# IN OUR OPINION

**THE NEWSLETTER OF THE LEGAL OPINIONS COMMITTEE**

**ABA BUSINESS LAW SECTION**

**Volume 15 — Number 2**

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FROM THE CHAIR

It is a privilege to share with you the Winter issue of the Committee’s Newsletter, “In Our Opinion.” This issue includes both our usual updates and the semi-annual Appendix summarizing the Fall Seminar of the Working Group on Legal Opinions Foundation held this past October in New York. As in the past, without the tireless work of our newsletter editors, Jim Fotenos and Susan Cooper Philpot, we would have nothing to read. And without Gail Merel, Jim and Susan working on the Appendix – coordinating the efforts of session reporters and other meeting participants – we would have no Appendix. With each passing issue it becomes more clear how the life of this Committee depends on the tireless work of sometimes too few volunteers!

Cross-Border Report. As most of you know (if you read your copy of The Business Lawyer or if you attended the November 2015 meeting of the Committee) the Committee’s Report on Cross-Border Opinions of U.S. Counsel has been published (71 Bus. Law. 139 (Winter 2015-2016)). This is the culmination of a huge effort on the part of the Reporter, Ettore Santucci, as well as the drafting committee. We are in their debt.

There are many reasons to read the Report. One is just to learn. If you want to know about forum selection clauses, or cross-border arbitration, or the enforcement of foreign judgments, here is your chance.

But I hope you will get more from the Report than just a better understanding of particular legal issues. The Report speaks more generally to the role of counsel on both sides of the table in the cross-border context. It posits that the best way for lawyers to communicate in the cross-border context is to accept that opinions given by a lawyer in a particular jurisdiction have to be understood in light of the customary practice of that jurisdiction. And lawyers receiving such opinions have to understand that the meaning of the opinion, and the diligence behind it, is shaped by that practice.

This is not the only premise upon which cross-border practice might be conducted. One might attempt to squeeze everything believed relevant into the four corners of an opinion and believe that one is not relying on custom to inform one’s opinion at all. I would suggest that that is a futile (and perhaps unduly expensive) effort. Words get their meaning from the context in which they are written. So custom will always inform meaning, and the starting point for understanding what is said has to include an understanding of the customs and usages of the writer.

The centrality of the opinion giver’s customary practice imposes an obligation on both opinion giver and recipient. Opinion givers need to have heightened sensitivity to the possibility of misunderstanding, and there are numerous areas where the Report suggests a different articulation of a matter than may be common in domestic practice, with an eye to promoting clarity. And opinion recipients need to know that if they do not believe they have sufficient familiarity with the customary practice of the opinion giver to understand what they receive, they will need counsel who has that familiarity to guide both their opinion requests and help them understand the meaning of what is given.

And of course, to paraphrase the Golden Rule, this works both ways. U.S. counsel representing recipients of opinions rendered by counsel in other jurisdictions need to understand what they are receiving, and take counsel from lawyers in the relevant jurisdiction as necessary.

We are planning a program at the Business Law Section’s Spring Meeting to discuss the Report. More importantly, we hope that the Report (and the program) will continue a dialogue among lawyers from various jurisdictions about opinion practice, and about how to promote greater understanding of the customs and practices of various jurisdictions and of the opinions given by lawyers in those jurisdictions. It is our hope that, over time, a
growing consensus on recurring issues for opinion givers and recipients will develop among lawyers active in cross-border transactions from different jurisdictions. This will develop through an open dialogue with broad participation. While it is unlikely that a separate body of “supra-national” cross-border customary practice will develop any time soon, it is highly desirable that mutual understanding increase. In that regard the Report is just the beginning, and it is our hope that its publication will be a catalyst for this important dialogue. Our Committee is uniquely situated to promote that dialogue and we expect to continue to look for opportunities to continue to do so.

Fall Meeting of the Committee. As with other editions of this Newsletter, we have included minutes of the meeting of the Legal Opinions Committee held this past November in Washington D.C., as well as minutes of the meetings of the Committees on Audit Responses and Law and Accounting, and those of the Securities Law Opinions Subcommittee of the Federal Regulation of Securities Committee. For those who could not attend these meetings, these minutes should provide a good overview of what each group is doing.

Section 630. If you have not heard of Section 630 of the New York Business Corporation Law, you will now. We are fortunate to have a summary by Dick Howe of Sullivan & Cromwell of recent changes to that provision applying it to foreign corporations (other than registered investment companies and public companies) doing business in New York. As some know, Section 630 provides that a New York corporation’s ten largest shareholders have personal liability for certain unpaid wages. The recent legislation provides that this liability extends to shareholders of non-New York corporations if the unpaid services were performed in New York. Dick’s article includes a sample disclosure lawyers might consider including when providing “fully paid and nonassessable” opinions on foreign corporations subject to the New York statute.

Threatened Litigation. This issue also contains a brief note on the recent Delaware Chancery Court decision in Rexam Incorporated v. Berry Plastics Corporation, 2015 WL 7958533 (Dec. 3, 2015). This case considers what constitutes a “threat” of litigation. We are often asked to provide “no litigation” confirmations that include “threatened” proceedings, and the case confirms the customary understanding of that term as requiring some expression of an intention to pursue a claim. While helpful as reinforcing our traditional understanding, most will agree that it does not eliminate the practical difficulties of providing “no litigation” confirmations.

Business Law Section Spring Meeting in Montreal. As many of you know, the Spring Meeting of the Business Law Section will take place this coming April 7-9 in Montreal, Canada. Yes, you get to enjoy that strong American dollar which is making it harder for you to attract overseas clients. Our Committee’s activities will center on Friday and Saturday, and include our meeting, a meeting of our Survey Subcommittee, and two programs. One program will focus, as noted above, on the Cross-Border Report and take place on Saturday afternoon. The other, co-sponsored with the Securitization and Structured Finance Committee, will consider whether and how opinion givers should (or should not) give opinions under the new risk retention rules. I hope to see many of you in Montreal!

- Timothy Hoxie, Chair
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What follows are the presently scheduled times of meetings and programs of the Spring Meeting that may be of interest to members of the Legal Opinions Committee. As of the date of publication of this issue of the newsletter, meeting rooms have not been set. For updated information on meeting times and places, check here.¹

### Legal Opinions Committee

**Friday, April 8, 2016**

Program: “Should Lawyers Give Opinions Under the New Risk Retention Rules?” (co-sponsored with the Securitization and Structured Finance Committee)

9:00 a.m. – 10:00 a.m.

Survey Subcommittee Meeting

12:00 noon – 2:00 p.m.

Committee Meeting:

3:30 p.m. – 5:00 p.m.

Reception: 5:00 p.m. – 6:00 p.m.

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¹ The URL is
http://www.americanbar.org/groups/business_law/events_cle/spring_2016/schedule.html
Committee met on Friday, November 20.

The Business Law Section held its Fall Meeting in Washington, D.C. on November 20-21, 2015. The Section had a full complement of meetings and programs. The following are reports on meetings held at the Fall Meeting of interest to members of the Legal Opinions Committee.

Legal Opinions Committee

The Committee met on Friday, November 20. The meeting was attended, in person or by phone, by approximately 35 members of the Committee. There follows a summary of the meeting.

Cross-Border Opinions Report. After a seven-year effort, the Committee’s report on Cross-Border Closing Opinions of U.S. Counsel is complete, and will be published in the Winter 2015-2016 issue of The Business Lawyer. The most recent draft of the report can also be found on the front page of the Committee’s website under “Working Drafts.”

Local Counsel Opinions. Philip Schwartz (of Akerman LLP) reported that the drafting committee of which he is a member (along with Bill Yemc of Richards, Layton & Finger, P.A. and Frank Garcia of Norton Rose Fulbright US LLP) have prepared a draft of a report on local counsel opinions, and in October 2015 presented the draft to a steering committee of some 17 members for review and comment. The comments of the steering committee are being reviewed. Mr. Schwartz’ expectation is that a draft of the report should be available for review by this Committee at the annual meeting of the Business Law Section in Boston in September 2016.

The drafting committee’s objective is to present a concise principles-based report that focuses on issues of particular relevance to opinions given by local counsel, rather than an exhaustive discussion of opinion topics that revisits matters addressed in other reports. The drafting committee intends to take into account the principles governing local counsel opinions that are currently being addressed by a joint committee of the Committee on Legal Opinions in Real Estate Transactions of the Section of Real Property, Trust and Estate Law, the Attorneys’ Opinions Committee of the American Bar Association, and the Committee on Attorney Advertising and Related Matters of the American Bar Association.

College of Real Estate Lawyers, and the Opinions Committee of the American College of Mortgage Attorneys, which joint committee is currently preparing a supplement to the Real Estate Finance Opinion Report of 2012 covering local counsel opinion practice in the real estate context.3

Mr. Schwartz reported that the report will also address ethical issues from the perspective of local counsel opinions and local counsel opinion practice, including those involved in identifying one’s client, how local counsel interacts with the client or the client’s representatives (such as its transaction counsel), and conflicts that arise in local counsel opinion practice. With respect to these issues, the drafting committee expects, at an appropriate time, to reach out to other relevant groups within the Business Law Section (such as the Committee on Professional Responsibility) for their input.

Volcker Rule (12 U.S.C. § 1851) Opinions. Volcker Rule opinions are given in connection with securitizations and generally focus on whether the securitization entity is a “covered fund.” A covered fund is an entity that relies on an exception from the definition of investment company in the Investment Company Act provided by Section 3(c)(1) or Section 3(c)(7) thereof, unless the related Volcker regulations provide a separate exclusion from covered fund status. The opinions are often variations on the standard “not required to register as an investment company” closing opinion with more specific detail about the section or rule of the ‘40 Act on which the no registration opinion is based. In more limited circumstances, reasoned opinions are being given that an entity may rely on the loan securitization exclusion from the definition of covered fund under the Volcker Rule regulations. Other variants are being discussed but rarely given. Volcker Rule opinions may be requested by banks and nonbank financial companies subject to the Volcker Rule to provide assurance to such recipients that any interest they acquire in the securitization entity is not an “equity, partnership or other ownership interest in … a hedge fund or a private equity fund.” 12 U.S.C. § 1851(a)(1)(B). (The statute uses “hedge fund” and “private equity fund” in the same way that the regulators use the term “covered fund.”)

Several groups are addressing Volcker Rule opinions and other legal matters arising from the implementation of the Dodd-Frank Act, including issues under the risk retention rules enacted by Section 941 of the Dodd-Frank Wall Street Reform and Consumer Protection Act, found in Exchange Act § 15G and the rules promulgated in October 2014 jointly by the Department of the Treasury, Federal Reserve System, Federal Deposit Insurance Corporation, Federal Housing Finance Agency, and the SEC. Exchange Act Release No. 73407 (October 22, 2014) (the SEC rules are found in Regulation RR, 17 C.F.R. Part 246). Groups examining Volcker Rule opinions and the risk retention rules include, in addition to the Legal Opinions Committee, the Working Group on Legal Opinions Foundation (“WGLO”), and the Securitization and Structured Finance Committee of the Business Law Section, the Chair of which is Ellen L. Marks of Latham & Watkins LLP, Chicago. The Legal Opinions Committee and the Securitization and Structured Finance Committee are working together, through a working group headed by Ms. Marks, on addressing Volcker Rule opinions and the risk retention rules. Ms. Marks updated the Committee by telephone on the work of that group. She noted that the risk retention rules currently apply to asset-backed securities collateralized by residential mortgages and will apply, effective December 24, 2016, to all other classes of asset-backed securities. They require “securitizers” to retain, on an unhedged basis, not less than 5% of the credit risk for any asset that the securitizer, through the issuance of an asset-backed security, transfers, sells, or conveys to a third party. The final rules also require that the “sponsor” of an asset-backed securities transaction be primarily responsible for retaining

3 The 2012 Report can be found on the Committee’s website in its Legal Opinion Resource Center under “State and Other Bar Reports.” See http://apps.americanbar.org/buslaw/tribar.
an economic interest equal to at least 5% of the credit risk of the assets collateralizing the issuance of asset-backed securities.

The focus of counsel’s work on the risk retention rules is not typically for the purpose of delivering third-party opinions, but to give advice to their clients that are involved in securitization transactions as sponsors or participants. Issues being addressed by Ms. Marks’ Committee under the risk retention rules include whether it will be possible or appropriate to provide third-party legal opinions under these rules and which aspects of the rules, if any, may be covered as legal matters (as opposed to factual or accounting matters).

The objective of the working group addressing Volcker Rule opinions and the risk retention rules is to prepare one or more white papers or similar statements once the group’s deliberations are complete.

Joint Project on Common Opinion Practices. This project is a joint one of the Committee and WGLO. Its focus is to produce a Statement on Opinion Practices (“Statement”) that updates the Committee’s Legal Opinion Principles (53 Bus. Law. 831 (1998)) and incorporates some of the opinion practice guidelines of the Committee’s Guidelines for the Preparation of Closing Opinions (57 Bus. Law. 875 (2002)). The working group in charge of this project consists of Steve Weise as its reporter, Pete Ezell and Steve Tarry as co-reporters, and Ken Jacobson and Stan Keller as co-chairs, as well as representatives of the Committee and representatives of a number of state bar associations.

Steve Weise and Stan Keller updated the Committee on the working group’s progress in producing the Statement. The working group is preparing both a shorter statement that can attract the widest possible support, as well as a more comprehensive statement to replace both the Principles and the Guidelines in their entirety. The objective is to produce a Statement that is accessible and user friendly. To this end, it may have parts, such as Part 1 addressing customary practice, Part 2 opinion etiquette, and Part 3 particular opinions. Gaining a broad consensus for the Statement will be a challenge and will take time.

TriBar Reports. Dick Howe, Co-Chair of the TriBar Opinion Committee, reported on the status of TriBar’s two current projects, one on opinions on risk allocation provisions in agreements, and the second on opinions given on limited partnerships. The first has proven to be a challenging project given the variety and complexity of risk allocation provisions in agreements. TriBar has no definite schedule yet for the completion of this report.

The report on limited partnership opinions has taken much longer than TriBar initially had anticipated, as the Committee delves into the detail of giving opinions on what seemed initially to be straightforward matters — due formation, existence and power — and the complexity of the governing statute (for the Committee’s purposes, the Delaware LP Act). This project, too, has no definite schedule for completion.

WGLO. In the absence of Andrew Kaufman, President of WGLO, who was unable to attend the meeting, Tim Hoxie gave a brief report on the recently-concluded meeting of WGLO in New York (October 26-27, 2015). He reported that there will be an upcoming WGLO opinion program on the Cross-Border Opinions Report. He noted that progress is being made by WGLO in other areas, including the launch of its website.

Other Committee Reports. The Committee also heard brief reports from the Chairs of the Law & Accounting Committee (Randy McClanahan) and the Audit Responses Committee (Tom White). Full summaries of the meetings of these two committees follow this summary of the Committee’s meeting.

No Violation of Law Opinions. Don Glazer summarized for the Committee the article he and Martin Carmichael recently published in the Fall 2015 issue of the Newsletter (“Mending Words a Little: Some Suggestions on How to Draft the No Violation of Law Opinion”). In the article
Don and Martin suggest that the no violation of law opinion in the 1998 TriBar form be phrased as follows (with the language Don and Martin suggest adding indicated by italics):

The execution and delivery by the Company of the [Agreement] do not, and the performance by the Company of its obligations thereunder will not, result in any violation by the Company of any statute of the United States or the State of New York, or any rule or regulation thereunder.

For further detail, readers are referred to Don and Martin’s article.

Case Law Developments. Steve Weise reported on two recent California arbitration decisions. In the first, *Imburgia v. Directv, Inc.*, 225 Cal. App. 4th 338, 170 Cal. Rptr. 3d. 190 (2014), the California Court of Appeal denied Directv’s application to refer a customer’s class-action complaint alleging state law violations to arbitration, concluding that a provision in Directv’s customer agreement invalidating the arbitration clause in the event that the law of the customer’s state would invalidate the agreement’s prohibition on class arbitration referred to California law as it existed prior to its being declared invalid by the U.S. Supreme Court in *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011). Review of the decision was denied by the California Supreme Court, but appealed to the U.S. Supreme Court. Steve read the transcript of the oral argument, and predicted that the U.S. Supreme Court, following its holding in *Concepcion* and later cases, including *American Express Co. v. Italian Colors Restaurant*, 133 S. Ct. 2304 (2013), would reverse the Court of Appeal. [That prediction proved accurate – see *Directv v. Imburgia*, 136 S. Ct. 463 (December 14, 2015).]

The second decision mentioned by Steve was *Brinkley v. Monterey Financial Services, Inc.*, 2015 WL 7302268 (November 19, 2015), in which the California Court of Appeal largely upheld an arbitration clause in a customer agreement with a financial services firm, rejecting the customer’s claims that the arbitration agreement was both procedurally and substantively unconscionable, with one exception: the Court ruled that the clause of the arbitration agreement that provided for an award to the prevailing party of all of its fees and costs, including attorneys fees, was unconscionable and unenforceable (the Court severed it from the rest of the agreement). The Court, interpreting the agreement, found that the law of the state of Washington applied to the agreement, and applied that law in determining unconscionability, but otherwise applied the Federal Arbitration Act to the arbitration agreement.

Next Meeting. The next meeting of the Committee will be held at the Section’s Spring meeting in Montreal, Canada, on Friday, April 8, 2016. A dial-in number will be provided for those unable to attend the meeting in person.

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Audit Responses Committee

The Committee met on November 20, 2015. The principal discussion points are summarized below.

Electronic Audit Letter Platform. The meeting was devoted to further discussion of Confirmation.com, an electronic audit response letter platform. Few Committee members indicated that, as of the meeting date, their firms had received audit request letters via Confirmation.com. As noted during previous meetings, some Committee members have engaged in direct conversations with Confirmation.com. Representatives from Confirmation.com, via audio link, addressed the Committee and responded to questions raised by Committee members at the meeting. Among the topics discussed:
• **Directing the inquiries to a firm.** Several Committee members noted that, at least initially, audit inquiry letters were being directed by Confirmation.com to individual lawyers within a firm. Many firms, however, have indicated a preference to receive all electronic communications at a centralized address for the firm. Others favor an approach where letters are directed to different locations within the firm, for example, to the office primarily responsible for the client’s representation. Confirmation.com indicated that it has the capability to direct audit inquiries according to a firm’s preferences.

• **Client authorization.** Several questions were raised about client interaction with the Confirmation.com platform, including the way in which auditors obtain authorization to send an audit inquiry letter to a law firm. Some Committee members raised questions about the form of the request, which appeared to be a non-descript form of inquiry letter without client letterhead or signature. They also asked how lawyers could be certain that the client had in fact authorized issuance of the inquiry letter. Confirmation.com stated that the client approved the content of the request and specifically approved the transmittal of each request (i.e., the client did not provide a blanket authorization), and that it believed that the client’s e-signature on the electronic request was effective to authorize the lawyer to respond. Some Committee members also raised questions whether the platform has sufficient flexibility, for example to allow lawyers to submit modified or amended audit response letters. Confirmation.com indicated that the platform permits lawyers to submit modified or amended audit response letters, but it requires that the auditors initiate a supplemental request on the platform.

• **User Agreement.** Members of the Committee again expressed concern about the fact that a lawyer’s clicking on the website, even to download a request, constituted agreement to the terms of Confirmation.com’s user agreement and privacy policy. Confirmation.com indicated that it was willing to discuss lawyers’ concerns, though some Committee members asked why lawyers should have to agree to any user agreement in order to receive a request or transmit a response. It was noted by a Confirmation.com representative that lawyers do not have to use the Confirmation.com platform to submit their responses and could transmit them to the accountant directly.

• **Confidentiality/data security.** Several Committee members raised concerns about the information technology structure underpinning the Confirmation.com platform and the impact of that structure on maintaining the confidentiality and privilege protection of information transmitted through the service. Confirmation.com stated that it considers its platform to be a “conduit” of audit inquiries and responses rather than a repository of such information. However, it also appears that audit letter responses transmitted through the channel do continue to reside in some form on Confirmation.com’s system. Confirmation.com retains such documents for ten years; Committee members questioned why that was necessary since auditors are required to retain workpapers only for seven years. With regard to data security, Confirmation.com noted that its website describes the data security measures it implements, including ISO 27001 certifications, client audits, and SOC (Service Organization Control) examinations.
Listserve Activity. For a summary of this activity, see “Summary of Recent Listserve Activity (Audit Responses Committee)” below.

Next Meeting. The Committee’s next meeting will be at the Business Law Section’s Spring Meeting at the Fairmont Queen Elizabeth (or Hotel Bonaventure, pending final room assignments) in Montreal, Quebec, on Saturday, April 9, 2016, at 10 a.m. EDT.

- Thomas W. White, Chair
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Law and Accounting Committee

The Law and Accounting Committee met on November 20, 2015. The principal items of discussion are summarized below.

SEC Update. The Committee was honored to have in attendance Mark Kronforst, Chief Accountant in the SEC’s Division of Corporation Finance. Mr. Kronforst summarized various key issues that have arisen in his position during the recent year, such as segment reporting, disclosures for foreign taxes, non-GAAP information, and materiality. Mr. Kronforst then answered a series of questions from the audience.

PCAOB Update. The Committee was also honored to have in attendance Santina Rocca, Deputy Director in the PCAOB’s Division of Registration and Inspections. First, Ms. Rocca discussed the general overall inspection process. She then discussed the evaluation of the audit of internal controls, areas of internal control that are problematic, independence, and root cause analysis. Ms. Rocca then answered various questions from the audience.

FASB Update. Randy McClanahan gave a brief update of current FASB developments. Mr. McClanahan reported that Accounting Standards Update No. 2015-16 was recently issued, which eliminated the requirement of retrospective adjustment to prior period statements for measurement period adjustments. He reported that the FASB had authorized the drafting of a final lease accounting standard which will be published in 2016. He also reported that the classification measurement and the credit impairment updates should be issued in the last quarter of 2015 and the first quarter of 2016, respectively. Finally, Mr. McClanahan reported that an exposure draft for the disclosure framework project is expected to be released in late 2015 or early 2016.

Next Meeting. The next meeting of the Committee will be held at the Section’s Spring meeting in Montreal, Quebec on Saturday, April 9, 2016.

- Randall D. McClanahan, Chair
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Securities Law Opinions Subcommittee

Federal Regulation of Securities Committee

The Subcommittee met on November 21, 2015. The meeting first discussed a revised draft of a report addressing Exchange Act Rule 14e-1 opinions given in connection with debt tender offers. The sense of the meeting was that the Subcommittee should continue working on this report, specifically focusing on the language of the opinion in view of the SEC staff’s interpretation and administration of such requirements. Subcommittee members were urged to submit written comments on the revised report.

The balance of the meeting was given over to a further discussion of a possible report addressing opinions delivered in respect of resales of securities conducted in reliance on the “Section 4(1-½)” exemption. As the meeting was held before the Fixing America’s Surface Transportation Act was enacted into law on December 4, 2015, which added new Section 4(a)(7) to the Securities Act of 1933, the meeting did not meaningfully address how this
new statutory exemption for resales would affect the Subcommittee’s work on resale opinions.

The next meeting of the Subcommittee will be at the Spring Meeting of the Business Law Section in Montreal, Canada on April 8, 2016. The agenda for this meeting will be (1) a revised draft of the report on opinions given in connection with debt tender offers, and (2) new Securities Act Section 4(a)(7).

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SUMMARY OF RECENT LISTSERVE ACTIVITY
AUGUST 2015 – NOVEMBER 2015
(AUDIT RESPONSES COMMITTEE)

Client Descriptions of Litigation Matters

A Committee member asked about how members have dealt with an audit letter request in which the client: (1) provided its own detailed description of litigation in much the same manner as would be provided in a law firm response, including the client’s own evaluation of the likelihood of success of the litigation and of any potential liability, and then asked outside counsel (2) to advise as to those portions of the description to which outside counsel disagrees, and comment on whether the client’s evaluations are reasonable. Committee members who responded to the inquiry indicated that their firms’ responses typically contain an acknowledgement of agreement with the general factual and procedural posture of the case as described by the client insofar as it is accurate, but explicitly correct or disclaim comment upon statements in the client’s description of the litigation. The responses also explicitly disclaim comment upon all assertions by the client concerning predictions of outcome or probability of success, relying upon the Treaty language to do so. It is understood that some Committee members disregard the client description and request for comment related thereto altogether and instead provide a conventional response addressing the matter, if appropriate.

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[Editors’ Note: This summary of Listserv activity during the period August 2015 – November 2015 among members of the Audit Responses Committee does not necessarily represent the views of the Committee or authoritative pronouncements regarding audit response letters practice, but rather reflects views of individual members of the Committee on current practice topics. The comments referred to below may be viewed by clicking on the “Listserve” item on the Audit Responses Committee’s web page.4]

4 The URL is http://apps.americanbar.org/dch/committee.cfm?com=CL965000.
New York Extends Section 630 of the Business Corporation Law to Foreign Corporations

Section 630 of the New York Business Corporation Law has long provided that:

“The ten largest shareholders . . . of every corporation (other than an investment company registered as such under an act of congress entitled “Investment Company Act of 1940”), no shares of which are listed on a national securities exchange or regularly quoted in an over-the-counter market by one or more members of a national or an affiliated securities association, shall jointly and severally be personally liable for all debts, wages or salaries due and owing to any of its laborers, servants or employees other than contractors, for services performed by them for such corporation . . .”

NY Bus. Corp. § 630(a).

Section 630 has recently been amended to extend this liability to shareholders of “any foreign corporation, when the unpaid services were performed in the state” of New York.

Many New York lawyers, when giving opinions that shares of stock of New York corporations are “fully paid and nonassessable” in situations where Section 630 is applicable, have followed the practice of disclosing in their opinions that applicable law provides for the personal liability of the ten largest shareholders under certain circumstances, even though Section 630 does not technically make shares of stock “assessable.” As a result of the amendment, many New York lawyers will likely extend this practice to include similar disclosure in opinions on stock of non-New York corporations when the stock is not listed.

The concept behind Section 630 has been included in the corporate law of New York since long before the Business Corporation Law was enacted in 1962. Because the law applied to “every corporation,” the issue of whether the personal liability attached to shareholders of foreign corporations arose in cases over the years. Decisions were inconsistent, but after 1962 it was easy to interpret Section 630 as applying only to domestic corporations. This followed because the Business Corporation Law defined “corporation” as a domestic corporation, and Section 630 did not use the word “foreign corporation,” which was defined as a corporation formed under the laws of another state.

The legislative memorandum in support of the amendment to Section 630 noted that it was always intended to apply to “every” corporation but blamed the courts for not applying it to foreign corporations. The memorandum also criticized the “anomaly in which the wages of two employees working side by side are treated differently with respect to their remedies for unpaid wages depending on which corporation employs them and whether the corporation is foreign or domestic.” The bill sought to “end this disparity” and was enacted unanimously in both chambers despite opposition by the New York State Bar Association and others. However, Governor Cuomo, in signing the bill into law, stated that the bill “contains numerous technical flaws, one of which would render the statute constitutionally infirm,” but indicated that “the Legislature has agreed to pass legislation in the upcoming session to correct these defects.”

Notwithstanding the Governor’s constitutional argument, the cases in New York that invalidated the application of Section 630 and its predecessors to foreign corporations were generally not based on constitutional considerations but rather on statutory interpretation. Nevertheless, there does appear to be a strong argument that the internal affairs
doctrine is constitutionally required. Delaware, in particular, has stated that “application of the internal affairs doctrine is mandated by constitutional principles, except in the ‘rarest situations,’ e.g., when the law of the state of incorporation is inconsistent with a national policy on foreign or interstate commerce.”

In light of the legislative purpose behind the amendment, and in the absence of court decisions dealing with the constitutional issue, it is far from clear that a New York court would decline to enforce Section 630 against the shareholders of a foreign corporation where the unpaid services were performed in New York. As a result, many New York lawyers giving “fully paid and nonassessable” opinions on shares of Delaware and other foreign corporations that are not listed, where the corporation has employees in New York, are likely to conclude that they should warn opinion recipients about the possible shareholder liability. The following paragraph illustrates the kind of disclosure that might be used for this purpose:

“Under certain circumstances Section 630 of the New York Business Corporation Law imposes on the ten largest shareholders (in terms of value) of a non-New York corporation, no shares of which are listed on a national securities exchange or regularly quoted in an over-the-counter market, a joint and several liability for debts, wages and salaries owed by the corporation to workers, servants and employees (other than contractors) for services performed for the corporation, when the unpaid services were performed in the State of New York.”

- Richard R. Howe
  Sullivan & Cromwell LLP
  hower@sullcrom.com

No Litigation Confirmations: When is a “Threat” a “Threat?”

Opinion givers often include in a third-party closing opinion a confirmation on the absence of “pending or threatened” litigation against the opinion giver’s client. While views differ on whether the confirmation should extend beyond litigation being handled by the opinion giver and affecting the transaction on which the opinion is given (or whether the confirmation in any form should be provided at all), until recently not much has been said by the courts about the meaning of the phrase “pending or threatened.” The belief among opinion givers has been that a “threat” includes only “an unequivocal statement by a reliable source to a responsible corporate official . . . that a claimant intends to bring a proceeding in the near future.” See Glazer, FitzGibbon and Weise, Glazer and FitzGibbon on Legal Opinions § 17.2.3 at 628 (3d ed. 2008) (hereinafter “Glazer”). And those familiar with audit letter practice know that “threatened” claims in that context are those in which the potential claimant has “manifested to the client an awareness of, and present intention to assert” a potential claim. See ABA Statement of Policy Regarding Lawyers’ Responses to Auditors Requests for Information, 32 Bus Law. 1709, 1712 (1976) (the “Treaty”).

The Delaware Court of Chancery recently had occasion to consider the meaning of the phrase “pending or threatened” (although not in the context of a closing opinion). In Rexam Incorporated v. Berry Plastics Corporation, 2015 WL 7958533 (Dec. 3, 2015), the court considered a dispute between Rexam and Berry that turned on whether or not there was a

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“pending or threatened legal or administrative action by the [Pension Benefit Guaranty Corporation].” Specifically, prior to closing a sale by Rexam to Berry, the parties were presented with information that the PBGC had decided to initiate an inquiry into the proposed pension plan transfer that formed a part of the sale. The parties agreed to close with the PBGC inquiry unresolved, but to allow Berry, as the buyer, to decide not to accept a transfer of the Rexam pension plan if, on or before an agreed outside date, the PBGC had filed or threatened a legal or administrative action with respect to the proposed transfer. If the outside date occurred and the PBGC had not filed or threatened to bring a legal or administrative action, the transfer of the plan would proceed as originally intended.

After the sale closed (but prior to the outside date), the PBGC wrote to the parties that it disagreed with assumptions made by Rexam and its actuaries in assessing the adequacy of the plan’s funding and as a result believed that Rexam was proposing to transfer an underfunded plan to a plan sponsor (Berry) “that is less likely to be able to support it. . .” The PBGC said it was “extremely disappointed” in the proposed transfer, stating that “while [it] does not plan to initiate legal action against Rexam at this time, we have not yet decided whether we will pursue this matter through the IRS and/or professional actuarial organizations.” 2015 WL 7958533 at *2.

The parties received no further communication from the PBGC prior to the outside date. Following that date, Berry took the position that the PBGC letter was a “threat” of litigation and therefore it did not need to accept the transfer of the pension plan (and its attendant obligations). Rexam disagreed, and litigation ensued.

The court determined that the PBGC letter was not a “threat.” Citing the case of i/mx Info. Mgmt. Solutions, Inc. v. Multiplan, Inc., 2014 WL 1255944 at *6-7 (Del. Ch. Mar. 27, 2014), the court concluded that a threat needed to entail more than simply notifying another party of a problem. Rather, a threat needs to carry with it an expression that the party making it “was going to do something about that problem, in such a way that a reasonable person would understand that [the party] was intending to press the issue through a proceeding before a third party.” 2015 WL 7958533 at *4 (quoting i/m). The court said the PBGC “gave no indication that it would do anything about the Pension Plan Transfer.” 2015 WL 7958533 at *5. Rather, it had simply expressed its frustration at (and disapproval of) the proposed course of action and, while expressly reserving the right to take action, it did not in fact say it would take action. Put in audit letter speak, the PBGC had manifested an awareness, perhaps, of a potential claim but had not expressed any intention to pursue it. It had simply reserved its rights.

The outcome of this case is consistent with the scope of a confirmation regarding threatened litigation as understood as a matter of customary practice and as articulated in the Treaty. See Glazer at § 17.2.3 (discussing customary practice regarding the meaning of a “threat” and citing numerous bar reports and, in the 2015 Supplement, the i/mx case cited by Rexam). Rexam breaks no new ground. But we now have case law (in the form of both the Rexam and i/mx cases) to support the “customary” interpretation of what constitutes “threatened” litigation.

Of course, this case does not diminish the serious issues faced by opinion preparers when asked to provide no litigation confirmations. Care must still be given to the scope of the confirmation. For example, is it drafted to cover “investigations” – as was the case in the infamous Dean Foods case? And, even if limited to pending and threatened “proceedings” or “actions,” does it cover all such proceedings or actions or only those that might interfere with the transaction in question? Rexam does not answer these questions. Nor does it ensure that, when applying its definition of threatened, practitioners will not face difficult questions in

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determining whether or not a “threat” has been made. For example, is a governmental investigation itself a “threat?” While the prevailing view would appear to be (consistent with *Rexam*) “no,” see Glazer at § 17.2.3 n. 15 (citing the Treaty), in such a case the opinion giver might well consider whether disclosure might be necessary to avoid a misleading opinion. See id. These and similar questions ensure that the precise boundaries of what constitutes a threat will continue to be less than crisp and leave plenty of room for difficult judgments. The result may well be that, as a practical matter, lawyers will err on the side of caution and advise clients to disclose, and will consider including in their no litigation confirmations, matters where there is a likelihood of future claims even if they are not “threatened” within the meaning of *Rexam* or as understood under customary practice.

On balance the *Rexam* decision is helpful in confirming the customary understanding of what “threatened” means. But the case does not mean that lawyers should be any less leery of the no litigation confirmation and the sometimes difficult judgments that it demands than they have been in the wake of *Dean Foods*.

- Timothy Hoxie
  Jones Day
  tghoxie@jonesday.com

**LEGAL OPINION REPORTS**

(See Chart of Published and Pending Reports on following page.)
Chart of Published and Pending Reports

[Editors’ 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 December 31, 2015.]

A. Recently Published Reports

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<tr>
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<th>2009</th>
<th>Effect of FIN 48 – Audit Responses Committee</th>
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<tr>
<td></td>
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<td>Negative Assurance – Securities Law Opinions Subcommittee</td>
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<td>2010</td>
<td>Sample Stock Purchase Agreement Opinion – Mergers and Acquisitions Committee</td>
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<td>2013</td>
<td>Survey of Office Practices – Legal Opinions Committee</td>
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<td>Legal Opinions in SEC Filings (Update) – Securities Law Opinions Subcommittee</td>
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<td>Revised Handbook – Audit Responses Committee</td>
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<td>2014</td>
<td>Updates to Audit Response Letters – Audit Responses Committee</td>
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<td>2015</td>
<td>No Registration Opinions (Update) – Securities Law Opinions Subcommittee</td>
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<td>Cross-Border Closing Opinions of U.S. Counsel</td>
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<td>ABA Real Property Section (and others)</td>
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<td>Real Estate Finance Opinion Report of 2012</td>
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<td>Arizona</td>
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<td>California</td>
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<td>Remedies Opinion Report Update</td>
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<td>Comprehensive Report Update</td>
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<td>2009</td>
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<td>Georgia</td>
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<td>Real Estate Secured Transactions Opinions Report</td>
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7 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/). Reports marked with an asterisk have been added to this Chart since the publication of the Chart in the last quarterly issue of this Newsletter.

8 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 Opinions Committees”).
Recently Published Reports (continued)

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<td>Bond Lawyers</td>
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<td>National Venture Capital</td>
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<td>Substantive Consolidation – Bar of the City of New York</td>
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⁹ A joint project with WGLO and other groups.

¹⁰ See note 8.
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 April 2016. Please forward cases, news and items of interest to Tim Hoxie (tghoxie@jonesday.com), Jim Fotenos (jfotenos@greeneradovsky.com), or Susan Cooper Philpot (philpotsc@cooley.com)

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

Working Group on Legal Opinions Foundation

Fall 2015 Legal Opinion Seminar Summaries
Addendum
Working Group on Legal Opinions Foundation

Fall 2015 Legal Opinion Seminar Summaries

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The following are summaries of the proceedings of the Fall 2015 WGLO Seminar, held in New York City on October 27, 2015, that were prepared by WGLO member-representatives serving as reporters for the various sessions or by other participants. Editorial oversight and input was provided by Gail Merel of Andrews Kurth LLP, WGLO’s Editor-in-Chief, with, for purposes of inclusion in this Addendum, input from the editors of the ABA Legal Opinions Committee’s Newsletter (Jim Fotenos and Susan Cooper Philpot).

PANEL SESSIONS I:

1. The Meaning of “Law” in Legal Opinions
   (Summarized by Stanley Keller)

   Robert H. Mundheim, Shearman & Sterling LLP, New York, Chair
   Arthur Norman Field, Field Consulting LLC, New York
   Barbara S. Gillers, New York University School of Law, New York
   Donald W. Glazer, Newton, Massachusetts
   Stanley Keller, Locke Lord LLP, Boston

   This panel discussed the very basic, but not entirely settled, concept of what the word “law” means in a third-party legal opinion and whether that word has different meanings depending on the context in which it is used.

   The opinion literature, as reflected in the TriBar 1998 Third-Party “Closing” Opinions Report and the Legal Opinion Principles, is clear that the reference to “law” in the coverage limitation included in most opinions and as applied to the remedies opinion means statutory, regulatory and decisional law at the state and, if covered, federal levels but not at the local level. Further, the only law covered is the law that a lawyer in the applicable jurisdiction exercising customary professional diligence would reasonably be expected to recognize as being applicable to the entity or transaction to which the opinion letter relates. Even when recognized as being applicable, however, some laws are understood not to be covered unless referred to expressly. (This was the subject of the panel session that followed.) It was noted that the reference to a statute is understood to mean that statute as interpreted by the courts in published decisions.

   The panel then explored the meaning of “law” in a no violation of law opinion. The TriBar 1998 Report describes this opinion as complementing the remedies opinion by addressing legal consequences of the transaction, such as fines or governmental sanctions, that would not prevent giving a remedies opinion but nevertheless may be of interest to the recipient. One view expressed was that “law” has the same meaning throughout the opinion letter and therefore the opinion covers statutory, regulatory and decisional law (such as a common law rule against unreasonable restraints on alienation or the rule against perpetuities). Another view expressed was that the opinion literature, including several state bar reports, is clear that the no violation of law opinion should be understood to cover only violations of statutes or regulations of governmental bodies that subject the company that is the subject of the opinion to fines, penalties or other governmental sanctions (such as injunctions preventing performance of acts in violation of the statute or regulation). The question was posed whether or not the customary practice just described could be comfortably relied upon when giving an opinion expressed in terms of “no violation of law.” In view of the differences expressed in the panel as to the meaning of “law” when used in a “no violation of law opinion,” the recommendation of the panel was that opinion givers should consider...
wording the opinion to make its intended meaning clear by replacing the word “law” with the word “statute.”

The panel then noted that the laws covered by an opinion letter could vary based on the nature of the transaction and the parties. Panelists illustrated this by referring to the discussion of the no violation of law opinion in the forthcoming ABA Report on Cross-Border Closing Opinions of U.S. Counsel. That report observes that what statutes and regulations are covered is even less clear in cross-border transactions than in domestic transactions and that, as a result, opinion preparers frequently include in their cross-border opinions non-exclusive lists of laws that are not covered.

Finally, the panel discussed what opinion preparers should do to determine the law when dealing with apparently inconsistent or conflicting decisions. Reference was made to the decision in Torrence v. Nationwide Budget Finance, 753 S.E. 2d 802 (N.C. Ct. App 2014), in which the court, determining whether to enforce an arbitration provision in a contract, analyzed seemingly inconsistent decisions by its state’s highest court and the U.S. Supreme Court. Members of the panel suggested that the court’s analysis of the reasoning underlying the holdings in those decisions to determine whether they in fact were in conflict illustrates the type of analysis lawyers should conduct in exercising the professional judgment required to give a legal opinion.

2. What “Law” is Implicitly Excluded from Legal Opinions?
(Summarized by Steven O. Weise)

Steven O. Weise, Proskauer Rose LLP, Los Angeles, Chair
Anna S. Mills, The Van Winkle Law Firm, Charlotte
Philip B. Schwartz, Akerman LLP, Miami

The panel discussed how to determine which laws within the “covered law” of an opinion letter are implicitly excluded from the opinion letter, particularly in the case of a remedies opinion and also in the case of the no violation of law opinion. An opinion letter can always expressly exclude a particular area of law. When an opinion expressly excludes from the covered law those areas of law the opinion giver does not address, then of course there is no need to consider which particular laws are implicitly excluded.

The panel started with the common understanding of “applicable law”:

“An opinion letter covers only law that a lawyer in the jurisdiction(s) whose law is being covered by the opinion letter … exercising customary professional diligence would reasonably be expected to recognize as being applicable to the entity, transaction, or agreement to which the opinion letter relates.”


The panel then considered whether the list of excluded laws under customary practice is static or organic and whether the answer varies by the context. Are the answers to these questions so uncertain that it is prudent to use a detailed specific list of excluded laws? Is there a cost-benefit analysis that affects the answer to this question?

1 Published in 71 Bus. Law. 139 (Winter 2015-2016).
The panel also raised the question of who has the burden to demonstrate that a particular law is “in” or “out”? Once it is determined that a particular law is excluded (explicitly or implicitly), it would seem that, if the recipient wants that particular law covered, then recipient’s counsel has to come forward and request its inclusion. This supposes that the opinion giver and the opinion recipient’s counsel have figured out what is expressly or implicitly excluded.

Examples of laws listed as excluded in bar reports. The panel reviewed some of the common lists of laws that are implicitly excluded, even though these laws may be relevant to the entity, transaction or agreement. Some of the lists indicate that they are intended to be comprehensive. Others just include examples, in which case the omission of a law or category of laws from a list does not mean that the group that issued the relevant report believes that an area of law is inherently included, even in instances where that area of law may be relevant to the entity, transaction or agreement.

Rely on customary practice or use a list? The panel discussed whether it is appropriate to rely on the implicit lists or whether it is better to include an express list. The panel noted that the use of a list might imply that matters not on the list are covered by the opinion letter. The reports in this area take varying approaches. For example, the 1998 TriBar closing opinions report comments “... the list of exclusions will never be complete, yet any list may suggest that it is complete.” TriBar Opinion Committee, “Third-Party ‘Closing’ Opinions” § 3.5.3, 53 Bus. Law. 591, 630 (1998). Similarly a California report comments that “[c]are should be exercised in listing the laws not addressed by this opinion, given the inference that may be drawn by the opinion recipient that laws not listed as excluded but relevant to the opinion are included.” Corporations Committee (Business Law Section, State Bar of California), Legal Opinion in Business Transactions (Excluding the Remedies Opinion) at page 56 note 168 (October 2007). A Florida report recommends including a list: “… the Committees urge Florida counsel to include the entire list of implicitly Excluded Laws [as listed in the report] in Florida counsel’s opinion letter.” Legal Opinion Standards Committee (Florida Bar Business Law Section) & Legal Opinions Committee (Florida Bar Real Property, Probate and Trust Law Section), Report on Third-Party Legal Opinion Customary Practice in Florida at page 32 (December 3, 2011)

Is there a neutral principle that establishes what applicable law is implicitly excluded? Given these uncertainties, the panel discussed whether there are neutral principles that would assist in determining when particular laws are implicitly excluded. For example, many believe that most regulatory laws are implicitly excluded. But, depending on the type of borrower and nature of its business, that might not always be the case.

Some will rely on customary practice or the lists in opinion letter reports for the laws that are implicitly excluded from the scope of the opinion letter. Some of these exclusions include laws that govern a particular legal result (such as the creation of a security interest).

Finally the panel discussed the possible use of a generic statement in an opinion letter to address these issues. Such a generic exception might read as follows:

“‘Covered Law’ means [identify the laws of one or more particular jurisdictions]; provided, however, that such term does not include Federal or state securities laws, antifraud laws or fraudulent transfer laws, tax laws, the Employee Retirement Income Security Act of 1974, antitrust laws or any law that is applicable to the Company, the Transaction [the transaction that is the subject of the opinion letter] solely as part of a regulatory regime applicable to the Company or its affiliates due to its or their status, business or assets.”

In Our Opinion

A-3

Winter 2015 – 2016

Vol. 15 ~ No. 2
1. **Choice of Law and Forum Selection Provisions**

*Willis R. Buck, Jr., Sidley Austin LLP, Chicago, Co-Chair*

*Susan Cooper Philpot, Cooley LLP, San Francisco, Co-Chair*

*Elizabeth Orelup, Quarles & Brady LLP, Milwaukee, Reporter*

This breakout session began with an overview of the session materials that included samples of choice of law opinion language based on New York law opinions. The materials noted that typically one of three types of regimes apply to the legal analysis of the enforceability of choices of law provisions: states with a statute permitting certain “inbound” choices of law under the governing agreement, states that have adopted the analysis of the Restatement (Second) of Conflict of Laws, and states without an “inbound” statute where the decisional law varies from the Restatement. The participants discussed the approach to choice of law provisions under the laws of the various states represented in the room.

The session discussion turned to a question posed in the materials: Absent qualification or disclaimer does the remedies opinion implicitly address the enforceability of the choice of law clause in the covered agreement? It was noted that the 1998 Tribar Report takes the clear position that the remedies opinion does cover the clause if it is contained within the covered agreement. The 2012 Real Estate Finance Opinion Report takes a different view, concluding that such an opinion should not be implied from the remedies opinion and recommending that, to avoid confusion, the issue should be separately considered and addressed expressly in an opinion letter. The participants discussed the reasons why the real estate finance and corporate practices differ on this point, focusing in particular on the convention of split choice of law provisions common in real estate finance documents.

The participants discussed their varying practices with respect to a “fundamental policy” exception to a choice of law opinion. As part of the discussion, participants were asked whether they generally decline to opine on issues of fundamental policy. Participants from California indicated that practitioners in that state typically would decline to give an opinion on whether a fundamental policy exception applies. Participants from Texas indicated that the usual practice is to give a choice of law opinion only if the clause falls squarely within one of the statutory safe harbors available under Texas law. In Michigan, the decisional law is not entirely clear as to which Restatement (First or Second) standard applies and so Michigan practitioners generally give a reasoned opinion if requested, but otherwise exclude the choice of law provision from the remedies opinion. It was reported that the American Law Institute has just begun a new project to draft a third revision of the Restatement of Conflict of Laws.

The discussion then turned to whether an “as if” opinion is an acceptable alternative to a choice of law opinion and how common the practice of “as if” opinions has become. It was noted that the venture capital industry is built on “as if” opinions. It is, for example, the practice in most such transactions that all of the contracts are governed by Delaware law, with company counsel giving an “as if” remedies opinion using its own non-Delaware state as the covered law. There was general consensus that “as if” opinions outside New York are also relatively common in middle market lending and real estate transactions, especially in those transactions involving split law provisions.

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2 It was noted that the Texas statutory regime permits both inbound and outbound choices of law by parties to certain “qualified transactions” involving at least $1 million, where the transactions bear a “reasonable relation” to the chosen jurisdiction. See Tex. Bus. & Com. Code Ann. §§ 271.001-.011.
It was noted that the recent ABA report on cross-border opinions strongly discourages “as if” opinions in outbound cross border opinions, because the customs and practices that support giving and accepting an “as if” opinion domestically do not translate to documents governed by foreign law for many reasons, such as: the agreement may be in a language other than English, the transaction is often under a different system of law and practice, and the document may have a different structure than that of a typical U.S. agreement. As a result, a choice of law opinion is widely expected in outbound cross-border opinions. The participants were asked whether New York firms are giving outbound choice of law opinions in the context of cross-border transactions, notwithstanding the variety of standards in New York decisional law on the subject and with no clear adoption of the Restatement. The consensus among the participants was that such choice of law opinions are commonly given under New York law.

The discussion turned to the practice in states with a statute validating choice of law provisions and whether opinion givers in those states expressly state their reliance on the applicable statute in their opinion letters. On this point, practice appeared to be mixed.

The participants discussed that, notwithstanding a valid choice of law provision, it is generally understood that some matters are implicit exceptions. Examples of such exceptions include the internal affairs doctrine, real estate law and the law applicable to procedural matters. The consensus was that such exclusions are typically understood to apply but are not generally stated expressly.

The discussion then turned to forum selection provisions. The participants reviewed the varying opinion practices in states that have enacted forum selection statutes and states that have decisional law adopting the “modern view” of generally honoring the contracting parties’ choice of forum. Notwithstanding the generally favorable law on the issue, the consensus of the participants was that most firms do not regularly give opinions about the enforceability of an outbound forum selection provision.

The participants also agreed that considering a forum selection clause as part of an “as if” remedies opinion is a can of worms. Several participants indicated their preference for expressly excepting the forum selection provision from an “as if” opinion.

The session concluded with a discussion of a California employment decision, Verdugo v. Alliantgroup, L.P., 237 Cal. App. 4th 141, 187 Cal. Rptr. 3d 613 (Ct. App. 2015). At issue in that case was an employment agreement that included a provision selecting Texas as the mandatory forum for litigation of disputes. The employee commenced wage-and-hour litigation in California, and the California court declined to enforce the forum selection provision on public policy grounds. This case highlights how fundamental policy questions are closely intertwined with choice of forum.3

2. Legal Opinions Covering Future Performance

Louis G. Hering, Morris, Nichols, Arst & Tunnell LLP, Wilmington, Co-Chair
Allen K. Robertson, Robinson, Bradshaw & Hinson, P.A., Charlotte, Co-Chair
Arthur A. Cohen, Haynes and Boone LLP, Washington D.C., Reporter

This breakout session focused on inclusion of coverage for “performance of its obligations” in typical third-party opinions, particularly opinions relating to authority, authorization and no violation of applicable law or covered documents.

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3 See the article on the Verdugo decision in the Summer 2015 issue of the newsletter (vol. 14, no. 4) at 9-11.
The first topic discussed related to whether the inclusion of “performance” in such opinions covers discretionary versus non-discretionary actions, and also whether the opinion covers the post-closing timeframe, as opposed to being limited to those actions that must be taken prior to the consummation of the transaction at closing. There was also discussion of whether coverage of performance is inherently limited by the opinion “speaking only as of its date.”

The discussion became more focused as the participants considered a financing opinion on a revolving loan. There was clear agreement among the participants that, at least in that context, the “performance” language in opinions has to relate to future repayment of the loan, and includes an opinion that there is no obstacle thereto in authority, authorization, applicable law or covered documents.

There was some discussion of the issue of performance in opinions relating to real estate transactions. Real estate opinions on future performance have developed explicitly to refer to, and cover only, future payment obligations. There was also some discussion of treatment of this issue in the venture capital area, where, rather than performance, many opinions refer to “execution, delivery and consummation” of the transaction.

The discussion made clear that performance cannot refer to all future actions under an agreement, given that (for example) anti-dilution protection may be dependent on future charter provisions and specific authorization of stock issuances. As a result, it appears that California practitioners interpret the performance requirement to refer to everything that can be authorized now, coupled with an undertaking to authorize in the future whatever cannot be done now.

This led to a discussion of whether there is an implicit assumption in performance opinions that the client will do what is necessary in the future. There was discussion of whether there is an implicit assumption, where the client may have to take action to do what is necessary, that it will take those required actions and its performance will be properly done. The participants also discussed whether the opinion giver needs to consider whether the client can comply in the future.

The discussion also turned to issues arising where a company needs a license in the future. How does that affect the performance opinion? Does it depend on whether the license is discretionary? Again, should the opinion be understood to contain an unstated assumption that the company will do what needs to be done and accomplish all tasks doable by it regarding its performance?

One hypothetical presented the issue of the performance opinion in situations where approvals from a public service commission are needed. Are such approvals regularly issued in due course? Should performance opinions be limited to situations where issuance is just a ministerial process? In a head count of the session participants, almost all participants felt that, in the context of an opinion as to performance where it hinges on an approval by a third-party, they would prefer an explicit exception in addition to any unstated assumptions.

Consensus among the participants generally was reached about the need to analyze the opinion in light of the overall context of the opinion and the situation. A simple hypothetical was discussed where performance involves a person driving someone else to the store. It would probably be reasonable to assume (for an authorization or authority opinion) that if the person has a driver’s license they will use it correctly and will not drive down a one way street the wrong way. But if there is an explicit opinion on licenses, the group considered whether an express assumption might be needed that the person undertaking the obligation has a valid driver’s license.
In another hypothetical, relating to a future obligation to repurchase stock, which can only be done out of surplus and surplus exists when the opinion is given, there was a general consensus that the opinion giver can implicitly assume that there will be surplus in the future, and that no explicit reservation, exception or assumption needs to be made in the opinion.

Overall, it was a good and interesting discussion. Participants ended the discussion with the recognition that further analysis and follow-up on this topic would be very worthwhile.

3. **No Breach or Default of Contracts**

*Cynthia Baker, Chapman and Cutler LLP, Chicago, Co-Chair*  
*Stephen C. Tarry, Vinson & Elkins LLP, Houston, Co-Chair*  
*James Gadsden, Carter Ledyard & Milburn LLP, New York, Reporter*

The materials for this breakout session were prepared by the Co-Chairs based on the three breakout sessions of this topic held at the Spring 2015 WGLO Seminar.

Three themes recurred in the group’s discussion: (1) what opinions are requested and given varies depending on the nature of the transaction — financing, offering of securities, M&A or project finance; (2) many opinion problems that arise can be avoided by addressing the issue in the underlying contracts at an earlier point in the transaction — review by the counterparty in its due diligence process or representations by the client in the transaction documents; and (3) difficulties can arise when the opinion giver concludes that a troublesome term is not covered by the opinion, if the later discovery of the issue leads to disagreement between the contracting parties which, even if not creating liability for the opinion giver to the opinion recipient, often will adversely affect the opinion giver’s relationship with his or her own client.

**Constitutive documents; side letters.** Although outside the title of the session, the first topic addressed was opinions on no violation of constitutive documents. Although noting and agreeing with the opinion literature that states that this opinion adds nothing to the enforceability opinion, for which compliance with the terms of the entity’s constitutive documents is a necessary element, the participants agreed that the no violation of constitutive documents opinion is still typically requested and given. This opinion does not cover whether the execution of the agreement violates the terms of some other agreement, an example of which would be a “side letter,” common in the world of private funds, by which a contracting party may limit the ability of the entity to engage in certain transactions without the consent of certain of its members or shareholders, thereby contractually restricting what is permitted by the terms of the constitutive documents (articles, by-laws, operating agreement or partnership agreement). It was noted that side letters may need to be addressed where requested as part of an opinion on material contracts.

**Contracts; identifying the contracts.** Session participants generally recognized the best practice of limiting the no breach or default of contract opinion to contracts listed in an officer’s certificate. A public company has a list of material agreements filed as exhibits to its SEC filings; an M&A agreement has a list of material contracts identified as part of the due diligence process. In a finance transaction it may be sensible to limit the contracts review to other financing agreements. However, there are some deals, such as structured finance transactions, where the transaction counsel who organized the special purpose vehicle and is familiar with all of the agreements entered into by the newly formed entity is asked for and often gives an opinion based on all contracts known to opining counsel. Such opinions often include a definition of knowledge which limits it to the knowledge of the opinion preparers or some other limited
The no breach or default opinion, however, is often not requested in an opinion letter delivered in connection with an amendment to an existing agreement.

**Materiality.** There was a broad consensus among the session participants that opinion givers generally are not taking responsibility for materiality determinations, either in determining what contracts to cover or determining what breaches or defaults require exceptions to the no breach or default of contracts opinion.

**Financial ratios.** From the session discussion, it appears that both the opinion literature and practice of the parties are split on whether the no breach or violation of contracts opinion covers financial ratios. One view is that the ratio covenants are covered, since the issue is compliance with a contractual obligation which is a legal matter, but that the opinion giver is entitled to rely on an officer’s certificate for the calculation of the ratio itself. The second view is that compliance with the covenant is an accounting issue applying accounting principles to facts and therefore not a proper subject for a legal opinion and accordingly is not covered by the no breach or violation of contracts opinion, whether or not there is an explicit disclaimer in the opinion.

**Prohibitions on assignment.** UCC §§9-406 to 9-408 in many cases permit assignments for security that can override a restriction on assignment. Similarly security agreements may exclude contracts that would terminate if assigned. Both of these are examples of issues that should be addressed as a business matter early in the deal rather than left to create an opinion problem, especially where the contract may be extremely significant to the transaction such as the principal supply and sale contracts in a project finance transaction.

**Contracts governed by other law.** While the session participants concurred in the position taken in the Cross-Border Closing Opinions Report that the no breach or violation of contracts opinion should not be given for contracts governed by foreign law and recognized the logic that the same position should extend to domestic contracts, the participants generally confirmed the common practice of giving the no breach or violation of contract opinion on contracts governed by the law of other states of the United States — albeit with a best practice of including an express statement that the opinion is based on the plain meaning of any contracts governed by the laws of other states and assuming that the contract terms are construed in the same way as would be the case under the covered law. It was generally agreed that an opinion of local counsel should be sought on difficult questions.

**Future performance.** On issues of future performance, what the no breach or violation of contract opinion covers may diverge from what advice should be given to the client or what the counterparty should have established earlier in the negotiation process. Addressing the hypothetical of a $100 million line of credit where an existing agreement limits borrowings by the client to $70 million and no more than $70 million is borrowed at closing, the opinion that the execution of the agreement does not result in a breach or default of the existing contract can be given. However, a more difficult question is presented by a hypothetical where the borrower is, in essence, going to be compelled to borrow the entire amount, such as a construction loan where drawing the entire amount of the construction loan will be necessary to complete the project and the project has real value only when completed. This is another issue that should be addressed earlier in the process of documenting the transaction.
Recent Opinion Developments
(Summarized by John B. Power)

John B. Power, O’Melveny & Myers, LLP, Los Angeles, Moderator
Donald W. Glazer, Newton, Massachusetts
Stanley Keller, Locke Lord LLP, Boston
Mark S. Sharpe, K&L Gates LLP, Charleston
Steven O. Weise, Proskauer Rose LLP, Los Angeles
Peter Szurley, Chapman and Cutler LLP, San Francisco

1. Bar Reports

Chart of Recent Published and Pending Reports. John Power referred to the Chart of Recent Published and Pending Reports as of September 30, 2015 in the program materials. He noted that the ABA Legal Opinions Committee issued its report on outbound cross-border opinions following the WGLO Spring 2015 Seminar, and the 2014 South Carolina comprehensive report is now in the list of recently published reports. Three proposed ABA reports newly appear in the pending reports list: an updated survey of office opinion practices by the Legal Opinions Committee, and reports on debt tender offer opinions and resale opinions by the Securities Law Opinions Subcommittee of the ABA on Federal Regulation of Securities Committee.

South Carolina Report. Mark Sharpe reported that South Carolina has issued a comprehensive opinion report, having received formal State Bar approval in January 2015. The report includes sample opinions for use in real estate secured transactions as well as transactions involving opinions on perfection of security interests in personal property collateral. The report confirms the use of customary practice in South Carolina opinion practice and largely follows the principles set forth in the major, national reports while identifying where departures from national practice are necessary to reflect peculiarities of South Carolina law. In particular, the report addresses the effect on opinions of South Carolina jurisprudence holding that documents may be unenforceable to the extent arising from a transaction involving the unauthorized practice of law.

California Sample Personal Property Security Interest Opinion Letter. Peter Szurley reported on an exposure draft of the Sample California Third-Party Legal Opinion Letter for Personal Property Secured Financing Transactions prepared by the Opinions Committee of the Business Law Section of the California State Bar. The sample opinion letter is unique in that, in addition to providing sample security interest opinions under the UCC, it includes other foundational, corporate and remedies opinions and related assumptions and qualifications. This facilitates use of the sample without referring to reports on other topics. While the sample opinion highlights certain issues particular to California (for example, California usury law and the non-uniform ability to perfect a security interest in insurance policies by notification), it is national in tone and scope. Peter noted that, based on comments received, the final draft

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4 An updated version of the Chart is reproduced in this issue of the newsletter under “Legal Opinion Reports — Chart of Published and Pending Reports.”
will include a section on limited UCC priority opinions not now included in the exposure draft. A copy of the exposure draft may be obtained here.  

2. Jurisdiction Issues

Steve Weise reviewed concepts of general jurisdiction and specific jurisdiction, referring to an excellent discussion of these concepts in *In re Libor-Based Financial Instruments Antitrust Litigation*, 2015 WL 4634541 at *19-*20 (S.D.N.Y. Aug. 4, 2015), a case not involving a legal opinion.

Steve noted that review has been granted by the California Supreme Court of the Court of Appeal’s decision in *BNSF Railway Company v. Superior Court*, 185 Cal. Rptr. 3d 391 (Cal. App. 2d Dist. 2015), rev. granted, 352 P.3d 417 (July 22, 2015). Steve discussed the Court of Appeal decision on the recent developments panel at the WGLO Spring 2015 Seminar. In that case, also not involving a legal opinion, a very large railway company was held not subject to the general jurisdiction of the California courts, even though it had very significant operations in California, because its California operations were small compared to its operations in other jurisdictions.

Steve and Don Glazer had a vigorous exchange on the likelihood of a particular court’s having general or specific jurisdiction over an opinion giver when the opinion being challenged was prepared in the law firm’s headquarters office in one jurisdiction and the law firm also had an office in a different jurisdiction where the recipient was located. They agreed that the result likely will depend heavily on the facts of the particular case.

3. Lightning Round

*Liability for an “Opinion.”* Stan Keller mentioned *City of Westland Police and Fire Ret. System v. Metlife, Inc.*, 2015 WL 5311196 (S.D.N.Y. Sept. 11, 2015), a case not involving a legal opinion, in which a federal district court extended the analysis in *Omnicare, Inc. v. Laborers District Council Construction Industry Pension Fund*, 135 S.Ct. 1318 (2015) from liability under Section 11 of the Securities Act of 1933 to liability under Rule 10b-5 under the Securities Exchange Act of 1934. In both cases, in determining liability for a statement of opinion in a disclosure document, the courts emphasized the particular facts and circumstances and the relevant context for ascertaining the reasonable expectations of the reader regarding the work expected to be done as the basis for the opinion. They thus provide analogous support for reliance on customary practice for giving and interpreting third-party legal opinions.  

*Responsibility of Counsel for Opinion Recipient.* Don Glazer reported on *Taylor v. Bell*, 340 P.3d 951 (Wash. App. 2014), in which the client of a Washington law firm received a third-party opinion from Idaho counsel for the other party to a transaction. The opinion was wrong on an issue of Idaho law. The client sued the opinion giver for negligent misrepresentation and its own Washington law firm for

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7 The UCC sample opinion is included as Annex A to the Fall 2015 issue of the newsletter (vol. 15, no. 1), and is discussed under “Recent Developments – Exposure Draft, Sample Third-Party Legal Opinion Letter for Personal Property Secured Financing Transactions,” at pages 20-21 of the Fall 2015 issue.

8 Under the California Rules of Court, a Court of Appeal opinion is no longer considered published if the Supreme Court grants review of the decision. Cal. Rules of Court, Rule 8.1105(e)(1).

9 See the WGLO Addendum to the Summer 2015 issue (vol. 14, no. 4) of the newsletter, at A-13 — A-14, for a further discussion of the *Omnicare* decision. See also John Villa’s and Craig Singer’s article on the decision in the Spring 2015 issue of the newsletter (vol. 14, no. 3), at 7-11 (“The Supreme Court’s Omnicare Decision: Potential Implications for Litigation Concerning Closing Opinions”).
malpractice. The trial court granted the Washington firm’s motion for summary judgment, and the appellate court reversed and remanded for trial. Don noted that although the case only involved denial of a motion for summary judgment, it nevertheless struck a cautionary note for lawyers representing opinion recipients in business transactions. It suggests, at least in some circumstances, that obtaining for a client an opinion from counsel for the other party may not be sufficient to discharge the duty the recipient’s counsel owes its client with regard to the matters covered by the opinion. Don noted that the most troublesome aspect of the holding was the implication that the duty recipient’s counsel owes to its client with regard to legal issues arising under the law of a state in which that counsel does not practice could extend beyond obtaining a third-party opinion for its client from counsel knowledgeable about that law, at least where the limits of recipient counsel’s engagement are unclear.

Jury Waiver Clauses. Under California law most pre-dispute jury waivers are invalid. In general, Federal law permits such waivers when knowingly and voluntarily given. Steve Weise reported on In re County of Orange, 784 F.3d 520 (9th Cir. 2015), in which the Ninth Circuit found the federal rule on jury waivers to be a constitutional minimum and, incorporating into federal law California’s more restrictive law on jury waivers, declined to enforce the jury trial waiver.

Arbitration Clauses: Waivers of Class Actions; Conflicting Authority. The U.S. Supreme Court has held that waivers of the right to a class action in an arbitration clause are enforceable. E.g., American Express Co. v. Italian Colors Rest., 133 S.Ct. 2304 (2013). Earlier the North Carolina Supreme Court had held that such clauses are unconscionable and unenforceable. Tillman v. Commercial Credit Loans, Inc., 655 S.E.2d 362 (N.C. 2008). Don Glazer reported on Torrence v. Nationwide Budget Fin., 753 S.E. 2d 802 (N.C. Ct. App 2014), in which an intermediate North Carolina appellate court, confronted with such a waiver, considered whether these authorities in fact conflicted and, finding that they did, followed the U.S. Supreme Court holding. Legal opinions express an opinion giver’s professional judgment on what the highest court of the covered law jurisdiction would hold; the North Carolina appellate court’s decision demonstrates how application of that principle, although not always easy, can be done.

Forum Selection Clauses. In Verdugo v. Alliantgroup, L.P., 187 Cal. Rptr. 3d 613 (Cal. App. 2015), an employer sought to enforce a clause in an employment agreement with a California employee exclusively selecting a Texas forum to adjudicate disputes under the contract. Under California law, a party opposing enforcement of a forum selection clause ordinarily has the burden to show that enforcement would be unreasonable and unfair. See M/S Bremen & Unterweser Reederel, GmbH v. Zapata Off-Shore Co., 407 U.S. 1 (1972). However, Steve Weise reported, the California Court of Appeal held in Verdugo that the burden is reversed when the underlying claims are based on unwaivable statutory rights (in this case provisions of the California Labor Code protecting rights of California employees). The agreement also included a provision designating Texas law as governing disputes under the agreement. The court held that the employer did not sustain its burden of proving that the Texas court would enforce the unwaivable California labor law.10

In giving an opinion on an agreement that contains a mandatory forum selection clause, opinion preparers will need to consider whether to take an explicit exception for the clause. Under the law of many states these clauses are generally enforceable unless the result of enforcement is unfair or unjust or violates a strong public policy of the forum state (the “Bremen Exception”), and many believe that circumstances covered by the Bremen Exception are understood to be excluded from the opinion without so stating.

10 See the article on the Verdugo decision in the Summer 2015 issue of the newsletter (vol. 14, no. 4) at 9-11.
CONCURRENT BREAKOUT SESSIONS II:

1. **Issues for Recipients of Legal Opinions**

*Dina Moskowitz, Standard & Poor’s Rating Services, New York, Co-Chair*
*Reade H. Ryan, Jr., Shearman & Sterling LLP, New York, Co-Chair*
*Lydia C. Stefanowicz, American College of Mortgage Attorneys, New York/New Jersey, Co-Chair*
*Herrick K. Lidstone, Jr., Greenwood Village, Colorado, Reporter*

This session continued discussions begun at prior WGLO sessions between opinion givers and opinion recipients.

**Genuineness of Signatures**

The session started with the Co-Chairs noting that some opinion recipients have been objecting to the fairly standard assumption that all signatures to the agreements (including those of the opinion giver’s client) are genuine. It was noted that their objection probably derives from the *Dechert* case of several years ago.\(^{11}\) One participant pointed out that the legal opinion at issue in that case actually included an express assumption as to the genuineness of all signatures. While the court focused on that specific assumption, it also addressed customary practice and may have reached the same conclusion even without the express assumption. It was noted, however, that inclusion of the express assumption may have made the difference between Dechert’s success on summary judgment, which was granted to Dechert by the appellate division of the New York Supreme Court, versus the burden of a full trial.

A comment was made that merely assuming the genuineness of signatures does not necessarily ensure that the right person has signed. One could, for example, have a genuine signature delivered by a person without authority, though if this amounted to fraud on the opinion giver, the opinion letter should not be actionable in such a case. On the other hand, inclusion of an express assumption as to genuineness could make the difference again between winning on summary judgment and the burden of going to trial.

Finally, another comment was made that most closings today occur by email and that opinion givers rarely see the client signing. Elimination of the genuineness assumption could result in more closings at closing tables where the attorneys can see the client’s representatives actually putting pen to paper. However, many viewed it as unrealistic to think that current closings will not, for the most part, continue to take place via email.

Generally the conclusion of the group was that it is appropriate to resist an opinion recipient’s request to delete the genuineness of signatures assumption.

**Bankruptcy and Equitable Principles Exception**

It was noted that the TriBar reports suggest that the bankruptcy and equitable principles exceptions (“BK-EP”) should only apply to the remedies opinion. It appears, however, that many opinion givers apply the BK-EP exception more broadly, with one participant indicating he often prepares

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\(^{11}\) *Fortress Credit Corp. v. Dechert LLP*, 89 A.D.3d 615, 934 N.Y.S.2d 119 (2011), discussed by Don Glazer and Stan Keller in “Opinion Practice Implications of the Fortress Decision” in the Spring 2012 issue of the newsletter (vol. 11, no. 3) at 8-10, and by counsel to Dechert in the Winter 2011 issue of the newsletter (vol. 11, no. 2) at 11-12 (Joel Miller) in “New York Appellate Court Dismisses Claims Against Dechert LLP Arising Out of Legal Opinion in Marc Dreier Fraud.”
In Our Opinion

opinions applying the BK-EP exception “to the extent the opinions rendered relate to enforceability.” This commenter noted that bankruptcy can affect a number of common opinions – for example, an opinion that a security interest is properly perfected implies or is based upon the enforceability of the security agreement.

Merger and Acquisition Agreements

There was significant discussion about legal opinions in the merger and acquisition context. It was noted that these opinions have substantially disappeared in the public-to-public context and are significantly reduced in frequency even in the private-to-private context.

It was noted that the legal opinions given to lenders in the M&A context frequently relate to the enforceability of the underlying documents between the seller and the buyer. In these transactions, the lender may request that its borrower, the buyer, obtain an opinion addressed to the lender from seller’s counsel. It was generally agreed, however, that such opinions are frequently objected to and not given. When they are given, they are very narrow in scope.

Opinions on Amendments

There was a discussion as to whether opinions are requested on amendments to loan agreements, and, if so, what types of opinions are requested. For example, do they cover the original agreements as well as the amendment, or merely the amendment with a statement that the amendment does not affect the existing perfected security interest?

It was noted that the opinion on an original loan transaction speaks as of its date, and not the subsequent date when the amendment is being signed. Alternatives discussed were (x) delivering an entirely new opinion as of the amendment date addressing each original agreement that has been amended, in each case, as such agreement has been amended, or (y) delivering an entirely new opinion covering both the amended documents and all other transaction documents originally opined on. While entirely new opinions are not often sought, some in the group expressed a preference for rendering entire opinions on the amended agreements over rendering short form “bringdown” opinions whose meanings may be less clear in some instances. No consensus was reached as to what types of opinions on amendments opinion givers are or should be rendering.

Additional Qualifications

Some time was spent discussing additional qualifications, including the provision that “no assignee of a loan shall have any greater rights than the original lender as of the date of the opinion letter, or any greater rights than the assignee from whom the current assignee received an interest in the loan.”

There was little discussion on the first half of this formulation, as it was generally thought to be fair.

The second half, however, generated discussion about whether a subsequent assignee should take a lesser right where (for example) its assignor had taken actions to reduce the value of the loan to the assignee. The answer that seemed to carry the day was that the assignee might have recourse to the assignor but in all events should not have recourse to the borrower, or to the borrower’s attorney, for actions or knowledge of the assignor.
2. Key Take-Aways From the Report on Cross-Border Opinions of U.S. Counsel (and Some Questions To Think About)

Ettore A Santucci, Goodwin Procter LLP, Boston, Chair
J. Truman Bidwell Jr., Sullivan & Worcester LLP, New York, Reporter

The Chair opened this session by noting that the number of opinions being given in cross-border transactions is increasing dramatically, with the gap between what is asked and what is possible also increasing – not decreasing as one might have expected. One of the goals of the Report is to serve as a catalyst for closing this gap.

Before turning to the broader question of how the Report may be a first step in facilitating the giving and receiving of cross-border opinions, the session considered a few specific opinion requests – these included choice of law, sovereign immunity, forum selection and arbitration. Each of these subjects is dealt with in the Report.

Several members noted that it is important to limit the “no violation of laws” opinion to statutory law so as to avoid giving “a back door” remedies opinion. This may be particularly meaningful as the Report strongly advises against remedies opinions that assume that the covered law is the same as the law chosen in the transaction documents (“as-if” opinions).

The group discussed various issues relating to the application of U.S. customary practice in cross-border opinions. It was noted that it is not the obligation of an opinion giver to ascertain opinion practice in a recipient’s country or to advise the recipient on U.S. customary practice. It was the consensus of the group, therefore, that opinion givers should consider alerting non-U.S. opinion recipients to the desirability of seeking legal advice from their own counsel on the meaning of the term “customary practice” as applicable to both usage and diligence requirements for an opinion rendered by a U.S. opinion giver. It was further the consensus that it would be desirable to state in a cross-border opinion that it is to be read and is to be supported by due diligence in accordance with U.S. customary practice.

Participants in the session noted that U.S. third-party opinions are often required in circumstances where opinions from non-U.S. lawyers are not. The session agreed that it is important to reduce requirements for third-party opinions in such circumstances to issues truly useful to non-U.S. opinion recipients; sometimes the request for these opinions seems to arise from “check-the-box” requirements rather than a real need for “across-the-table” legal advice.

The Chair remarked that “English style” opinions do not rely on customary practice, but rather spell out the terms under which the opinion is given; in essence, an English law opinion states what in U.S. legal opinions is supplied in most cases by “customary practice.” He further remarked that the absence of a customary practice in England requires this approach and then questioned whether U.S. opinion practice might tend in the same direction. Some U.S. opinion givers spell out at length the exceptions and assumptions on the basis of which the opinion is rendered. While U.S. practice in some types of transactions has been tending away from that practice, the international financial community may cause a reversion to the lengthier approach.

12 Published in 71 Bus. Law. 139 (Winter 2015-2016).
The session considered the dangers a U.S. firm might face in a foreign court with non-U.S. laws being applied to set standards of liability for the U.S. opinion giver. U.K. law firms typically include in their opinions a choice of English law to govern the definition of and resolution of issues of liability as well as a provision limiting the situs of litigation to courts in London. It was the consensus of the session that such clauses are often acceptable to recipients of U.S. opinions in cross-border transactions; and, as noted above, while U.S. opinions often do not specify the jurisdiction in which disputes on legal opinions should be heard, it is advisable to specify that they should be adjudicated pursuant to U.S. (federal and state) law and practice.

Several participants noted that it might not be advantageous to opt for the jurisdiction of U.S. courts. The courts in this country have tended to impose liability on lawyers, whereas the courts of foreign jurisdictions generally have not done so; hence one might be better off in a foreign court.

The session also considered the merits of arbitration versus litigation. It was noted that some insurers do not like their insureds to submit to U.S. arbitration. However, the group felt that arbitration in London might be an appropriate alternative. It was the consensus of the group that arbitration in London is generally speedy and cost effective. Participants also felt that U.K. arbitrators are amply familiar with the law relating to commercial transactions whereas the vast majority of judges in this country are less so, as most of the trials over which they preside are criminal cases. The thought was advanced that it might be appropriate for opinion givers to require arbitration in London unless proceedings are to be brought in the courts of one or two acceptable jurisdictions.

It was noted that English lawyers typically limit their liability to an opinion recipient to a particular monetary amount. However, only one participant had been successful in getting such a clause accepted. It was noted that setting a limit on liability might serve as a target for the amount to be claimed. It was also noted that in some foreign jurisdictions liquidated damages are not acceptable. Members of the session generally agreed that a limitation on liability could be seen to benefit both parties, if the limit were to be set at an amount sufficient to ensure that the firm is incentivized to do its best work but insufficient to cripple the firm financially.

The session considered the possibility of reciting expressly in the opinion the U.S. (or state) standards of liability applicable to U.S. lawyers issuing opinions to non-clients. This would be akin to what is done in an indenture with respect to the liability of a trustee. However, while this may be possible, it seemed unlikely the stated standard would be higher than simple negligence and, if that is the standard, concern was expressed that a foreign court might find a firm liable if the opinion proved to be incorrect, thereby raising the specter of an opinion being regarded more in the nature of a guarantee than an expression of professional judgment.

In conclusion, the Chair noted that the Cross-Border Report is but a first small step towards harmonizing international legal practice. He suggested that a survey of opinions given by firms in other jurisdictions might be useful to determine if consensus can be reached on a core of standard concepts. He also suggested that there are two fundamental concepts, choice of law and forum, which must be universally accepted if opinion practices are to be harmonized. If recognition of these two concepts can be achieved, it could facilitate reaching agreement on other key opinions, such as status of an entity, its power to enter into a transaction, the legal, valid and binding nature of the transaction documents and the no violation of law opinion.

It is envisaged that the next steps will be to reach out to bar associations and leading firms in Toronto, London, EU capitals and Hong Kong to open discussions on the process of harmonizing international legal practice.
3. **Risk Management of Legal Opinions in Law Firms**

*Randy J. Curato, ALAS, Inc., Chicago, Co-Chair*
*Richard R. Howe, Sullivan & Cromwell LLP, New York, Co-Chair*
*Norman M. Powell, Young Conaway Stargatt & Taylor, LLP, Wilmington, Reporter*

In this concurrent session, participants considered a variety of approaches to opinion risk. There was no suggestion of a standard, or even a preferred, approach. On the contrary, views were expressed in support of law firm approaches as varied as (i) any partner being authorized to give any opinion, with the expectation that he or she will exercise sound judgment in doing so, including involving other appropriate colleagues, and (ii) every opinion requiring second partner review, and perhaps also a “cold read” by a subject matter expert. This summary memorializes the discussion of varying approaches that work in different firms, highlighting risk management at client intake, during the opinion process, and after an opinion has been delivered. A few related risk management topics were considered.

There was general agreement that risk management begins with client intake. Some clients are a poor fit for some law firms, and attorney-client relationships in such instances are best avoided at the outset. Sometimes, mismanagement of client expectations gives rise to heightened risk. Similarly, many participants advocated endeavoring to identify and consider any likely opinion requests early in (or, indeed, before agreeing to) a representation, facilitating better engagement decisions, management of expectations, and staffing of matters. One participant suggested that the rigor often brought to bear in the opinion process may be undermined by the exigencies and incentives of the business intake process. Another remarked that firms might consider requiring second partner approval of new business. All seemed to agree that ultimate responsibility for opinion letters rests with those who prepare them, not those who review them.

Many participants reported some sort of training or education program, more or less formal, to better equip firm lawyers for the opinion process. Approaches range from mandatory formal in-house classes for senior associates and lateral hires, to ad-hoc discussions at practice group meetings and in other contexts. The consensus of the group was that the opinion process should bring to bear at least two distinct bodies of knowledge: whatever substantive area(s) of law are covered by the opinion and the law and practice unique to opinions. As noted above, the means to that end vary widely, from the *laissez-faire* to the detailed and hierarchically imposed. Some firms have developed and maintain forms or templates, and there was wide agreement that where such resources are available they offer a benefit (that working off of previously delivered opinions may not) when they are kept current to reflect changes in law and other developments. One participant mentioned a preference that draft opinions be redlined against the forms or templates on which they are based, so as to ease and expedite review by colleagues. A few noted that they found due diligence or closing checklists helpful.

Discussion progressed to the challenges inherent in implementing and assuring compliance with any system. Participants cited varying cultural norms and other factors that might encourage, or discourage, frank collaboration and the seeking of help from others. If firm culture is conducive, it was suggested, associates and even staff can play a role in assuring that good practice is followed. One member of the group suggested a possible approach of having an opinion committee member randomly audit opinion files. Recognizing that situations can differ, sometimes markedly, one participant indicated his firm’s disfavor of policies framed in terms of “always” and “never.” The niceties of litigation and the formal allocation of burdens of proof aside, it was suggested (anecdotally, but informed by experience in defending claims) that in general lawyers would do well to keep some record substantiating what they have done by way of diligence in rendering an opinion. In one participant’s experience, jurors tend to
draw negative inferences from a lawyer’s indication that he or she “doesn’t recall, but presumes” what he or she did, particularly where the jurors view the transaction as being so large as to be memorable.

Discussion moved to how one proceeds after perceiving that an opinion may be problematic. Some advocated for appropriate discussion among team members. It was suggested that the “in firm privilege” may apply to shield from discovery only communications with one’s in-house general counsel. Time entries, as well as email, voicemail, and other records, should be created with care. This led to a brief consideration of the inclusion of liability caps in third-party opinions. Noting that Rule 1.8(h)(1) of the ABA Model Rules of Professional Conduct prohibits a lawyer from prospectively limiting liability to a client absent certain safeguards, such as the client’s having independent counsel in making the agreement, it was generally the view that liability caps are both permissible and effective (at least with respect to ordinary negligence) as between an attorney and a non-client (i.e., third-party) opinion recipient. While it was mentioned that a Colorado firm has included such a limitation in at least one opinion, members of the group were not aware of instances where other firms in the U.S. are including such provisions in their opinions.

Finally, the group was cautioned that while comparatively few lawyers actually get the law wrong in their legal opinions, somewhat greater exposure results from flawed due diligence, and from inadvertent, informal opinions. The first can occur when it is alleged the lawyer knew, or should have known, that a foundational fact, whether assumed by the lawyer or represented to by the lawyer’s client, was false. The second can occur when a lawyer informally expresses a view to someone, who may or may not be his or her client, and that person relies on the advice. This problem is exacerbated by the quick turnaround often demanded in this age of constant electronic connectivity, and it is the quick reply that, absent considered qualification, supporting assumptions, stated limitations, and the like, can be taken as a much broader statement than may be intended.

**PANEL SESSIONS III:**

**Current Ethics Issues Relating to Opinions**
(Summarized by E. Carolan Berkley)

*Charles Davant IV, Williams & Connolly LLP, Washington, D.C., Co-Chair*
*Craig D. Singer, Williams & Connolly LLP, Washington, D.C., Co-Chair*

This panel reviewed significant ethics issues that commonly arise in opinion practice. The presenters noted that they are not aware of any disciplinary action being brought by state bars against lawyers with respect to legal opinions. However, third-party opinion recipients and clients have alleged violations of ethical rules when bringing actions against opinion givers. In the case of third-party claimants, the legal opinion may be the primary basis to support such an action. The presenters used a number of hypothetical cases, which were provided to participants in advance of the meeting, to make their points.

In the first hypothetical, outside counsel to a company being sold in a private transaction is expected to give a negative assurance letter to the purchaser. The draft letter provides that “we have relied upon the representations of factual matters contained in the Purchase Agreement and have made no independent investigation of such factual matters; however, nothing has come to our attention which causes us to doubt the accuracy thereof.” As the transaction progresses, an employee of the seller tells outside counsel of his suspicions regarding activities of another employee that may involve personal use of company property. Although not covered by a representation in the Purchase Agreement, the
information raises concerns. Outside counsel discusses what he has learned and his concerns with general counsel.

Besides considering whether it is appropriate to request or give a negative assurance in this context, discussion ensued regarding circumstances where it might be appropriate to give an “I am not your lawyer” warning to the employee providing the information and counseling general counsel regarding potential whistleblower liability. Rule 1.13 of the ABA Model Rules of Professional Conduct (Client-Lawyer Relationship: Organization as Client) was considered and whether the information would have a significant impact on the client.

The second hypothetical involved alleged dumping of containers in a remote part of the local river. The same employee provides the information to outside counsel, and again outside counsel advises general counsel. General counsel later replies that she looked into the matter and the employee was mistaken, but does not provide any further information. The Purchase Agreement does contain a representation that the selling company believes it is in compliance with all environmental laws.

In the hypothetical, outside counsel, being unsatisfied with the explanation of general counsel, goes up the ladder to the CEO and Chairman of the Board. The next day outside counsel is replaced. Because the company is private, there is little confidence that going to the full board would result in any different response. It was agreed that Rule 1.6 of the ABA Model Rules of Professional Conduct (Client-Lawyer Relationship: Confidentiality of Information) would preclude outside counsel from revealing the information to the buyer but, in some states and depending on the facts, it might be possible to go to legal authorities if to do so would prevent a substantial injury to the organization.