meeting-business-law/Meeting%20Materials/1949.pdf.)

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

The Subcommittee met on August 7, 2011. The principal topic of discussion was the pending Securities and Exchange Commission (the “SEC”) Staff Legal Bulletin regarding Exhibit 5 opinions in connection with offerings of securities that are registered under the Securities Act of 1933. In anticipation of the Staff’s pending guidance on Exhibit 5 opinions, the Subcommittee discussed recurring SEC comments and issues on Exhibit 5 opinions. The topics discussed included —

- the dating of opinions;
- opinions involving multiple jurisdictions (e.g., debt securities issued by a Pennsylvania corporation pursuant to an indenture governed by New York law);
- non-corporate securities (e.g., those issued by limited partnerships, limited liability companies and trusts);
- disclaimers of reliance; and
- the scope of state law opinions rendered by lawyers who do not practice in the state of incorporation (e.g., opinions regarding securities of entities organized under Delaware lawyers by lawyers not practicing in Delaware).

Other issues discussed included (i) whether the Staff might provide incremental flexibility with respect to the filing of opinions with respect to guaranties, particularly in the “shelf” registration process where guaranties often are registered but not subsequently offered or sold and (ii) efforts to streamline the filing of unqualified opinions required in the context of “shelf takedowns” by frequent issuers.

The slides from the meeting are available on the Subcommittee’s website (http://apps.americanbar.org/dch/committee.cfm?com=CL410053)
The next meeting of the Subcommittee will be in Washington, D.C. on Friday, November 18, 2011. The principal topic of discussion will be the Staff Legal Bulletin referred to above (available at http://www.sec.gov/interps/legal/cfslb19.htm), which was issued on October 14, 2011.

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Committee on Audit Responses

The Committee on Audit Responses met on August 7, 2011 and addressed two subjects — Canadian approaches to audit responses, and recent SEC comments on registrants’ loss contingency disclosures.

Canadian Approach to Audit Responses

Glenn Leslie, General Counsel of the Canadian firm Blakes, described Canadian practice for lawyers responding to audit letters and dealing with the disclosure of contingent liabilities. Canada previously used GAAP accounting, and the Canadian Bar Association had a 1978 “Treaty” with the accounting profession — a “Joint Policy Statement.”

Public companies in Canada are now subject to International Financial Reporting Standards, and in particular IAS 37, dealing with contingent liabilities.

Canadian bar association and accountant representatives are currently serving on a committee to create new guidelines for audit responses. They started work in 2009, but because the International Accounting Standards Board is considering changes to IAS 37 (likely to come into effect in 2012), no final statement has been approved. Last August the committee issued interim guidelines as a supplement to the existing Joint Policy Statement.

The committee is trying to deal with differences between GAAP and IAS 37, and principally with directives to clients on how to assess liability. Under the old standards there were three categories — likely (roughly a 75% probability), unlikely or not determinable. Most contingencies were considered not determinable. However, under the new standard the focus is on “probable” (whether an outcome is more likely than not — 51% or more) or “not probable.”

The standards for assessment of outcome have also changed. The prior standard was “the best estimate that could reasonably be made” — and it was often not possible to make an estimate. Now there is an expectation that there will be an assessment of outcome in all except rare cases. However, there is an acknowledgement that an ability to assess outcome may be rare in litigation.

Although there are guidelines on how lawyers should respond, there is not much experience in their implementation. The guidelines instruct lawyers that if they have a concern about how the client is evaluating the matter, the lawyers should take up the issue with the client — not the auditors. The lawyers should only consult with the auditors if the lawyers cannot reach an agreement with the client, and then only after obtaining the client’s consent for the consultation. The goal is to protect privilege.
The Canadian bar submitted comments to the IASB on IAS 37, stating that in litigation one cannot realistically make the assessments that IAS 37 contemplates, and also objecting to ranges and urging the expansion of the applicability of the “rare” standard for certain types of contingencies, including litigation.

The form of Canadian lawyer response letter contemplates that the lawyer will agree or disagree with the client’s assessment of the claim. However, in a high proportion of matters items are described objectively, with a statement that the outcome is not determinable. Responses do not have hard numbers, and do not give estimates.

With respect to pending or overtly threatened claims, the lawyers will comment. The law firm may confirm the reasonableness of a client’s assessment on probability of outcome, but will be brief as to the factors involved.

Questions were raised as to the appropriate response by a U.S. law firm receiving an audit letter from a Canadian client. The practice appears to be that U.S. lawyers follow the ABA/AICPA Treaty and say so in their response. A related question was whether the ABA Statement, which works with U.S. GAAP, will work with the new Canadian standard. It was noted that there were always differences between Canadian GAAP and U.S. GAAP, so the historic approach of the lawyer following the ABA/AICPA Treaty probably continues to be the best approach.

**SEC Comments on Loss Contingency Disclosure**

The staff of the SEC is aggressively commenting when it believes that companies are not following the current accounting standards concerning loss contingency disclosures. However, in assisting the client in responding to these inquiries, lawyers do not confer with the auditors outside the scope of the Treaty. This has not changed as a result of the SEC’s focus on greater disclosure with respect to loss contingencies. Governmental investigations also are addressed within the scope of the Treaty.

There are more requests for updates of audit responses, and the time available to respond has tightened. But the basic procedures are still followed.

New reserves for previously undisclosed litigation that come as a surprise (because the litigation was not previously mentioned) get particular attention from the SEC.

In general, while the SEC’s focus on loss contingencies has resulted in a greater need for clients to receive advice concerning their disclosure obligations, the audit response approach itself has not significantly changed.

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Opinion Practice Corner: Introduction to Third-Party Opinion Practice: Basic Questions and Answers

1. What Are Third-Party Legal Opinions?

Third-party opinion practice involves delivering a written legal opinion at the request of a client to a counterparty at the closing of a business transaction, such as issuing equity securities to investors or entering into a credit facility or a guaranty. A third-party opinion is different from advice to clients in that the third party is looking to specific legal conclusions set forth in the written opinion on which to rely. The opinion is not a guaranty of an outcome, but expresses the lawyer’s professional judgment of how the highest court of a jurisdiction whose law is covered by the opinion would rule on issues concerning the lawyer’s client, the transaction or both. Opinions can cover the legal existence of the client, its power and authority to enter into the transaction or the enforceability of the organizational or transaction documents. They can also cover specific issues such as the perfection of security interests under U.C.C. Article 9 or the valid issuance of stock or LLC interests.

2. What Are The Benefits Of These Opinions?

In rendering an opinion, counsel for a party to a transaction examines the transaction and the capacity of the client to enter into the transaction. Thus, opinions serve as an added level of diligence. Additionally, the process of drafting an opinion can improve the transaction. Occasionally, when the opinion giver identifies areas of concern, the transaction documents can be modified or organizational deficiencies can be corrected prior to consummation. These benefits may be enhanced when local counsel is retained to opine as to issues particular to its jurisdiction. Local counsel, in addition to being familiar with state statutes and case law, may have worked on hundreds of similar transactions and understand the pitfalls and best practices concerning the law of its jurisdiction. Because legal reviews are expensive, care should be taken to consider the size and complexity of the transaction when evaluating whether opinions or special local counsel opinions will be required.

3. How Do You Support Your Opinion With Relevant Facts?

A third-party legal opinion only sets forth the opinion giver’s legal conclusions and is not intended to certify as to facts or identify fraud. However, certain opinions require background facts, typically relating to the opinion giver’s client or the opinion recipient, to support the legal analysis required to give such opinions. For example, an opinion on the due formation of a Delaware LLC requires, among other things, confirmation of the background fact that the LLC has at least one member.

In addition to other methods such as reliance on the public record or, in certain instances, reliance on certain factual statements within the transaction documents, facts can be obtained through certifications provided by a responsible officer of the client or posited through assumptions. Assumptions are an important tool to reduce cost and delay and, when appropriately used, are a generally accepted part of opinion practice. Assumptions also benefit the diligence process by putting the counterparty on notice as to facts that the opinion giver has not attempted to establish. Assumptions are particularly appropriate when assuming a fact relating to the opinion recipient or when the attorney was not involved in all the steps of a transaction. Certifications are required when an opinion recipient will not accept an assumption and wants an additional form of diligence. For example, in rendering a power opinion, if the governance documents of the client prohibit it from making more than 20% of its investments overseas, the opinion giver could obtain a certification from a responsible officer of the client stating that, after giving effect to the proposed transaction, the client will not have made more than 20% of its investments overseas. Customary diligence requires the attorney to consider certain issues in obtaining a certificate, including
the appropriateness of the source and the types of facts certified. The opinion giver, however, is not required to verify the veracity of the facts. However, the opinion giver may not rely on a certification if the opinion giver is aware of facts or circumstances which render the certification unreliable.

4. **How Do You Draft An Opinion And Why Does It Seem So Specialized?**

In addition to a thorough understanding of the transaction documents, applicable statutes and case law, practitioners must understand the nuance of customs and conventions of opinion practice, including those established by “customary practice” such as through bar reports, as well as the practices established by internal firm opinion committees. Customary practice is understood to include customary diligence, discussed above, and customary usage - how certain words are used, even expanding or limiting the plain meaning of those words. Thus, the meaning of opinions is guided by customary practice. Customary practice also makes some assumptions unnecessary because they are understood without the need to be stated.

5. **How Do You Limit The Scope Of An Opinion?**

An opinion’s scope should be limited, either because, as a matter of law, an attorney cannot come to a legal conclusion with sufficient certainty or, as a matter of cost, the opinion would be prohibitively expensive to prepare and issue. In addition to the cost of researching a point of law or the factual basis for an opinion, an opinion not subject to reasonable limitations could expose the opinion giver to unacceptable liability. Generally, an opinion’s scope may be limited in various ways. First, opinions should be limited to the law of a specified jurisdiction, or, in certain cases, to a body of law within a specified jurisdiction. Second, opinions that relate to the enforceability of the transaction documents routinely are subject to and qualified by other laws, such as bankruptcy and insolvency laws or equitable principles that may affect the enforcement of certain provisions of the transaction documents. Third, exceptions or qualifications may need to be tailored to address the application of a specified jurisdiction’s laws to certain contractual provisions such as a waiver of jury trials or the requirement that all contractual modifications be in writing. Finally, reliance on the opinion should be limited by time and recipients. The opinion letter should confirm that it speaks only as to the date of its issuance and that an opinion giver has no obligation to update an opinion letter for subsequent events or legal developments. Generally, reliance on the opinion letter should be limited to the addressee unless the opinion giver expressly authorizes reliance by persons to whom the opinion is not addressed (for example, assignees of notes). The opinion letter, however, should confirm that such persons are entitled to rely on the opinion to the same extent as – but to no greater extent than – the original addressee.

6. **Are There Useful Resources?**

The following are some useful resources related to legal opinion practice:

- The Legal Opinion Resource Center available at: http://apps.americanbar.org/buslaw/tribar/
- The ABA Business Law Section Legal Opinions Committee’s Listserv

The Committee on Legal Opinions sponsored a program on “Cross Border Closing Opinions: Customary Practice” at the ABA Section of Business Law’s Global Business Law Forum in London on September 22, 2011. Ettore Santucci of Goodwin Procter LLP, who is the reporter of the Committee’s proposed report on outbound cross-border opinions, was the chair. He was joined by Daniel Bushner of Jones Day’s London office, Donald Glazer of Boston, and Michael Kutschera of Binder Grosswang Rechtsanwalte GmbH of Vienna. Mr. Kutschera is a co-author of “Legal Opinions in International Transactions,” a report of the Subcommittee on Legal Opinions of the Committee on Banking Law of the International Bar Association.

After briefly describing the practice of delivering third-party legal opinions (“closing opinions”) in the United States, the panelists stated that closing opinions are routinely requested and given in cross-border leveraged finance and capital market transactions. However they questioned whether as a cost/benefit matter closing opinions should be required in other cross-border transactions.

The panelists agreed that U.S. counsel necessarily must rely on United States customary practice when giving “outbound” legal opinions (opinions to non-U.S. recipients). However, they pointed out that non-U.S. recipients may not understand U.S. customary practice or even that U.S. counsel is relying on customary practice when preparing closing opinions. This puts a premium on stating clearly in the opinion that it is governed by U.S. customary practice, stating expressly the assumptions regarding those matters that are governed by the chosen non-U.S. law, and in some cases stating expressly exceptions and assumptions that are generally understood and do not need to be stated under U.S. customary practice.

The panel discussed opinions by U.S. counsel on the effectiveness under the law of a specific state of the U.S. of a clause that chooses non-U.S. law as the agreement’s governing law. Courts of many states use a test found in Section 187 of the ALI’s Restatement (Second) of Conflict of Laws to analyze questions about the effectiveness of a choice of law clause. Assuming sufficient contacts with the jurisdiction whose law is chosen, Section 187 provides that a choice-of-law clause is effective unless (i) applying the chosen law would violate a fundamental policy of the jurisdiction whose law would apply if no law were chosen and (ii) that jurisdiction has a materially greater interest in the issue in question.

This test is troublesome for those preparing opinions on choice-of-law clauses, even in wholly domestic U.S. transactions. It can be very difficult to determine with sufficient certainty which U.S. state’s law would apply in the absence of a choice of law clause, as well as what is a fundamental policy of that state. It is even more difficult for a U.S. opinion giver when the chosen law is non-U.S. law. In that case the U.S. opinion preparers cannot be certain of the meaning of the provisions of the non-U.S. agreement under the non-U.S. law because of their lack of familiarity with that law. As a result they
cannot reasonably be expected to determine whether those provisions violate a fundamental policy of another jurisdiction.

The panelists concluded that if U.S. counsel is required to give a choice-of-law opinion, it should seriously consider excluding expressly coverage of fundamental policies of any state or country whose law might apply, including those of the state whose law is covered by the opinion. This is consistent with the approach likely to be taken in the Committee’s pending report on outbound cross-border opinions.

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[Editor’s Note: For further discussion of choice-of-law opinions, see the summary of the WGLO breakout session, “Choice-of-Law Opinions” in the WGLO Addendum (page A-5) to the Winter 2010 (vol. 10, no. 2) issue of the newsletter.]

Notes From the Listserve

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

The last dialogues from the Committee’s listserv summarized in the newsletter appeared in the Spring 2011 issue. There have been ten legal opinion queries from our members since those that were addressed or referred to in the Spring issue. Six of the dialogues that generated substantive responses are summarized here.

1. Enforceability Opinions on Subsidiary Guaranties of Parent Debt

By his inquiry of March 15, 2011, Ken Maready of the Hutchison Law Group, Blacksburg, Virginia, asked if it is now common to refrain from giving enforceability opinions on subsidiary guaranties of parent debt in light of the bankruptcy court’s opinion in Official Committee of Unsecured Creditors of TOUSA, Inc. v. Citicorp North America, Inc., 42 B.R 783 (Bankr. S.D. Fla. 2009).

As Steve Weise (Proskauer, Los Angeles) pointed out, the bankruptcy exception to the remedies opinion excludes fraudulent transfer issues from the scope of the remedies opinion and therefore no special TOUSA exception is necessary to address fraudulent transfer issues. See also TriBar Report on Third-Party “Closing” Opinions § 3.3.2, 53 Bus. Law. 591, 623 (1998). Nevertheless, observed Steve, “some extra-cautious folks add a specific fraudulent transfer exception when giving an opinion on an upstream (or side-stream) guaranty.”

Richard Goldfarb of Stoel Rives LLP, Seattle, noted that his firm often gives remedies opinions for U.S. subsidiaries of Canadian parent companies where the parent is the borrower and the subsidiary issues a guaranty of the entire debt but, explained Richard, “[w]e ensure that in our exception [to the
remedies opinion], we explain in more detail why the guaranty may be subject to challenge instead of relying on the more general exceptions.”

Jack Burton of Rodey, Dickson Sloan, Akin & Robb, Santa Fe, notes that his firm in such opinions often takes a qualification such as that suggested by Glazer & FitzGibbon:

“We express no opinion as to whether a subsidiary may guarantee or otherwise become liable for, or pledge its assets to secure, indebtedness incurred by its parent except to the extent such subsidiary may be determined to have benefited from the incurrence of such indebtedness by its parent, or whether such benefit may be measured other than by the extent to which the proceeds of the indebtedness incurred by the parent are directly or indirectly made available to such subsidiary for its corporate purposes.”

Glazer & FitzGibbon on Legal Opinions § 8.3.2 n. 18 (3d ed. 2008).

Summing up, Chair Stan Keller noted that three separate issues were identified by the responders to Ken’s inquiry: (i) whether the subsidiary has the corporate power to grant the guaranty — a function of the requirements of applicable state corporate law; (ii) issues of fraudulent conveyance and similar laws — with the prevailing practice being to rely upon the standard bankruptcy exception to exclude coverage of such laws; and (iii) the limited issue raised by TOUSA when there are multiple upstream guaranties with savings clauses (which the court in TOUSA ruled invalid due to their ambiguity as a matter of New York contract law).

[Editor’s Note: For a discussion of TOUSA, see Notes from the Listserve from our July 2010 issue (vol. 9, no. 4) pages 12-13, and the WGLO discussion of “Fraudulent Transfer Savings Clause Opinions after TOUSA,” in the WGLO addendum (page A-2) to the July 2010 issue].

2. Opinions Not Addressing Federal Law But Including the Bankruptcy Code Exception to the Remedies Opinion

Joseph Manello of Seyfarth Shaw LLP, Boston, questioned by his email of March 24, 2011 why borrower’s counsel, in an opinion that addresses only state law, nevertheless references the Bankruptcy Code in its exception to the remedies opinion.

As noted by Pete Ezell of Baker, Donelson, Bearrman, Caldwell & Berkowitz, P.C., Nashville, not addressing federal law is common in real estate closing opinions, whereas, noted Chair Stan Keller, it is common in opinions on corporate transactions to include federal law within the scope of the opinion (sometimes with exclusions). Nevertheless, as several responders noted, whether or not federal law is addressed in the opinion, the enforceability of the agreement addressed by the opinion can be affected by a bankruptcy filing. Moreover, as Ariel Philip Sloan of Smith, Katzenstein & Jenkins LLP, Wilmington, observed, citing the TriBar Report §§ 3.3.2-3.3.3, the “bankruptcy” exception to the remedies opinion “includes similar state law and includes a whole body of law including fraudulent conveyance [laws] at the state level.”

3. Taking a Broad Exception for the Dodd-Frank Act

John Regier of Mintz, Levin, Cohn, Ferris, Glovsky and Popeo, P.C., Boston, queried the listserve on July 13, 2011 for its reaction to the following disclaimer proposed by counsel to a national bank in connection with an opinion on the enforceability of a standby bond purchase agreement:
“We note in particular that the Dodd-Frank Wall Street Reform and Consumer Protection Act … includes many provisions that are to be interpreted, developed or implemented through regulations in the future. We have not considered and express no opinion with respect to the provisions of such law or similar laws, except where the applicable final regulations have been promulgated and are in effect.”

The responders were unanimous in expressing skepticism about the acceptability of this disclaimer. Noted Steve Keen of Reed Smith LLP, Pittsburgh, “I don’t see how money market funds can accept this qualification.” As John Eckstein of Fairfield and Woods, P.C., Denver, who routinely serves as counsel to banks and to bond insurers, observed, his firm would not accept such a disclaimer, noting that a “recipient of a legal opinion deserves an up-to-date opinion on enforceable laws, particularly from a national bank directly affected by them.”

If the authors of the disclaimer are concerned about future regulations or interpretations, then, as noted by Lawrence Bauer of Sidley Austin LLP, New York, the standard exclusion for “a change in law, regulation or ruling (or in the application or official interpretation of any law, regulation or ruling) after the date hereof” should address the legitimate concerns of the opinion giver.

Chair Stan Keller closed the discussion by giving background on the disclaimer, which Stan traces to similar language developed by the ABA’s Derivatives and Futures Law Committee for use in opinions on swaps. As noted by Stan, a “number of lawyers involved in opinion practice . . . who saw the disclaimer raised questions about the need and appropriateness of the disclaimer,” similar to those raised by the responders to John’s inquiry.

[Editor’s Note: See the discussion above under “Application of Dodd-Frank to Swaps” in Stan Keller’s summary of the meeting of the Committee held at the ABA 2011 annual meeting.]

4. Opining on the Legal Capacity and Competency of Persons Acting for a Party

Matthew Rotenberg of Blank Rome, LLP, Philadelphia, elicited spirited responses to his request of July 24, 2011 for comments on a request by lender’s counsel that Matthew’s firm not only strike the assumption that natural persons who are a party to or acting on behalf of a party to the documents subject to the opinion have the legal capacity and competency to do so, but also that his firm “affirmatively opine that the principals actually have the legal capacity and competency to execute, deliver and perform obligations under documents.”

The uniform response was that the request of lender’s counsel was not reasonable, particularly the request for an affirmative opinion on the legal capacity and competency of the individuals signing the documents (“both [requests of lender’s counsel] are way out of bounds,” stated Henry Evans, Farella Braun + Martell LLP, San Francisco). As noted by Steve Weise, the capacity of individuals is an implicit assumption in a closing opinion (TriBar Report § 2.3(a)), and the request “for an affirmative opinion on capacity is completely outside of what a lawyer has the professional skill to address.” Michael Ellis of Porter Wright, Cleveland, noted that he had to give an opinion on the capacity of an individual to an insurance company many years ago. Under the law in his state (Ohio), capacity is determined by three characteristics: the individual must be over the age of 18 (which can be verified by examining the individual’s driver’s license); the individual cannot be incarcerated; and the individual cannot be incompetent. He could verify the first two, but not the third, and so stated in his opinion. The insurance company accepted the opinion, as qualified.
5. **Opining that a Guarantor is not a Foreign National**

Freddie Mac’s standard form of opinion letter includes an opinion on a guaranty by an individual, that the guarantor “is not a foreign national.” Sterling Scott Willis of Fishman Haygood Phelps Walmsley Willis & Swanson, L.L.P., New Orleans, by his email of July 26, 2011, asked for the listserv’s experience with this opinion request. As noted by Scott, while one can determine whether a person is a citizen by reviewing his or her birth certificate, “how can you confirm the person has not renounced his or her citizenship?”

The consensus of the responders was that the opinion giver should resist giving this opinion, as it is beyond the competence of lawyers to determine. As noted by Harrick Lidstone, Jr. of Burns, Figa & Will, P.C., Greenwood Village, Colorado, “[w]here is the legal analysis in the request for a factual determination?”

Illustrating the complexity of the questions surrounding expatriation, Jason Warner of Spruce Pine, North Carolina, reviewed the standards used by the IRS to determine the effective date of expatriation and by the U.S. State Department when issuing “certificates of loss of nationality.”

But several responders, while joining the consensus that the request is inappropriate, suggested procedures for meeting the request for the opinion while at the same time limiting the diligence required to render it to specified and reasonable procedures. As noted by Chair Stan Keller, an opinion giver “can take the appropriate steps to undertake [appropriate] diligence and satisfy yourself as to the basis for providing the required opinion (e.g., birth certificate, current passport and certification), preferably indicating the basis upon which it is given.” As suggested by Joseph Heyison, Senior Vice President and Associate General Counsel of Daiwa Capital Markets America Inc., New York, “[i]f a passport is available, state you are relying solely on it as to matters of fact and assume authenticity.”

Charles Menges of McGuire Woods LLP, Richmond, closed the discussion by referring the participants to the current project on opinions to federal agencies by his subcommittee of the Committee on Legal Opinions in Real Estate Transactions of the ABA’s Real Property, Trusts and Estates Section. Charles’ subcommittee is addressing the opinion practices of Freddie Mac, Fannie Mae, and HUD. As noted by Charles, while HUD has historically allowed no changes to its form of opinion, Freddie Mac and Fannie Mae have been somewhat more flexible in allowing their forms to be negotiated. Those interested in these efforts should contact Charles at cmenges@mcguirewoods.com, or Ed Levin, chair of the RPTE Committee on Legal Opinions in Real Estate Transactions at elevin@gfrlaw.com.

[Editor’s Note: For further background, see the WGLO discussion of “Non-Negotiable Opinions” (including forms of opinion mandated by government agencies) in the WGLO addendum (at page A-14) to the Winter 2010 issue (vol. 10, No. 2) of the newsletter.]

6. **Reasoned Opinions and Opining in the Alternative**

Daniel Devaney of Cades Schutte LLP, Honolulu, by his inquiry of September 30, 2011 queried the listserv on whether a reasoned opinion letter could include additional language addressing the possibility that the reasoned opinion is or turns out to be wrong. Arthur Field responded that he had not seen this approach used or discussed, but that there would be nothing wrong with this approach if the opinion giver believes the reasoned opinion is correct. A discussion of the alternative might even be something an opinion recipient might request — “What happens if your opinion is wrong?” But, asked Arthur, if the alternative possibility is addressed, “is the second opinion reasoned?”
Jack Burton of Rodey, Dickson, Sloan, Akin & Robb, P.A., Santa Fe, noted that under certain circumstances, an attorney can even be found to be acting negligently if he or she fails to advise a client of the adverse consequences of pursing a course of action advised by the lawyer, citing the court’s opinion in *First National Bank of Clovis v. Diane, Inc.*, 102 N.M. 528, 698 P.2d 5 (Ct. App. 1985).

Dick Howe of Sullivan & Cromwell, LLP, New York, closed the discussion by addressing the nature of reasoned opinions and the opinion giver’s responsibility in rendering such opinions. As noted by Dick, the purpose of a legal opinion “is to provide the opinion recipient with some degree of assurance regarding the legal consequences of the transaction addressed in the opinion.” “An opinion,” noted Dick, “should state a conclusion that the lawyer actually believes.”

“Even if the matter is not free from doubt, the lawyer should believe that when the matter is brought to the proper tribunal based on the facts stated in the opinion, the tribunal will reach the conclusion expressed in the opinion. If the lawyer doesn’t really believe this, the opinion is not stating the lawyer’s real opinion.”

We have not been able to summarize all of the opinion dialogues that have occurred on the listserve since the Spring 2011 issue of the newsletter was published. Those not summarized here include giving an enforceability opinion on a split choice-of-law provision; requiring borrower’s counsel to give a Reg-U/Reg. X opinion; requests from a federal agency to counsel to a non-profit economic development corporation to render a first priority security interest opinion; and an audit letter request that counsel confirm to the auditors whether it has any knowledge that the client has been designated as a “potentially responsible party” by the EPA or other environmental regulatory bodies. To review these dialogues, go to the “archives” link under “listervs” on the Committee’s website.

As always, members are encouraged to raise legal opinion issues on the listserve and to participate in the listserve exchanges. 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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**Recent Developments – SEC Issues Opinion Guidance**

On October 14, 2011, the SEC issued its long-awaited guidance on opinions filed in registered offerings. The guidance is Staff Legal Bulletin No. 19 (CF), which provides the Division of Corporation Finance staff’s views on Exhibit 5 legality opinions and Exhibit 8 tax opinions. The new guidance not only makes the staff’s views regarding legal opinions in registered offerings generally available, but it updates its longstanding internal guidance and, in doing so, recognizes current opinion practice and the practical realities of specific securities offerings.
A few aspects of the SEC’s guidance are worth noting. First, the new guidance, to a greater extent than the SEC staff’s historic positions, recognizes the applicability of customary practice to opinions filed in registered offerings. Although the guidance does not state this expressly, the effort to recognize customary practice is clear from some of the views expressed and in the references to the TriBar Opinion Committee’s reports. For example, the guidance recognizes the acceptability of stating expressly customarily understood unstated assumptions.

Second, the guidance reflects the limitations that the requirements of federal securities law impose on common opinion practices that might be acceptable in private transactions. Thus, for a legality opinion to satisfy the statutory requirement, it must cover the applicable law even though in private transactions an opinion recipient, for efficiency, may be willing to accept a so-called “as if” opinion covering the law of a jurisdiction the opinion giver is in a position to address even though it is not the governing law. Also, certain assumptions and exceptions that opinion recipients in private transactions may be willing to accept may not be acceptable in opinions filed with the SEC, at least, in some cases, without accompanying disclosure in the registration statement.

Third, the new guidance confirms and expands on the SEC staff’s willingness to be flexible in accommodating the needs of particular securities offerings, so long as the underlying securities law requirement that an unqualified legal opinion is filed as part of the registration statement as of its effective date is satisfied. Examples of this flexibility are:

- The guidance recognizes that the typical legality opinion on corporate stock (i.e., that the shares are “duly authorized, validly existing, fully paid and nonassessable”) does not readily fit equity securities of non-corporate issuers. Thus, the staff is willing to accept legality opinions for non-corporate securities that are tailored to fit the circumstances of those securities. In this connection, the staff has indicated that the form of legality opinion on LLC interests suggested by TriBar in its report on Opinions on LLC Membership Interests will be acceptable.

- For frequent shelf drawdowns, such as at-the-market (“ATM”) offerings, the guidance confirms the staff’s previously-announced position that an unqualified legality opinion can be filed prior to the closing of the offering either in a post-effective amendment that becomes effective automatically or in a Form 8-K.

- Medium-term-note (“MTN”) programs present special problems because of the potential frequency of takedowns with tailored terms, sometimes without the involvement of counsel. The staff’s guidance offers as one alternative for dealing with this problem the inclusion of the text of the unqualified opinion in the pricing supplement without the need to file a separate opinion.

The guidance included on tax opinions discusses when an Exhibit 8 tax opinion is required, which is typically when tax consequences are material to an investor. It also discusses long-form and short-form approaches to tax opinions and their requirements.

The new SEC guidance is must reading for every practitioner who deals with opinions filed in connection with registered offerings. It is a very helpful resource outlining the requirements for these opinions.

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Legal Opinion Reports

Tennessee Issues Opinion Report

The Tennessee Bar Association has issued its Report on Third Party Closing Opinions by the Joint Opinion Committee of its Sections of Business Law and Real Estate Law. The report can be found in the Legal Opinion Resource Center on the Committee’s website, at http://apps.americanbar.org/buslaw/tribar/.

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 Winter issue of the newsletter to be circulated in January 2012. Please forward cases, news and items of interest to Stan Keller (stanley.keller@eapdlaw.com) or Jim Fotenos (jfotenos@greeneradovksy.com).