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FROM THE CHAIR

As you receive this issue, we are about to come together at the Spring Meeting of the Business Law Section in Los Angeles. I hope that I will see many of you at that meeting, or that you will join the meeting by teleconference. Information on the meeting is included under “Future Meetings” below.

The main focus of our meeting will be to review the discussion draft of the Committee’s Report on Cross–Border Closing Opinions of U.S. Counsel. The discussion draft of this Report was circulated to members of the Committee several weeks ago so as to provide members ample time to review the draft prior to our meeting. For those who need to obtain another copy, you may do so here [Ctrl + click].

I want to thank the drafting committee that produced the Cross–Border Report. The committee, led by Reporter Ettore Santucci, has worked tirelessly on the Report for almost five years. It represents a great deal of thought and research, and as a result will be a tremendous resource for members of the bar.

It is my hope, however, that once published the Report will be more than just a useful compendium of analysis relevant to rendering opinions in cross–border contexts. Rather I hope that it will be a significant contribution to promoting understanding about both the appropriateness of opinion requests and the meaning of opinions given among lawyers in many jurisdictions engaged in cross–border practice. I hope the Report will serve as a catalyst to stimulate increased dialogue among lawyers in many jurisdictions who give and advise clients receiving opinions, dialogue that will promote greater mutual understanding of what opinions in cross–border transactions can and cannot be expected to address, and perhaps as a result be part of a larger evolution toward a more common set of expectations about the scope and meaning of opinions in the cross–border context. To this end, it is my hope that our Committee will follow up this Report with additional initiatives to promote that dialogue among lawyers around the world.

I think you will find this issue of the Newsletter interesting. Its centerpiece is a thoughtful summary by our former Chair, Stan Keller, addressing a number of issues that have emerged in recent years that bear on opinions given in M&A transactions. As many know, the delivery of third–party opinions in the M&A context has declined in recent years; it is now almost unknown when a public company is being acquired (setting aside tax opinions), and is becoming less common even when private companies are acquired. There may be many reasons for this, including the relatively comprehensive nature of remedies in acquisition agreements (and limitations on those remedies) negotiated by the parties. As Stan notes, some of the more important parts of an acquisition agreement (including the remedies for breach and limitations on such remedies customarily included in the “indemnification” section of the agreement) present issues for opinion givers at least in some jurisdictions. Stan’s article provides a good overview of these issues that each of us, if asked to render an opinion on the enforceability of a merger agreement, will find useful.

In addition to the M&A article, Don Glazer has contributed some observations on the implications for opinion practice of recently enacted Delaware General Corporation Law Sections 204 and 205. As many know, those provisions provide a pathway to ratification of defective corporate acts and stock issuances, something practitioners have long sought. Don talks about the reasons opinion givers should feel comfortable giving “duly authorized and validly existing” opinions on stock has been ratified under the new provisions. We will devote some time at our upcoming meeting to discussing such opinions.

1 The URL is:
http://meetings.abanet.org/webupload/commupload/C
L510000/relatedresources/201403_draft.pdf;
Please review the schedule of our Committee’s activities at the Spring Meeting under “Future Meetings” below. Our meeting and traditional reception sponsored by Jones Day will take place on Friday April, 11. Our programs will take place on Saturday, April 12. We are sponsoring two programs. The first is an 8:00 a.m. panel discussion by Steve Weise and Don Glazer, moderated by Carolan Berkley, that looks at recent decisions of the United States Supreme Court and their implications for opinion practice in areas such as arbitration and forum selection. The second, geared to lawyers participating in the Section’s Young Lawyer’s Institute, will take place Saturday afternoon at 2:00 p.m. and will look at the work a lawyer needs to do support an opinion. We are happy as a Committee to support the Young Lawyer’s Institute, and we hope all of our members will encourage younger lawyers with interest in opinion practice to join both the Business Law Section and our Committee.

Finally, I want to welcome Susan Cooper Philpot as a co-editor on the Newsletter, joining Jim Fotenos. Susan, a partner of Cooley LLP, San Francisco, is the long-time Chair of Cooley’s Opinion Committee, where the opinion practice focuses heavily on opinions given and received in venture capital financings and capital markets transactions. Susan has been active for many years in the California State Bar’s opinion activities and reports, serves as a current member of the Opinions Committee of the Business Law Section of the California State Bar, and formerly served as Chair of the Section’s Corporations Committee.

I look forward to seeing many of you in Los Angeles.

- Timothy Hoxie, Chair
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FUTURE MEETINGS

ABA Business Law Section
Spring Meeting
Los Angeles
JW Marriott
April 10-12, 2014

Legal Opinions Committee

Friday, April 11, 2014

Committee Meeting:
3:30 p.m. – 5:00 p.m.
Diamond Ballroom Salon 9 & 10, Fourth Level

Reception: 5:00 p.m. – 6:30 p.m.
Olympic 3, Third Level

Saturday, April 12, 2014

Program: “How Is the Supreme Court Messing Around With Third-Party Legal Opinions?”
8:00 a.m. – 10:00 a.m.
Platinum Ballroom Salon C, Second Level

Program: “It’s Midnight and the Closing is Tomorrow: What Do I Need to Know to Give the Opinion the Other Party (and My Team) Have Asked Me to Prepare?”
(Jointly sponsored with the Young Lawyers)
2:00 p.m. – 3:30 p.m.
Convention Center, 504, West Hall
ABA Business Law Section
Spring Meeting
(continued)

Audit Responses Committee
Saturday, April 12, 2014
Committee Meeting:
10:00 a.m. – 11:00 a.m.
Atrium 1, Third Level

Working Group on Legal Opinions
New York, New York
May 12 & 13, 2014

ABA Business Law Section
Annual Meeting
Chicago
Hyatt Regency
September 11-13, 2014

ABA Business Law Section
Fall Meeting
Washington DC
Ritz Carlton
November 21-22, 2014

FUTURE MEETINGS
(CONTINUED)

Securities Law Opinions Subcommittee
Friday, April 11, 2014
Subcommittee Meeting:
2:00 p.m. – 3:00 p.m.
Plaza 2, Third Level

Law and Accounting Committee
Saturday, April 12, 2014
Committee Meeting:
11:00 a.m. – 12:30 p.m.
Atrium 1, Third Level

Professional Responsibility Committee
Friday, April 11, 2014
Committee Meeting:
2:30 p.m. – 4:30 p.m.
Diamond Ballroom Salon 8, Fourth Level

Saturday, April 12, 2014
Program: “Beyond the Attorney-Client Privilege: The Ethical Duty of Confidentiality for the Business Lawyer”
10:30 a.m. – 12:30 p.m.
Gold Ballroom Salon 1, First Level
Opinion Issues in Current M&A Practice

Closing opinions have, by and large, disappeared in public company merger transactions and become less frequent when private companies are involved. Nevertheless, closing opinions are still seen in some merger transactions. Recent judicial decisions have not only made merger practice more complicated but have raised issues that need to be considered when a closing opinion is being given, especially an opinion on the enforceability of the merger agreement. This article will identify and briefly discuss some of these issues.

Non-Reliance and Disclaimer

Merger agreements often seek to limit a party’s recourse through limitations on liability and the grounds upon which claims may be asserted. For example, the agreement may limit claims to breaches of the representations made in the agreement, cap the amount of liability for any breach and specify the time within which claims for a breach may be brought. In some cases, the agreement may disclaim a party’s reliance on information that was provided but that is not covered by a representation.

The validity of these limitations can be an issue. The Delaware Chancery Court, in Abry Partners V, L.P. v. F&W Acquisition LLC, 891 A.2d 1032 (Del.Ch. 2006) held that limitations on liability for violations of representations in the agreement were invalid to the extent they applied to fraudulent misrepresentations. In the same decision the court gave effect to a disclaimer on reliance on any information provided outside the agreement – i.e., information that was not covered by the representations in the agreement. Subsequent Delaware decisions refine these concepts. See, e.g., RAA Management, LLC v. Savage Sports Holdings, Inc., 45 A.3d 107 (Del. 2012) (addressing non-reliance provisions in a nondisclosure agreement governed by New York law); Airborne Health, Inc. v. Squid Soap, LP, 984 A.2d 126, 140-142 (Del.Ch. 2009) (a non-reliance provision precluding reliance on extra-contractual representations and concealment of facts must be explicit to be valid under Delaware law).

Although an opinion giver, when giving an opinion on the enforceability of a merger agreement, should be entitled to rely on an unstated assumption regarding the absence of fraud and an exception for fraud should be understood without having to be stated, some opinion givers may choose to state the exception expressly.

Extending Statutes of Limitation

Merger agreements sometimes define the period during which claims may be made in ways that could have the effect of extending the applicable statute of limitation. For example, claims for breach of certain representations, such as tax, environmental and intellectual property representations, may be specified as extending until the statutes of limitation applicable to those potential liabilities expire and, possibly, for some grace period after that. Those statutes can go well beyond the statute of limitation for breach of contract claims that would apply to alleged breaches of the representations made in the agreement (for example, normally three years in Delaware). Sometimes representations are stated to last indefinitely.

The Delaware Chancery Court, in GRT, Inc. v. Marathon GTF Technology, Ltd., 2011 WL 2682898 (Del. Ch. July 11, 2011), in upholding a shortening of a statute of limitation, confirmed that a provision that had the effect of extending a legislatively adopted statute of limitation was invalid as a matter of public policy. Thus, an opinion giver would have to consider whether a merger agreement provision extended an applicable statute of limitations, and, if so, whether it was valid under the law covered by the opinion.
Whether a provision extends a statute of limitation could depend upon whether a claim would be based upon breach of a representation, which accrues at the time of the transaction, or would be based upon indemnification for a liability to a third party that accrues in the future. Also, if the agreement upon which the misrepresentation claim is based is under seal in accordance with the requirements of state law a longer statute of limitations may apply (twenty years in Delaware). See Whittington v. Dragon Group, LLC, 991 A.2d 1 (Del. 2009); and Lou Hering’s and Melissa DiVincenzo’s note, “Opinion Considerations for Agreement Provisions Extending Statutes of Limitations” in the Spring 2011 (vol. 10, no. 3) issue of the Newsletter (pages 3-4).

Shortening Statutes of Limitation

The converse of a provision that lengthens a statute of limitation is a provision in a merger agreement that shortens a statute of limitation. See Melissa DiVincenzo’s note, “Contractual Shortening of Statutes of Limitation” in the Winter 2013 (vol. 13, no. 2) issue of the Newsletter (pages 15-17). An example is a survival provision for representations (such as one year) or a similar limitation on the assertion of claims or commencement of suit. These are valid in some states, such as Delaware (see ENI Holdings, LLC v. KBR Group Holdings, LLC, 2013 WL 6186326 (Del. Ch. Nov. 27, 2013)) but not in others. Thus, in Massachusetts in Shahin v. I.E.S. Inc., 988 N.E.2d 873 (Mass. App. Ct. 2013), citing Creative Playthings Franchising Corp. v. Reiser, 978 N.E. 2d 765 (Mass. 2012), a limitation on claims was found to be unenforceable as against public policy because the provision did not provide for operation of the discovery rule under which a limitation period is tolled while the party did not know and could not reasonably have known the information upon which the claim is based even though the one-year period specified in the agreement for the assertion of claims might otherwise have been reasonable. Instead of reading into the contract a tolling provision, the court held the provision to be entirely invalid, leaving the parties with the regular statute of limitation period. Therefore, opinion givers should consider whether under the law covered by the opinion a remedies opinion can be given without an exception for a provision that has the effect of shortening an otherwise applicable statute of limitation.

Even if the state whose law is covered by the opinion will give effect to a provision that shortens a statute of limitation, the inquiry is not ended since a court in a state in which the lawsuit is brought might, contrary to the prevailing modern rule, treat the question of the applicable statute of limitation as procedural and governed by its law as the forum state. Even if the court follows the modern rule to give effect to the law chosen by the parties to govern the agreement it might decline to give effect to the provision that shortens the statute of limitations on the grounds that shortening a statute of limitation without providing a reasonable discovery period violates a fundamental policy of that state. Although these situations could result in the provision not being enforced, an opinion exception should not be necessary because the opinion, by virtue of its coverage limitation, typically covers only the law treated in the opinion as governing the agreement’s enforceability.

Ownership of Attorney-Client Privilege

In a merger, “all rights, privileges, powers and franchises” of the target company are transferred to the survivor. A court, as the Delaware Chancery Court did in Great Hill Equity Partners IV, LP v. SIG Growth Equity Fund I, LLLP, 80 A.3d 155 (Del. Ch. 2013), may interpret the statutory provision on the effect of a merger to include a transfer of the attorney-client privileges of the target to the survivor, including advice the target’s counsel may have given about the merger. This is not unlike the right to assert conflicts of interest to disqualify the target’s counsel that pass to the survivor. Absent a relevant agreement provision, there normally should not be any opinion issue arising from these rights transferring (although counsel for the target might have an unhappy former client).
With the notoriety of the Great Hill decision, there has been an increase in the inclusion of provisions in merger agreements to deal with these issues, such as waivers and assigning rights to the privilege to a stockholder representative or other third party, following the suggestion of Chancellor Strine (now Chief Justice Strine) in his Great Hill decision (“[o]f course, parties in commerce can — and have — negotiated special contractual agreements to protect themselves and prevent certain aspects of the privilege from transferring to the surviving corporation in the merger.” 80 A.3d at 160-161.) Opinion givers should consider the effectiveness of these provisions.

Although not likely to be an opinion issue, counsel for the target should think beyond agreement provisions to the practical considerations of preserving the confidentiality of pre-merger communications and avoiding unintended loss of confidentiality and waiver of the privilege following the merger.

**Modification of Fiduciary Duties**

With the increase in popularity of non-corporate entities, such as limited liability companies and limited partnerships, there has been an increase in provisions seeking to modify fiduciary duties. These provisions usually appear in the entity’s governing documents, such as the LLC agreement, and are unlikely to be the subject of an enforceability opinion in a merger transaction. If, however, a provision that modifies fiduciary duties is included in the merger agreement, a remedies opinion on that agreement would cover the enforceability of such a provision. The enforceability of provisions attempting to modify fiduciary duties will vary depending on the type of entity – for example, limited liability companies and limited partnerships have greater flexibility than corporations to modify by contract their governance arrangements. Statutory provisions may prescribe limitations on the ability to modify fiduciary duties. Thus, in Delaware, it was first determined that the statute then in effect permitted limited partnerships to modify but not eliminate fiduciary duties of general partners (see Gotham Partners, L.P. v. Hallwood Realty Partners, L.P., 817 A.2d 160 (Del. 2002)); the statute was then amended in 2004 to clarify for both limited partnerships and limited liability companies that fiduciary duties could either be eliminated or modified, but the contractual duty of good faith and fair dealing could not be affected. This has prompted efforts to define “good faith”, which has raised questions of the extent to which “good faith” can be defined by contract. See Gerber v. Enterprise Products Holdings, LLC, 67 A.3d 400 (Del. 2013).

If faced with a provision in the merger agreement that attempts to modify fiduciary duties, opinion givers need to consider its validity under the law covered by the opinion.

**No Breach of Anti-Assignment and Change-of-Control Provisions**

An important consideration in merger transactions is the effect of the transaction on material contracts of the target company. To the extent that the contracts have anti-assignment or change-of-control provisions (or indeed involve personal service contracts), the contracts could be affected by the transaction in the absence of consents.

An opinion that consummation of the transaction will not cause a breach of other contracts or require a consent under those other contracts would normally cover the effect of the transaction on those contracts. That effect can depend upon the nature of the contract, the language of the relevant provision and the type of merger transaction. Thus, a sale of assets could involve an assignment while a merger might not. On the other hand, if the transaction is a forward merger and the anti-assignment provision in the contract covers assignments by operation of law, the transaction might trigger the anti-assignment provision. A sale of stock normally would not involve an assignment of the contract but it could trigger a change-of-control provision. To illustrate the complexity of this area, the Delaware Chancery Court in Meso Scale Diagnostics, LLC v. Roche Diagnostics GmbH, 2011 WL 1348438 (Del. Ch. Apr. 8, 2011), initially declined to rule that a reverse
merger (in which the target company is the survivor) did not involve an assignment of the target’s contracts before finally ruling in Meso Scale Diagnostics, LLC v. Roche Diagnostics GmbH, 2013 WL 655021 (Del. Ch. Feb. 22, 2013), that the reverse merger transaction did not trigger the particular contractual anti-assignment provision.

Opinion givers, therefore, need to carefully review the contracts the opinion is covering, the nature of the transaction and the applicable law covered by the opinion before giving a no breach/no consent opinion.


Provisions in merger agreements choosing the law that governs the agreement and selecting the forum in which disputes are to be resolved present the same opinion issues that they do for other types of agreements. There may, however, be added complexity in the case of merger agreements if the state or states whose laws govern the merger (typically the state or states of incorporation of the constituent corporations) is not the state whose law is selected to govern the merger agreement.

Under the internal affairs doctrine, corporate process and fiduciary duty issues affecting the corporation and its officers, directors and stockholders usually are governed by the law of the state of incorporation notwithstanding that the parties may have chosen other law to govern the merger agreement (this article does not address the unique provisions of California law that purport to modify the internal affairs doctrine by applying some provisions to corporations incorporated elsewhere). Sometimes, the choice-of-law provision in the agreement recognizes this difference but often it does not. Even if it does not, an exception to the enforceability opinion that covers the law chosen to govern the agreement is not necessary because the limitation of the internal affairs doctrine on the parties’ choice of law to govern the agreement is well understood. See TriBar Opinion Committee, “Third-Party ‘Closing’ Opinions” § 4.5, 53 Bus. Law. 591, 634 (1998).

The selection of the courts of a specified state as the exclusive forum to resolve disputes under a merger agreement also can raise issues, some of which are common with other agreements and some of which have unique aspects. One common issue is the need to recognize the difference between selection of a jurisdiction (e.g., federal and state courts in Delaware) and choice of a venue (e.g., the Delaware Court of Chancery) because the selection of a particular court can be more difficult due to jurisdictional limitations. Another common issue is the need to consider the Bremen exceptions to the modern view under which courts will give effect to the parties’ choice of forum, and whether to rely on the exception as unstated and understood or to state it expressly. See M/S Bremen v. Zapata Off-Shore Co., 407 U.S. 1 (1972). In addition, even if the selected forum is the state of incorporation, enforcement of that provision by a court in that state when an action is brought in another state contrary to an exclusive forum provision, at least in the early stages of the proceeding, is not assured because courts have the discretion to defer to other states as a matter of comity. However, this discretion should not require an opinion exception because it is well understood. See TriBar Opinion Committee, “Special Report of the TriBar Opinion Committee: The Remedies Opinion — Deciding When to Include Exceptions and Assumptions” II(F), 59 Bus. Law. 1483, 1498-1502 (2004).

When the courts of a state that is not the state of incorporation are selected, a court in the state of incorporation, if an action is filed there, may be reluctant to surrender jurisdiction if the action relates to the corporation’s internal affairs. This may be because the court determines that doing so would result in violation of a strong public policy of the state of incorporation. This basis for declining to recognize the parties’ choice of forum is one of the Bremen exceptions and is understood without being stated. Another basis on which the court may decline to recognize the parties’ choice of forum is by interpreting the agreement’s forum selection clause narrowly so as not to cover matters, such as breach of
fiduciary duties, that are subject to the internal affairs doctrine. See OTK Associates, LLC v. Friedman, 2014 WL 684174 at *17 – *20 (Del. Ch. Feb. 5, 2014) (New York forum selection denied because fiduciary duty-based challenge to transaction was governed by Delaware law and did not arise out of or relate to agreement even though breach of fiduciary duty could invalidate agreement). An opinion is unlikely to cover the enforceability of the forum selection clause under the law of the state of incorporation because it was not the state whose law was chosen to govern the agreement. Even if it did cover that law, no opinion exception would be necessary for the possibility that a court might narrowly construe the provision so long as the provision as construed is enforceable. An opinion addresses the agreement’s enforceability, not how a court will interpret the agreement.

With the increased use of exclusive forum selection provisions in corporate charters and bylaws and governing documents of other entities, opinion preparers should consider whether a forum selection provision in a merger agreement, to the extent it applies to internal affairs matters, is consistent with the provision in the other documents that may govern.

Arbitration Provisions

There has been an increase in the use of arbitration provisions in merger agreements, especially those with earn-outs or other contingent payments, at least prior to the Delaware plan for judicial arbitration being invalidated. See Delaware Coalition for Open Government, Inc. v. Strine, 733 F.3d 510 (3d Cir. 2013), cert. denied, 2014 WL 271920 (Mar. 24, 2014). Arbitration and other dispute resolution provisions in merger agreements present the same opinion issues as they do in other agreements. Just as there has been a tug and pull in recent years between the United States Supreme Court and many federal and state courts on whether various arbitration terms, such as denial of the ability to bring class actions, are permissible, there have been differences in opinion practice on whether routinely to include exceptions for arbitration provisions. As might be expected, the Supreme Court has prevailed through such decisions as Stolt-Neilsen S.A. v. AnimalFeeds International Corp., 559 U.S. 662 (2010); AT&T Mobility LLC v. Concepcion, 131 S.Ct. 1740 (2011); and American Express Co. v. Italian Colors Restaurant, 133 S.Ct. 2304 (2013), giving broad effect to the Federal Arbitration Act. It remains to be seen what effect the Supreme Court’s approach to upholding arbitration provisions will have on opinion practice.

Just as with forum selection provisions, there has been increased interest in the use of arbitration provisions in corporate charters and bylaws and governing documents of other entities. Again, opinion preparers should consider whether an arbitration provision in a merger agreement that might apply to internal affairs matters is consistent with the provision in the other documents that may govern a dispute arising under the agreement.

Due Authorization Defects

An opinion on a merger agreement will usually include an opinion that the merger agreement and the merger contemplated by it have been duly authorized by all necessary corporate action on the part of the company. This opinion requires the opinion preparers to be alert to any defects in that authorization. For example, if a merger agreement following the purchase of control by an acquirer is authorized by written consents of persons who are to become directors effective upon the merger, there is case law calling into question the validity of that action because the persons signing the consents were not directors when they signed them and thus were not subject to fiduciary duties at that time (see AGR Halifax Fund, Inc. v. Fiscina, 743 A.2d 1188 (Del. Ch. 1999) and U.S. Bank Nat’l Ass’n v. Verizon Communications Inc., 479 B.R. 405 (N.D. Tex. 2012)). In addition, the sequencing of director and stockholder action can be critical. In some states, such as Delaware, the board’s recommendation of the merger must precede stockholder approval; in other states, such as California, it need not.
Another example of a defect in authorization is when stock has been invalidly issued and therefore, in a state like Delaware, is treated as void, resulting in an inability to determine whether the requisite stockholder vote has been obtained. As described in Don Glazer’s article in this issue of the newsletter, sections 204 and 205 of the Delaware General Corporation Law (the "DGCL") recently became effective to establish procedures for retroactively curing defective corporate actions, such as invalid stock issuances. In addition to satisfying themselves that the procedures under those sections were properly followed, opinion preparers should be mindful of any intervening rights that may have been created that could permit the holders of those rights to challenge the full retroactive effect of the curative actions.

Related to due authorization are actions that can result in an otherwise valid authorization being set aside on equitable grounds, such as breach of fiduciary duties. Thus, in Delaware, there are so-called “Revlon duties” in connection with the sale of a business (see Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc., 506 A.2d 173 (Del. 1986)), limitations on locking up the vote before stockholder approval is obtained (see Omnicare, Inc. v. NCS Healthcare, Inc., 818 A.2d 914 (Del. 2003)), and grounds to invalidate corporate action obtained through deceptive and unfair means (see Adlerstein v. Wertheimer, 2002 WL 205684 (Del. Ch. Jan. 25, 2002)). These infirmities usually do not require an opinion exception because they are covered by an unstated assumption as to their absence, which opinion preparers may rely upon so long as they do not recognize that assumption to be unreliable. If, however, the opinion preparers have concerns, for example, because they know that the voting agreements required by the acquirer could violate Omnicare, they might include in the opinion an express assumption as to compliance with duties or even decline to give the opinion.

**Issues Under DGCL §251(h)**

A new merger technique has been created in Delaware by the enactment of Section 251(h) of the DGCL. This section permits structuring an acquisition transaction so that a second step merger can be completed without stockholder approval following consummation of a tender or exchange offer that results in the acquirer owning at least the percentage of stock that would have been required to approve the merger. When this new “medium form” merger technique is used, the agreement typically will provide for the tender/exchange offer to be followed by the merger without stockholder approval if the minimum purchase condition is satisfied.

Because the target must be a public corporation for Section 251(h) to apply, it is unlikely that there will be a closing opinion. If there is an opinion, though, it is likely that it would cover the ability to effect the merger without stockholder approval. To give this opinion the opinion preparers would have to satisfy themselves that the conditions of Section 251(h) have been met. Doing so involves a number of issues, including determining that the target is a public corporation as defined, that no other party to the agreement is an “interested stockholder” as defined in Section 203 of the DGCL at the time the merger agreement was approved by the board of directors, that the tender/exchange offer has been “consummated” and that the non-tendered shares are entitled to receive in the merger the same amount and kind of consideration paid in the tender/exchange offer.

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**Opinions on DGCL Section 204 Stock:**
**A Rose is a Rose is a Rose**

Section 204 of the Delaware General Corporation Law, which became effective on April 1 of this year, provides Delaware corporations a procedure by which they can ratify stock whose issuance did not satisfy statutory requirements. (In this article I will refer to stock that has been ratified under Section 204 as “Section 204 stock.”)
Section 204 permits corporations to convert lead to gold, deeming, as if by alchemy, stock whose approval initially was defective to have been validly issued from the date it originally was issued.

In cases challenging the validity of stock, the Delaware courts have insisted on punctilious compliance with statutory requirements and, for stock whose issuance was not approved in accordance with those requirements, have compounded the difficulty of validating it by blurring the distinction between voidable stock, which can be ratified as of the date the stock originally was issued, and void stock, which cannot be ratified and hence whose issuance cannot be corrected retroactively. See “Recent Developments — Caveat Opinion Givers: Opinions on the Status of Stock” in the Summer 2011 issue (vol. 10, no. 4) of the Newsletter (at pages 13-14); “Notes from the Listservice — Postscript: Curing Prior Deficiencies in Authorizations of Share Issuances” in the Spring 2011 issue (vol. 10, no. 3) of the Newsletter (at pages 10-12); S. Bigler and S. Tillman, “Void or Voidable? — Curing Defects in Stock Issuances Under Delaware Law,” 63 Bus. Law. 1109 (2008). By permitting ratification of stock that is void as well as voidable, Delaware in adopting Section 204 has provided corporations a knife to cut the Gordian knot when their counsel is unable to assure them that stock they are seeking to validate is voidable and not void. An article by Steve Bigler and John Mark Zeberkiewicz, “Restoring Equity: Delaware’s Legislative Cure for Defects in Stock Issuances and Other Corporate Acts,” in the February 2014 issue of The Business Lawyer is must reading for anyone advising a corporation regarding compliance with Section 204.

For opinion givers a question has arisen whether a duly authorized and validly issued opinion on Section 204 stock should be worded differently from an opinion on other stock or otherwise hedged. I believe the answer to that question is no. Section 204(f) deems stock validated in accordance with the requirements of Section 204 to be “no longer … void or voidable” and makes its validation retroactive to the time that stock was purportedly issued. Thus, compliance with Section 204 restores stock, whether void or voidable, to the same status as stock that originally was issued in accordance with statutory requirements. An opinion that Section 204 stock is duly authorized and validly issued confirms that all of the requirements of Section 204 for ratifying that stock were satisfied and that, but for the defects corrected under Section 204, the original approval and issuance of that stock satisfied statutory requirements. A hedge in an opinion on Section 204 stock would cast a cloud over the stock’s validity and should be unacceptable to a recipient, who deservedly expects to be told without equivocation that the stock has been duly authorized and validly issued.

I have heard two objections to the conclusion that an opinion on Section 204 stock should not be worded differently from an opinion on other stock or otherwise hedged. I believe that neither holds up under analysis.

One objection is based on Section 205(f) of the Delaware General Corporation Law, which prohibits the bringing of an action challenging the validity of Section 204 stock more than 120 days after the ratification became effective. Lawyers arguing for a qualification claim that until the 120 day period has run an opinion giver has an obligation to put the recipient on notice that the validity of the stock is subject to challenge. The problem with this argument is that it ignores the language of Section 204(f), which, in deeming stock no longer void or voidable as of the “validation effective time,” validates the stock as of the inception of the 120 day period, not its expiration. Moreover, qualifying an opinion on Section 204 stock until the 120 period has run would ignore the reason the 120 day period was included in the statute, which was not to provide a plaintiff an opportunity it would not have had under Delaware law to challenge the validity of that stock but to shorten the period it otherwise would have had under the Delaware statute of limitations. Thus, just as in practice lawyers never point out that the validity of stock on which they are giving an opinion may be
challenged until the statute of limitations has run, they have no reason, when giving an opinion on Section 204 stock, to point out the possibility that the validity of that stock may be challenged during the 120 days after the effective time of its validation.

A second objection to treating Section 204 stock differently for opinion purposes is based on Section 205(b), which states that the Delaware Court of Chancery in its discretion may declare a ratification effected in accordance with Section 204 not effective or effective only upon conditions established by the Court and further that the Court may require measures to remedy or avoid harm to any person substantially and adversely affected by a ratification. Here, the argument runs, the possibility the Court of Chancery might in its discretion invalidate Section 204 stock requires an opinion qualification. Section 205(b), however, only restates the existing power of the Delaware courts to invalidate on equitable grounds stock whose issuance met statutory requirements, for example because the board violated its fiduciary duty in approving its issuance (as boards sometimes have been found to have done in issuing stock in interested party transactions and as a defensive measure in hostile takeovers). As a matter of practice, opinions on stock issued in accordance with statutory requirements are understood not to address the possibility that the stock may be invalidated on equitable grounds and, in addition, with regard to violations by the board of its fiduciary duty in approving its issuance, rely on an assumption, which may be unstated so long as the opinion preparers do not recognize it to be unreliable, that the board satisfied its fiduciary obligations. I see no more reason to depart from that practice for opinions on Section 204 stock than for any other stock.

In adopting Section 204, Delaware has done the corporate world (and its counsel) a huge favor by providing a procedure for correcting defects in stock issuances that otherwise could not have been corrected retroactively. In doing so, Delaware has permitted lawyers to give opinions that stock has been duly authorized and validly issued that they otherwise could not have given. Because many equity financings require delivery of an unqualified duly authorized and validly issued opinion, the utility of Section 204 would be undercut if opinion givers were to treat Section 204 stock differently in their opinions than other stock. As discussed above, I see no reason why they should. Once its unsightly petals are removed, a rose becomes just another rose.

- Donald W. Glazer
dglazer@goodwinprocter.com

[Editors’ Note: We understand that major Delaware law firms are taking the approach described in Don’s article, for the reasons he has outlined, and are not hedging their opinions on Section 204 stock.]

Nomura Asset Capital Corp v.
Cadwalader, Wickersham & Taft LLP

On February 13, 2014, the Appellate Division of the New York State Supreme Court affirmed, as modified, the trial court’s dismissal of Cadwalader’s motion for summary judgment on Nomura’s claim of malpractice. 980 N.Y.S.2d 95. (The trial court’s decision can be found at 2012 WL 1647308 (January 11, 2012).) Nomura, Cadwalader’s former client, claims the firm committed malpractice in connection with its representation of Nomura in a 1997 structuring and issuance of interests in a REMIC trust. The claim has two components, one asserting that Cadwalader did not adequately advise Nomura about the applicable REMIC regulations pertaining to the determination of the fair market value of real property, and the second asserting that the firm failed to perform necessary due diligence before issuing its opinion letter to the purchasers of the securities of the trust.

On the first point, the Appellate Division concluded that the trial court should have granted summary judgment for Cadwalader and modified the order accordingly. The testimony and evidence submitted by the firm convinced
the Appellate Division that the firm had advised Nomura on the applicable requirements of the REMIC rules regarding the value of real property securing a REMIC loan.

However, on the second point, the Appellate Division affirmed the trial court’s denial of summary judgment, concluding that while the firm did not have a generalized duty to review the appraisals of the real properties underlying the REMIC loans, a document submitted by Nomura to the firm setting forth the “deal highlights” of one of the major loans in the portfolio raised sufficient “red flags” so that the issue of the firm’s diligence in issuing its legal opinion was a matter to be submitted to the jury. While the firm had relied upon Nomura’s representations in the securitization documents that the REMIC factual tests were satisfied, the Appellate Division concluded that “if ‘red flags’ are raised about a client’s representations, further inquiry [is] warranted.” 980 N.Y.S.2d at 103. The Appellate Division found support for this conclusion in the testimony of Cadwalader’s tax partner that he would typically inquire further if he became aware of a property valuation that came close to “REMIC-eligibility,” and “that his practice was to request the underlying appraisal if he believed further inquiry was required.” Id. at 104.

While one may dispute the significance of the purported “red flag” found determinative by the Appellate Division (Justice Friedman issued a vigorous dissent), the principle the panel relied upon — that counsel may not rely upon factual representations under circumstances making reliance unwarranted — is not controversial. As noted in comment c to Section 95 of the Restatement of the Law Third, the Law Governing Lawyers (2000):

“A lawyer normally may rely on facts provided by corporate officers and other agents of a client that the lawyer reasonably believes to be appropriate sources for such facts without further investigation or specific disclosure, unless the recipient of the opinion objects or other circumstances indicate that further verification is required.”

- The Editors

AN INTRODUCTORY UPDATE, SECOND EDITION OF THE AUDITOR’S LETTER HANDBOOK

Editors’ Note: We reprint here, with the permission of the Audit Responses Committee, its introduction to the Second Edition of the Auditor’s Letter Handbook (2013). The Handbook is available for purchase from the ABA here (CTRL + click).]

Much has changed since the American Bar Association Statement of Policy Regarding Lawyers’ Responses to Auditors’ Requests for Information (the “ABA Statement”) and the American Institute of Certified Public Accountants’ (“AICPA”) related Statement of Auditing Standards No. 12 (“SAS 12”) were

3 The URL is http://www.americanbar.org/groups/business_law/publications.html.
approved in December 1975 and January 1976, respectively. We have seen, for example, an increased emphasis on the quality of loss contingency disclosure, an expansion of private litigation and SEC enforcement actions against accountants and other professionals, and a new regulatory regime for the accounting profession established by the Sarbanes-Oxley Act of 2002. Despite these changes, the ABA Statement has stood the test of time and shown its flexibility to adapt to meet changing circumstances.

Background

The ABA Statement is intended to balance two objectives: (i) to facilitate effective auditing as the underpinning for public confidence in financial reporting, and (ii) to preserve client confidences as mandated by attorney ethics rules and to protect attorney-client privilege, each of which is a critical component of our legal system. The preservation of client confidences and the protection of attorney-client privilege encourage client consultation with counsel and thus promote voluntary legal compliance. The ABA Statement’s objectives are at least as important today as they were when the ABA Statement was approved. These objectives are achieved by requiring lawyers to identify pending and threatened claims they are handling, but permitting them to assess the likely outcome only when an adverse result is either “probable” or “remote” (as defined in the ABA Statement); by limiting when lawyers address unasserted claims; and, when appropriate in connection with their engagement, by having lawyers acknowledge to the auditors their professional responsibility with respect to their client’s disclosures, thereby providing a basis for the auditors to know that the lawyers who advise the client on disclosure matters continue to be involved.

Impact of Sarbanes-Oxley Act

The Sarbanes-Oxley Act, which was enacted in response to a series of accounting scandals, imposed new regulations on both the accounting and legal professions and on their clients. These include creation of the Public Company Accounting Oversight Board (the “PCAOB”) to regulate the accounting profession and the adoption by the Securities and Exchange Commission (the “SEC”) of rules governing attorney professional conduct. The PCAOB’s authority to conduct inspections and issue reports and to take disciplinary actions against accountants, along with increased private litigation against accountants, has heightened the pressure on auditors to seek more information about loss contingencies to support their audits of management’s assertions and have put a premium on lawyers’ providing appropriate information as contemplated by the ABA Statement.

Notably, the SEC’s professional conduct rules adopted to implement Section 307 of the Sarbanes-Oxley Act and changes to related state legal ethics rules provide an even firmer basis than existed when the ABA Statement was approved for auditors to be able to rely on the performance by lawyers of their professional responsibilities. Under the SEC’s Part 205 Rules on Attorney Professional Conduct, a lawyer appearing and practicing before the SEC in the representation of a public company is required to report up the ladder (ultimately to the board or an appropriate board committee if necessary) evidence of a material violation of federal securities and certain other laws, and is authorized in some situations to report such violations to the SEC. These rules supplement state ethics rules, which also govern lawyer conduct. In that connection, about the same time as the SEC was issuing its Part 205 Rules, the ABA approved related changes to the Model Rules of Professional Conduct, which do not themselves govern lawyer conduct until adopted by the applicable state. These changes extend permissible disclosure under Rule 1.6 to reach client conduct that causes substantial financial injury and require lawyers under Rule 1.13 to pursue remedial measures for corporate misconduct and to communicate with higher authority within the client organization if necessary to prevent or rectify the problem, with permission to disclose if necessary client information outside the client organization. These rules complement Rule 1.2(d), which prohibits a lawyer from assisting a client to
engage in a crime or fraud, and Rule 4.1(b), which requires a lawyer to make disclosures necessary to avoid assisting a client’s crime or fraud.

In addition, the Sarbanes-Oxley Act heightened the legal prohibitions against misleading auditors in connection with an audit of a public company, and the SEC implemented this legislation in Rule 13b2-2. That rule applies to officers and directors of an issuer and persons acting under their direction, which can encompass a broad range of participants in the audit process, including lawyers communicating with auditors.

Changes in Accounting and Auditing Standards

In recent years, we have seen changes in the accounting standard applicable to income tax contingencies with the adoption by the Financial Accounting Standards Board (the “FASB”) of FASB Interpretation No. 48, Accounting for Uncertainty in Income Taxes (“FIN 48”). FIN 48 removed these contingencies from the scope of Financial Accounting Standards No. 5 (now Accounting Standards Codification Item 450-20 (“ASC 450-20”)). We also saw the codification of accounting standards that changed the nomenclature and references used in the ABA Statement. In each case, the Committee on Audit Responses of the ABA’s Section of Business Law issued reports addressing how these changes affect the ABA Statement. These reports are included in this updated Handbook.

In 2008, the FASB also proposed to change the requirements for disclosure of loss contingencies. After modifying its proposal in 2010 in response to adverse comments, in July 2012 the FASB decided to terminate this effort, concluding that any inadequacies in disclosures did not necessitate new standards but rather improved implementation of existing standards. This action by the FASB followed an initiative by the SEC to seek improvement in disclosure of loss contingencies, particularly those involving litigation, in accordance with the existing standards, principally through its comment letter process. Although the FASB decided not to pursue changes in the standards, we can expect auditors and the SEC to continue to look closely at companies’ accounting for and disclosure of loss contingencies.

Changes in accounting and auditing standards relating to treatment of subsequent events and the dating of the auditors’ report have also affected audit responses. Previously, auditors typically dated their reports as of the date they completed their audit work, even if that date was before the date the financial statements were issued. Now auditors date their reports on the same date that the financials are issued, and they now often seek lawyers’ responses through that date. In practice, this change has resulted in more requests that lawyers update the audit response letters they previously have furnished the auditors. As a general matter, lawyers treat update requests the same as original requests.

The Sarbanes-Oxley Act also gave the PCAOB authority to prescribe auditing standards governing the performance of audits of companies that are required to file reports with the SEC under the Securities Exchange Act of 1934 or that have a registration statement pending under the Securities Act of 1933. The PCAOB adopted SAS 12 (now codified as AU Section 337) as an interim audit standard in 2003. Except for a change related to the dating of the auditors’ report, the PCAOB has not adopted or proposed any significant changes to that standard. However, while essentially the same substantively, the AICPA version of AU Section 337 applies to private company audits, and the PCAOB version applies to public companies. Both standards are included in this Handbook.

International Aspects

Another development since the ABA Statement was approved has been the increasing relevance of international accounting and auditing standards and the expansion of cross-border practice by law firms. International Financial Reporting Standards (“IFRS”) adopted by the International Accounting Standards Board
have become the accounting standards in many countries throughout the world other than the United States. Canada, for example, recently converted to IFRS for publicly-traded companies. The SEC has been considering whether the United States should adopt IFRS or take some other approach to bringing U.S. standards into line with those of countries that use IFRS, but as of this date has not decided what, if any, action to take. Under IFRS, the accounting for loss contingencies (called contingent liabilities under IFRS) is dealt with in International Accounting Standard No. 37 (“IAS 37”), which takes a somewhat different approach than ASC 450-20 to accounting for loss contingencies.

Auditing standards in the international arena also differ from those in the United States, with greater variation among countries that use IFRS. Thus, some countries have counterparts to the ABA Statement but they often differ significantly from the approach taken in the ABA Statement. Some of these differences are due to the differences in the nature of the legal and accounting professions and some to differences in legal systems.

At the same time, the international activities of United States law firms have expanded significantly, both in terms of representation of foreign clients, who may prepare financial statements using IFRS, and maintaining offices outside the United States. As a consequence, law firms may receive audit letter requests referencing IAS 37 rather than ASC 450-20 or in a form other than that contemplated by the ABA Statement. The United States offices of those firms generally respond to such requests with the standard response they would provide under the ABA Statement. In some instances they may refer the request to a non-U.S. office of the firm for response. Those non-U.S. offices may also respond to requests directly in accordance with the understanding applicable in their jurisdictions. This internationalization of law practice presents challenges that are beyond the scope of this publication, which focuses, instead, on domestic United States practice.

Conclusion

In the 35 years since approval of the ABA Statement, significant changes have taken place in the responsibilities, exposure to litigation and regulation of accountants, in professional standards governing lawyer conduct, in disclosure requirements for public companies and in accounting standards. Over the years, the ABA Statement has proven to be adaptable to these changes and has continued to fulfill the purposes to which it was directed.

- Audit Response Committee
  Business Law Section
  James J. Rosenhauer, Chair
  Thomas W. White, Vice Chair
  Stanley Keller, Past Chair

April 2013

NOTES FROM THE LISTSERVE

[Editor’s Note: Dialogues on the Committee’s listserve are not intended to be authoritative pronouncements of customary opinion practice, but represent the views of individual lawyers on opinion topics of current interest. Members of the Committee may review the comments referred to below by clicking on the “Archives” link under “Listserves” on the Committee’s website.]

Permitting and Zoning Opinions

Jill Dinneen, Nashua, New Hampshire, prompted a robust response with her January 14, 2014 inquiry to the Listserve asking for its response to a request made to her firm for the delivery of a “permitting” opinion in connection with project financing, namely, “that all necessary permits have been obtained for the project being financed.”
The consensus of the responders was that these opinions are often requested in certain real estate and project finance transactions and, if given, are given by a land use or regulatory specialist (Richard L. Goldfarb, Stoel Rives LLP, Seattle; Arthur A. Cohen, Haynes and Boone, LLP, Washington, D.C.). In jurisdictions where title insurance is common (e.g., California), counsel typically refuse to give such opinions (Douglas F. Landrum, Jackson DeMarco Tidus Peckenpaugh, Irvine, California).

Joshua Stein of Joshua Stein PLLC, New York, New York, described New York practice:

“For real estate development projects it is common to require the developer’s land use counsel to issue a zoning opinion, confirming the zoning characteristics of the site, which will often take into account various discretionary permits, approvals, and waivers. Having been paid to analyze (and if necessary improve) the zoning characteristics of the site, developer’s land use counsel can reasonably be expected to issue such an opinion, both to the borrower and the lender. Of course the opinion has suitable assumptions and qualifications …”

Joshua’s New York colleague, Thomas D. Kearns of Olshan Frome Wolosky LLP, responded with examples of the type of opinions/negative assurance local counsel on development projects have been asked to give:

“I. In connection with our representation of Borrower [, General Partner/Managing Member] and Guarantor, nothing came to our attention that would lead us to believe that the Secured Property does not comply with all laws, ordinances, rules, regulations, covenants and restrictions affecting the construction, occupancy, use and operation thereof.

2. To the best of our knowledge, all permits, licenses and approvals that are required for the construction, use and occupancy of the Secured Property have been duly and validly issued by the governmental authorities or persons having jurisdiction or rights with respect thereto, are in full force and effect, and are not subject to any appeal, any applicable period for appealing such actions having expired."

Andrew M. Pearlstein, Seyfarth Shaw LLP, Boston, concurring with Joshua Stein, noted that “[l]and use opinions are the norm in many, but not in all, … states and rendered in connection with the closing of a construction loan.”

On the other hand, John (“Jack”) P. Burton of Rodey, Dickason, Sloan, Akin & Robb, P.A., Santa Fe, New Mexico, noted that his firm resists giving such opinions, suggesting that the parties obtain one or more of the following other sources of assurance: (i) a letter or certificate from the local zoning authority confirming the zoning classification of the property and confirming no violation, if available; (ii) an ALTA (American Land Title Association) survey of the boundary and improvements on the property, showing setback lines, building heights, curb cuts, easements, utility lines, etc.; and/or (iii) a zoning endorsement to the title insurance policy, if available, and any other endorsements that might be relevant to zoning or permits, such as access endorsements.

Philip Schwartz of Akerman LLP, Fort Lauderdale, conurred with Jack Rodey that the practice of rendering zoning opinions varies by locale, noting that such opinions in Florida are rarely given and, when given, are generally based solely on a letter obtained from the local zoning authority.

Phil, who served as the Reporter of the Florida Bar’s 2011 Legal Opinions Report (“Report on Third-Party Legal Opinion Customary Practice in Florida”, available in the Legal Opinion Resource Center on the
Committee’s website (accessible [here](http://apps.americanbar.org/buslaw/tribar/)) attached to his response the applicable pages from the Florida Legal Opinions Report discussing zoning and land use opinions (pages 161-162), which includes recommended opinion language, if such an opinion is given:

“The land use classification of the [Real Property] as presently set forth in the comprehensive plan of ___________ is ____________. The present zoning classification of the [Real Property] is ____________ under the applicable zoning ordinances of ___________. The uses presently allowed under such classifications include [insert present or proposed use of the Real Property]. In rendering these opinions, we have relied solely upon our review of a [nonbinding/binding] [letter/certificate] issued by ____________, dated ____________, a copy of which is attached hereto.”

Charles L. Menges of McGuireWoods LLP, Richmond, Virginia, closed the discussion. He noted that in routine real estate finance transactions most practitioners would consider a permitting or zoning opinion totally inappropriate, since these opinions require specialized expertise and the costs of due diligence will usually be disproportionate to the size of the transaction. “Conduit” opinions based solely on a letter from public officials or a certificate from the borrower are of little value and some opinion givers fear that conduit opinions may be construed to impose on the opinion giver an “undefined” duty to confirm the accuracy of the underlying letter or certificate.

Charlie noted, with Jack Rodey, that where zoning endorsements are available, they should obviate the need for a zoning legal opinion. The one area where the market appears to require “robust” permitting opinions are in project finance transactions involving large industrial facilities, such as power plants, where environmental compliance issues, energy regulations, and special federal and state permits are of particular concern. In such transactions, the opinions are provided by sophisticated regulatory counsel and based upon extensive due diligence and comprehensive factual certifications from the borrower and perhaps others. Such opinions are typically “heavily negotiated, highly qualified and very specific as to the laws and approvals intended to be covered.”

### Title Opinions and Title Insurance Policies

Real estate legal opinions were also on the mind of Jack Burton with his inquiry to the Listserve of October 3, 2013, asking whether any one gives title opinions solely “in reliance on title insurance policies” without performing a title examination. The overwhelming consensus response was “what’s the point?” As Herrick K. Lidstone, Jr., Burns Fig & Will P.C., Greenwood Village, Colorado, responded, “[w]hy would you give an opinion in that circumstance? ... Seems like a waste of time.” Charlie Menges concurred, noting that this practice was not uncommon years ago, “but most real estate attorneys no longer give such opinions.” Charlie noted that some government agencies (the Rural Utilities Service of the Department of Agriculture) do continue to insist on title opinions “of some sort in connection with agency loans or guaranties.”

There are variations in certain states. John M. Flynt of Brunini, Grantham, Grower & Hewes, PLLC, Jackson, Mississippi, noted that in Mississippi attorneys render title opinions and act as agents for title insurers, but observed that his firm would not render a title opinion if title insurance were issued. R. Marshall Grodner of McGlinchey Stafford, Baton Rouge, Louisiana, reported that, in Louisiana, “title insurance cannot be issued without [a] title opinion issued by an attorney.” That is why, noted Marshall, “almost all title agents are attorneys, so they can rely on their own opinion.”
Several responders noted that title insurance policies are not title opinions (Stan Keller, Brian L. Holman, Musick Peeler & Garrett LLP, Los Angeles, and Joseph A. Heyison, Daiwa Capital Markets America Inc., New York). As Brian Holman observed:

“Title insurance policies are not opinions of title, only insurance against losses arising from a lack of title as insured. Insurance companies often knowingly insure over known defects in title, such as mechanics liens or drilling rights. I don’t see how one could ever give an opinion of title based on an insurance policy.”

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

- James F. Fotenos
  Greene Radovsky Maloney
  Share & Hennigh LLP
  jfotenos@greeneradovsky.com
**Chart of Published and Pending 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 March 31, 2014.]

**A. Recently Published Reports**

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<th>Section/Commission</th>
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<th>Report Title</th>
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<tr>
<td>ABA Business Law Section</td>
<td>2007</td>
<td>No Registration Opinions – Subcommittee on Securities Law Opinions</td>
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5 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/).

6 This Report is the product of the Committee on Legal Opinions in Real Estate Transactions of the Section of Real Property, Trust and Estate Law, Attorneys’ Opinions Committee of the American College of Real Estate Lawyers, and the Opinions Committee of the American College of Mortgage Attorneys (collectively, the “Real Estate Opinion Committees”).
### Recently Published Reports (continued)

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### B. Pending Reports

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<td>ABA Business Law Section</td>
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7 See note 6.
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<td>Comprehensive Report Update</td>
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<td>Comprehensive Report</td>
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<tr>
<td>Multiple Bar Associations</td>
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MEMBERSHIP

If you are not a member of our Committee and would like to join, or you know someone who would like to join the Committee and receive our newsletter, please direct him or her here. If you have not visited the website lately, we recommend you do so. Our mission statement, prior newsletters, and opinion resource materials are posted there. For answers to any questions about membership, you should contact our membership chair Anna Mills at amills@vwlawfirm.com.

NEXT NEWSLETTER

We expect the next newsletter to be circulated in July 2014. Please forward cases, news and items of interest to Tim Hoxie (tghoxie@jonesday.com) or Jim Fotenos (jfotenos@greeneradovsky.com).

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