# In Our Opinion

The Newsletter of the Legal Opinions Committee

ABA Business Law Section

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**FROM THE CHAIR**

I am pleased to share with you the Summer 2017 issue of *In Our Opinion*. This issue begins with Steve Bigler’s and Stephanie Norman’s article on a recent decision of the Delaware Court of Chancery (Nguyen v. View, Inc., 2017 WL 2439074 (Del. Ch. June 6, 2017)), where the Court held that Section 204 of the Delaware General Corporation Law may not be used to ratify a “deliberately unauthorized corporate act” in order to “undo a stockholder vote rejecting a transaction proposed by the company’s board of directors.” Please note also Tom White’s timely article on the recently approved PCAOB auditing standard (AS 3101) governing the form and contents of auditors’ reports which, among other changes, adds a new requirement that the auditor discuss “critical audit matters” (“CAMs”) to supplement the traditional “pass/fail” opinion as to whether or not an issuer’s financial statements fairly present, in all material respects, the company’s financial condition, results of operations and cash flows in accordance with generally accepted accounting standards in the United States. The new standards are subject to SEC approval. Both Nguyen and AS 3101 will be on the agenda at the upcoming meeting of our Committee in Chicago on September 15, 2017.

Although it is bad form to promote one’s own work, let me also mention my article on where the Second Circuit’s decision in Marblegate Asset Management, LLC v. Education Management Corp. (846 F.3d 1 (2d Cir. 2017)) leaves lawyers who practice in the debt capital markets space, particularly issuer’s counsel who are asked to give a variety of opinions addressing the legality of a debt restructuring affecting the rights of holders of indenture securities.

**Call for Content.** While I am on the subject of content, I would like to ask all of our Committee’s members to think about producing content for this Newsletter. We are fortunate that members of our Committee, TriBar, the Securities Law Opinions Subcommittee, and the Working Group on Legal Opinions (“WGLO”) author articles regularly on important reports or developments. But I would like us to capitalize more on the single best resource our Committee has to offer: the shared wisdom of its members — all 1,400 of us. I would like to see more short articles authored by members on topics they find interesting: from a short note about a panel discussion you participated in or moderated to a commentary about a noteworthy case or situation you encountered in your practice. Some of you also may feel that a novel or intriguing opinion practice issue deserves a “point-counterpoint” article where several authors debate the pros and cons of different approaches. An example of the latter was a 2016 article on how opinion preparers could deal with bail-in clauses that are required to be included in US-law loan agreements under EU regulations, which was accompanied by several commentaries.

The Committee’s listserv is a great vehicle for substantive discussions among our members and may provide fertile raw material if a member who posted a question or comment later finds that the thread generated analysis worthy of further exposition. I would love to see the Newsletter become more and more a natural downstream pool where issues that originate from the listserv get fleshed out and broader debate is fostered. That in turn could become the topic for a CLE program at a Section meeting.

**Business Law Today.** Coincidentally, Christina Houston, in her capacity as Executive Editor of the Legal Opinions & Ethics Practice Area for *Business Law Today* (“BLT”), recently e-mailed me that BLT is looking for legal opinions content. Content produced for our Committee’s Newsletter could easily lend itself to being “re-purposed” for publication in BLT (either as a traditional type of BLT article — typically about 800 words in length — or as a “Month-in-Brief” piece — ideally 75 words). Both formats lend themselves to a summary version of a note initially published in our Newsletter and offer an opportunity to give the
As I approach my first anniversary as Chair of the Committee, I ask for your constructive criticism and suggestions for how to do the job better. My admiration for past chairs of our Committee has only grown while I have tried to map a course for the Committee to follow. I am happy with the two new projects that are beginning to take shape — a joint effort with interested lawyers in other countries to promote convergence in cross-border opinion practice and a new report that would improve, rationalize and standardize practice for giving opinions covering intellectual property issues in financing or acquisition transactions. I hope these projects will help our Committee reach beyond our traditional constituencies. Cross-border transactions and IP-intensive enterprises are rapidly expanding segments of the practice of law and it would be a win-win for our Committee to become a contributor to their growth and development on issues related to opinion practice. Over the past year the co-chairs of the committees working on the Statement of Opinion Practices and the next Survey of Opinion Practices have made tremendous progress and I may be lucky enough to see both projects come to fruition during my term. All in all, I am happy with the direction and momentum of our Committee’s activities, but there is always more we could be doing. I look forward to your suggestions and help for keeping our efforts fresh and relevant.

I hope to see you at the Section’s Annual Meeting in Chicago on September 14-16.

- Ettore A. Santucci, Chair
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ABA Business Law Section
Annual Meeting
Chicago, IL
Sheraton Chicago Hotel & Towers
The Gleacher Center
September 14-16, 2017

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. For updated information on meeting times and places, check here.¹

Legal Opinions Committee

Friday, September 15, 2017

Cross-Border Opinions Task Force Meeting:
8:00 a.m. – 9:00 a.m.
Old Town, Lobby Level

Committee Meeting:
9:00 a.m. – 10:30 a.m.
Erie, Meeting Room Level

Program: “Third-Party Closing Opinions on Limited Partnerships”
2:30 p.m. – 4:30 p.m.
Michigan, Meeting Room Level

Legal Opinions Committee (continued)

Subcommittee Meeting
(Survey of Opinion Practices):
4:30 p.m. – 5:30 p.m.
Wrigleyville, Lobby Level

Reception: 5:30 p.m. – 6:30 p.m.
Columbus, Lobby Level

Professional Responsibility Committee

Thursday, September 14, 2017

Committee Meeting:
10:00 a.m. – 11:30 a.m.
Colorado, Meeting Room Level

Saturday, September 16, 2017

Program: “Ethics and Tax Law Practice”
10:30 a.m. – 12:30 a.m.
Michigan, Meeting Room Level

Program: “Reclaiming Professional Competence & Ethical Behavior in the Digital Age”
2:00 p.m. – 4:00 p.m.
Sheraton Ballroom II, Ballroom Level

Securities Law Opinions Subcommittee,
Federal Regulation of Securities Committee

Thursday, September 14, 2017

Committee Meeting:
2:30 p.m. – 3:30 p.m.
Ballroom IX, Ballroom Level

¹ The URL is
https://www.americanbar.org/content/dam/aba/events/business_law/2017/09/annual/alpha_schedule.authcheckdam.pdf
In Our Opinion

Audit Responses Committee
Saturday, September 16, 2017
Committee Meeting:
11:00 a.m. – 12:00 p.m.
Ontario, Meeting Room Level

Law and Accounting Committee
Saturday, September 16, 2017
Committee Meeting:
3:30 a.m. – 11:00 a.m.
Ontario, Meeting Room Level

ABA Business Law Section
Fall Meeting
Washington, D.C.
The Ritz-Carlton Hotel
November 17-18, 2017

ABA Business Law Section
Fall Meeting
Washington, D.C.
The Ritz-Carlton Hotel
November 17-18, 2017

Working Group on
Legal Opinions Foundation
New York, New York
October 31, 2017

RECENT DEVELOPMENTS

Nguyen v. View, Inc.: The Delaware Court of Chancery Holds That Acts Deliberately Rejected by Stockholders Are Not Subject to Ratification under Section 204 of the Delaware General Corporation Law

Since it became effective on April 1, 2014, Section 204 of the Delaware General Corporation Law (the “DGCL”) has served its purpose by enabling corporations to retroactively cure defects in their corporate records and by allowing corporate practitioners to give clean legal opinions as to, among other things, a corporation’s capitalization. As the Delaware courts have noted, however, Section 204 of the DGCL (“Section 204”) is not “a license to cure just any defect.” In a recent opinion, Nguyen v. View, Inc., 2017 WL 2439074 (Del. Ch. June 6, 2017), the Delaware Court of Chancery held in a proceeding brought pursuant to Section 205 of the DGCL (“Section 205”) that Section 204 may not be used to ratify a “deliberately unauthorized corporate act” (2017 WL at *2) in order to “undo a stockholder vote rejecting a transaction proposed by the company’s board of directors.” 2017 WL at *10.

The concern expressed by the View Court that corporations may misuse Section 204 to ratify actions that were deliberately rejected by the stockholders is among the specifically enumerated factors that the Court of Chancery is entitled to consider in a proceeding brought pursuant to Section 205. Section 205(d)(1), for example, expressly provides that the Court of Chancery may consider “whether the defective corporate act was originally approved or effectuated with the belief that such approval or effectuation was in compliance with the provisions of [the DGCL], the certificate of incorporation or bylaws of the corporation.” In addition, as with any other action taken pursuant
to the DGCL, any ratification under Section 204 is subject to equitable review, and the Court of Chancery is expressly authorized under Section 205(d)(5) to consider “any other factors or considerations that the Court deems just and equitable” in determining whether to sustain a ratification under Section 204. Nonetheless, absent facts indicating the stockholders have deliberately rejected an act or transaction, the View opinion should not be interpreted as a broad curtailment of a corporation’s power to ratify an otherwise void or voidable act or transaction. Rather, as with any action brought in the Court of Chancery challenging any corporate act or transaction, the outcome of any proceeding under Section 205 challenging a ratification under Section 204 will necessarily be heavily dependent on the particular facts and circumstances at issue.

A. The View Decision

In View, the founder of View, Inc. (the “Company” or “View”) challenged the ratification of several rounds of financing in which View had raised an aggregate of approximately $500 million. The first of the challenged financings was a Series B preferred stock financing round (the “Series B Financing”). Prior to the Series B Financing, the founder held approximately 70% of View’s outstanding common stock and was entitled, pursuant to View’s certificate of incorporation and the terms of a voting agreement (the “Voting Agreement”), to fill one of five seats on View’s board of directors. In connection with the Series B Financing, View’s certificate of incorporation and the Voting Agreement were to be amended to eliminate the common stockholders’ separate right to appoint a director and to enable the Company to increase or decrease the number of authorized shares of common stock without a separate class vote of the common stock. The founder would also lose his right to consent to any amendment to the Voting Agreement.

Prior to the consummation of the Series B Financing, the founder’s employment with View was terminated and he was removed as a member and chairperson of View’s board of directors. The founder disputed his removal and termination, following which the parties entered into a settlement agreement to resolve the claims. At View’s insistence, the settlement agreement required the founder to consent to the Series B Financing. The settlement agreement provided, however, that either View or the founder could rescind the agreement within seven days of its execution.

Following the execution of the settlement agreement but before the seven-day revocation period had expired, View consummated the Series B Financing. After the consummation of the Series B Financing, the founder notified View that he was rescinding the settlement agreement. View and the founder agreed to submit various claims relating to the founder’s termination to binding arbitration, including whether the founder had properly rescinded the settlement agreement. While the arbitration was pending, View proceeded to consummate a series of additional financing rounds. The arbitrator subsequently determined that the founder had properly rescinded the settlement agreement, including his consent to the Series B Financing, and that the Series B Financing was void and invalid. Due to the invalidity of the Series B Financing, the subsequent financings were also effectively invalidated due to the failure to obtain the founder’s required consent.

After the arbitrator’s decision, View proceeded to ratify each of the financings under Section 204. In connection with the ratification, the holders of View’s Series A preferred stock converted their shares into common stock, which resulted in their holding a majority in voting power of the outstanding common stock at the time of the ratification and eliminated View’s need to obtain the founder’s consent to authorize the ratification of the financings under Section 204. Following the ratification of the Series B Financing and the subsequent financings rounds, the founder filed suit pursuant to Section 205 challenging the ratification and seeking a declaration of invalidity under Section 205. View moved to dismiss the complaint for failure to state a claim upon which relief can be granted on the basis that the founder failed to plead facts...
that would support a reasonable inference that View’s ratification was technically invalid or that it should be disregarded as a matter of equity under Section 205.

Addressing whether to grant View’s motion to dismiss, the Court of Chancery noted that it must first determine whether the Series B Financing and the subsequent financings constituted defective corporate acts that were eligible for ratification under Section 204. In framing the issue, the Court stated that it “must consider whether an act that the majority of stockholders entitled to vote deliberately declined to authorize, but that the corporation nevertheless determined to pursue, may be deemed a ‘defective corporate act’ under Section 204 that is subject to later validation by ratification of the stockholders.” 2017 WL 2439074 at *6. After considering the plain language of the statute and the synopsis to the legislation enacting Section 204, the Court noted that Section 204 is a remedial statute that requires the action that is the subject of the ratification to be an act that was within the corporation’s power at the time the act was purportedly taken. In considering whether View had the power to consummate the Series B Financing and the subsequent financing rounds, the Court did not limit its consideration to whether the act taken was an act within the power of corporations generally under the DGCL. Rather, the Court considered whether, at the time the acts were initially taken, View had the power to take such actions under its governing documents in light of its “operative reality.” 2017 WL at *9. In this regard, the Court noted that the founder, as the majority common stockholder at the time of the Series B Financing, was required to consent to the Series B Financing and that he had deliberately declined to do so.

In finding that the Series B Financing and the subsequent financings were not defective corporate acts, the Court explained that the validity of the Series B Financing was not due to a “failure of authorization,” but rather by “the classic exercise of the stockholder franchise to say ‘no’ to a Board-endorsed proposal.” 2017 WL 2439074 at *9. The Court stated: “The plain meaning of ‘failure’ in [the context of Section 204] is distinct from a ‘no’ vote or outright rejection of the proposal by a majority of the stockholders entitled to vote.” Id. Thus, because the Series B Financing was deliberately rejected by the founder, the Series B Financing was not an act that was subject to ratification under Section 204. To hold otherwise, the Court noted, would “allow a corporation to ratify an act that stockholders years earlier had expressly voted not to take and to certify that act as effective on the date the stockholders rejected it,” (id.) a result that was clearly not intended by the Delaware General Assembly in adopting Section 204. The Court therefore concluded that the founder had pled facts that supported a reasonable inference that the Series B Financing was void and the ratification thereof was invalid under Section 204.

B. Motion for Reargument

Following the Court’s decision, View filed a motion for reargument on the grounds that the Court’s opinion misunderstood the nature of a corporation’s power to take and then correct a defective corporate act under Section 204 and impermissibly carved out “rejected” acts from ratification under Section 204. In denying View’s motion for reargument on the basis that it merely rehearsed arguments the Court had previously rejected, the Court again distinguished between acts taken without a required vote of the stockholders and acts taken in the face of deliberate rejection by the stockholders.

C. Statutory Support for Court’s Decision

As noted above, the View Court’s assertion that the Delaware General Assembly did not intend to permit a corporation to retroactively ratify acts that were deliberately rejected by the stockholders is supported by the factors enumerated in Section 205(d). In a proceeding challenging a ratification under Section 204, Section 205(d) expressly entitles the Court of Chancery to consider, among other things, whether the action sought to be ratified was
originally approved with the belief that it was being approved in compliance with the DGCL and the corporation’s organizational documents as well as any other factors the Court deems just and equitable. Although the Court grounded its analysis of the validity of the ratification in the definitions of “defective corporate act” and “failure of authorization,” the framework established by Section 205, including Section 205(d), provided a basis upon which the Court could decline to give effect to View’s ratification of the Series B Financing. Viewed in this light, the Court’s decision thus provides insight into the relative weight the Court of Chancery may accord to the factors enumerated in Section 205(d) in considering a validation under Section 204. Based on the analysis in View, evidence of the deliberate rejection of a transaction by the stockholders entitled to vote thereon will factor significantly into the Court’s decision whether to sustain a ratification under Section 204.

D. Continued Reliance on § 204 by DE Corporations and Opinion Givers

Accordingly, to the extent an act or transaction is void or voidable due to a corporation’s failure to obtain a required stockholder consent (as opposed to a corporation’s decision to proceed with an act or transaction in the face of an affirmative stockholder rejection of it), corporations should continue to have confidence in proceeding with, and opinion providers should continue to have confidence opining on, the ratification of the act or transaction under Section 204. In addition, absent facts indicating the stockholders have affirmatively rejected an act or transaction, the View opinion should not be read as curtailing a corporation’s power to ratify an otherwise void or voidable act or transaction, or the ability of an opinion provider to opine on the ratification or the underlying act or transaction. The View opinion is a reminder that, as with any transaction, the equities matter, and the Court of Chancery has the authority under Section 205 to invalidate a ratification if it concludes the equities favor that result.

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Reflections on the Second Circuit’s Marblegate Decision

On January 17, 2017 the Second Circuit rendered its decision in Marblegate Asset Management, LLC v. Education Management Corp., 846 F.3d 1 (2d Cir. 2017), holding that Section 316(b) of the Trust Indenture Act of 1939, as amended (“TIA”), protects only bondholders’ formal legal right to the payment of principal and interest and not their practical ability to collect principal and interest. The Second Circuit reversed the District Court’s decision, which had created great uncertainty among practitioners concerning out-of-court bond workouts. Two Marblegate funds had challenged a complex restructuring of Education Management Finance Corp. (“EMFC”) (to which they did not consent) based on the argument that the language of TIA Section 316(b) (“…the right of any holder of any indenture security to receive payment of the principal of and interest on such indenture security … shall not be impaired or affected without the consent of such holder”) violated their statutory rights. The District Court had held that, even though the restructuring did not change the terms of the indenture, it violated Section 316(b) because it completely eliminated

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2 For prior discussions of the Marblegate litigation, see “Current Opinion Practices in Connection with Section 316(b) of the Trust Indenture Act — The Marblegate and Caesars Decisions,” WGLO Addendum (Spring 2016 Legal Opinion Seminar Summaries), In Our Opinion (Summer 2016, vol. 15, no. 4) at A-8—A-10; “Opinion White Paper (§ 316(b), Trust Indenture Act,” In Our Opinion (Spring 2016, vol. 15, no. 3) at 28, and the Addendum thereto (the Opinion White Paper).
non-consenting bondholders’ “practical ability to receive payment.”

The Second Circuit, in a 2-1 decision, concluded that the restructuring was permissible because the transaction as a whole neither amended any “core payment terms” of the indenture (i.e., the amount of principal and interest owed or the maturity date) nor prevented the objecting bondholders from suing the issuer for payment. The majority agreed with the District Court that the text of Section 316(b) was ambiguous but then looked to the legislative history and concluded that Section 316(b) protects only against formal amendments of core payment terms. The dissent viewed the restructuring as “annihilating” the bondholders’ rights to recover on their bonds and hence argued that the plain language of the statute — requiring that a bondholder’s right to payment cannot be “affected or impaired” without its consent — supported the District Court’s conclusion that Section 316(b) had been violated. 846 F.3d at 12-16 (dissent of Judge Straub).

A. Free Sailing After Marblegate?

Is it premature for lawyers who are asked to give closing opinions on complex debt restructurings to breathe a complete sigh of relief now that the Second Circuit has confirmed the narrow scope of Section 316(b)?

The opinion most directly affected by Marblegate is that the transaction does not violate Section 316(b). That opinion is given most frequently to indenture trustees as part of an opinion letter confirming that that the issuer has validly authorized an indenture amendment and that all conditions precedent under the indenture to execution of the amendment by the trustee have been satisfied. This is a uniform requirement in indentures and opinion preparers have little to no flexibility in how they word the opinion and in the assumptions or qualifications they can include in the opinion letter. The restructuring at issue in Marblegate did not, in fact, include an indenture amendment, and the most troubling aspect of the District Court’s decision was that it extended the reach of Section 316(b) well beyond the narrow situation where a collective action clause in an indenture (i.e. a majority-vote provision) is used to strip away protections from non-consenting bondholders. In reversing that decision, the Second Circuit adopted the traditionally narrow interpretation of Section 316(b) and held that it only “prohibits non-consensual amendments of core payment terms (that is, the amount of principal and interest owed, and the date of maturity) [and] bars ‘collective action clauses’ – i.e. indenture provisions that authorize a majority of bondholders to approve changes to payment terms and force those changes on all bondholders.” As a result, we are now back to where we were before the District Court’s decision in Marblegate with respect to giving standard Section 316(b) opinions to indenture trustees.

Those are not, however, the only opinions that address the legality of a debt restructuring affecting the rights of holders of indenture securities. Many restructurings require opinions to lenders under existing, new or amended loan agreements that often include as closing conditions modifications to the terms of outstanding debt. As a general matter an opinion that the company has duly authorized an amendment requires the opinion preparers to do the same work to support it that they are required to perform when giving an opinion that the company duly authorized the agreement when it entered into it initially. In addition, to support an opinion that the amendment is an enforceable obligation of the company the
opinion preparers are required to determine what conditions the agreement provides for its amendment, and then to confirm that all of them have been satisfied (or to deal with that issue in some other way, for example by an express assumption). Typically, an agreement will require that amendments be approved in a certain way by the parties, either unanimously or by a specified percentage (in some cases with the percentage varying depending on the nature of the amendment). To confirm that parties whom they are not representing have approved an amendment opinion preparers may review the written consents the parties have provided or, if many consents are involved, obtain a certificate from an officer or an agent of the company that a specified number of consents have been received.

Many restructurings also include opinions to dealer-managers acting for the issuer in connection with the solicitation of consents to indenture amendments or exchange offers in which new securities are to be issued in exchange for outstanding bonds and bondholders who accept the exchange offer give a so-called “exit consent” to stripping out of the indenture, to the detriment of non-participating holders, covenant and other protections. And many restructurings include typical closing opinions and negative assurance letters to underwriters or placement agents for offerings of new equity or debt securities.

Thus a complex debt restructuring often involves many different agreements and multiple steps affecting different creditors, intermediaries and agents, where the order of the steps matters and each step builds upon prior ones. Issuer’s counsel typically gives a full range of opinions to different participants covering due authorization, validity, receipt of all necessary consents, no breach of other agreements, and no violation of law. These opinions cover issues that are too inter-related for the opinion preparers not to look to all the opinions taken together, including under the misleading opinion rubric with respect to reliance on assumptions, not just to each opinion within its four corners.

While the Second Circuit’s opinion in Marblegate provided welcome clarity with respect to the meaning of Section 316(b), the court, in dicta, cast a potential cloud over its ruling:

“Limiting Section 316(b) to formal indenture amendments to core payment rights will not leave dissenting bondholders at the mercy of bondholder majorities. … By preserving the legal right to receive payment, we permit creditors to pursue available state and federal law remedies. … The foreclosure in this case may be challenged by creditors under state law. … [C]reditors may be able to sue the new entity [that foreclosed on the debtor’s collateral pursuant to the reorganization] under state law theories of successor liability or fraudulent conveyance. … We obviously take no view on the potential merit of any state law or federal law claims in the context of [the restructuring transaction] at issue here.”

846 F.3d at 12 (citations omitted).

B. Implications of the Second Circuit's Dicta

As noted, the Second Circuit put to rest (at least in the Second Circuit) concerns about a debt restructuring’s compliance with Section 316(b) when the “core payment terms” of an indenture are not being amended. Many indentures include the same language as Section 316(b) and therefore specify as a matter of contract that the right of any bondholder to receive payment of principal and interest shall not be impaired or affected without its consent. Issuers have begun not including this language in indentures. If an indenture is subject to the TIA, the language is automatically deemed to be part of the indenture and issuers have no reason to include it. If an indenture is not subject to the TIA, issuers also have no reason to include the language, although purchasers of bonds may oppose omitting it. As practice evolves, differences in language may develop among
indentures, opening the door for non-consenting bondholders to argue that the parties intended the contract to mean something different from Section 316(b).

In May 2017, seizing upon the dicta in Marblegate the holdouts in the EMFC restructuring shifted their focus to post-restructuring entities, demanding that the indenture trustee file a complaint asserting a claim for successor liability against those entities. The complaint asserts that the Second Circuit “made clear that Marblegate is not without legal recourse.” The complaint contends that “while [EMFC] has continued to make interest payments on the Notes, upon information and belief, it has done so only to avoid the declaration of an Event of Default under the Notes pending regulatory approval of a proposed sale of the Educational Institutions to a third party, and, once the sale has closed, intends to make good on its promise that obligations to non-consenting Noteholders will not be fulfilled.” The case is before the same District Court judge who decided Marblegate. The Second Circuit’s dicta in Marblegate leave the door open for other unhappy hold-outs in complex debt restructurings to convince a judge that the transaction violated their rights as creditors or unlawfully impaired or affected their practical ability to collect principal and interest under state or federal law other than the TIA.4

The District Court and the Second Circuit agreed that the language of Section 316(b) is ambiguous. If the issue is contract interpretation of that language, rather than the meaning of the statute, future courts should, to the extent that the “impair or affect” wording of an indenture tracks the text of Section 316(b), interpret it the same way as the Second Circuit interpreted Section 316(b).5 But under rules of evidence, the facts of the case or state law precedent (typically New York law), courts may not feel constrained to interpret the language the same way, particularly if the words are not exactly the same. If non-consenting bondholders continue to press their case outside the TIA, time will tell whether they will find ways to secure redress.

An opinion is an expression of professional judgment as of the date of the opinion about what the highest court of the applicable jurisdiction would hold. Assuming the opinion letter covers New York law, the opinion preparers need not extrapolate from the Second Circuit’s dicta in Marblegate that the New York Court of Appeals (New York’s highest court) would find in indenture language mimicking Section 316(b) broader protection of the practical ability to receive payment of bargained-for principal and interest than is provided for in Section 316(b) as interpreted by the Second Circuit. Moreover, the non-TIA-based avenues for recourse suggested by the Second Circuit for non-participating bondholders are not new or novel. Therefore, opinion givers have no more reason today than

4 Where courts will take the Second Circuit’s dicta is an open question. While the theories mentioned by the Marblegate court are not novel, the decision invites non-participating bondholders whose practical ability to recover principal and interest is impaired through out-of-court restructurings to pursue their grievances with new vigor. However, if no amendments to the indenture are needed to effect the restructuring, or any required amendments have been consented to by the requisite majority of bondholders without violating Section 316(b), challenges based outside the TIA to the process of foreclosure on collateral by senior creditors are likely to face arguments that they are rendered moot as a result of the issuer itself having consented to the foreclosure. Claims for successor liability or fraudulent conveyance are always a matter of fact and equity.

5 Interpreting the TIA, the Second Circuit in Marblegate reiterated its view that boilerplate indenture provisions are to be interpreted by courts as a matter of law in the interest of uniformity of interpretation. Courts applying state contract law to the same language should feel compelled to follow the same interpretation. Precedent exists for uniformity in interpreting under state contract law terms that under federal or state statutes (including the UCC) have an understood technical meaning, even when the statute does not apply as a technical matter. Going forward, however, as noted above, some indentures may omit language of Section 316(b) while others will include it, or investors may be successful in pushing for different language.
before to consider whether they can give opinions covering no breach or default and no violation of statutes, rules or regulations other than the TIA.

C. The 2016 Opinion White Paper on TIA § 316(b)

Before the Second Circuit reversed the District Court’s decision in Marblegate, a number of law firms authored a white paper (April 25, 2016) to provide guidance to opinion givers in light of that Court’s expansive interpretation of Section 316(b). The paper, however, also focused more broadly on customary closing opinions provided to a financing source or underwriter/initial purchaser at the closing of a new money financing, to a dealer manager in connection with a consent solicitation or exchange offer, or to a trustee under an indenture for newly issued notes. In particular, the white paper addressed enforceability opinions on an indenture amendment where the “impair or affect” language is in play and “no conflicts” opinions to new money lenders covering such an indenture. Although the main concern addressed by the white paper was the impact of the District Court’s decision in Marblegate on opinions to the indenture trustee, the analysis in the white paper had broader implications:

“[W]hether a transaction or a series of transactions constitutes a debt restructuring is a factual matter and may be difficult to discern. The cases provide little in the way of guidance; however, they do suggest that a “debt restructuring” is only implicated if the issuer is experiencing sufficient financial distress that, absent debt modification, it will likely be unable to pay its debts when due or will likely file for protection under the bankruptcy code (or any similar regime). Particular attention should be paid to transactions that include releases of material guarantors of the subject notes, releases of all or substantially all of the collateral securing the subject notes or a transfer of all or substantially all of the assets of the issuer and its subsidiaries to entities that will not provide ongoing credit support for the subject notes. … If the opinion givers both (a) have reason to believe that the [transaction] constitutes a debt restructuring and (b) have not received evidence satisfactory to them that the issuer will likely be able to make all future payments of principal and interest to non-consenting noteholders when due after giving effect to the [transaction], the opinion givers may determine that an unqualified opinion to the trustee or other transaction participants in connection with the [transaction] is inappropriate or that their opinion should include a discussion of, or reference to, the recent cases.”


With respect to Section 316(b) the white paper has been superseded by the Second Circuit’s decision in Marblegate. Whether it could become relevant again should a future court provide non-consenting bondholders relief under state or federal law other than the TIA in a debt restructuring under which they had no prospect of receiving payment on their bonds depends on how that future (currently hypothetical) court fashions that relief.

D. Opinion Practice after Marblegate

Many lawyers believe that the Second Circuit’s decision heralds a permanent return to pre-Marblegate opinion practice because the novelty of the District Court’s decision was to treat the language of Section 316(b) as a far-reaching basis for challenging out-of-court debt restructurings. Those lawyers maintain that, while definitively closing the book on attempts to reach an expansive interpretation of Section 316(b), the Second Circuit in its dicta did nothing more than list existing non-TIA avenues for recourse by non-participating bondholders.

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6 See note 2 (the white paper was included as an Addendum to the Spring 2016 issue of In Our Opinion).
Other lawyers point out that *Marblegate* can be limited to its facts as it did not involve a formal amendment to the indenture. Moreover, much ink was spilled while *Marblegate*, and other cases dealing with similar issues like *Caesars I* and *Caesars II*, wound their way to a final decision or settlement, including in Judge Straub’s dissenting opinion. If a debt restructuring does involve a majority-approved amendment and the indenture contains “impair or affect” or similar language, non-consenting bondholders can be expected to challenge it outside of the TIA, particularly if important structural protections like guaranties or collateral are removed, or hurdles under negative covenants are waived through an exit consent in reliance on a collective action clause. For example, some lawyers have pointed out that subsidiary guaranties of bonds issued by the parent are separate indenture securities. In the meantime, cases based on fraudulent conveyance or other theories pointed to by the Second Circuit’s *dicta* will likely increase, which at a minimum argues for drafting the bankruptcy and equitable principles exceptions to apply generally to all opinions, not only to the enforceability opinion — which is what many opinion preparers already do and should not be a controversial step.

Debt restructurings are notoriously complex transactions where great time and attention are spent on structuring to overcome “blocking positions,” where investors at different levels in the capital stack wrestle for control, and where disclosure documents often caution about contingencies and uncertainties, including legal uncertainties, that could affect various parties adversely or cause the outcome to be different from what the letter of the transaction agreements provides. That is precisely the context in which *Marblegate*, *Caesars I* and *Caesars II* arose. Against this backdrop, lawyers who are active in this segment of transactional practice should be vigilant, keep on top of evolving case law and practice, and exercise caution when giving closing opinions in complicated or controversial situations.

We all hope that the Second Circuit’s decision in *Marblegate* is the final word in a highly contentious area of practice. Until we confirm that is so, however, counsel for opinion recipients and the opinion preparers will need to level with each other in a professional manner rather than simply advocate for their clients. The genius of opinion practice is to balance the needs of transaction participants with reasonable concerns of opinion givers, particularly when issuer’s counsel is the only one giving opinions. It is not always easy, it may not always make lawyers popular with principals, and it always takes dialogue. We have seen this kind of constructive process play out recently in connection with closing opinions in debt tender offers.

*Marblegate* was a prime example of an extreme case where well-funded investors seized upon unusual facts to take a stand, using a novel interpretation of an old statute to seek a new route to advance the interests of non-participating holders in debt restructurings. We can expect more cases like it, and opinion givers are among those with risk of liability. Extra attention, maybe even extra caution, seems to me to be appropriate before practitioners go back to “the good old days” before the District Court’s decision in *Marblegate*. In the meantime the best opinion givers can do is to be alert to situations in which independent risk management considerations should weigh on the decision whether to give unqualified opinions on a debt restructuring transaction that is aggressively structured and is subject to significant litigation risk.

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Will the PCAOB’s New Audit Report Standard Affect Audit Letter Practice?

On June 1, 2017, after more than six years of discussion and proposals, the Public Company Accounting Oversight Board (“PCAOB”) approved a new auditing standard governing the form and contents of the audit report issued by a public reporting company’s independent registered public accounting firm.8 The new standard, AS 3101, The Auditor’s Report on an Audit of Financial Statements When the Auditor Expresses an Unqualified Opinion, changes the audit report in many respects. The most important change is a new requirement that the auditor discuss “critical audit matters” (“CAMs”). The auditor’s discussion of CAMs will supplement the audit report’s traditional “pass/fail” opinion as to whether or not an issuer’s financial statements fairly present, in all material respects, the company’s financial condition, results of operations and cash flows in accordance with generally accepted accounting standards in the United States. According to the PCAOB, its proposed CAMs disclosure “responds to investor requests for additional information about the financial statement audit without imposing requirements beyond the auditor’s expertise or mandate.”9

A. Definition of a CAM; Application to Loss Contingencies

A CAM is defined as a matter arising from the financial statement audit “that was communicated or required to be communicated to the audit committee and that: (1) relates to accounts or disclosures that are material to the financial statements and (2) involved especially challenging, subjective, or complex auditor judgment.”10 For each CAM, the audit report must identify the CAM; describe the principal considerations that led the auditor to determine that the matter is a CAM; describe how the CAM was addressed in the audit; and refer to the relevant financial statement accounts or note disclosures that relate to the CAM.11

Among other issues, the new standard raises questions about how it may apply to auditing of loss contingencies. Although the PCAOB does not discuss the matter in detail, it contemplates that a loss contingency could be a CAM. In discussing what types of matters would be covered by the standard, the PCAOB states:

“[A] matter that does not relate to accounts or disclosures that are material to the financial statements cannot be a critical audit matter. For example, a potential loss contingency that was communicated to the audit committee, but that was determined to be remote and was not recorded in the financial statements or otherwise disclosed under the applicable financial reporting framework, would not meet the definition of a critical audit matter; it does not relate to an account or disclosure in the financial statements, even if it involved especially challenging auditor judgment.”12

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8 PCAOB Release No. 2017-001, The Auditor’s Report on an Audit of Financial Statements When the Auditor Expresses an Unqualified Opinion and Related Amendments to PCAOB Standards (June 1, 2017). The standards are subject to approval by the Securities and Exchange Commission. If approved, the “critical audit matters” (CAMs) provisions are intended to be effective for audits of large accelerated filers for fiscal years ending on or after June 30, 2019, and for other issuers for fiscal years ending on or after December 15, 2020. The CAMs requirements will not apply to audit reports for audits of emerging growth companies. The PCAOB’s other proposed auditor’s report changes are intended to be effective for audits of fiscal years ending on or after December 15, 2017.


The implication of this statement is that a material loss contingency can be CAM if it involves a probability of an adverse outcome that is more than remote. Under Accounting Standards Codification Topic 450, Contingencies, where the probability of an adverse outcome is more than remote, the issuer must determine whether an accrual should be recognized and what disclosure may be required, whether or not there is an accrual. Determinations such as the probability of the outcome, whether the loss can be reasonably estimated and the amount of any such estimate can involve significant judgment by management. The line items to which the accrual is applied could be material. Questions about whether to disclose and the content of disclosures could also involve judgments as to content and materiality. It is not hard to imagine that in some circumstances the auditor may conclude that its audit of loss contingencies involved the kind of “especially challenging, subjective or complex auditor judgment” that triggers CAM disclosure.

B. Initial Observations

It is far too early to assess how AS 3101 will play out in practice as applied to loss contingencies, and dire predictions should be avoided. However, as with loss contingency disclosure generally, lawyers will need to be sensitive to the potential impact of the new standard on a client’s attorney-client privilege and on the client’s position in litigation.  

Below are some initial observations about aspects of the new standard that could have an impact on the relationship between lawyers and auditors in the audit process:

- AS 3101 does not change the auditing standards governing audit letters. AS 2505, Inquiry of a Client’s Lawyer Concerning Litigation, Claims, and Assessments, continues to specify the procedures that the independent auditor should follow to identify legal contingencies and satisfy itself regarding the financial accounting and reporting for such matters. AS 3101 also does not change the lawyer’s responsibilities under the ABA Statement of Policy Regarding Lawyers’ Responses to Auditors’ Requests for Information (the “ABA Statement”). There is little reason to think that AS 3101 will change practice with respect to most loss contingencies that are covered by AS 2505 — particularly, those that do not involve “especially challenging, subjective, or complex auditor judgment.”

- The possibility that an auditor will have to provide CAM disclosure about its audit judgments with respect to contingencies may cause the auditor to seek additional information from the company’s counsel (both in-house and outside) about the matter. This may especially be the case with contingencies that involve significant government investigations or complex, “bet-the-company” litigation. In recent years, there has been a trend toward auditors asking company counsel for additional information regarding significant loss contingencies, and that trend may expand if auditors frequently conclude that contingencies are or could

13 Several years ago, the legal profession and business community expressed concerns about the Financial Accounting Standards Board’s proposed amendments to the loss contingency disclosure requirements of Accounting Standards Codification Topic 450, Contingencies. These commenters were concerned that the proposed new disclosures regarding loss contingencies could have a prejudicial impact on companies’ litigation positions and raised risks for fundamental attorney-client privilege and work product protections. See, e.g., Letter from Stephen N. Zack, President, American Bar Association, to Russell G. Golden, Technical Director, Financial Accounting Standards Board (Sept. 20, 2010), available at https://www.americanbar.org/content/dam/aba/migrated/poladv/letters/attyclient/2010sep20_fasb_c.authcheckdam.pdf. The FASB dropped this project in 2012.
be CAMs. In such cases, lawyers will have to be cognizant of the guidelines set forth in the ABA Statement for providing information to auditors and will need to focus closely on the privilege and disclosure implications of providing information to the auditors that goes beyond the information provided for by the ABA Statement.

- If an auditor concludes that a loss contingency is a CAM, that may raise questions about the appropriate content of disclosure about the CAM in the audit report. AS 3101 allows the auditor to disclose non-public information about the company if doing so “is necessary to describe the principal considerations that led the auditor to determine that a matter is a critical audit matter or how the matter was addressed in the audit.” This could lead to a concern that additional disclosures advanced by the auditor might include information — such as the nature and content of information obtained from the issuer’s lawyers about the contingency that is the subject of the CAM — that could prejudice the company’s litigation position or even raise concerns about waiver of privilege and attorney work product protections.

- In connection with the new reporting standard, the PCAOB also revised AS 1301, Communications with Audit Committees, to require the auditor to “provide to and discuss with the audit committee a draft of the auditor’s report.” This process can provide a means for companies and their counsel to work through any concerns about CAM disclosures related to loss contingency matters. Ultimately, however, the auditor alone has control over the content of its report.

- Finally, as contemplated by Paragraph 7 of the ABA Statement, most audit inquiry responses state that, without the written consent of the lawyer or firm, the response is not to be quoted or referred to in the financial statements, the notes thereto, or the auditor’s comments thereon, or in any communication to shareholders or other persons or in any filings with any governmental agency. Questions about the need for consent could arise when an auditor believes it is necessary to describe its communications with lawyers in a CAM disclosure.

14 AS 2505.10 contemplates that “[i]n special circumstances, the auditor may obtain a response concerning matters covered by the audit inquiry letter in a conference, which offers an opportunity for a more detailed discussion and explanation than a written reply. A conference may be appropriate when the evaluation of the need for accounting for or disclosure of litigation, claims, and assessments involves such matters as the evaluation of the effect of legal advice concerning unsettled points of law, the effect of uncorroborated information, or other complex judgments.”


17 Paragraph 7 of the ABA Statement also provides that auditors may furnish the response to others “in compliance with court process or when necessary in order to defend the auditor against a challenge of the audit by the client or a regulatory agency,” provided the lawyer is given at least 20 days’ notice before the response is furnished, or as in advance as possible if the situation does not permit 20 days’ notice. The Commentary to Paragraph 7 explains that it is “designed to give the lawyer an opportunity to consult with the client as to whether consent should be refused or limited or, in the case of legal process or the auditor’s defense of the audit, as to whether steps can and should be taken to challenge the necessity of further disclosure or to seek protective measures in connection therewith.”
The foregoing considerations all indicate the value of timely discussions during the audit process between the auditors, in-house and outside lawyers and company management about any loss contingencies that might be candidates for CAM disclosure, as well as timely discussions among those persons about the content of any such disclosure prior to discussions about both matters with the audit committee. In addition, the potential impacts of the new audit report standard suggest that a dialogue between the legal and auditing professions may be worthwhile to address potential concerns before the CAM standard takes effect.

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**LEGAL OPINION REPORTS**

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

* Mr. White is the former Chair (2013-16) of the Audit Responses Committee of the Business Law Section of American Bar Association.
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 August 31, 2017.

A. **Recently Published Reports**

| ABA Business Law Section | 2009                           | Effect of FIN 48 – Audit Responses Committee
|                         | 2010                           | Negative Assurance – Securities Law Opinions Subcommittee
|                         | 2011                           | Sample Stock Purchase Agreement Opinion – Mergers and Acquisitions Committee
|                         | 2013                           | Diligence Memoranda – Task Force on Diligence Memoranda
|                         | 2014                           | Survey of Office Practices – Legal Opinions Committee
|                         | 2015                           | Legal Opinions in SEC Filings (Update) – Securities Law Opinions Subcommittee
|                         | 2016                           | Revised Handbook – Audit Responses Committee
|                         | 2017                           | Updates to Audit Response Letters – Audit Responses Committee
|                         | 2018                           | No Registration Opinions (Update) – Securities Law Opinions Subcommittee
|                         | 2019                           | Cross-Border Closing Opinions of U.S. Counsel
|                         | 2020                           | Report on the Use of confirmation.com – Audit Responses Committee
|                         | 2021                           | Opinions on Debt Tender Offers — Securities Law Opinions Subcommittee*
| ABA Real Property Section (and others) | 2012                           | Real Estate Finance Opinion Report of 2012
|                         | 2016                           | Local Counsel Opinion Letters in Real Estate Financing Transactions
| Arizona                 | 2004                           | Comprehensive Report
| California              | 2007                           | Remedies Opinion Report Update
|                         | 2009                           | Comprehensive Report Update
|                         | 2014                           | Venture Capital Opinions
|                         | 2015                           | Sample Venture Capital Financing Opinion
|                         | 2016                           | Revised Sample Opinion
|                         | 2017                           | Third-Party Closing Opinions: Limited Liability Companies and Partnerships*

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18 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.

19 These Reports are 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”).
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<sup>20</sup> A joint project of the ABA Legal Opinions Committee, the Working Group on Legal Opinions, and other bar groups.
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 October 2017. Please forward cases, news and items of interest to Ettore Santucci (esantucci@goodwinprocter.com), Jim Fotenos (jfotenos@greeneradovsky.com), or Susan Cooper Philpot (philpotsc@cooley.com).

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