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From the Chair

This newsletter continues the Committee’s tradition of providing its members and others with the most current, thoughtful and comprehensive information about legal opinion practice. Once again, our appreciation goes to Jim Fotenos for his tireless efforts in putting the newsletter together.

You will find several items in this newsletter that deal with the risks opinion givers face when giving third-party legal opinions. One is a summary by Jim Fotenos of the SEC’s Detling enforcement action. The culpability of the lawyer in that action, based on the SEC’s allegations, seems obvious. What is less obvious is the SEC’s focus on violations arising from the lawyer’s legal opinion to the underwriters, in particular, the no-litigation confirmation and the negative assurance on the official statement. This enforcement action demonstrates the risks of becoming subject to an SEC enforcement action based upon these opinions.

The newsletter includes as an addendum an article by John Villa and John Williams of Williams & Connolly explaining the increased risks to lawyers, including opinion givers, from state law-based claims following the New York Court of Appeals decision in Assured Guaranty. We are fortunate to have the insights contained in this article from such knowledgeable sources.

As a balance to these two items is an article by Don Glazer and me on the implications of the Fortress decision, which dismissed a lawsuit against opinion givers caught up in the Marc Dreier fraud. Contrary to the view of some that the decision demonstrates the benefit of spelling out qualifications in the opinion letter, Don and I take the position that the decision in fact should afford comfort that a streamlined opinion approach does work.

This focus on risk and risk mitigation is an important backdrop of the Committee’s survey of law firm opinion practices project. Real progress is being made on digesting the survey responses and reflecting them in a report that should be helpful to law firms in evaluating and updating their own opinion practices. It is not premature to conclude, as one would expect, that law firms have significantly expanded their procedures for administering their opinion practices.

Another project of the Committee, its report on outbound cross-border opinions, continues to make good progress. One important issue that the Cross-Border Report Subcommittee is currently considering relates to the recent City of London Law Society (“CLLS”) English opinion guide described in Daniel Bushner’s article in the newsletter – namely, the proper approach to handling differences in opinion practices in cross-border transactions. In domestic opinion practice, we have come to universally accept the “Golden Rule,” generally articulated as “don’t ask for opinions that you would not give” (which parallels the common Golden Rule maxim, although, given legitimate differences in opinion practice among firms, a better articulation might be “do not ask for opinions you believe it would not be professional for another lawyer to give”). A reciprocal corollary to the Golden Rule is “do not decline to give an opinion you have the expertise to give that other lawyers would give under comparable circumstances.” Unfortunately, these rules do not translate well to cross-border practice because of the differences in approach to opinions in different countries. This means that a different protocol needs to be formulated to facilitate cross-border opinion practice, but what that should be is not clear. For example, as the CLLS guide may suggest, should lawyers be expected to give opinions they would give in domestic practice even though their foreign counterpart follows a more limited opinion-giving regime or should there be more reciprocity and, if so, in which direction? A broad exchange of views will be helpful to the Cross-Border Report Subcommittee as it considers this issue. It may be that an ultimate answer is to find
more common ground in opinion practice in different jurisdictions. The Legal Opinions Committee can provide leadership in that effort.

I hope that you will enjoy this issue of the newsletter and let us have your views on the subjects covered. I also hope you will participate in our March 23 Las Vegas meeting, either in person or by phone.

- Stan Keller
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   stanley.keller@edwardswildman.com

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**Future Meetings**

*ABA Section of Business Law Spring Meeting*

*Caesar’s Palace, Las Vegas, NV*

March 22-24, 2012

(All times Pacific Time)

**Committee on Legal Opinions**

Friday, March 23, 2012

- Committee Meeting: 3:00 p.m. — 5:00 p.m.
- Reception: 5:00 p.m. — 6:30 p.m.
  (Sponsored by Proskauer Rose LLP)

Saturday, March 24, 2012

- Program: Legal Opinions on Securities Offerings: 8:00 a.m. — 10:00 a.m.

**Professional Responsibility Committee**

Friday, March 23, 2012

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

Saturday, March 24, 2012

- Program: What Business Lawyers Need to Know About Ethics 20/20: 8:00 a.m. — 10:00 a.m.
Committee on Federal Regulation of Securities, Subcommittee on Securities Law Opinions

Friday, March 23, 2012

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

Committee on Audit Responses

Saturday, March 24, 2012

- Committee Meeting: 10:00 p.m. — 11:00 p.m.

Law & Accounting Committee

Saturday, March 24, 2012

- Committee Meeting: 11:00 a.m. — 12:30 p.m.

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

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

Rendering an Enforceability Opinion When a Relevant Point of Law is Being Challenged

By his inquiry to the listserv of December 16, 2011, James C. Tilden of Seigfreid Bingham Levy Selzer & Gee, P.C., Kansas City, Missouri, asked whether his firm should qualify an enforceability opinion on a future advance clause in a mortgage by reference to a pending case whose outcome could change what, according to Jim, his colleagues generally agreed was the law. Jim observed that Kansas law was reasonably well established that the stated dollar limit in a mortgage refers to the principal of the
mortgage only and that interest and costs on the loan were also entitled to the protection of the mortgage
even though the addition of those amounts caused the total owed to exceed the stated dollar limit.
Nevertheless, at the time, a case was pending before the Kansas Court of Appeals wherein the appellant
was challenging that generally accepted interpretation of the applicable statute, namely, that the principal,
interest and all other amounts secured by the mortgage were limited to the amount stated in the mortgage.
It should be noted that while Jim and his colleagues believed appellant’s position to be an incorrect view
of the law, the position advanced had some merit and neither the Court of Appeals nor the Kansas
Supreme Court had directly decided the issue.

Virtually all respondents referred to the bedrock opinion principles that an opinion letter speaks
only as of its date and that opinion givers have no obligation to update an opinion for subsequent events
or legal developments. See, e.g., ABA Committee on Legal Opinions, Legal Opinion Principles IV
(“Date”), 53 Bus.Law 831, 833, 876 (1998); TriBar Third-Party “Closing” Opinions § 1.2(b) (“No
Robb, P.A., Santa Fe, New Mexico; Brian M. Gottesman, Berger Harris, Wilminton; and Joseph
Manello, Seyfarth Shaw LLP, Boston, among others.) But the respondents also referred to the equally
well established principle that an opinion giver should not render opinions that will mislead a recipient
with regard to the matters addressed by the opinions given, ABA Legal Opinions Committee, Guidelines
for the Preparation of Closing Opinions § 1.5, 57 Bus.Law 875, 876 (2002); TriBar Report § 1.4(d). As
noted by Jack Burton, “if we thought that such a statement would be misleading to an opinion recipient,
we would qualify it in an appropriate manner.” Norman Newman of Benesch, Friedlander, Coplan &
Aronoff, LLP, Indianapolis, went further and observed that “[i]t is both necessary and proper to qualify an
opinion when the law is unsettled. This includes referencing any pending appeals or legislation and any
conflicting authorities.” Moreover, as noted by Brian Gottesman, “you don’t want to give the recipient an
excuse to later claim that you misled them [by not noting the potentially law-changing case that is
pending].”

Observed Norman Powell of Young Conaway Stargatt & Taylor, LLP, Wilmington, “the question
is whether the current state of the law comfortably rounds off in support of the ‘reasonably well
established’ view, or of the opposing view thought to have ‘some merit.’” Joel Miller of Miller|Wrubel,
New York, speaking, from a litigator’s viewpoint, stated that “it may be best to explain the issue in the
opinion, and either give a reasoned opinion on whether it is more or less likely that the appellate court
will rule one way or another, or refer to the appeal and state that because the accepted understanding of
the statute is being challenged by arguments having merit, you do not opine on whether future advances
would be afforded priority over junior lenders for any amounts in excess of the stated amount in the
mortgage.”

Concluded Chair Stan Keller, opinion givers “give opinions based upon our professional
judgment of what the law is. It may be easy because there is controlling precedent on point or it may be
harder because we have to extrapolate from existing precedents and predict how the appellate court would
come out. . . . Nevertheless, we have to exercise that judgment, and part of that judgment is do we have
sufficient confidence in the outcome to give a clean opinion or do we believe the situation is such that it
would be more appropriate to give a reasoned opinion, either unqualified or qualified.”

Taking into account the responses from the listserve participants, Jim Tilden included this
language in his firm’s opinion:

“The foregoing is the status of Kansas law as of the date of this letter, however,
we note that in Central National Bank v. Board of County Commissioners of
Osage County, Kansas, No. 10-104825-A (Kansas Court of Appeals), the Kansas
Court of Appeals has before it the question of whether the total amount secured
by a future advance mortgage, including principal, interest, costs, fees and other amounts, is limited by the language of §58-2336 KSA to the dollar amount stated in the mortgage.”

On February 17, 2012, the Court of Appeals released its unpublished opinion affirming the lower court and confirming the generally-accepted understanding of Kansas law as articulated by Jim.

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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**Notes From the Listserve (Index of Dialogues, October 2008-Spring 2012)**

We inaugurated “Notes From the Listserve” (formerly called “Lessons From the Listserv”) with the October 2008 issue of the newsletter (volume 7, number 4). We included an index of the dialogues (from October 2008 through Fall 2010) in the Winter 2010 (volume 10, number 2) issue of the newsletter. We update that topical index in this issue, for all dialogues covered in this feature from October 2008 through this issue.

**Dialogue Topic** | **Issue**
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A. The Remedies or Enforceability Opinion |  
“*As If*” Remedies Opinions on Loan Documents Drafted by Lender’s Counsel | Spring 2011 (10/3)
Enforceability Opinion on a General Release | Spring 2011 (10/3)
Enforceability Opinions on Documents Governed by U.S. Federal Law | October 2009 (9/1)
Enforceability Opinions on Loan Documents in which MERS (Mortgage Electronic Registration Systems) Corporation is Named as Nominee for Lender | Spring 2011 (10/3)
Dialogue Topic

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<th>Fall 2011 (11/1)</th>
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<tr>
<td>Opinions Not Addressing Federal Law But Including the Bankruptcy Code Exception to the Remedies Opinion</td>
<td>Fall 2011 (11/1)</td>
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<td>Rendering an Enforceability Opinion When a Relevant Point of Law is Being Challenged</td>
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<td>Taking a Broad Exception for the Dodd-Frank Act</td>
<td>Fall 2011 (11/1)</td>
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<td>TOUSA and the Bankruptcy Exception to the Remedies Opinion</td>
<td>July 2010 (9/4)</td>
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B. No Breach or Default Opinion

Does the “No Breach or Default” Opinion on Material Agreements Include the Financial Covenants of the Material Agreements? How Does the Opinion Giver Address Financial Covenants in Material Agreements if a No Breach or Default Opinion Covers Them? October 2008 (7/4)

C. Addressees; Reliance

Bondholder Reliance Upon Opinions Addressed to Bond Trustee April 2010 (9/3)

Including the Opinion Giver’s Client as an Addressee of a Closing Opinion January 2010 (9/2)

Reliance on a Closing Opinion by Parties Other Than the Addressee(s) October 2009 (9/1)

D. Bond and Loan Opinions

Bondholder Reliance Upon Opinions Addressed to Bond Trustee April 2010 (9/3)

Opining That a Guarantor is Not a Foreign National Fall 2011 (11/1)

Responding to Dated Bond Indenture Opinion Requirements January 2010 (9/2)

Whether a Loan Modification Constitutes a Novation July 2010 (9/4)
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<td><em>Opinions Rendered in Connection with FHA Insured Projects</em></td>
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<td><em>Auditor Request for Opinion on Historical Compliance of Prior Issuances of Securities with Securities Laws</em></td>
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<td><em>M&amp;A Opinions on Conversion of Capital Stock, Options, and Warrants</em></td>
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<td><em>Postscript: Curing Prior Deficiencies in Authorizations of Share Issuances</em></td>
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<td><strong>J. Other</strong></td>
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<td><em>Challenging an Opinion Giver’s Assumption as to the Genuineness of Signatures</em></td>
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<td><em>Include an “Anti-Sandbagging” Provision in a Closing Opinion?</em></td>
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Dialogue Topic

Opinions Addressing Use of Transaction Documents as “Evidence”

January 2010
(9/2)

Reasoned Opinions and Opining in the Alternative

Fall 2011
(11/1)

- The Editor

Recent Developments

Opinion Practice Implications of the Fortress Decision

The last issue of this newsletter included an article by Joel Miller, of Miller & Wrubel P.C., counsel for Dechert LLP in its successful defense of an action Fortress Credit Corp. brought against it for an allegedly faulty opinion letter. The opinion letter was on a loan that, according to the documents provided to Dechert, was being made by Fortress to Solow Realty, a reputable real estate firm in New York. In fact, the documents had been forged by Solow's supposed co-investor and legal counsel, Marc Dreier, who, until his fraudulent activities were revealed, was a highly respected lawyer and the founder and name partner of an over 100-lawyer New York law firm. The facts and the appellate court's unanimous decision reversing the trial court’s denial of Dechert’s motion to dismiss Fortress’ complaint are described at length in Mr. Miller's article; we will not describe them further here. (His article can be accessed here.1 The appellate decision, Fortress Credit Corp. v. Dechert LLP, is reported in 89 A.D.3d 615, 934 N.Y.S.2d 119, 2011 WL 5922969 (2011).) The purpose of this article is to discuss the implications of the appellate court’s Fortress decision for opinion practice.

After summarily dismissing the claims of fraud and legal malpractice, the court considered the plaintiff’s claims of negligence and negligent misrepresentation. A claim for negligent misrepresentation requires that the plaintiff establish both that the opinion letter contained a misrepresentation and that the opinion giver was negligent in making that misrepresentation. In ruling for Dechert, the court held that Fortress had failed to allege sufficient facts on either of those points to permit the case to go forward.

In finding that the complaint had not adequately alleged negligence, the court noted the absence of allegations that Dechert had been informed that its obligations were not limited solely to a review of relevant and specified documents or that it had been informed that it was to investigate, verify and report on the legitimacy of the transaction. Thus, the court concluded that Fortress had not alleged sufficient facts to support its claim that Dechert breached its duty of care. Although the decision is not framed in terms of “customary practice,” this part of the decision is premised on the need of a plaintiff to allege facts demonstrating negligence, which in turn requires allegations of facts supporting a claim that the opinion giver failed to perform customary diligence or that it was informed that it was expected to do more in the way of diligence.

On the issue of misrepresentation, Fortress alleged that Dechert’s opinion that the agreement was an enforceable obligation of Solow was incorrect as was a statement in the first paragraph of the opinion letter that Dechert was representing Solow in the transaction. The court pointed out, however, that the opinion letter expressly assumed that signatures were genuine and documents authentic and stated that Dechert had made no independent inquiry into the accuracy of the factual representations or certificates. Based on those assumptions and statements, the court found that everything stated in the opinion letter was correct.

On its face the *Fortress* decision is narrow and its conclusions seem obvious. The court read the opinion letter and found nothing in the complaint to support Fortress’ claims.

A number of years ago we wrote an article proposing, on behalf of the Boston Bar Association’s Business Law Section, a streamlined form of legal opinion letter that stripped out much of the boilerplate, including assumptions regarding the genuineness of signatures and the authenticity of documents, that appeared then and still often appear in opinion letters. The *Fortress* decision has prompted us to ask ourselves whether the proposal to streamline opinion letters was ill-considered and whether in light of *Fortress* law firms would do well to state those assumptions and others expressly in their opinion letters. We have concluded, after much discussion, that the approach the Boston Bar proposed continues to be the right one.

Opinions can be challenged in many ways, and only with hindsight can one know which express qualification will be helpful in litigation. Thus, the logical alternative to streamlining is to throw the kitchen sink into opinion letters in an effort to assure that every possible limitation is expressly stated. The problem with that approach, however, is that it so overqualifies an opinion letter that it exposes the opinion giver to the risk that a court, concluding that the opinion letter must mean something, will disregard the qualifications. That, in fact, is what the trial judge did in *Dean Foods* when he refused to give effect to the "without investigation" limitation in the opinion letter in that case. And it is the position a judge took on a recent opinion panel (“What to Do? Has the Potential Client (Who Will Not Disclose) Intentionally Misrepresented?”, page A-16 of the WGLO Addendum to the Winter 2011 issue of this newsletter) and other judges took on earlier panels. Moreover, no recitation of limitations can be complete, and an opinion giver may well have hanged itself by negative implication if the limitation it needed is not stated. For example, many opinion letters do not recite an assumption that the board has complied with its fiduciary duties even though a failure of the board to fulfill those duties can result in the invalidation of a transaction and in at least one case resulted in the liability of an opinion giver.

Streamlining opinion letters also has the important benefit of focusing the opinion letter on the issues that matter. Rather than becoming buried in an overabundance of limitations, the streamlined form underscores exceptions and assumptions that are unique to the transaction by omitting those that are not. Thus, it prevents misunderstanding and assures that issues of importance receive the attention they deserve. The streamlined form, therefore, furthers the utility of an opinion letter as a device for communicating information the recipient has identified as important.

On the negligence point, the streamlined opinion, in its reliance on customary practice, covers the same territory as the Dechert opinion letter and therefore provides a court the same basis for granting a motion to dismiss as did the Dechert opinion letter.

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Despite our view that the *Fortress* decision does not provide a basis for abandoning the streamlined approach, we would be remiss in not noting that the form proposed by the Boston Bar contained an optional paragraph in which the opinion letter incorporates the ABA Legal Opinion Principles by reference.\(^5\) That paragraph was included at the suggestion of distinguished defense counsel, who pointed out that at the motion to dismiss stage a reference, directly or by incorporation, to customary practice and some of the issues it addresses is helpful in alerting a judge, who probably has never seen an opinion letter before, that the words used are words of art and cannot simply be accorded their dictionary meaning.

We continue to believe that including the paragraph is helpful, and we understand that many law firms, both within and outside Boston, now include it (or where they meet resistance attach the Principles – which after all are only two pages – to their opinion letter or include in their opinion letter some of the Principles’ provisions, such as the reference to customary practice). While not purporting to be comprehensive, the Principles do make clear that opinion letters should be read in light of customary practice and that the opinions expressed are based on unstated assumptions (including the assumptions as to genuineness of signatures and authenticity of documents, which it cites as examples) that are the same from opinion letter to opinion letter and hence need not be stated to be understood by opinion givers and opinion recipients and their counsel.\(^6\) The application of customary practice no doubt would be established at a later stage in the litigation process when expert witnesses are brought in, but making its application clear even before that point can help to avoid the cost of protracted litigation.

To sum up, for the reasons we have offered above, we do not believe that the *Fortress* decision should lead opinion givers to adopt a less streamlined form of opinion. We continue to believe, however, that inclusion in opinion letters of a cross reference to the Legal Opinion Principles could be helpful in obtaining dismissal at the motion to dismiss stage of an action challenging an opinion.

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**SEC v. Detling: Counsel’s Responsibilities for Material Omissions in Offering Circular**

On January 3, 2012, the SEC announced its filing of a civil injunctive action against Chalmer Detling, an attorney based in Atlanta. *SEC v. Detling*, No. 11-cv-04565-TWT (N.Dist. GA., Dec. 29, 2011). The action arose out of Detling’s participation in the 2006 offer and sale of approximately $3 million of industrial development revenue bonds (“Bonds”) issued by Raleigh County, West Virginia. Without admitting or denying the allegations in the complaint, Detling agreed to settle the Commission’s charges by (i) consenting to the entry of a final judgment, permanently enjoining him from violating Section 17(a) of the Securities Act of 1933, Section 10(b) of the Securities Exchange Act of 1934, and

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\(^5\) “[This opinion letter shall be interpreted in accordance with the Legal Opinion Principles issued by the Committee on Legal Opinions of the American Bar Association’s Section of Business Law as published in 53 Business Lawyer 831 (May 1998)]”, from a Streamlined Closing Opinion, 61 Bus. Law. 389, 397.

Rule 10b-5 thereunder; (ii) returning his $10,000 legal fee in disgorgement and paying prejudgment interest and a $25,000 civil penalty; and (iii) consenting to the entry of an administrative order suspending him from appearing or practicing before the Commission as an attorney, with the right to reapply after five years.

The Bonds were issued to permit a newly-organized purchaser, Aiken Continental, LLC (“Aiken Continental”), to acquire a casket manufacturing facility located in Raleigh County. Aiken Continental was organized, controlled, and managed by Charles Aiken (“Aiken”).

Detling acted as both Aiken Continental’s counsel in connection with the bond offering and Aiken’s personal counsel in connection with a pending criminal indictment of Aiken for financial fraud. At the time of the Bonds’ issuance, Detling was negotiating a plea agreement for Aiken. Neither Aiken nor Detling disclosed to the key participants in the Bond offering — including the underwriter, underwriter’s counsel, the trustee for the bondholders, bond counsel, or Raleigh County — the criminal proceedings pending against Aiken.

The underwriter required Aiken to contribute $200,000 to Aiken Continental as equity at the closing. Aiken borrowed the money from an entity partially owned by Detling. The loan required Aiken and Aiken Continental to repay the full $200,000 plus $100,000 in interest within eight months, and, if not repaid by then, the loan agreement required Aiken to convey to the lender a 20% equity interest in Aiken Continental as collateral. The terms of this loan were not disclosed in the Official Statement used to market the Bonds.

As alleged by the Commission, Detling “reviewed and provided certain information to be included in the Official Statement, and knew that Aiken’s indictment and the Loan were not disclosed in the Official Statement.” Complaint ¶ 7.

Detling delivered a closing opinion as counsel for Aiken Continental. The opinion letter included a no-litigation confirmation (“there is no action, suit or proceeding . . . pending or now threatened against or affecting [Aiken Continental]”) and negative assurance on the accuracy of the Official Statement (it “did not . . . contain any untrue statement of a material fact, and did not omit to state any material fact necessary . . . to make the statements therein not misleading”).

As part of his plea agreement, Aiken spent three months in jail and served an additional 90-day home detention. In no small part due to Aiken’s incarceration, the purchaser failed and the Bonds went into default.

In light of the criminal proceedings pending against Aiken and because Detling was negotiating a plea agreement for Aiken at the time he rendered his no-litigation confirmation, the Commission alleged that Detling was “severely reckless,” in giving that confirmation, Complaint ¶¶ 43, 45. Moreover, the Commission alleged that “Detling’s failure” to disclose the terms of the loan and the information concerning Aiken’s indictment made the Official Statement materially misleading, contrary to Detling’s negative assurance. Complaint ¶¶ 52, 54.

On the facts alleged, it is not surprising that the Commission accused Detling of aiding and abetting Aiken’s and Aiken Continental’s violations of Section 10(b) of the Exchange Act and Rule 10b-5 thereunder in the use of an Official Statement that omitted information on the criminal proceedings pending against Aiken and the terms of the loan he took out to satisfy his obligation to contribute equity to the purchaser. What does raise eyebrows is the Commission’s allegations that Detling himself violated Section 17(a)(2) of the Securities Act and Section 10(b) of the Exchange Act and Rule 10b-5 thereunder. In alleging Sections 17(a)(2) and 10(b) violations, the Commission asserted that Detling offered and sold
securities and obtained money (i.e., his $10,000 legal fee) “by means of untrue statements of material fact or [omissions] to state material facts necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading.” Complaint ¶ 68-72. Notwithstanding that Detling served only in the role of counsel to the borrower of the Bond proceeds, the Commission treated him as an offeror and seller of the Bonds for purposes of liability under Sections 17(a) and 10(b).

Nevertheless, this is now a well-worn path by the Commission when it concludes that counsel (or any other advisor) has materially participated in the preparation of a misleading offering circular or prospectus, that is, to treat the advisor as the “maker” of the untrue statement or material omission. This approach is given statutory validation by Section 8A of the Securities Act (added in 1990 by the Securities Enforcement Remedies and Penny Stock Reform Act), which permits the Commission to enter cease-and-desist orders against an issuer “and any other person that is, was, or would be a cause of the violation, due to an act or omission the person knew or should have known would contribute to such violation, . . . .” (Emphasis added.) See, e.g., In the Matter of Don S. Hershman, Release No. 33-9180 (February 2, 2011), 2011 WL 323849 (by reason of counsel’s knowledge of material facts not disclosed in private placement memoranda and his participation in the preparation thereof, counsel “was a cause” of the issuer’s violations of Sections 17(a)(2) and 17(a)(3) of the Securities Act). This position was given judicial validation by the D.C. Court of Appeals in Weiss v. SEC, 468 F.3d 849 (2006), in which the Commission concluded, and the D.C. Court of Appeals agreed, that bond counsel was liable for violations of Sections 17(a)(2) and 17(a)(3) (which do not require the Commission to establish scienter) for not having followed reasonable due diligence in rendering an unqualified tax opinion and for the consequent failure of the Official Statement to disclose the issuer’s failure to meet the tests for qualifying the interest on the bonds as tax-exempt for federal income purposes. As was noted by the Commission in its administrative decision issuing the cease-and-desist order in Weiss, “[c]ourts have held that a person may be primarily liable under Exchange Act Section 10(b) and Rule 10b-5 for directly or indirectly making an untrue statement of fact if that person creates a false statement that reaches investors.” 2005 WL 3273381 at *18 n. 32. See also the SEC’s Exchange Act § 21(a) Report, “Attorney’s Conduct in Issuing an Opinion Letter Without Conducting an Inquiry of Underlying Facts Failed to Comport With Applicable Standards of Conduct,” Release No. 34-17831 (June 1, 1981), 1981 WL 38243.

Detling and these authorities once again point up the risks in rendering no-litigation confirmations and negative assurance on a disclosure document. Providing negative assurance is particularly challenging because such assurance, as noted by the D.C. Court of Appeals in Weiss, 468 F.3d 849, 855, “adopts” the offering circular as counsel’s offspring. Given that Commission proceedings against counsel under Securities Act § 17(a)(2) and (3) need only establish negligence on the part of counsel, the Commission’s Section 17 proceedings against lawyers serve as a reminder that there is no more challenging “opinion” for transaction counsel to give than providing negative assurance on disclosure documents.

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**Editor’s Note:** For an analysis of the recent New York Court of Appeals’ interpretation of New York’s Martin Act and its implication for securities litigation against lawyers, including based on delivery of a third-party legal opinion, see John Villa’s and John Williams’ case note on *Assured Guaranty (UK) Ltd. v. J.P. Mortgage Investment Management Inc.*, included as an Addendum to this issue of the newsletter.

### Dodd-Frank Uncertainties

The Dodd-Frank Act and its implementing regulations can have broad reach for certain transactions in which legal opinions are given, including those involving derivatives, such as swaps and securities-based swaps, and securitizations. This broad reach and uncertainty of application of certain of the regulations can raise issues for opinion preparers in these transactions.

An article by Michael S. Sackheim of Sidley Austin LLP entitled “Professional Responsibility Issues for Swaps Lawyers Under Dodd-Frank” in volume 44 (page 253) of *The Review of Securities & Commodities Regulation* (Nov. 23, 2011) discusses issues raised generally by the breadth and vagueness of the Commodity Futures Trading Commission’s proposed new anti-evasion rules and interpretations, as well as by its adopted whistleblower rules. Under these anti-evasion rules, a transaction structured to avoid Dodd-Frank derivatives regulation could be recharacterized after the fact as evasive and subject to that regulation.

Similarly, the SEC has proposed Rule 127B under the Securities Act to implement the Dodd-Frank Act’s prohibition against conflict of interests in certain securitization transactions. The ABA Business Law Section’s Federal Regulation of Securities Committee and Securitization and Structured Finance Committee have submitted a comment letter to the SEC dated February 13, 2012 which states, under the caption “Costs Arising from the Proposed Rule,” as follows:

“A further consequence (and cost) of the Proposed Rule is its impact on opinion letter practice, especially given the format of the Proposal and its application to “indirect benefits.” At the closing of securitization transactions, counsel for securitization participants are often requested to give opinion letters to other participants and, in rated transactions, to rating agencies. These opinion letters often cover the validity and enforceability of the transaction documents, the receipt of any required governmental approvals and non-contravention of applicable laws. Because new Section 27B of the 1933 Act and the Proposed Rule state that a securitization participant “shall not . . . engage in any transaction that would involve or result in any material conflict of interest,” these provisions must be considered in any proposed noncontravention of law opinion. However, these conflict of interest provisions may be triggered by separate transactions entered into by the securitization participant (including an affiliate) that are not part of the securitization transaction on which outside counsel is being asked to advise and outside counsel may be completely unaware of those unrelated transactions. In addition to the interpretive issues arising out of the format of the Proposed Rule and the uncertain effect of the Commentary, as a practical matter, it will not be possible for outside counsel to identify other transactions which he or she has not worked on and which may implicate the Proposed Rule. It would certainly not be appropriate for outside counsel to rely on an officer’s certificate of the securitization participant in this situation,

* This excerpt from the letter is provided without comment for information purposes.
because the officer would have to reach a legal conclusion as to the interpretation and application of the conflict of interest rules. Accordingly, we do not believe that it is possible for outside counsel to provide a non-contravention of law opinion with respect to Section 27B and the Proposed Rule in an asset-backed security transaction that is subject to Section 27B.”

Report on Opinions to Federal Agencies

The Committee on Legal Opinions in Real Estate Transactions of the ABA’s Section of Real Property, Trust and Estate Law (“RPTE”) continues to examine the form of legal opinions required by certain federal agencies. The Legal Opinions Committee has been participating in these efforts. Last year, the RPTE Section’s Subcommittee on Opinions to Federal Agencies, which is chaired by the undersigned, completed its review and comment on the form of opinion required by HUD in FHA-insured multifamily mortgage loans. The revised form, which became effective as of September 1, 2011, reflects improvements suggested by the Subcommittee and others, although it still has requirements that do not conform with customary practice and the Subcommittee has not been successful in convincing HUD to change its policy that its form cannot be varied.

The Subcommittee is now examining the opinion forms of Fannie Mae and Freddie Mac for multifamily and assisted living mortgage loans. Although both Fannie and Freddie permit more changes than HUD, most seller/servicer counsel responsible for closing loans expect the forms to be followed as closely as possible, even though the forms do not conform in all respects with customary opinion practice. As an example, one of the Fannie Mae forms requires an opinion as to the legal capacity of individuals executing the loan documents, which is customarily assumed (either implicitly or explicitly) by opinion givers. The Subcommittee will sponsor a program on Fannie Mae and Freddie Mac opinions at the RPTE Section’s Spring Symposia in New York on May 3, 2012.

The opinion policies and forms of HUD, Fannie Mae and Freddie Mac can be found on the Subcommittee’s website which can be accessed here.7

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Legal Opinion Reports

English Report on Legal Opinions

On November 17, 2011 The City of London Law Society ("CLLS") issued a "Guide to the questions to be addressed when providing opinion letters on English law in financial transactions" (the "CLLS Report"). The fourteen page report is posted on the Legal Opinion Resource Center on the Committee’s website. Literature on legal opinions outside the U.S. is fairly rare, and so the CLLS Report

7 http://apps.americanbar.org/dch/committee.cfm?com=RP902755
is an important resource. Aside from an academic interest regarding English domestic opinion practice, the CLLS reminds us that there can be perils in cross-border opinion practice.

As the CLLS Report observes, opinions in the United Kingdom are not under "U.K. law" or "British law". Because of the nature of the union, English law is distinct from the laws of Northern Ireland or the laws of Scotland, and now even Wales may be different depending on particular legislation by the Welsh Assembly. The CLLS Report only addresses legal opinions under English law.

The CLLS is one of the largest local professional bodies for solicitors and law firms and is focused on those solicitors practicing in the financial sector. There are 17,000 solicitors practicing in the "Square Mile" (the financial district in London), or 15% of all solicitors in England and Wales. Membership of the CLLS is primarily by law firm, rather than individual membership. The CLLS frequently comments on a wide range of topics, particularly on proposed regulations related to the financial sector, and much of its work is conducted through 17 committees. The report on opinions was produced by the Financial Law Committee, through a fifteen member working party.

The CLLS should not be confused with the Law Society of England and Wales, a statutory body that represents all English solicitors, and also regulates the profession in England and Wales. The Solicitors Regulation Authority (the "SRA"), under the Law Society, deals with all regulatory and disciplinary matters. The SRA provides a regulatory framework that governs solicitors including its Handbook and Code of Conduct. The CLLS in its report offers its interpretation of such regulation in relation to opinions, but as a group of practitioners, not as a regulator.

The report covers legal opinions for transactions, principally third-party opinions. The U.S. practitioner will find in the CLLS Report certain familiar concepts, such as the "Golden Rule": "before requesting another law firm to provide an opinion letter or to address an issue in an opinion letter, whether, if the roles were reversed, the requesting law firm would itself be prepared (and permitted under professional conduct rules) to give the opinion requested or address the relevant issue in any particular form or at all." The CLLS Report, however, focuses our attention on the potential asymmetry of the Golden Rule in a cross-border context: recipient's counsel may request an opinion typical in its jurisdiction that is considered unreasonable by the opinion giver in its jurisdiction.

Generally, the reluctance or refusal to give an opinion may arise for three reasons in a cross-border context. First, the matter may not be capable of opinion in that jurisdiction as a matter of substantive law. The CLLS cites the old chestnut that "good standing" is not recognised as a term of art under English corporate law, and it has no relevance or meaning.

The second hurdle may be the professional conduct or ethical rules that govern practitioners in the jurisdiction of the opinion giver. The first part of the CLLS Report sets out concerns under the SRA's Handbook and Code of Conduct that came into force in October 2011. Although the new Code as it relates to opinions is remarkably similar to the earlier Code, the CLLS Report recites potential issues on whether giving an opinion to a third party is in the best interests of the client, potential conflicts of interest and the risk of disclosure of confidential client information. The section of the CLLS Report devoted to these issues, however, does not suggest that English lawyers cannot give third-party opinions, only that great care (including consideration of the opinion's scope) is necessary.

The third reason is simply a reluctance, because of time, effort, cost, liability, reputation or other reasons, to give an opinion to a non-client. Such reluctance may also relate to how lawyers view their role in commercial transactions in that jurisdiction. This might be referred to as "market practice." Certainly much of the U.S. bar would prefer to avoid giving opinions to the other side, but opinion recipients, frequently financial institutions such as lenders, over the years have taken U.S. practice to a
place where third-party legal opinions are common place. Much of the CLLS Reports seems to be directed to support the traditional English position that most opinions are to be avoided, third-party opinions in particular, and third party enforceability opinions simply should be off limits.

The CLLS Report is organized, after an introduction, by answering twelve questions. The answers to those twelve questions take a very much narrower approach than in the U.S., with a clear preference that opinions should be given to clients, not third parties. In certain circumstances, such as because of cost, a third-party opinion on status, power and authorization might be appropriate, but generally enforceability opinions should not be given to third parties because it is not in the interests of a client to disclose deficiencies and risks. The CLLS also recommends that an opinion giver should consider a disclaimer of a duty of care to a third party recipient, except for matters expressly covered. On opinion substance, there are recommendations to avoid "no litigation" and "no breach or default" opinions and a caution that any officer certificate should not be the basis of an opinion (the certificate should be addressed directly to the recipient).

The CLLS Report reflects the traditional view of English solicitors, a view that remains a feature of debt financing transactions involving English law in the U.K. Lenders' counsel rather than borrower’s counsel typically provide an enforceability opinion for their clients on documents drafted by lender's counsel, unlike in the U.S. But since the approach appears to be grounded more on market practice than on the technical capability to opine or professional conduct rules, there must be some question whether the "market" is not moving in a direction familiar to U.S. practitioners. The CLLS Report, for example, recognizes that third-party opinions, including enforceability opinions, already are typical in securities offerings, and there is some evidence that in finance markets there also has been some change in the last few years in the same direction. These market developments, driven by global financial institutions as opinion recipients, undercut arguments as to potential concerns under professional conduct rules.

The CLLS Report deserves to be read carefully, and for the American practitioner, it may be worth remembering George Bernard Shaw’s observation: "England and America are countries divided by a common language".

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The Florida Legal Opinions Report

On December 3, 2011, the "Report on Third-Party Legal Opinion Customary Practice in Florida" of the Legal Opinion Standards Committee of The Florida Bar Business Law Section and the Legal Opinions Committee of The Florida Bar Real Property, Probate and Trust Law Section was approved by the Executive Council of each Section. The Report is intended to provide guidance to Florida attorneys who render third-party legal opinions, and to both Florida and out-of-state attorneys who, on behalf of their clients, receive third-party legal opinions from Florida attorneys, as to the nature and meaning of the content of legal opinions and to the diligence recommended to render such opinions. The Report is also intended to be a practice guide comprehensively covering many aspects of third-party legal opinion practice. More than 40 lawyers from around the state of Florida participated in the drafting of the Report.

The Report: (i) includes coverage of opinions that are "building block" opinions to the enforceability of a contract, including sections on opinions on entity status and organization, authorization to transact business in Florida, entity power, authorization of the transaction, execution and delivery, no violation and no breach or default and no required governmental consents or approvals; (ii) describes the
meaning of the remedies opinion and lays out the qualifications to the remedies opinion that are appropriate to include in opinions rendered by Florida counsel under Florida customary practice; (iii) sets forth guidance about giving a no-litigation confirmation; (iv) addresses opinions on particular substantive areas of commercial practice, including opinions with respect to issuances of securities, opinions with respect to collateral under the Uniform Commercial Code and opinions with respect to real estate transactions; (v) provides guidance on delivering opinions under Florida law regarding usury and choice of law; and (vi) includes guidance on matters that are common to all third-party legal opinions rendered by Florida counsel and on matters to consider when acting as local counsel.

The Report is accompanied by four illustrative opinion letter forms: (i) a form of opinion letter to be used in a commercial lending transaction; (ii) a form of opinion letter to be used in a lending transaction secured by real estate; (iii) a form of opinion letter to be used in connection with a share issuance by a Florida corporation; and (iv) a form of opinion letter to be used in a loan transaction when Florida counsel is acting as local counsel. The Report also includes an illustrative form of certificate to counsel that can be used with each of the forms of opinion letters. These illustrative forms are annotated with guidance and with references to sections of the Report where further information about the Florida customary practice regarding such opinion is described.

The Report, along with unannotated editable MS Word versions of the illustrative forms that accompany the Report, is available for download on the website of The Florida Bar Business Law Section (click here) and the website of The Florida Bar Real Property, Probate and Trust Law Section.

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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 (click here): 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.

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9 http://www.americanbar.org/groups/business_law.html
Next Newsletter

We expect the next newsletter to be circulated in July 2012. Please forward cases, news and items of interest to Stan Keller (stanley.keller@edwardswildman.com) or Jim Fotenos (jfotenos@greeneradovsky.com).
ADDENDUM
Analytically, securities law claims against lawyers can be divided primarily on the basis of whether the security in question was traded on a national exchange and whether the case is brought as a class action, i.e., a case involving 50 or more plaintiffs whether or not denominated as a class action. If the security was traded on an exchange, any class-style claim alleging fraud in connection with that security is, pursuant to the Securities Litigation Uniform Standards Act (“SLUSA”), 15 U.S.C. § 78bb (amending Exchange Act § 28), required to be litigated in federal court and under federal law, Exchange Act § 28(f)(1)–(2). Practically, these on-an-exchange class plaintiffs are limited to asserting claims for violation of the federal securities laws, § 28(f)(1). That means that investors suing as a class involving exchange-traded securities are not permitted to bring suit under state securities laws (known as Blue Sky laws) or for other state law statutory or common law claims such as negligent misrepresentation. Instead, they must proceed under the federal securities laws, usually Section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78j(b), and Rule 10b-5 promulgated thereunder, 17 C.F.R. § 240.10b-5. (SLUSA does not apply to exclusively derivative actions brought by one or more shareholders on behalf of a corporation. Exchange Act § 28(f)(5)(C).)

Because class-style claims involving securities typically must rely on alleged misrepresentations in publicly-disseminated statements, liability for lawyers under the federal securities laws has been curtailed significantly by the Second Circuit’s decision in Pacific Investment Management Co. v. Mayer Brown LLP, 603 F.3d 144 (2d Cir. 2010) and the Supreme Court’s decision in Janus Capital Group, Inc. v. First Derivative Traders, 131 S. Ct. 2296 (2011). In substance, those cases hold that an investor cannot recover from a lawyer for the securities issuer or seller unless the alleged false statements on which the investor relied were attributed to the lawyer at the time they were made. This is known as the “attribution rule”. A single investor (i.e. one not proceeding through a class action) or a group of fewer than 50 could theoretically bring a claim under state law in federal court (if there was a basis for federal jurisdiction) or in state court against a non-speaking lawyer for fraud in connection with a publicly traded security. As a practical matter, however, such claims are in most instances not economically viable as the investor did not suffer sufficient loss to warrant mounting a separate suit. Class actions clearly change the economics of suit. If our hypothetical solo investor or small group of investors were to file a separate suit asserting state law causes of action, however, they are probably not barred by the “attribution” rule from Pacific Management and Janus as most states have not adopted that “attribution rule” gloss to the interpretation of their respective securities laws.

For securities not traded on an exchange, the analysis is altogether different. SLUSA in general does not require those claims to proceed in federal court (although there are exceptions), so claims could be brought in federal or state court asserting state statutory and common law causes of action if such claims exist under the state laws. In New York, the most important jurisdiction for securities litigation, such claims have in the past been severely limited by the interplay between New York’s “blue sky” law, which is called the Martin Act (N.Y. Gen. Bus. Law Art. 23-A), and all other state law claims. In substance, the historical interpretation of the Martin Act is that it preempted and thus precluded a private plaintiff bringing a claim with respect to the sale of securities under New York law from proceeding unless the claim alleged fraud or
aiding and abetting fraud. See, e.g., Nanopierce Techs., Inc. v. Southridge Capital Management LLC, No. 02 Civ. 0767, 2003 WL 22052894, at *4 (S.D.N.Y. Sept. 2, 2003) (noting the allowance of “common law fraud claims” because the additional element of scienter distinguishes the cases from claims under the Martin Act). Of course, plaintiffs bringing such claims faced—and still face—the difficult prospect of pleading and then proving scienter or, in the case of an aiding and abetting claim, the even higher standard of actual knowledge. Preemption under the Martin Act was not, however, a common ground for dismissing such fraud-based claims.

The situation was different for claims not predicated upon fraud. Prior to Assured Guaranty (UK), Ltd. v. J.P. Morgan Investment Management, Inc., No. 227, __ N.Y.3d __, 2011 WL 6338898 (N.Y. Dec. 20, 2011), many courts had ruled that nonfraud common-law claims involving securities were preempted and barred by the Martin Act. See, e.g., Stephenson v. Citgo Group Ltd., 700 F. Supp. 2d 599, 612–13 (S.D.N.Y. 2010); Marcus v. Frome, 329 F. Supp. 2d 464, 475–76 (S.D.N.Y. 2004). The theory of these decisions was that the New York Attorney General had sole authority to enforce the Martin Act and it would be illogical for private litigants to be entitled to file their own separate suits for violations of the Martin Act. This provided significant protection to non-speaking lawyers in securities cases even if those cases could proceed in state court on state law causes of action. Rejecting the reasoning of those decisions, on December 20, 2011, the New York Court of Appeals indicated in Assured Guaranty, 2011 WL 6338898, that nonfraud claims are not preempted by the Martin Act unless the claim “is predicated solely on a violation of the Martin Act or its implementing regulations and would not exist but for the statute.” Id., slip op. at 10. In what situations will Assured Guaranty impact the defense of lawyers by undermining the preemption defense?

There are several securities-related paradigms where Martin Act preemption would in the past have been a powerful defense for outside professionals. One example involved opinions delivered in connection with private securities offerings. A disgruntled investor could attempt to bring a claim for negligent misrepresentation against the lawyer on the ground that the opinion contained misrepresentations or omissions. The investor might claim that the lawyers’ statement in a negative assurance letter that “nothing came to [their] attention that caused [them] to believe” that the offering documents included misrepresentations or omissions was a negligent misrepresentation. See, e.g., Negative Assurances in Securities Offerings (2008 Revision): Report of the Subcommittee on Securities Law Opinions, Committee on Federal Regulation of Securities, ABA Section of Business Law, 64 Bus. Lawyer 395, 408 (Feb. 2009) (model opinion). Under the previous Martin Act-preclusion caselaw, there was a powerful argument that such a claim would be foreclosed.10 After Assured Guaranty, however, it is far less likely that preemption based on the Martin Act would be an effective defense.

A second, related, illustration where the Martin Act would have been a strong defense is a claim based on a lawyer’s conduct in due diligence. In a merger or acquisition gone awry, one side to the transaction may claim that statements made by outside professionals working for the other side amounted to misrepresentations. Before Assured Guaranty, Martin Act preemption could have been deployed to defeat the claim to the extent it was based on a theory of negligent

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10 To be sure, such a claim would be subject to other defenses as well, such as whether the investor had the requisite relationship with the lawyer “so close to approach that of privity” that would give rise to a duty of care. Prudential Ins. Co. of Am. v. Dewey, Ballantine, Bushby, Palmer & Wood, 80 N.Y.2d 377, 382 (N.Y. 1992). And, even if the relationship were sufficiently close, there are further questions of whether the lawyer would be in violation of its duties, or whether the opinion letter actually contained misrepresentations. See Fortress Credit Corp. v. Dechert LLP, 89 A.D.3d 615, 616-617 (App. Div. – 1st Dep’t 2011).
misrepresentation (as opposed to fraud). Now, that argument will not likely fare as well. Like with opinion letters, however, there are other good defenses post-Assured Guaranty which could focus on the relationship between the plaintiff and the defendant law firm. See, e.g., Thomas H. Lee Equity Fund V, LP v. Grant Thornton LLP, 586 F. Supp. 2d 119, 130 (S.D.N.Y. 2008) (involving an accounting firm). Additionally, an outside professional could argue that any claim for negligent misrepresentation based on pre-contractual representations runs afoul of the integration clauses found in most merger or acquisition agreements. See ATSI Communications, Inc. v. Shaar Fund, Ltd., 493 F.3d 87, 107–08 (2d Cir. 2007).

Although not considered a standard type of securities litigation, a third paradigm where Martin Act preemption was important was a suit brought against an outside lawyer or other professional by a court-appointed trustee after a company is brought into bankruptcy because of misconduct by its managers. Because the trustee inherits the claims that could have been brought by the company, the trustee may bring claims based on the lawyer’s attorney-client relationship with the company—such as professional malpractice and breach of fiduciary duty—in addition to claims for negligent misrepresentation similar to the claims that could be brought by plaintiffs’ seeking to base liability on opinion letters or communications in due diligence. To the extent that the alleged malpractice or breach of fiduciary duties could be tied to securities transactions, Martin Act preemption had served as a defense to these claims in the past. Once again, its viability as a defense has been adversely affected. Even after Assured Guaranty, however, the trustee’s claims would still be subject to a muscular defense under New York law—in pari delicto—which New York courts frequently apply at the pleadings stage. See, e.g., Kirschner v. KPMG LLP, 15 N.Y.3d 446, 514 n.3 (2010).

In summary, Assured Guaranty is a very important decision in the field of securities litigation governed by New York law. While we have discussed the ruling in this note exclusively with respect to its impact on litigation against lawyers, it will have a significant effect in many other situations where actual fraud cannot be alleged or proved.

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