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Addendum, WGLO Spring 2012 Seminar ............................................................. A-1
Legal opinion practice is at a crossroads. And that crossroads comes as the 40th anniversary of the seminal article of James J. Fuld on legal opinions approaches. That article, “Legal Opinions in Business Transactions: An Attempt to Bring Some Order Out of Some Chaos” (28 Bus. Law. 915 (1973)), set us on the course of dealing with legal opinions as a learned discipline to be approached with good sense, practicality and, above all, professionalism. From it came the original 1979 TriBar Report that was followed and replaced by the 1998 TriBar Report, both of which set us on the “easier path,” grounded in a belief in and respect for customary practice (which Jim Fuld advocated for in 1973 as “generally accepted principles” of legal opinions). This approach has been codified in this Committee’s relatively concise Legal Opinion Principles and in the even shorter Statement on the Role of Customary Practice in the Preparation and Understanding of Third-Party Legal Opinions, which has been subscribed to by many bar groups, including this Committee.

However, we are experiencing a crisis in confidence in the approach first laid out by Jim Fuld and carried forward by his successors. This crisis in confidence has many causes, including a trend away from practicality to literalism, an increasing concern over the risks of liability (even though the number of situations where lawyers have been liable on opinions, while greater than before, is still relatively small), over-analysis that inevitably comes from the proliferation of reports, and the growing involvement of bar groups in disparate areas of practice with different traditions. This has led to an expansion of assumptions, qualifications and limitations (sometimes without regard to whether they are necessary), and a trend toward making express what otherwise is implicit (at times characterized by the statement, “if you mean it, say it”). This rejection of the “easier path” based on reliance on customary practice is demonstrated well by the following excerpt from the recent Real Estate Finance Opinion Report (to be sure the approach taken in that report is not limited to real estate practitioners and not all real estate practitioners subscribe to that approach):

“[U]ntil customary practice that has established accepted and essential normative conduct in opinion practice has become so ingrained and judicially accepted that no arguable doubt can be cast on the effect of omission of an assumption or limitation, or unspoken limitation of diligence required to render an opinion, there is risk inherent—at least procedurally—in relying on customary practice to ‘fill in the blanks.’ [Footnote omitted.]

Real estate finance lawyers tend to use lengthier opinion letters than are used by many of their counterparts in other business transactions. This may result in part from the nature of the type of transaction, but it also may result in part from viewing matters through a different lens than other business lawyers, and from the nuanced legal issues that attend a sophisticated real estate secured financing transaction.”

For comparison purposes, one need only look to the Boston Streamlined Form of Closing Opinion (61 Bus. Law. 389 (2005)) that I co-authored with Don Glazer and which is based upon the ABA Legal Opinion Principles.

Opinion practitioners have a decision to make on the future course of opinion practice. Obviously, the choice is not just between two approaches on the boundaries since there are many alternatives in between, as we have seen develop in what might be called the “modified easier path.”
However, there has to be a philosophical underpinning to the approach taken to prevailing opinion practice if we are to operate on a common base of understanding that is critical to sensible and efficient opinion practice. This Committee, along with the TriBar Opinion Committee, has consistently been in the forefront of promoting opinion practice based on reliance on customary practice, as the ABA’s Legal Opinion Principles evidences. Our joint project with WGLO on identifying common opinion practices can be a useful vehicle for advancing development of sound and acceptable opinion practices. In addition, the theme of this Fall’s WGLO Seminar will be FULD@40, an exploration of the evolution and future of opinion practice, and this will be a wonderful opportunity for thoughtful consideration, discussion and a probing of these issues.

There is an opportunity for you to be involved in this process of exploring the bases for opinion practice and for you to make your views known on the path that should be followed as we approach the crossroads. I look forward to seeing and hearing from many of you at the Annual Meeting where we can continue this discussion.

- Stanley Keller
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**Future Meetings**

*ABA Business Law Section Annual Meeting*
*Chicago Marriott Downtown*
*Chicago, Illinois*
*August 2-7, 2012*

**Committee on Legal Opinions**

Sunday, August 5, 2012

- Committee Meeting: 9:30 a.m. — 11:00 a.m.
  Salon III, 7th Floor

- Program: Issues Confronted by Local Counsel Opinions: 2:30 — 4:30 p.m.
  Clark Room, 4th Floor

- Reception: 5:30 p.m.— 7:00 p.m.
  Terrace, 9th Floor (sponsored by Edwards Wildman Palmer LLP (Chicago))
Professional Responsibility Committee

Saturday, August 4, 2012

- Program: Embracing Conflicts: Ethics and the Lawyer for the Deal:
  10:30 a.m. — 12:30 p.m.
  Chicago Ballroom G/H, 5th Floor

Sunday, August 5, 2012

- Committee Meeting: 12:30 p.m. — 2:30 p.m.
  Chicago Ballroom C, 5th Floor

Law & Accounting Committee

Sunday, August 5, 2012

- Committee Meeting: 8:00 a.m. — 9:30 a.m.
  Purdue/Wisconsin Room, 6th Floor

Committee on Audit Responses

Sunday, August 5, 2012

- Committee Meeting: 1:30 p.m. — 2:30 p.m.
  Chicago Ballroom F, 5th Floor

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

Sunday, August 5, 2012

- Subcommittee Meeting: 4:30 p.m. — 5:30 p.m.
  Chicago Ballroom C, 5th Floor

Working Group on Legal Opinions
New York, New York
October 29-30, 2012

ABA Business Law Section Fall Meeting
The Ritz-Carlton Hotel
Washington, D.C.
November 16-17, 2012

ABA Business Law Section Spring Meeting
Hilton Hotel
Washington, D.C.
April 4-6, 2013
Spring Meeting of the ABA Business Law Section

The Business Section Law held its Spring Meeting in Las Vegas March 22-24, 2012. Following are reports on meetings of interest to members of the Committee.

Committee on Legal Opinions

The Committee met on March 23, 2012. Following is a summary of the substantive topics taken up by the Committee.


Dick Howe of Sullivan and Cromwell LLP, New York, reported that, in light of the publication on October 14, 2011 by the SEC’s Division of Corporation Finance of Staff Legal Bulletin No. 19 (“Legality and Tax Opinions in Registered Offerings”) (“SLB 19”), an update to the 2004 report is being prepared and should be available for review at the ABA’s annual meeting to be held in Chicago August 2-7, 2012. Once again, the updated report will be a joint undertaking of the Committee and the Subcommittee on Securities Law Opinions.

(A Committee program on SLB 19 was presented the following day, reported on below.)

Survey of Law Firm Opinion Practices. John Power reported that the summary of the Committee’s survey of law firm opinion practices is still under preparation, but that a draft should be ready for review at the Chicago annual meeting. Some 250 firms responded to the survey, one-third from firms of 50 or fewer lawyers.


The Guide reflects the traditional English Bar’s aversion to the rendering of remedies opinions to lenders by borrower’s counsel, and is now being cited by some UK firms as grounds not to give a remedies opinion on behalf of borrowers to lenders. Counsel in other Commonwealth jurisdictions are likewise citing the Guide in resisting the giving of remedies opinions on behalf of borrowers. The Guide is focused on traditional domestic English financing transactions. Different approaches may be followed in cross-border financing and securities transactions.

Cross-Border Project. Ettore Santucci, Goodwin Procter LLP, Boston, the reporter for the Committee’s outbound cross-border legal opinions report, gave an update on the status of the report, now

1 The URL is http://apps.americanbar.org/buslaw/tribar/.
in its fourth year of gestation. Ettore anticipates the next draft will be exposed “when it is ready,” hopefully before year-end. Progress in completing the report is being accelerated now that the difficult issues of choice-of-law, choice-of-forum, and service of process have been addressed and resolved for purposes of the report. Remaining issues to be addressed include qualification to do business in the U.S. and sovereign immunity. The working group also is considering covering no breach or default opinions because agreements governed by foreign law, whether governing the transaction agreement or the other agreements, can present interpretive difficulties and a plain English approach to other agreements does not work well when foreign law applies. A spirited discussion ensued.

Ettore concluded by describing the difficulties the working group is having in applying the “golden rule” to cross-border opinion practice. The golden rule, as articulated by the Committee’s “Guidelines for the Preparation of Closing Opinions” (¶ 3.1), states that an opinion giver should not be asked to give an opinion that counsel for the opinion recipient would not give, and that an opinion giver should not refuse to give an opinion that lawyers experienced in the matters under consideration would commonly give, in comparable situations. In cross-border practice, however, opinions that are “commonly given in comparable situations” may vary by jurisdiction, making application of the golden rule impracticable. There was a lively discussion of what ground rules should apply in the cross-border context.

**Joint Project on Common Opinion Practices.** Steve Weise, Proskauer Rose LLP, Los Angeles, reported on the status of the joint project undertaken by the Committee with the Working Group on Legal Opinions in preparing a description of common opinion practices. A draft is still being prepared. Steve is hopeful that a draft will be available for review by the Committee at the Chicago annual meeting.

Separately, Steve brought to the Committee’s attention the project by the American Law Institute to update the Restatement of the Law of Torts, which is being produced piecemeal. Recently the section on economic harm has been circulated (Restatement (Third), Torts: Liability for Economic Harm), which includes reference to the economic harm that may be created by legal opinions. The draft is at variance with customary opinion practice, and therefore will be the subject of a comment letter by the Committee.

**TriBar.** TriBar addressed choice-of-law issues in its report on the remedies opinion (“Special Report of the TriBar Opinion Committee: The Remedies Opinion — Deciding When to Include Exceptions and Assumptions,” 59 Bus. Law. 1483, 1495-1498 (2004)) (“Remedies Opinion Report”). Choice-of-law and choice-of-forum issues have received intense scrutiny in connection with the Committee’s cross-border project, which scrutiny has prompted increased appreciation of the difficulties involved in giving choice-of-law opinions. In light of this review, TriBar is working on a supplement to the Remedies Opinion Report that will address choice-of-law opinions.

**Annotated Real Estate Finance Opinion.** Pete Ezell of Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Nashville, participating by conference telephone, reported on the ongoing efforts by the Legal Opinions in Real Estate Transactions Committee of the ABA’s Real Property, Trusts and Estates Section, the American College of Real Estate Lawyers (ACREL), and the American College of Mortgage Attorneys to develop a sample real estate finance opinion. A draft has been prepared by the working group and is being circulated for review and comment.

**Opinion Requirements of Governmental Agencies.** Charles Menges of McGuireWoods, LLP, Richmond, Virginia, the chair of the Subcommittee on Opinions to Federal Agencies of the Legal Opinions in Real Estate Transactions Committee of the ABA’s Real Property, Trusts and Estate Section, which is reviewing the opinion requirements of governmental agencies, principally in real estate financing transactions, gave his report. HUD’s updated requirements on legal opinions it requires has been posted
on the Subcommittee’s website, accessible here.² While the updated HUD form of opinion is an improvement over the old form, it remains non-negotiable. Charles’ committee is now focusing on working with Fannie Mae and Freddie Mac on their required forms of closing opinions.

California VC Sample Opinion. Rick Frasch, co-chair of the Legal Opinions Committee of the Business Law Section of the California State Bar, reported on this Committee’s development of a sample venture capital financing closing opinion. A discussion draft has been prepared and circulated for comment. The comment period ends April 19, 2012, after which the Committee hopes to complete the draft and then publish it in The Business Lawyer. The form of sample opinion builds upon the California Committee’s Legal Opinion Committee’s VC report (“Report on Selected Legal Opinion Issues in Venture Capital Financing Transactions”), published in 65 Bus. Law. 161 (2009), and the sample closing opinion for a borrower in an unsecured lending transaction prepared by the California Legal Opinions Committee in 2010. The draft of the VC opinion can be obtained from Rick at rnfrasch@gmail.com.

Enforceability of Arbitration Agreements. There followed a lively debate between Don Glazer and Steve Weise on taking an exception on the enforceability of provisions to arbitrate disputes arising under an agreement. While the U.S. Supreme Court, in AT&T Mobility LLC v. Concepcion, 131 S.Ct. 1740 (2011), affirmed the enforceability of a provision requiring individual as opposed to class arbitration, lower courts continue to chafe at the implications of the Supreme Court’s ruling. Those courts include the Second Circuit in its decision in In re American Express Merchants’ Litigation, 667 F.3d 204 (2d Cir. February 1, 2012), which invalidated an arbitration provision requiring class arbitration on the grounds that it would preclude the plaintiff from pursuing an antitrust action against Amex. Don argued for routinely taking an exception for arbitration provisions (and covering them only upon specific request and after consultation with a firm expert on arbitration), while Steve, in light of AT&T Mobility and the Supreme Court’s 9-0 per curiam decision in Marmet Health Care Center, Inc. v. Brown, 132 S.Ct. 1201 (February 21, 2012), rejecting a West Virginia Supreme Court decision questioning AT&T Mobility, argued that taking an exception to the overall enforceability of an arbitration provision should generally not be necessary.

For Steve’s note on AT&T Mobility, see the Summer 2011 issue of the newsletter (page 15).

Fortress Decision. Stan Keller closed the meeting by referring the Committee to his and Don Glazer’s discussion of the opinion practice implications of the Fortress decision (Fortress Credit Corp. v. Dechert LLP, 89 A.D.3d 615, 934 N.Y.S. 2d 119, 2011 WL 5922969), appearing in the Spring 2012 issue of the newsletter (pages 8-10).

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  jfotenos@greeneradovsky.com

² The URL is http://apps.americanbar.org/dch/committee.cfm?com=RP213000.
Subcommittee on Securities Law Opinions, Committee on Federal Regulation of Securities

The Subcommittee met on March 23, 2012. The principal topic of the meeting was a review of a draft update of the 2004 report on “Legal Opinions in SEC Filings” (published in 59 Bus. Law. 1505 (2004)). An update of the 2004 report is timely because of the recent issuance of the SEC Division of Corporation Finance Staff’s Legal Bulletin No. 19 providing the staff’s views on legality and tax opinions in registered securities offerings. The draft update reflects SLB No. 19, as well as other developments in opinion practice since issuance of the 2004 report, including those arising from Securities Offering Reform, which streamlined the registration process and expanded the availability of shelf registration.

A number of issues were discussed at the meeting, and the Subcommittee will be working on the update in coordination with the Legal Opinions Committee. It hopes to issue an updated report in the near future.

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Committee Programs Presented at the Spring Meeting

The Committee presented a program entitled “Legal Opinions on Securities Offerings” at the Spring Meeting on March 24, 2012. The panelists included Stan Keller, Cathy Dixon, Bob Buckholz and Tom Kim of the SEC, who participated by phone. The panel reviewed the SEC’s October 14, 2011 Staff Legal Bulletin No. 19 (“Legality and Tax Opinions in Registered Offerings”). Program materials included Don Glazer’s and Stan Keller’s Q&A on SLB 19 from the Winter 2011 issue of the Newsletter (vol. 11, no. 2), Stan’s November 2011 Insights article, “New SEC Guidance on Legality and Tax Opinions in Registered Offerings,” and sample Exhibit 5 opinions from experienced SEC practitioners. The program materials are available on the Committee’s website, here.³

For additional discussion of SLB 19, see the Addendum to this issue (“SEC Opinion Guidance”), page A-6.

Spring Meeting of the Working Group on Legal Opinions

On May 22, 2012 the Working Group on Legal Opinions (“WGLO”) held its semi-annual seminar in New York, featuring panel discussions and breakout sessions on current opinion practice issues. Summaries of the panel sessions and breakout groups are included as an Addendum to this issue.

The next WGLO seminar is scheduled for October 29-30, 2012.

³ The URL is http://apps.americanbar.org/dch/committee.cfm?com=CL510000.
Recent Developments

FASB Ends Loss Contingencies Project

On July 9, 2012, the FASB voted to remove from its agenda the project to revise the disclosure requirements for loss contingencies. This had been one of the FASB’s more controversial projects and two exposure drafts, one in 2008 and another in 2010, drew sharp criticism from the preparer community, including companies and their counsel. The ABA submitted comment letters that expressed concerns regarding erosion of attorney-client privilege and disclosure of client confidential information.

The majority of FASB members concluded that the existing requirements under ASC 450-20 (formerly FAS No. 5) are adequate and that concerns over contingency disclosures is a matter of compliance and enforcement rather than of standard setting. There was recognition that improvement in compliance has taken place as a result of the SEC’s increased focus on loss contingencies disclosure beginning in late 2010. The FASB’s chairwoman also noted that the FASB disclosure framework project, for which an exposure draft is soon to be released, will have relevance to loss contingencies disclosures, especially in its qualitative disclosures guidance. (A discussion paper was issued on July 12, 2012 and is available on the FASB’s website, here.4)

As a result of the FASB action, the emphasis is now on compliance with the existing loss contingencies disclosure standards, influenced by whatever qualitative disclosure guidance may emerge from the FASB disclosure framework project. Lawyer responses to auditor requests for information regarding loss contingencies in accordance with the ABA Statement of Policy, which were not directly affected by the FASB project, continue to be an important part of the loss contingency disclosure process.

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4 The URL is http://www.fasb.org/cs/BlobServer?blobkey=id&blobwhere=1175824166287&blobheader=application%2Fpdf&blobcol=urldata&blobtable=MungoBlobs
**Legal Opinion Reports**

**[Editor’s Note:]** The chart of published and pending legal opinion reports below has been prepared by John Power, O’Melveny & Myers LLP, Los Angeles, and is current through June 30, 2012.

**Recently Published Reports:**

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<th>State</th>
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<tr>
<td>ABA</td>
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<td>No Registration Opinions – Subcommittee on Securities Law Opinions</td>
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<td></td>
<td>2010</td>
<td>Sample Opinion</td>
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<td>Florida</td>
<td>2011</td>
<td>Comprehensive Report Update</td>
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<td>Maryland</td>
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<td>Michigan</td>
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These reports are available (or soon will be available) in the Legal Opinion Resource Center on the web site of the ABA Legal Opinions Committee, [http://apps.americanbar.org/buslaw/tribar/](http://apps.americanbar.org/buslaw/tribar/).
Pending Reports:

ABA Business Law Section
Outbound Cross-Border Opinions – Committee on Legal Opinions
Survey of Office Practices Update – Committee on Legal Opinions
Legal Opinions in SEC Filings (Update) – Subcommittee on Federal Securities Law Opinions

ABA Real Property Section
(among others)
Annotated Real Estate Finance Opinion

California
Sample Venture Capital Opinion

Multiple Bar Associations
Commonly Accepted Opinion Practices

South Carolina
Comprehensive Report

Texas
Comprehensive Report Update

TriBar
Limited Partnership Opinions
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 here.\(^6\) 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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Next Newsletter

We expect the next newsletter to be circulated prior to the Fall Meeting of the Business Law Section in Washington, D.C. Please forward cases, news and items of interest to Stan Keller (stanley.keller@edwardswildman.com) or Jim Fotenos (jfbtenos@greeneradovsky.com).

\(^6\) The URL is http://apps.americanbar.org/dch/committee.cfm?com=CL510000.
Addendum

Working Group on Legal Opinions

Spring 2012 Seminar Summaries
## Addendum

**Working Group on Legal Opinions**

**WGLO Spring 2012 Seminars**

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DINNER MEETINGS:

On Monday evening, May 21, 2012, three concurrent dinner meetings were held, addressing legal opinions in mergers and acquisitions, private financing, and public financing transactions. Reports on the presentations were given the following morning in a session chaired by David L. Miller, Pillsbury Winthrop Shaw Pittman LLP, McLean, Virginia. Summaries of the reports follow.

1. Legal Opinions in M&A Transactions  
(Summarized by Nathaniel Doliner and Lou Kling)

Nathaniel L. Doliner, Carlton Fields, P.A., Tampa, Co-Chair  
Lou R. Kling, Skadden, Arps, Slate, Meagher & Flom LLP, New York, Co-Chair

M&A Transactions Involving Public Targets. Are opinion letters being issued in M&A transactions involving a publicly-traded target? The participants in this session were of the view that, other than in certain limited instances, opinion letters in public target M&A deals have virtually disappeared. A few of the participants cited certain transactions, such as those involving a European buyer, where an opinion letter might be requested and given. Others noted that opinion letters with respect to public target M&A transactions are sometimes required by a buyer’s lenders. One participant was of the view that, with the possible exception of a due authorization opinion, an opinion letter should almost never be given in a public target M&A transaction. Even due authorization opinions can be problematic if, for example, proper notice of a board of directors’ meeting of the target company has not been given. One participant pointed out that even where a due authorization opinion is given, the opinion giver may be relying on the certificate of the target company’s secretary. Another participant noted that whether an opinion letter is required in a public company deal depends less on whether the target company is public or private and more on the geographic market in which the deal is taking place, the size of the company and the transaction, and whether the buyer is comfortable with the target company and its counsel.

Private Target Deals. The participants generally noted that they are seeing even fewer opinion letters in private target M&A deals. Again, the type and size of the deal often makes a difference as to whether an opinion letter is given. Opinions are more frequently seen in certain industries, such as oil and gas reserve acquisitions, where, as noted by one individual, title opinions are often required. Another participant gave the example of large tech buyers that often require opinions from the target company’s counsel. In addition, opinions are sometimes given to public company buyers in cross-border transactions. On the other hand, one participant stated that, in his experience, opinion letters (especially as to due authorization and enforceability) are routinely given, without regard to the target’s industry, in deals of under $100 million or where the buyer is a private equity fund.
**Reasons for Fewer Opinion Letters.** The following reasons were given for the much lower incidence of opinion letters in M&A deals than in loan transactions: (a) lenders generally have more leverage in a loan transaction than do acquirers in a M&A deal; (b) M&A lawyers tend to represent both buyers and sellers whereas finance lawyers typically are either lender’s counsel or borrower’s counsel; (c) some buyers have become less concerned about opinion letters in the wake of the large number of hostile transactions that occurred years ago when some companies were acquired without any target representations or warranties, let alone opinion letters; and (d) there is no reason to ask for an enforceability opinion because buyer’s counsel is as familiar with issues of enforceability as is seller’s counsel.

**Due Diligence Reports.** The participants addressed issues surrounding the distribution of due diligence reports prepared by the target’s counsel to buyers or buyers’ lenders. The participants noted that such reports may be viewed as disclosure documents under the securities laws and that express non-reliance agreements or disclaimers in the due diligence reports may not always be effective in defeating a 10b-5 claim, a Securities Act claim in connection with a Rule 144A financing, or similar claims. Nevertheless, one individual stated that his firm refuses to distribute such reports to the buyers or their lenders unless they sign a non-reliance agreement, even in a securities law context. Some participants expressed the view that a due diligence report, under certain circumstances, could be analogized to a legal opinion expressed by the target’s counsel. One individual noted that the due diligence report, typically prepared by a junior associate, might entail greater risk than an opinion letter. Because of this concern, some law firms are using more experienced lawyers to prepare, or to more closely review, the due diligence report. Another concern is the possible waiver of the attorney-client privilege if otherwise privileged information is disclosed to third parties. Some participants noted that European buyers are much more aggressive in insisting on obtaining target counsel’s due diligence report. In Europe, however, there are fewer lawsuits over deals and European buyers tend to agree to limitations of liability regarding incorrect or misleading statements in the due diligence reports.

[Editor’s Note: On diligence reports generally, see the Section of Business Law’s Task Force’s report, “Report of the ABA Business Law Section Task Force on Delivery of Document Review Reports to Third Parties,” 67 Bus. Law. 99 (2011). Several members of the Committee on Legal Opinions were members of the Task Force.]

### 2. Opinions on Private Financing Transactions
(Summarized by Reade Ryan)

**Andrew M. Kaufman, Kirkland & Ellis LLP, Chicago, Co-Chair**  
**Reade H. Ryan, Jr., Shearman & Sterling LLP, New York, Co-Chair**

The attendees at this session discussed two topics: *In re TOUSA, Inc.*, 680 F.3d 1298, 2012 W.L. 1673910 (11th Cir. 2012), led by Andrew Kaufman, and the recent Greek sovereign debt restructuring, led by Reade Ryan.

**TOUSA.** The TOUSA bankruptcy litigation involved the upstream credit support (guarantees provided by subsidiaries of the borrower and secured by the grant of a security interest in the subsidiaries’ assets) provided to the new lenders in a refinancing of parent-only debt. The original 2009 decision by the Florida bankruptcy court (422 B.R. 783) held that the savings clauses (contractual clauses in the loan agreements that purported to automatically reduce the joint and several liability of the subsidiaries for the parent debt, if challenged, to avoid the guaranty’s unenforceability, see 422 B.R. at 863, 865) were unenforceable for vagueness and indefiniteness as a matter of New York contract law. The bankruptcy court also held that the upstream credit support provided by the TOUSA subsidiaries was subject to attack as a fraudulent conveyance because the subsidiaries did not receive reasonably equivalent value in return.
In February 2011, the Federal district court quashed many of the bankruptcy court’s findings (444 B.R. 613). The recent decision by the Court of Appeals for the Eleventh Circuit reinstated most of the bankruptcy court’s findings and represents the latest chapter in this litigation.

**Key Takeaways from the Eleventh Circuit’s TOUSA Decision:**

- **Treatment of savings clauses unchanged.** The Eleventh Circuit’s ruling does not address the bankruptcy court’s decision on savings clauses in subsidiary guarantees. There is a separate appeal on that topic that has been stayed pending the Eleventh Circuit’s decision. (CastleRigg Master Investments Ltd. v. Official Committee of Unsecured Creditors of Tousa (No. 10-60508-CIV), Order Staying and Administratively Closing Case, dated March 28, 2011 (U.S.D.C. Fl.)) That separate appeal now needs to work its way through the federal courts. The assessment for opinion purposes regarding the validity of savings clauses based on the 2009 bankruptcy decision has not changed.

- **May discourage reliance on indirect economic benefits in distressed situations.** The Eleventh Circuit opinion does not resolve the question of whether the avoidance of bankruptcy constitutes “reasonably equivalent value” to a subsidiary that insulates a subsidiary guaranty or other upstream credit support from attack as a fraudulent conveyance. The bankruptcy court had found that indirect economic benefits like the ability to operate as a going concern did not constitute “value” at all. The appeals court left this question open, but deferred to the factual determination of the bankruptcy court. The bankruptcy court had found that, even if this benefit counted as value received by the subsidiaries, it did not match the value upstreamed to the parent and its creditors by the subsidiaries’ providing credit support for the new financing.

- **Risk of 20/20 hindsight.** The Eleventh Circuit decision highlights the risk that whether a subsidiary receives reasonably equivalent value at the time it provides upstream credit support will be judged in hindsight. Resolution of this question in TOUSA was not helped by TOUSA’s incurring over $400 million in secured debt, ostensibly to avoid bankruptcy, and then filing for bankruptcy within six months. The bankruptcy court found that the refinancing, rather than giving the business a new lease on life, merely delayed the inevitable.

- **TOUSA risk is lower if outgoing lenders had held upstream guarantees.** The Bankruptcy Code specifically defines “value” to include the repayment of antecedent debt. It appears, therefore, that providing a new upstream guaranty to take out an existing upstream guaranty should yield value to the subsidiary guarantor. Accordingly, the fraudulent transfer risk in this context is most acute where, as in TOUSA, significant new upstream credit support is added to the parent financing from subsidiaries that had not guaranteed the parent debt that was repaid.

- **Risk of clawback from outgoing lenders in distressed refinancings.** The decision also limits the apparent benefit of funding the repayment of the outgoing lenders through the borrower, as was done in TOUSA. This funds flow structure is often used to enable the outgoing lenders to claim the status of subsequent transferees taking in good faith, and therefore beyond the reach of the avoidance powers of the bankruptcy court. In TOUSA, the outgoing lenders were required to return that repayment because they were the entities for whose “benefit” (within the meaning of the Bankruptcy Code) the fraudulent upstream transfer of the liens collateralizing the guarantees had been made. The Eleventh Circuit noted that the agreement for the new loan expressly required that it be used to
repay the outgoing lenders and that it was not unreasonable to impose a due diligence burden on the outgoing lenders regarding the source of the funds for their repayment.

**Greek Restructuring.** The recent restructuring arising out of the Greek sovereign debt crisis reminds us that the governing law of a debt instrument is key and can be changed by the applicable government, thereby affecting the enforceability of the debt instrument.

In the case of the Greek sovereign debt crisis, Greece proposed to restructure 206 billion Euros of Greek-law sovereign bonds held by the private sector by having the bondholders exchange their existing bonds for new bonds with a principal amount less than 50% of the principal amount of the existing bonds and with maturities extended by 10-15 years (the “Private Sector Initiative”). In order to effect the Private Sector Initiative, Greece passed legislation that changed the law applicable to the bonds: that legislation imposed on Greek-law sovereign bonds a collective action clause (the “CAC”), which provided that if at least 60% of the bondholders agreed to the Private Sector Initiative, the rest of the bondholders were deemed to have agreed to the Private Sector Initiative.

The threat of the use of the CAC induced many of the bondholders to voluntarily exchange their old bonds for the new bonds, but the imposition of the CAC did not create a “Credit Event” required for triggering the enforceability of the credit default swaps that supported the old bonds. Thus, many bondholders who thought they were protected by such credit default swaps were left “hanging” for a long time without support from their credit default swaps — until the Greek government decided that it needed more bondholders to actually agree to the Private Sector Initiative and so invoked the CAC to force the remaining bondholders to exchange their old bonds for the new ones. At that point, the ISDA Determinations Committee concluded that a Credit Event had occurred under the credit default swaps that supported the Greek sovereign bonds, thus allowing the bondholders to enforce their credit default swaps.

3. **Opinions on Public Financing Transactions**
   (Summarized by Stan Keller)

   *Julie M. Allen, Proskauer Rose LLP, New York, Co-Chair*
   *Stanley Keller, Edwards Wildman Palmer LLP, Boston, Co-Chair*

   The focus of the discussion at this session was on the impact of the recently enacted Jumpstart Our Business Startups (“JOBS”) Act on capital raising and related opinion practice. The discussion was divided into two main parts – the impact on private companies and the impact on “emerging growth companies,” a new category of public companies.

   **Impact on Private Companies**

   The JOBS Act offers private companies new opportunities to raise capital and allows them to remain outside the SEC reporting system longer. It does the first by permitting general solicitation to take place in Rule 506 private offerings so long as sales are made only to accredited investors, by establishing a new crowdfunding exemption for raising limited amounts through intermediaries using a web-based platform, and by authorizing the SEC to establish a new Regulation A-type exemption with higher dollar limits. Since the latter two fundraising alternatives do not exist until there is SEC implementation, the discussion centered on issues presented for no registration opinions in Rule 506 offerings that utilize general solicitation once the SEC amends that rule. Specifically, the question was posed what diligence will be necessary to confirm satisfaction of the condition that sales are made solely to accredited investors if there is general solicitation, especially since the statute requires issuers to take reasonable steps in accordance with methods prescribed by the SEC to verify the status of the purchasers. There was
discuss the approaches currently followed with respect to the 35 non-accredited investor limitation under Rule 506 and the likelihood that the same approaches will be followed when only accredited investors are permitted.

The ability of companies to remain outside the SEC reporting system longer results from the increase made by the JOBS Act in the number of record holders a company may have before it must register under the Securities Exchange Act of 1934 and the exclusion of certain holders from that count. There was recognition of the difficulties companies may face in determining the status of their shareholders, and therefore the need to think about mechanisms to restrict transfers or require the provision by holders of current information.

It was noted that these changes will put increased pressure on the desire of investors to have liquidity through resales of private company shares and thus will highlight issues regarding opinions on resales, such as concerns regarding general solicitation. There was discussion of whether the permissibility of general solicitation under the Rule 506 issuer safe harbor will have influence in other exempt areas. The general view was that for the time being the ability to conduct general solicitation is limited to the safe harbor but that it remains to be seen whether this will have influence over time in prevailing practices or court decisions in other areas.

It also was noted that these changes are relevant to private investment funds, both in how they deal with their portfolio companies and how they raise capital themselves.

**Impact on Emerging Growth Companies**

The JOBS Act creates a new category of “emerging growth companies” (“EGCs”) for whom relief from some of the regulatory burdens is provided in the process of going public and in disclosure and governance requirements through an “on-ramp” approach. EGCs can be thought of in general terms as newly public companies with less than $1 billion in annual revenues who have not been public for more than five years.

The offering process relief includes the ability to submit an IPO registration statement confidentially to the SEC, to test the waters with institutional accredited investors before or after filing the registration statement, and for the underwriter to involve its analysts in the process and issue research reports. The on-ramp relief includes scaled financial statement requirements and compensation disclosure, freedom from auditor attestation of internal financial controls and freedom from say-on-pay shareholder votes.

There was discussion of whether the expansion of permissible communications will affect opinions on compliance with the registration requirements or negative assurance provided to underwriters. It was generally believed that the “disclosure package,” which is the basis for the negative assurance comfort, would remain as it is and not include the newly permitted communications, although the company’s representations in the underwriting agreement might change.
PANEL SESSION I:

SEC Opinion Guidance
(Summarized by Stan Keller)

Stanley Keller, Edwards Wildman Palmer LLP, Boston, Chair
Andrew J. Pitts, Cravath, Swaine & Moore LLP, New York
Edward E. Gonzalez, Skadden, Arps, Slate, Meagher & Flom LLP, New York

This panel discussed in greater detail than was done at the October 2011 WGLO seminar the guidance given on the SEC staff’s views on Exhibit 5 legality opinions and Exhibit 8 tax opinions contained in Staff Legal Bulletin No. 19, “Legality and Tax Opinions in Registered Offerings.”

Stan Keller began with an overview, noting that the SEC guidance recognizes and is generally consistent with customary opinion practice. However, it is important to recognize that there are federal securities law requirements that must be met and that may require departures from customary practice which may be acceptable in private transactions. An example is the use of “as if” opinions; another is some exceptions and assumptions, at least absent prospectus disclosure. He also noted that the SEC guidance demonstrates a willingness of the staff to be flexible to accommodate special situations.

Andy Pitts then reviewed some issues dealt with in the guidance regarding Exhibit 5 legality opinions. He focused on shelf registration statement opinion practice and, in particular, alternatives for dealing with frequent and rapid shelf takedowns (such as medium term note ("MTN") programs), often without the involvement of lawyers. One alternative permitted by the guidance is inclusion of a forward-looking opinion that covers future takedowns. While this approach may avoid the need to file an opinion at the time of takedown, the opinion giver still needs to have an understanding with its client regarding utilization of the opinion.

Ed Gonzalez then discussed the Exhibit 8 tax opinion guidance and described the recently-issued New York State Bar Association Tax Section’s report on “Tax Opinions in Registered Offerings,” (April 4, 2012). He indicated that the SEC staff has made clear that the guidance is not intended to change existing tax opinion practice and that the purpose of the New York State Bar report is to describe that practice as a complement to the SEC guidance. He identified a few issues tax practitioners face, such as the SEC staff sometimes requiring tax opinions in transactions when the tax consequences are not considered “material” to investors, being asked by the SEC to cover in the tax opinion non-material tax matters because they are described in the prospectus even though the SEC guidance acknowledges that only material tax consequences need be covered by an opinion, and dealing with the distinction between “will” and “should” opinions even though there is a high bar for giving a “should” tax opinion.

[Editor’s Note: For prior analyses of SLB 19, see Don Glazer’s and Stan Keller’s Q&A on the guidance in the Winter 2011 issue of the Newsletter (vol. 11, no. 2), pages 12-15, and Stan Keller’s report on the guidance appearing in the Fall 2011 issue of the Newsletter (vol. 11, no. 1), pages 16-17.]
CONCURRENT BREAKOUT SESSION I:

1. Assignability Issues in Third-Party Opinions
   (Summarized by Kenneth P. “Pete” Ezell, Jr., Gail Merel, and Reade H. Ryan, Jr.)

   Gail Merel, Andrews & Kurth LLP, Houston, Co-Chair
   Reade H. Ryan, Jr., Shearman & Sterling LLP, New York, Co-Chair
   Kenneth P. “Pete” Ezell, Jr., Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Nashville, Reporter

   This breakout session was a follow-on to a breakout session on the same subject at the Fall 2011 WGLO seminar, as well as a number of prior WGLO programs which considered assignability and reliance issues in the context of third-party opinion practice. (See the Winter 2011 issue of the Newsletter (vol. 11, no. 2) page A-6).

   At the Fall 2011 breakout session, there was general consensus that the so-called "Wachovia" limitation on reliance is now both generally acceptable to opinion recipients and commonly used by opinion givers – at least in the context of loan transactions. Following that session, some breakout participants continued to work to develop additional opinion language that would both expand upon the Wachovia formulation and respond to the particular concerns expressed by the participants at that breakout session.

   The resulting draft limitation on reliance was presented for comment at this latest breakout session on May 22 and is set out at the end of this report in a form modified so as to incorporate drafting suggestions made during this session (the “Sample Language”). The Sample Language is intended to clarify the following points:

   1. Lenders that become parties to a loan agreement subsequent to the issuance date of an opinion (“Additional Lenders”) should not have any greater rights than the members of the original bank group that received the opinion on the date it was rendered, including rights as to any statute of limitations period that begins to run from or applies as of the date the opinion is delivered.

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1 In brief, the Wachovia formulation presumes the opinion is addressed only to the Administrative Agent and the Lenders as of the date of the opinion and permits reliance by any future Lender only if the Additional Lender’s reliance is actual and reasonable under the circumstances at the time it becomes a Lender.

2 The proposed opinion language was prepared by the following group: A. Mark Adcock, Moore & Van Allen, Charlotte; Kenneth “Pete” Ezell, Jr., Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Nashville; Stanley Keller, Edwards Wildman Palmer LLP, Boston; Gail Merel, Andrews Kurth LLP, Houston; and Reade H. Ryan, Jr., Shearman & Sterling LLP, New York.

3 It was noted during the session that some jurisdictions have statutes of limitations for negligent misrepresentation that begin to run when the incorrect statement is made (i.e., the date the opinion is issued). In those jurisdictions, the limitations period could expire prior to the time an Additional Lender becomes a Lender so that, effectively, the Additional Lender would have no rights under the opinion. It was also noted, however, that any different approach could have the anomalous effect of permitting a party that becomes a lender years after a closing to have enforcement rights no longer available to members of the original lending group that continue to hold loans but for whom the limitations period has run.
2. Additional Lenders that become parties to a loan agreement subsequent to the issuance date of an opinion by way of assignment should not have any greater rights than their respective assignors.4

3. Rights of the various recipients of a third-party legal opinion should be asserted only in a single proceeding by and through the Administrative Agent or the Required Lenders. This limitation is intended to address concerns relating to potential claims of multiple Lenders or Additional Lenders asserted in multiple lawsuits in multiple jurisdictions under inconsistent applicable laws, all with respect to the same legal opinion issues. The limitation reflects the approach under many loan agreements that actions on behalf of the lenders are to be taken by the Administrative Agent or at the direction of the Required Lenders.

During the breakout session, the Co-Chairs shared with participants the fact that, in preparation for this session, the drafters of the proposed Sample Language had consulted with representatives of two different lending institutions which had found many, and in one case all, of these three concepts acceptable.

Sample Language

“The opinions expressed in this letter are solely for the benefit of the addressees and for the benefit of any successor to the Administrative Agent pursuant to Section ___ of the Credit Agreement, in each case in connection with the Subject Documents. We consent to reliance on the opinions expressed herein, solely in connection with the Subject Documents, by any party that becomes a Lender subsequent to the date of this opinion letter in accordance with the provisions of the Credit Agreement (each an "Additional Lender") as if this opinion letter were addressed and delivered to such Additional Lender on the date hereof, on the condition and understanding that: (i) in no event shall any Additional Lender have any greater rights with respect hereto than the original addressees of this letter on the date hereof nor, in the case of any Additional Lender that becomes a Lender by assignment, any greater rights than its assignor, (ii) in furtherance and not in limitation of the foregoing, our consent to such reliance shall in no event constitute a reissuance of the opinions expressed herein or otherwise extend any statute of limitations period applicable hereto on the date hereof, and (iii) any such reliance also must be actual and reasonable under the circumstances existing at the time such Additional Lender becomes a Lender, including any circumstances relating to changes in law, facts or any other developments known to or reasonably knowable by such Additional Lender at such time.

[Include other typical language as to the opinion speaking as of its date, disclaiming any responsibility to update, and limiting publication of the opinion.] Furthermore, all rights hereunder may be asserted only in a single proceeding by and through the Administrative Agent or the Required Lenders.”

4 This concept is consistent with the approach taken in most loan assignment and assumption agreements (including that promulgated by the Loan Syndications and Trade Association), which contemplate the assignment by an assignor to its assignee of all rights with respect to the loan – including all claims against professionals. If the assignee succeeds to all rights of its assignor, and essentially steps into its assignor’s shoes, logically the assignee should not be in a better position than its assignor simply by the happenstance of coming late to the transaction.
2. **Risk Management — the Opinions Committee . . . or, What? The Ethics of Failing to Manage**  
(Summarized by Ed Fleischman)

*William Freivogel, Chicago, Co-Chair*  
*James A. Smith, Foley Hoag LLP, Boston, Co-Chair*  
*Edward Fleischman, Linklaters LLP, New York, Reporter*

The breakout session continued the discussion that began at the Fall 2011 WGLO seminar breakout session entitled “Internal Opinion Policies and Procedures: Problematic Opinion Requests” regarding the possible role of a law firm’s opinions committee as something more than a reviewer of the technical aspects of opinions. (See the Winter 2011 issue of the Newsletter (vol. 11, no. 2) page A-9 et seq.)

It became clear from participant comments that almost all law firms of any size have an opinion review process. Several mentioned that their own firm’s opinions committee does, at least episodically, do more than analyze the four corners of an opinion. At least one person present said her firm has, in addition to the opinions committee, a separate risk management committee. Several pointed out that their law firm’s “general counsel” was in charge of risk management.

Bill Freivogel reminded those present that client fraud in the business context is a huge claims problem for large law firms. He also made the point that there has been no known claim against a law firm in which violation of the law firm’s policy proved to be an aggravating factor. The implication of this is that if a firm perceives a genuine need to have a written policy, it should proceed with little fear of aggravating a future claim.

The overall impression from this session was that more firms are doing more to regulate the conduct of their lawyers in opinion practice and in client relations, including in some cases using their opinion committee in a broader way than just reviewing the opinion itself.

3. **A Litigator’s Look at Legal Opinion Letters**  
(Summarized by Rick Frasch)

*John K. Villa, Williams & Connolly LLP, Washington, D.C., Chair*  
*Richard N. Frasch, San Francisco, Reporter*

Although there are few reported lawsuits against law firms for allegedly faulty opinions, there are a greater number of pre-lawsuit claims that are publicly reported that relate to both big “O” (formal/written) and little “o” (informal) opinions/advice. The paucity of publicly reported lawsuits is because most claims are either resolved informally or through arbitration. Consequently, although few opinion-related lawsuits against law firms are filed, the risk to law firms from such claims by their clients and by third parties is higher than generally appreciated.

The discussion at this session focused on five issues relating to claims against law firms based on their legal opinions:

*Why are claims increasing in severity?* Over the last several years, failed companies represented by receivers are becoming more aggressive in asserting claims against their former law firms. For a number of reasons relating to lack of concern over waiver of the attorney-client privilege, indifference to contributory negligence defenses that might embarrass management, and a desire on the part of trustees
and their counsel to recover contingent fee awards, failed companies often pose a bigger problem for law firms than do solvent clients (which are much less likely to assert claims). The failed company also increases markedly the risk of claims by third parties such as investors, lenders or contract counterparties. While the original “client” is still solvent, suing the client is far easier for the third party. When the original client fails, third parties focus on suing the failed client’s lawyers.

What is the reason for the increasing number and severity of claims? The reasons for the increase in the number and severity of claims are not intuitive: they are less related to the quality of lawyering or the quality of written opinions and more to the quality of the client. In particular, the highest risk clients are those that fail and particularly those that are privately held, fast growing and, in many cases, highly leveraged (with few “hard” assets). Such high growth, highly leveraged clients are also characterized by a small executive cadre and the use of “secret formulas” or allegedly unique business models that are not transparent. In addition, the insolvency trustees for such clients often make claims that relate to little “o” opinions (i.e., informal advice rather than formal opinions) rather than big “O” opinions (e.g., formal opinion letters that have the limitations and caveats that protect opinion givers). The key to reducing risk is to identify and avoid such clients.

How to reduce the risk of claims once things “go bad.” Obviously, avoid the bad client. But if one sneaks through, several risk management techniques were discussed, such as resigning from the representation, retention of a copy of client files for the law firm’s later defensive use, and careful consideration of requests by former clients to “interview” the firm’s lawyers.

What are practical drafting steps to increasing the chances of a successful defense of an opinion-related claim? First, and most importantly, law firms should try to put “everything” reasonably possible in their legal opinions so as to leave less room for argument about what is customary practice. Second, the use of express limitations and definitions in an opinion, as well as the incorporation by reference of the ABA Legal Opinion Principles, can go a long way to increasing the chances of the opinion giver’s prevailing on a motion to dismiss. A number of audience members noted that the failure to incorporate the ABA Legal Opinion Principles in an opinion letter is sometimes due to pressures from the firm’s client.

What are other risk management techniques that law firms can implement to reduce the risk of opinion-related claims? Utilizing “in-take committees” to screen for potentially troublesome clients was suggested. Other suggestions included NOT establishing firm risk management policies that the lawyers then ignore. Finally, excessive “promotion” by attorneys should be discouraged.

PANEL SESSION II:

Does the Fortress Decision Offer any Lessons for Opinion Givers?
(Summarized by Norman Powell)

Joel M. Miller, Miller & Wrubel, P.C., New York, Co-Chair
Norman M. Powell, Young Conaway Stargatt & Taylor, LLP, Wilmington, Co-Chair

At this breakout session the co-chairs presented a paper and led a discussion on the Dechert litigation, Fortress Credit Corp. v. Dechert LLP, 89A.D.3d 615, 934 N.Y.S.2d 119, 2001 WL 592969 (2011). Joel Miller’s firm successfully defended Dechert in this lawsuit (with Norman Powell assisting Miller & Wrubel in an advisory capacity). (The Dechert case is also discussed by Joel Miller in the Winter 2011 issue of the Newsletter (vol. 11, no. 2), at page 11).
Dechert had been contacted by then-lawyer Marc S. Dreier to provide an opinion for the borrower in connection with a $50 million loan by Fortress Credit Corp. to companies controlled by Sheldon Solow (collectively, “Solow Realty”). Solow Realty was a Dreier client, and Dreier himself was a party (as guarantor) to the transaction. Alas, Solow Realty knew nothing of the transaction — Dreier had falsified documents and forged signatures on Solow Realty’s behalf, has since pled guilty to criminal fraud charges and been disbarred, and is currently serving a 20 year prison term. Fortress sought to recover the “loan” from Dechert.

Fortress alleged fraud, legal malpractice, negligence, and negligent misrepresentation against Dechert. The trial court denied Dechert’s motion to dismiss, and Dechert appealed. Late in 2011, the New York Supreme Court, Appellate Division, reversed. In its unanimous decision, the Appellate Division summarily dismissed the fraud and legal malpractice claims, but considered at some length the claims of negligence and negligent misrepresentation. In June 2012, the New York Court of Appeals denied leave for further appeal (2012 WL 2094312 (Table), concluding this litigation 2½ years after it began.

The Appellate Division of the Court concluded that the allegation of recklessness did not sufficiently allege scienter, a necessary element of a cause of action for fraud. The allegation of legal malpractice failed for want of an attorney-client relationship between Dechert and the opinion recipient — Fortress. Though there was no contractual privity, the “near privity” between Dechert and Fortress was sufficient to support the claims of negligence and negligent misrepresentation. But these claims, too, ultimately failed — the complaint did not allege that Dechert was informed that its obligations were to extend beyond a review of the documents specified in the opinion letter, nor that Dechert was to investigate and report on the bona fides of the transaction. The Appellate Division noted that Dechert’s legal opinion was limited by express assumptions as to the genuineness of signatures and the authenticity of the documents and disclaimed the undertaking of any independent inquiry or investigation. Both limitations appeared in typical language, and the opinion had been reviewed by Fortress’ counsel prior to its acceptance.

It is fair to say the Appellate Division reached the conclusion that most, if not all, opinion practitioners believe to be the right one. In that sense, perhaps, the case offers no lessons (other than an unsettling reminder that ours is a litigious society). On the other hand, it took two years and an appeal to get there. Without suggesting an answer, the co-chairs discussed possible measures to better protect opinion givers. While sophisticated opinion recipients (and their counsel) understand the customary limitations on the scope of a closing opinion, the Fortress decision demonstrates that a trial judge may have a different understanding of the meaning and purpose of an opinion and the scope of an opinion giver’s obligation to conduct a factual investigation of the transaction addressed by the opinion. Opinion recipients may assert claims that are contrary to, or enlarge, the purpose and terms of the opinion letter, or that are based on alleged oral communications made during negotiations of the opinion letter. In defending such claims in a lawsuit, the opinion giver will need to negate such assertions or prove the customary meaning of certain terms. Doing so may present issues of fact that would prevent the dismissal of the action by means of an early motion. The co-chairs suggested it may be worthwhile to include in closing opinions language that may increase the chance for dismissal by an early motion, thereby avoiding discovery and trial.

Chillingly, the trial court rejected the argument that Dechert was not negligent based on the opinion’s explicit assumptions. The court said:
But they [the loan documents] weren’t enforceable . . . . They weren’t enforceable because they were total frauds.

* * *

. . . you’re reducing an opinion letter to a worthless document.

* * *

If the opinion letter is supposed to mean anything, there must be some validity to the transaction, that yes, this is a transaction between my client and the lender.

Thus the trial court ignored, or proceeded with an unsettling (mis)understanding of Dechert’s assumption of the genuineness of signatures and its disclaimer of the conduct of any investigation. To facilitate explicit discussion, the co-chairs proposed consideration of adding specific statements to opinion letters to address this situation. First, the co-chairs considered the inclusion of an “integration” clause, similar to that found in most commercial contracts, so as to avoid a court’s looking beyond the “four corners” of the opinion letter. Of course, in including any such statement, care must be taken so as not to preclude resort to customary practice.

Second, to avoid the need for proof of what constitutes customary practice, the co-chairs suggested that the opinion also might more explicitly specify what is (and, more to the point, what is not) meant by “duly executed” and “valid, binding and enforceable,” thereby eliminating the need for testimony as to their meanings in customary practice. Third, in situations where such is the case, an opinion letter might explicitly indicate that the opinion giver was engaged by referring counsel and did not have direct contact with the borrower.

The co-chairs’ presentation drew diverse and numerous views from the participants in this breakout session. Some believed that no re-visitation of opinion language is necessary or warranted. Some cautioned that greater specificity in one part of an opinion letter carries the risk of stricter, less fluid interpretation of other parts of the opinion letter where there is less specificity. Some believed that modest revision that aids in defense may be advisable, but questioned just what to revise and how.

The consensus was that these issues deserve further deliberation by opinion practitioners.

NOON PANELS:

1. Status Report on Work of the Joint Committee on a Statement of Certain Commonly Accepted Opinion Practices

Kenneth M. Jacobson, Katten Muchin Rosenman LLP, Chicago
Steven O. Weise, Proskauer Rose LLP, Los Angeles

Steve Weise and Ken Jacobson reported that the joint project is progressing well. The Committee is continuing its review of commonly accepted opinion practices, using as a reference the Legal Opinion Principles and Guidelines.
2. **Bar Opinion Report Developments and Other Recent Opinion-Related Developments**  
(Summarized by John Power)

*John B. Power, O’Melveny & Myers, LLP, Los Angeles, Moderator  
Richard N. Frasch, San Francisco  
Richard R. Howe, Sullivan & Cromwell LLP, New York  
David L. Miller, Pillsbury Winthrop Shaw Pittman LLP, McLean, Virginia  
Steven O. Weise, Proskauer Rose LLP, Los Angeles*

John Power referred to the April 30, 2012 chart of recent and pending bar reports on legal opinions in the seminar handbook, noting that a few changes had been made from the chart discussed at the fall 2011 seminar.5

Rick Frasch reported on the March 19, 2012 draft of the proposed California Sample Third-Party Legal Opinion for Venture Capital Financing Transactions included in the seminar handbook. He pointed out the controversial exception in the draft opinion for anything disclosed in the principal agreement opined on or in a schedule of exceptions to the agreement’s representations and warranties. He said this was a common approach to opinions in venture capital transactions, at least in the Silicon Valley, in light of the often limited budgets for legal expenses in these transactions.

Dave Miller commented on the proposed real estate finance opinion report, which is in the final stages of completion by a joint drafting committee of opinion committees of the three national real estate bar groups.6 He pointed out that the enforceability opinion in the illustrative opinion in the proposed report includes many assumptions and limitations that the constituent committees believe would be implied under customary practice even if not expressly stated. He acknowledged that the enforceability opinion also includes a generic exception that in effect limits its coverage to the exercise of remedies (including acceleration of debt) upon a material default of a material covenant.

Dick Howe, Co-Chair of the TriBar Opinion Committee, stated that the Committee is preparing a report on opinions on limited partnerships, as a follow-up to its reports on limited liability companies (“Third Party Closing Opinions: Limited Liability Companies,” 61 Bus. Law. 679 (2006) and “Supplemental TriBar LLC Opinion Report: Opinions on LLC Membership Interests,” 66 Bus. Law. 1065 (2011)), and is considering preparing reports on opinions on contractual choice-of-law provisions, arbitration provisions, and misleading opinions.

Steve Weise commented on a decision and order of the New York trial court in *Nomura Asset Capital Corporation v. Cadwalader, Wickersham & Taft LLP*, 35 Misc. 3d 1222(A), 2012 WL 1647308 (NY Sup. Jan. 11, 2012), denying defendant’s motion for summary judgment in a malpractice action on a written opinion to the defendant’s own client that a securitization trust qualified for tax treatment as a real estate investment conduit (REMIC). The defendant law firm contended that its reliance on its client’s valuations of mortgage loans in the securitization pool and its failure to review appraisals to verify that the pool met REMIC requirements were the customary practice of securitization attorneys when giving these opinions. Although the judge acknowledged that reviewing appraisals was not common practice in

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5 The chart is included in the Newsletter, page 9. The principal changes to the chart from that presented at the Fall 2011 WGLO Seminar are the addition of the joint project on commonly accepted practices and the TriBar limited partnerships report to the pending reports list, and the relocation of the Florida report to the published reports list.

6 The American Bar Association’s Section of Real Property, Trust and Estate Law, the American College of Real Estate Lawyers, and the American College of Mortgage Attorneys.
giving these opinions, he found that there was a triable issue of fact as to whether “red flags” were present that should have put the law firm on notice that it should have made further inquiries.

3. **Update on Final Florida Report**

   *Arthur Norman Field, New York, Moderator*
   *Philip B. Schwartz, Akerman Senterfitt LLP, Miami*

   Phil Schwartz provided further insight into the Florida report published December 3, 2011. He noted for example that the report takes the view that an enforceability opinion covers only the essential provisions of the contract rather than each and every provision.

**PANEL SESSION III:**

**Liability Exposure and Ethical Responsibility on the Perimeter of Legal Opinions**

(Summarized by Arthur Field)

*Arthur Norman Field, Field Consulting LLC, New York, Co-Chair*
*Jeffrey M. Smith, Greenberg Traurig LLP, Atlanta, Co-Chair*

While this presentation identified nearly a dozen cases, the primary emphasis was on two puzzling areas of the law, aiding and abetting by lawyers and the definition of scienter.

**Aiding and Abetting.** Attention was first given to three cases involving lawyer conduct alleged to constitute aiding and abetting and decided under New York law. They were decided within a one-year period and all were decided on preliminary motions. Thus we do not know the facts, only what was or was not alleged. Two of the three cases were decided by the same intermediate appellate court sitting in Manhattan and one by a Federal District Court Judge sitting in Brooklyn. And two of the cases related to the same Ponzi scheme. One case involving the Ponzi scheme was dismissed, the other was not. What these cases demonstrate is that the law in this area is quite unsettled. There are a significant number of cases and thus the area should be seen as a developing one.

Aiding and abetting requires both actual knowledge and substantial assistance under New York law.

The first state court case decided was *Art Capital Group, LLC v Neuhaus*, 70 A.D.3d 605, 896 N.Y.S. 2d 35 (1st Dept. 2010). Here the lawyer was not alleged to have had contact with or to have made misrepresentations to the plaintiff. But she was alleged to have knowingly assisted former employees of the plaintiff Art Capital who misappropriated its business information in an attempt to build their own business. The appellate court saw the services rendered to the client as characteristic legal services. The court saw the lack of any misrepresentations made in the context of work done to protect client interests as determinative. A motion to dismiss was granted by the appellate court, reversing the trial court. The dissent argued that an attorney who violated an ethical rule (here Mode Rule 1.2(d), aiding a client engaged in a fraud) was not acting in a characteristic lawyer role.

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7 Report on Third-Party Legal Opinion Customary Practice in Florida, posted in the Legal Opinions Committee’s Legal Opinion Resource Center, which can be accessed [here](http://apps.americanbar.org/buslaw/tribar/).
Within months the same appellate court (but with largely different judges who cited and distinguished *Art Capital*) in *Oster v Kirschner*, 77 A.D.3d 61, 905 N.Y.S. 2d 69 (1st Dept. 2010), reversed the granting of a motion to dismiss by the trial court. The lawyer defendants were alleged to have aided in the Ponzi scheme by drafting investment documents they knew to be false. The court seemed satisfied that a misrepresentation was made to plaintiff and the lawyer knew of it. The appellate court did not state, however, that preparation of the loan documents constituted a lawyer misrepresentation.

The third case (and the one decided first) was *Hightower v Cohen*, 1:08- cv-03229 (E.D.N.Y. Sept. 30 2009). The Ponzi scheme in the *Oster* case was the setting for this case as well. However, in the *Hightower* case, the complaint was dismissed. Neither the complaint's allegations nor the pleading standards applicable in federal court for a motion to dismiss were the same as in the *Oster* case. Nevertheless, the *Hightower* dismissal may be seen as inconsistent with the *Oster* case in interpreting New York law on aiding and abetting as applied to lawyers. The *Oster* court saw it as inconsistent. In an unusual footnote, the N.Y. appellate court stated that “[t]o the extent the federal court took a narrow view of the ‘actual knowledge’ requirement under New York law, we respectfully disagree with the decision.”

**Scienter.** Of the other cases identified, *Orlan v Spongetech Delivery Systems, Inc. Securities Litigation*, 2012 WL 1067975 (E.D.N.Y. 2012), is particularly interesting. It presents the question of how to define “scienter.” The Supreme Court in *Tellabs Inc. v Makor Issues & Rights, Ltd.*, 551 U.S. 308, 318 (2007) provides a definition (“mental state embracing intent to deceive, manipulate or defraud”). Nevertheless, as can be seen in *Orlan* (among other cases), the federal district courts and courts of appeals continue to use a number of other definitions. Presumably they do so because the definition provided by the Supreme Court in *Tellabs* is difficult to apply in practice. As a result, when determining whether “scienter” is involved, the outcome is less than clear.

**CONCURRENT BREAKOUT SESSION II:**

1. **Some Common Qualifications and Exceptions to a Remedies Opinion in U.S. Loan Transactions**
   (Summarized by Willis R. Buck, Jr.)

   *Gail Merel, Andrews & Kurth LLP, Houston, Chair*
   *Willis R. Buck, Jr., Sidley Austin LLP, Chicago, Reporter*
   *Louis G. Hering, Nichols, Arshe & Tunnell LLP, Wilmington, Reporter*

   This breakout session focused on a paper in preparation by a group of practitioners from the states of California, Delaware, Florida, Illinois, New York, North Carolina and Texas describing qualifications that in their experience are generally acceptable to opinion recipients (typically commercial banks) and their counsel in domestic loan transactions. This common qualifications project grew out of a breakout session on the topic led by Reade Ryan and Andy Kaufman at the October 2008 WGLO seminar.

   Gail Merel, who chairs the group working on the common qualifications paper, explained that the paper does not purport to have the authority of a state bar or other professional group report or to constitute an authoritative statement of customary practice. Rather, the paper is intended to be descriptive of qualifications and exceptions that are often taken and accepted, based on the experience of the participating practitioners as opinion givers and recipients representing borrowers and lenders in domestic loan transactions. Moreover, the paper is not intended to address whether a particular qualification is
necessary or to catalogue all possible or even prudent qualifications. As the working group nears completion of an initial draft of the paper, it is seeking feedback from a larger constituency on the substance and usefulness of the paper.

Three illustrative sections of the paper were circulated to the breakout session participants for discussion, addressing qualifications to the enforceability opinion with respect to indemnification provisions, submission to jurisdiction provisions and setoff provisions in loan agreements. Each section began with a boldface formulation of the relevant qualification or exception to be found in the opinion, followed by discussion of (i) the basis for the qualification or exception and (ii) practice variations among the seven states in which the members of the working group practice. Additional state-by-state detail, including case citations, appears in footnotes.

While some participants expressed preference for different phrasing, there appeared to be a consensus among the participants, including those from states other than the seven in which the members of the working group practice, that the formulation and discussion of the illustrative qualifications are consistent with their experience. For example, with respect to the qualification on indemnification provisions, some participants preferred a less detailed qualification, such as excluding opinion coverage to the extent the underlying indemnification provision is contrary to public policy. And, with respect to setoff, while the exception set out in the draft paper excludes opinion coverage for setoff provisions altogether, some participants suggested that a more targeted qualification, carving out from the opinion only the overreaching elements of the setoff provisions, should be possible.

Despite such differences, however, there appeared to be a consensus among the breakout session participants that a paper identifying and discussing commonly accepted opinion qualifications in the manner set forth in the illustrative sections would be very helpful to practitioners. The boldface formulation of the qualification language should serve as a reference point to focus negotiation between opinion givers and recipients even in cases where a different formulation of the qualification is ultimately agreed upon. The discursive parts of the paper, together with the footnotes, provide summaries of the legal and opinion practice issues underlying each qualification and should help to streamline the preparation and negotiation of opinions, even in jurisdictions other than those in which the members of the working group practice.

2. **Special Issues in Real Estate Opinions**
   (Summarized by Charles Menges)

*Charles L. Menges, McGuire Woods LLP, Richmond, Chair*
*Vladimir R. Rossman, New York, Reporter*

The breakout session on opinion letters in real estate finance transactions first attempted to define a “real estate opinion” as distinguished from opinions issued in other types of secured financings. Real estate opinions generally fall into two categories: those issued by the principal outside counsel to the borrower in connection with a financing of a specific real estate project or projects and those issued by local counsel in a multistate financing that includes real estate collateral in the state or states where the local counsel practices. In the case of the former, the real estate is often the primary or only collateral, the loan may be nonrecourse and the borrower may be a special purpose entity. In the case of the latter, the real estate is usually only one component of a larger collateral package for a syndicated loan to a corporate borrower with multiple subsidiaries owning real estate in various states.

It was noted that real estate opinions generally tend to take the approach of setting forth assumptions and qualifications rather than relying on implicit assumptions and qualifications. It is also
common in real estate opinions to include the generic enforceability qualification that essentially limits the enforceability opinion to payment obligations and the right of acceleration and foreclosure of the mortgage upon a material breach, although the practical realization concept is also used.

[Editor’s Note: For background on the generic exception and the practical realization concept, see the summary of the February 24, 2010 webinar put on by the Committee on Legal Opinions and the ABA’s Real Property, Trust and Estate Law Section (“Real Property Section”), “Should Legal Opinion Letters in Real Estate Transactions Differ from Opinions in Other Business Transactions?” in the April 2010 (vol. 9, no. 3) issue of the Newsletter (page 4); R. Thompson, Real Estate Opinion Letter Practice § 5.10 (“Specific or General Exceptions for Other Matters – The Laundry List versus Generic Exception”) (ABA Real Property Section 2009).]

The breakout session also discussed specific opinions frequently requested that may not be necessary in view of the title insurance being provided, such as an opinion as to the validity and perfection of the mortgage lien, an opinion as to the recordability of the mortgage, and an opinion as to recording/mortgage taxes. Also discussed were local counsel opinions that are not normally given, such as an opinion whether a mortgage provides the remedies customary for a state, an opinion as to no violation of other agreements, and an opinion/confimation as to no litigation. The breakout session also examined local counsel opinions that involve particular difficulty or complexity, such as an opinion whether a lender is required to qualify to do business in a state or to pay taxes in a state merely by making the loan, and a choice of law opinion.

Finally, the breakout session acknowledged the efforts of the respective legal opinion committees of the ABA Section of Real Property, Trust and Estate Law, the American College of Real Estate Lawyers and the American College of Mortgage Attorneys in preparing the Real Estate Finance Opinion Report of 2012, which at the time of the WGLO Spring program was nearing completion.

3. **Traps for the Unwary in Legal Opinion Practice**
   (Summarized by Mark Spradling)

   Mark R. Spradling, Vinson & Elkins LLP, Houston, Chair
   David A. Murdoch, K&L Gates LLP, Pittsburgh, Reporter

   *Advice Based on Translated Documents.* This session first considered law firms’ advice and opinions rendered on documents translated from a foreign language into English. Session participants discussed a number of different examples of issues encountered with translations. Suggestions to reduce law firms’ risks in using translations included disclaimers or assumptions in opinions regarding the accuracy of the translations. The participants discussed the question of whether translated terms had the same legal significance as in the original language. Some law firms deal with an opinion’s discussion of key terminology by quoting the translated phrase and following it with the original text in parentheses to establish a common acceptance of the terminology between the opinion giver and the recipient. One firm went so far as to have the entire translation of a critical document appended to the opinion, with the intention that the opinion recipient would agree that the translation was accurate.

   A second area of risk in using opinions in these circumstances arises when law firm personnel who are fluent in the language of the original document, but who are not qualified lawyers in the jurisdiction where the document originated, give advice on the document to (or merely translate the document for the convenience of) clients. The question is whether such personnel might be viewed as warranting the accuracy and legal significance of the translation of the original terms. A suggested way to mitigate the risk of such a result is to include in the engagement letter with the client, or in a
supplement, a disclaimer of any warranties regarding translations prepared for the client’s convenience. A note of humor was injected into the discussion when one session participant practicing in the U.K. noted that the documents do not need to be in a different language: her firm makes such disclaimers when advising Americans!

**Representation of Joint Venture When One Joint Venturer has Brought the Opinion Giver to the Deal.** The session turned next to lawyers who represent members of a group and the potential conflicts that can arise from having multiple clients in one transaction. The participants were in agreement that establishing “ground rules” for such representations, to which all the clients agree, usually in the engagement letter, are important protections for the law firm. The topics to be covered in the ground rules will vary by engagement by engagement, but general topics to consider might include (i) the lawyer’s inability to represent the group on matters where there are conflicts among the members, and (ii) the members’ informed acknowledgement that communications by one member to the lawyer are not protected by the attorney-client privilege from disclosure to the other members. Session participants discussed particular types of multiple client representation, (e.g., a consortium formed to make a joint bid in a large acquisition or pre-designated investors’ counsel in a private placement of notes). In the former, the consortium counsel is likely to represent at least one of the members of the group on a frequent basis; in the latter, the counsel is likely to practice at one of a handful of firms from which placement agents regularly designate counsel. The American College of Investment Counsel published in 2007 guidelines for pre-designated investors’ counsel, available [here](http://aciclaw.org/forms_guides/default.asp).\(^8\) Counsel to a bidding consortium in an M&A transaction has no such guidelines. Each group representation situation has its own risks and issues, but a particularly troublesome issue arises when a member of the consortium that uses the counsel on other matters expects counsel to advocate its particular position. Another is whether, after the transaction is concluded, the group’s lawyer is free to represent one former member of the group on any related topic without the consent of the other members. There was a general view that the conflict issues are mitigated when group members are individually advised by separate (often in-house) counsel.

**Outside Counsel Guidelines.** A third trap for the unwary is the implied assurances imbedded in some clients’ “outside counsel guidelines.” One overt request for assurance in a client’s guidelines discussed by the participants is the requirement that, before closing, the client’s counsel deliver a letter assuring the client that the closing documents are in “substantially acceptable legal form,” quoting a phrase from the TriBar’s original 1979 report. “Legal Opinions to Third Parties: An Easier Path,” 34 Bus. Law. 1891, 1915-16 n. 34 (1979). Participants observed that in the 23 years since the report was published, a law firm’s (and especially any individual lawyer’s) knowledge of a client’s business has often become so limited that a request for such assurance may no longer be appropriate. The discussion included references to the meanings given to the phrase “in substantially acceptable legal form.” Some participants thought the phrase was intended to provide comfort that the documents were consistent with the client’s usual approach to the matters covered by the documents—in short, that the documents were “substantially acceptable to the client.” Such a judgment may not be able to be made today. Other participants focused on the language in the 1979 Report that the phrase means that “each of the Documents on its face (i) is not illegal or invalid, (ii) is complete, and, upon execution and delivery, is able to function, as an agreement of the kind it is and (iii) contains provisions which are within the range of provisions customarily acceptable, in {our} opinion...in transactions of similar nature and purpose.” It was also noted that no discussion of this assurance is included in TriBar’s 1998 report on closing opinions, 53 Bus. Law. 591 (1998).

**Certifications as to Accuracy of Billing Reports.** A more subtle assurance may be imbedded in certain clients’ requirements with respect to billing. If bills are to be rendered in tenths of an hour and broken out by phases and tasks, as many electronic bills now are, and if the outside counsel guidelines

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\(^8\) The URL is [http://aciclaw.org/forms_guides/default.asp](http://aciclaw.org/forms_guides/default.asp).
state that, by submitting the bill, the relationship attorney is certifying to its correctness, do the guidelines impose a level of accuracy that is unrealistic? Participants recognized the risks of certifying to timekeeping that can be dissected by computers, but were hopeful that a rule of reason would prevail.

The Interpretation of “Separateness Covenants” in Two Recent Michigan Cases. Time did not permit discussion of Wells Fargo Bank, NA v. Cherryland Mall Ltd. P’ship, 295 Mich. App. 99, 812 N.W.2d 799, 2011 WL 6785393, and 51382 Gratiot Ave. Holdings, LLC v. Chesterfield Dev. Co., 2011 WL 6153023 (E.D. Mich. Dec. 12, 2011), two important cases that may affect remedies and non-consolidation opinions, even though the Michigan Legislature has decisively disapproved the courts’ contract interpretation. After foreclosing on commercial properties, the lenders in these two cases sought deficiency judgments against the borrowers and the borrowers’ guarantors, claiming that the separateness covenant by the borrowers that they would remain solvent and pay their debts and liabilities as they became due had been breached by their insolvency. Both the Michigan Court of Appeals and the United States District Court for the Eastern District of Michigan, interpreting the loan documents, held that the loans became recourse because the borrowers breached their separateness covenants by failing to remain solvent and by failing to make required loan payments. As the Michigan Court of Appeals noted in its Wells Fargo decision:

“We recognize that our interpretation seems incongruent with the perceived nature of a nonrecourse debt and are cognizant of the amici curiae’s arguments and calculations that, if accurate, indicate economic disaster for the business community in Michigan if this Court upholds the trial court’s interpretation. Nevertheless, the documents at issue appear to be fairly standardized nationwide, and defendants elected to take that risk – as did many other businesses in Michigan and nationwide. It is not the job of this Court to save litigants from their bad bargains or their failure to read and understand the terms of a contract.”


The Michigan Legislature wasted no time in passing legislation disapproving of these two courts’ interpretations of solvency covenants in nonrecourse loan agreements. By the Nonrecourse Mortgage Loan Act (SB No. 992), Michigan Compiled Laws § 445.1591 et seq., the Legislature has provided that a “post-closing solvency covenant” cannot be used, directly or indirectly, as a nonrecourse carve-out or as the basis for any claim or action against the borrower or any guarantor or other surety on a nonrecourse loan. § 445.1593(1). A “post-closing solvency covenant” is defined to include a covenant, representation, warranty, or event of default “that relates solely to the solvency of the borrower, including, without limitation, a provision requiring that the borrower maintain adequate capital or have the ability to pay its debts, with respect to any period of time after the date the loan is initially funded. § 445.1592(d). The Act applies to the enforcement and interpretation of all nonrecourse loan documents in existence on, or entered into on or after, the effective date (March 29, 2012) of the Act. § 445.1595.
This panel on opinions on the enforceability of arbitration clauses was moderated by Don Glazer, with Robert Risoleo addressing domestic arbitration opinions, Ettore Santucci addressing cross-border arbitration opinions, and Professor Rusty Park offering comments in both areas as the President of the London Court of International Arbitration and a prolific author in the field of arbitration generally. The panel contrasted opinions on arbitration provisions in domestic practice, where recent controversial U.S. Supreme Court and difficult-to-reconcile lower court decisions make giving opinions a rather hazardous exercise, with opinions on arbitration clauses in cross-border transactions, where the New York Convention of 1958 provides a much more “stable” environment for opinion givers.

### Domestic Practice

Section 2 of the Federal Arbitration Act ("FAA") states that arbitration provisions shall be “valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.” 9 U.S.C. § 2. The final “savings clause” provides that arbitration clauses may be challenged on the same grounds as apply to any contract, such as fraud, illegality, mutual mistake, duress and unconscionability. The FAA reflects a federal policy favoring arbitration agreements, but recently important Supreme Court cases addressing arbitration issues have been decided by the slimmest of majorities.

The remedies opinion covers arbitration provisions just as it covers other undertakings in the agreement, unless the opinion letter includes an exception. As a matter of customary practice the conclusion that the provision will be given effect means that the courts of the jurisdiction covered by the opinion will refuse to take jurisdiction over disputes to which the arbitration clause applies.

Several recent Supreme Court cases have considered the enforceability of arbitration clauses included in standard form contracts. In *Stolt-Nielsen S.A. v. AnimalFeeds International Corp.*, 130 U.S. 1758 (2010), the arbitral tribunal allowed class arbitration of an antitrust dispute where the parties had stipulated that their arbitration agreement was silent on the matter. The Court ruled, 5-3 (with Justice Sotomayor not participating), that this exceeded the arbitrators’ powers under the FAA because their decision was based in public policy and not New York law (the stated governing law) or maritime law. The Court then decided the class arbitration question for itself and held that where the arbitration clause is silent, the FAA barred class arbitrations.

A year later in *AT&T Mobility LLC v. Concepcion*, 131 S.Ct. 1740 (2011), the Court considered an arbitration clause that expressly barred class arbitration. Overturning a judge-made rule in California, the Court held, 5-4, that arbitration agreements waiving class arbitration are enforceable in accordance with their terms, and that the FAA preempts state laws that would otherwise deem such class action waivers unconscionable.
Early in 2012, the Supreme Court in *CompuCredit Corp. v. Greenwood*, 132 S.Ct. 665 (2012), considered the arbitrability of claims brought under the federal Credit Repair Organizations Act (“CROA”), which includes a provision stating that consumers have an unwaivable "right to sue". The Court held that because the CROA is silent on whether claims under the CROA can be arbitrated, the FAA requires the arbitration agreement to be enforced according to its terms.

After *Concepcion*, a number of courts, typically in consumer or employment cases, have read *Stolt-Nielsen* and *Concepcion* narrowly and distinguished them to reach results that permit class arbitration despite contractual provisions prohibiting it. The decisions in *Stolt-Nielsen, Concepcion* and *CompuCredit*, though resisted by some courts, confirm and reinforce the Supreme Court’s pro-arbitration stance. The relevance of cases involving class arbitration waivers to typical third party opinion practice is in any event questionable. These cases appear uniformly to arise in connection with contracts of adhesion, mostly consumer purchase or service contracts or employment agreements. Where commercial parties advised by counsel negotiate an agreement containing an arbitration clause, one critical basis for a finding of unconscionability — an adhesive contract — will by definition be absent.

Arbitration clauses nonetheless may pose issues of concern to opinion preparers. An arbitration clause may provide for judicial review of arbitral awards in a manner that is determined to conflict with the FAA or state law. Although restrictions on mandatory arbitration will not easily be inferred by the Supreme Court, some statutes do expressly prohibit pre-dispute arbitration agreements. The opinion preparers would need to consider whether any laws containing such a prohibition could reasonably form the basis for a claim that is subject to the agreement to arbitrate. In addition, opinion preparers may have to consider whether the invalidity of one aspect of the arbitration provision might render the entire provision invalid if a court were to find it an essential term, and whether in some cases the court might even hold the entire agreement invalid if it were to find mandatory arbitration a key element of the transaction.

Excluding the arbitration provision from coverage of a typical remedies opinion may be appropriate in many cases, either because of specific concerns about the enforceability of the arbitration clause or because of the cost of doing the work necessary to give the opinion. There may be cases, however, where the opinion is not difficult to give and may be important to the opinion recipient. In those cases counsel may choose to include the exception in the first draft of the opinion, but be prepared to deliver the opinion if it is specifically requested. This approach has the advantage of focusing attention on the clause and any issues it raises. Transactional lawyers may utilize special back-up procedures for such opinions, such as review by a colleague who keeps current on developments in the law (both cases and statutes) on arbitration, before they deliver a remedies opinion that covers the arbitration clause.

**Cross-Border Practice**

In cross-border agreements mandatory arbitration is still prevalent because of international parties’ desire to keep the national courts of all countries with any nexus to the transaction out of the merits of a dispute. An opinion on the enforceability of an international arbitration clause means that under the law of the jurisdiction covered by the opinion (1) courts will refuse to take jurisdiction over disputes to which the arbitration clause applies and (2) an arbitral award will be recognized and enforced without a hearing on the merits. If the agreement is governed by non-U.S. law, there is no remedies opinion of U.S. counsel (as opposed to the typical domestic context); thus cross-border enforceability opinions on international arbitration typically will take the form of a specific opinion on the arbitration clause.

The 1958 UN Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the “*New York Convention*”) was implemented by the U.S. in Chapter 2 of the Federal Arbitration Act, 9
U.S.C. §§ 201-208 (“FAA/2”). FAA/2 applies only to arbitration agreements arising out of international contractual transactions and only if the arbitration is to take place in a country that is party to the New York Convention (“reciprocity requirement”). FAA/2 applies to foreign arbitral awards only; if arbitration took place in the U.S., even though in connection with a cross-border transaction, Chapter 1 of the FAA may apply, bringing to bear the same concerns as for domestic opinions.

The New York Convention has two pillars: (1) preventing national courts from asserting their own jurisdiction over a dispute and (2) putting signatory countries’ enforcement powers behind an arbitral award that has been properly issued abroad. As authorized by the convention, FAA/2 contains exceptions to both requirements, but they are designed to be narrow. U.S. courts have heeded the New York Convention’s strong policy that international commerce requires a strong system of international arbitration, such that national courts must eschew an activist role when it comes to international arbitration, and construe the exceptions allowed by the convention narrowly.

U.S. courts have consistently compelled international arbitration. A U.S. court may refuse to enforce an agreement to arbitrate to which FAA/2 otherwise applies if it finds that it is null and void, inoperative, or incapable of being performed. This exception has been construed by U.S. courts narrowly, keeping the focus on the arbitration clause itself, not the broader agreement (doctrine of “separability”). Therefore the opinion preparers normally can conclude that an arbitration clause in a cross-border agreement requiring arbitration outside the U.S. of future disputes arising in connection with the transaction is enforceable under U.S. federal law, subject to the exceptions set forth in FAA/2, if they can confirm that the clause satisfies five specific prerequisites set forth in FAA/2.

After an international arbitral award has been rendered, the New York Convention is designed to allow it to be easily and consistently enforced in all of the signatory countries. FAA/2 requires U.S. courts to treat a foreign award as final as to the merits of the dispute and to enforce it, subject to seven specific exceptions. U.S. courts have consistently resisted requests to refuse enforcement of foreign arbitral awards to avoid disrupting the most efficient dispute resolution mechanism in cross-border transactions. Violation of public policy, the exception most frequently invoked, has been interpreted narrowly. Similarly, U.S. courts have been reluctant to find that the subject matter of a dispute is not suitable for resolution by arbitration as a form of “private justice” (the so-called “arbitrability exception) if the transaction involves business entities or other international commercial actors (as opposed to, for example, consumer transactions and labor/employment matters). Therefore opinion preparers normally can conclude that a foreign arbitration award made pursuant to an arbitration clause to which FAA/2 applies will be recognized and enforced in the U.S., subject to the seven specific defenses set forth in FAA/2.

(Summarized by Susan Cooper Philpot)

Elihu (“Hugh”) F. Robertson, Milbank Tweed, Hadley & McCloy LLP, New York, Chair
A Stephen Gillespie, Kirkland & Ellis LLP, London
Caroline Leeds Ruby, Shearman & Sterling LLP, London

This panel presented a high level introduction to the recently released Guide Regarding Opinion Letters on English Law in Financial Transactions (“Guide”) issued by the City of London Law Society in November 2011. The Guide has no official legal status, but is intended to help the Society’s members in seeking and giving opinions under English law. The Guide describes common English opinion practice, suggests the questions which a law firm practicing English law should consider addressing when seeking
or providing an opinion letter in a financial transaction, and explains the key considerations which might be relevant in answering such questions.

The panel particularly focused on those opinion practices described in the Guide that differ significantly from U.S. opinion practice. Historically, English opinions in financing transactions were rare and their use in these transactions is a relatively recent development. Generally lender’s counsel is the only firm that will issue an opinion, on the theory that lender’s counsel will be the most protective of the lender’s interests. No one other than lender and its counsel typically ever see the opinion. To the extent that the opinion requires an inquiry into the borrower’s affairs, lender’s counsel will conduct a search of the public records to determine the relevant facts. The opinion will often list the searches done and will speak only as of the date of such searches. Officer certificates are not used to establish facts; if the public record does not reveal all relevant facts, the opinion expressly will assume those facts. English opinion practice has no concept of “customary practice” as exists in the U.S. The opinion needs to stand on its own, with the words and concepts conveyed having their meaning within the four corners of the opinion letter.

The opinion practice described in the Guide is consistent with the three primary tenets of an English solicitor’s duties: (i) a duty to keep the client’s confidences; (ii) a duty to advise the client on the client’s situation; and (iii) a prohibition on any conflict of interests between the solicitor and the solicitor’s client. The importance of these ethical duties has largely discouraged the development of third-party opinion practice under English law, except in the very specialized area of capital markets transactions where English firms do give third-party opinions. While these duties are waivable by the client, it is rare to see third-party opinions in English practice outside of cross border deals with U.S. parties where English and American firms each try to reconcile their very different expectations surrounding third-party legal opinions. When given, however, under English law the ethical obligations for the opinion giver in a third-party opinion are the same as in a first party opinion—i.e., the solicitor owes a duty of due care and non-negligent performance of the solicitor’s services. But under English law, there are no obligations to third-party opinion recipients outside the four corners of the opinion itself. To date there has been little litigation over legal opinions in the U.K, and as a result there is not a large body of case law dealing with opinions to guide lawyers seeking or giving legal opinions under English law.

[Editor’s Note: See also Daniel Bushner’s report on the Guide in the Spring 2012 issue of the Newsletter (vol. 11, no. 3, at 14-16).]

3. Audit Responses Covering Multiple Countries
(Summarized by Stan Keller)

James J. Rosenhauer, Hogan Lovells US LLP, Washington, D.C., Chair
Julie M. Allen, Proskauer Rose LLP, New York
Stanley Keller, Edwards Wildman Palmer LLP, Boston

This panel discussed the problems faced by U.S. law firms in responding to audit requests for foreign clients or foreign subsidiaries of U.S. clients, as well as the special problems faced when the U.S. law firm has foreign offices.

Stan Keller began by summarizing the operation of the Treaty (consisting of the ABA Statement of Policy and the AICPA’s SAS No. 12) as the basis for audit responses in the U.S. He noted that the Treaty is a standard governing the auditing of the accounting for loss contingencies under U.S. generally accepted accounting standards. He added that these reflect the values and culture of the U.S. legal system, which may differ from those in other countries.
Julie Allen then summarized the approach in certain other jurisdictions, where bar groups have reached their own “treaties” but with different approaches. Examples used were Canada, the U.K. and Hong Kong. These jurisdictions operate under accounting standards that are different than those in the U.S., with International Financial Reporting Standards (IFRS) being the prevailing standard. She noted that many jurisdictions do not have a “treaty,” but rather requirements are set by the auditors. In some jurisdictions, like France, a lawyer is prohibited from communicating with a client’s accountants. In the U.K., a bar group recommends that solicitors not provide information on a pending matter unless the inquiry from the auditor specifically identifies the matter.

Jim Rosenhauer then led a discussion of practical problems and approaches. When U.S. lawyers receive an audit request from foreign clients in the form used in the client’s country, prevailing practice is to give the response in the standard U.S. form, identifying it as such, and these responses have generally been accepted. When a firm has offices in more than one jurisdiction, with lawyers from many of the jurisdictions involved with the client, the firm needs to consider how to handle the response. Often, a firm will seek to provide, or a client will require, a single, coordinated response to avoid inconsistencies. If it does so, it needs to decide which office will provide the response and in what form. That decision can be based on several factors, which usually relate to where the center of gravity is for the relevant client representation. Even if a single response is used, it may have to be tailored to recognize differences in the several jurisdictions. Sometimes, multiple responses may be necessary or make sense, in which case coordination becomes paramount. This highlights the need for firms with offices in multiple jurisdictions to have policies and mechanisms in place to deal with the responses. These are likely to vary among firms based upon the circumstances and firm organization and culture.